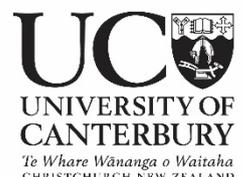


Economic Securitisation and the Normalisation of Exceptionalism

How economic risk rhetoric is used to justify
and normalise exceptionalism

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Introduction

Plenty of creatures are intelligent, but only one tells stories.

That's us, pan narrans [the storytelling ape].

– Terry Pratchett¹

Populations around the world are faced with many challenges that threaten the normality of their lives. Terrorism, climate change, environmental disasters, and pandemics create a sense of existential uncertainty in many societies. The public expects its government to protect it against existential threats. Ordinary public measures may not suffice in the face of existential threats to a population. The more severe the threat appears, the more extreme measures the public is therefore willing to accept to avert or mitigate it. But the complexity of modern life means that it is not always easy for laypeople to realise the existence and understand the severity existential challenges. Causal connections between actions and threats may be too obscure or remote. For example, there is no direct visible or experiential connection between driving a car or drinking a glass of milk and climate change.

The public is therefore dependent on a public narrative to understand systemic existential threats. The metaphor of *homo narrans* (the storytelling human) posits that humans were essentially storytellers who perceive their world as a set of stories on which their rationality and decision-making are based.² In other words, humans tend to make sense of the complexity of the world and of our lives by way of stories. Rather than relying on the cold scientific rationality of data, we prefer to perceive our world as an ongoing narrative that aligns with our experiences and beliefs. It is difficult to make sense of or even to perceive the complex causal relationships that make up the world and everyday life. Perceiving it within our own personal narrative therefore helps us understand our world. It also enables us to create a moral compass against which to evaluate and assess events and social interactions. Consequently, our decision-making strongly depends on our personal narrative.

The subjectivity of storytelling, as well as different circumstances and experiences, mean that one person's personal narrative may differ from that of another. When confronted with new information, we assess it against our awareness of 'narrative probability' and 'narrative fidelity'.³ We are more

¹ Terry Pratchett, Ian Stewart and Jack Cohen *The Science of Discworld II - The Globe* (Random House, London, 2002), at 345.

² Walter R. Fisher "Narration as a Human Communication Paradigm: The Case of Public Moral Argument" 1984 51(1) Communication Monographs, at 6-7.

³ At 2, at 7.

likely to accept new information if it fits within a coherent story and if it rings true in the context of our own experiences. Conversely, if the new information does not fit neatly into our personal narrative, it is less likely that we accept it as true, irrespective of its actual veracity.

Personal narrative is heavily influenced by the public narrative. Many modern issues are too complex to fit into our personal narrative in a meaningful way. We must rely on the public narrative to inform our personal narrative about issues that affect our lives. The public discourse also creates a feeling of community identity, as we align our personal narrative with those of the ones around us. In this context, the public narrative is politically significant, especially in democracies where public policy must correlate to the public narrative lest the public decision-makers lose popular support. The public narrative influences the political views of individuals. Therefore, influencing the public narrative is an effective political tool as it can create support for or against particular political agendas.

Because of the inscrutability of many modern issues, it can be said that existential issues do not exist in the consciousness of the public until they have been introduced into the public narrative, irrespective of their actual existence. Influencing the public narrative to create existential issues in the minds of the public is called securitisation. It allows political actors to shape how the public perceives an ostensible existential threat. If the narrative downplays the severity of the threat, the public may be indifferent to it. For example, although the effects of human activity on climate change has been known for decades, the public narrative has only recently begun to take the threat somewhat seriously to take some political action. The narrative can also be influenced to exaggerate potential threats. For example, since the terrorist attacks on the World Trade Centre on 11 September 2001 many governments around the world have taken exceptional measures and passed exceptional laws to fight the threat of terrorism. The measures and laws often restricted individual rights and due process rights in the name of mitigating the existential threat emanating from terrorism. The actual risk of terrorist attacks was relatively low over the past two decades, yet the public narrative has kept terrorism in the public consciousness and created a perception of a disproportionately high risk of terrorist attacks.

Securitisation is a powerful political tool that can have immense constitutional impact. Existential threats to society can justify the use of constitutionally exceptional measures, measures that are not available to the state during ordinary times. As the public narrative determines whether the public perceives a threat as existential, influencing the public narrative enables political actors to control whether exceptional measures are ostensibly justified.

This is exacerbated by the increasing tendency of the public political discourse to 'riskify' political issues, i.e. to view and assess political issues in terms of risk. Modern societies are growing increasingly

risk averse.⁴ Scientific progress has increased society's awareness for the existence of systemic risks, risks that affect society on a systemic level and are thus more likely to lead to existential threats, e.g. climate change, terrorism, or a financial recession or depression. They are not controllable on an individual level so that individuals cannot address them personally. This is disempowering and leaves individuals vulnerable, thus looking to government to address the risks. Systemic risks are generally highly complex and ambiguous. Their existence, causes, and solutions are not easily determinable. People depend on the public narrative to know about and understand systemic risks. At the same time, due to the ambiguity of systemic risks even experts often cannot agree on them.⁵ The resulting uncertainty leads to a growing risk sensitivity and risk aversion in people.

This leads to a so-called riskification of issues, i.e. the public focus increasingly shifts to risk. The public does not only expect the state to protect it from acute and imminent threats, but it also increasingly requires the state to address risks. In contrast to threats, risks are merely potentials whose manifestation is uncertain, both in terms of probability and severity. Consequently, the situations in which exceptional measures are acceptable broadens. In this context, the power to influence the public narrative becomes even more potent. Not only are the people more dependent on the public narrative due to the complexity and ambiguity of modern systemic risks, they are also more willing to accept exceptional measures to address systemic risks.

Due to the complexity of modern risks, it behoves political actors to influence the public narrative. Without public explanation and education, many complex issues could not be politicised, and they could thus not be publicly addressed. However, the power of influence over the public narrative can be abused. As it is difficult for most individuals to ascertain the veracity of the public narrative, political actors can make false or exaggerated claims to make an issue appear like an existential risk, even if it is not. That means that political actors can create an environment in which exceptional measures seem justified and use such measures for their own ordinary political ends.

The question around the propriety of exceptional measures in the context of crime and terrorism has been widely discussed and debated, particularly over the last two decades. But little attention has been paid to the use of economic risk rhetoric to influence the public narrative. Populations in most modern societies are intimately familiar with economic pressures and risks. In many Western democracies, economic liberalism and neoliberalism have inserted economic considerations such as productivity, efficiency, and competition into almost all aspects of life. Many important aspects of

⁴ Ulrich Beck *Risk Society: Towards a New Modernity* (Sage Publications, London, 1992), at 20; Anthony Giddens "Risk and Responsibility" (1999) 62(1) MLR 1, at 4.

⁵ Eugene A. Rosa, Ortwin Renn and Aaron M. McCright *The Risk Society Revisited: Social Theory and Governance* (2013), at 190.

modern life are at least to some degree dependent on economic success. The public narrative around economic risk easily fits the narrative probability and fidelity of people's own personal narrative. Exaggerating or falsely claiming economic risk is therefore highly effective as people understand its logic and potential effects.

The research question of this thesis is to what extent exaggerated or false economic securitisation threatens constitutional and democratic processes and structures. People's growing aversion to risks, and in particular economic risks, means that it becomes increasingly easy to exaggerate or falsely claim economic risks to gain access to exceptional measures. If this is done for ordinary political reasons rather than to address genuine existential threats, exceptional measures will increasingly become part of the normal political and constitutional process. The second research question therefore is how the effects of false or exaggerated securitisation can be prevented or at least mitigated.

The thesis will answer these research questions in three parts. Part one will address the concept of risk and the reasons why modern populations are increasingly averse to risk. Modern risk aversion is mainly caused the complexity and ambiguity of systemic risk. Chapter Two will investigate these concepts and show that their combination breeds existential uncertainty in the population. Risk complexity means that risks are neither calculable nor in many cases identifiable by laypeople. Even experts often do not agree on the causes or solutions to risks. This ambiguity undermines the authority of experts and disempowers individuals to address risks themselves. The resulting uncertainty means that the public becomes ever more risk sensitive and therefore risk averse. Consequently, it turns to the state to protect it from the potential effects of systemic risks. But since it also relies on the public narrative to understand risk, securitising risk rhetoric becomes an important political tool. As the public perceives proactive engagement with ostensible risks as positive, it is in governments' interest to communicate the existence and extent of risks to the public. While this is important for the public's awareness and understanding of risk, it can also be misused to create a false or exaggerated perception of risk.

Chapter Three will investigate the power of securitising risk rhetoric in an economic context. The success of securitising rhetoric depends on how much it aligns with the public's narrative probability and fidelity. If the public does not perceive the risk as existential, the securitising effort has failed. When it comes to economic risks, however, securitising attempts have a lower likelihood of failure because the public is extremely averse to economic risks. Economic liberalism and neoliberalism have created an environment in which the public is not only intimately familiar with economic considerations in all aspects of their lives, but most aspects of their lives also depend on economic stability and success. People are extremely wary of economic risks then because economic failure

adversely impacts much of their lives. Securitising economic risk rhetoric is therefore especially powerful and becomes a standard political tool.

Part Two of the thesis explores the constitutional impacts of securitising economic risk rhetoric. The consequence of successful securitisation is the use of exceptional measures to address the perceived existential risk. Chapter Four will explain the constitutional concept of exceptionalism. During ordinary times, governments in liberal democracies must operate within legal and constitutional limits. During times of crisis, these limits may hinder the government from responding swiftly and decisively to the needs of the public. Constitutional systems therefore generally contain mechanisms that extend temporary exceptional powers to governments for the purpose of dealing with the crisis.

Since securitisation creates the perception of an existential risk, it justifies the use of exceptional measures. Existential risks threaten society on a systemic level and are thus extraordinary. Securitising risk rhetoric does not require the existence of a real existential risk but merely the perception of one. Political actors can exploit this by exaggerating or falsely claiming the existence of an existential risk to gain access to exceptional powers. Chapter Five will explore three case studies to illustrate this danger. In the first case study, the government passed the Employment Relations (Film Production Work) Amendment Act 2010 in response to a dispute between an actors' union and the production company of the film 'The Hobbit'. The legislation fundamentally affected employment protection in New Zealand and likely violated New Zealand's international commitments. The government used exaggerated economic risk rhetoric to suggest an existential risk to New Zealand's film industry and consequently on the national economy. Based on this rhetoric, it used the exceptional step of passing the legislation in a single day without public consultation.

In the second case study, the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 was passed after the government created the exaggerated perception that a local regional council's 'incompetence' was a threat to the Canterbury region's water resources on which a large part of the agricultural and dairy industry relied. Again, the Act was passed in a single sitting and replaced the entire democratically elected council with government-appointed commissioners, thus suspending local democracy for almost a decade.

In the final case study, the government passed the Canterbury Earthquake Recovery Act 2011 (NZ) in a single sitting in response to the devastating Canterbury earthquakes. The act was meant to facilitate swift recovery for the Canterbury region. For a duration of five years, it provided the government with exceptional powers that were equal to, and at times even exceeded the powers available during the immediate response to natural disasters. The government used economic risk rhetoric to emphasise

the risk of a slow regional recovery to the regional and national economy. Yet, while a swift recovery was desirable, there was no urgency to justify the extended use of exceptional powers.

Parts One and Two answer the main research question. They show that exaggerated or false securitising economic risk rhetoric enables governments to use exceptional measures irrespective of the existence of an actual existential threat. This undermines constitutional and democratic principles and institutions because it bypasses essential processes and normalises the use of exceptional measures. Part Three will therefore assess possibilities of how to mitigate the power of exaggerated or false securitisation.

Chapter Six will explore the effectiveness of traditional review mechanisms when attempting to prevent or mitigate false or exaggerated securitisation attempts. It will show that important constitutional mechanisms such as courts, ombudsmen, and other public bodies can prevent egregious misuses of exceptional powers, particularly if reviewed *ex ante*. However, they are often unwilling to challenge executive use of exceptional measures during perceived crises. They do not wish to be seen as standing in the way of responding to an existential threat. Moreover, legislation that empowers executive use of exceptional measures is often very broad as the legislator does not want to limit response powers for an unknown future crisis. As traditional review mechanisms generally assess the state's compliance with existing legislation, challenging exceptional action that is based on broad empowering legislation is exceedingly difficult.

Chapter Seven will investigate the possibility of expanding administrative discretion of the bureaucracy when dealing with exceptional situations. Expanded administrative discretion could avoid the need to resort to exceptional measures, keeping emergency response measures within the ordinary legal system. As such, dealing with crises may be less political, as the bureaucracy is ideally apolitical, or at least further removed from the political executive. The government's need for exceptional measures would thus be reduced, as the apolitical bureaucracy has sufficient discretion to cope with crises. However, in order to prevent abuse of broader discretionary powers, the use of discretion would have to be better regulated. In particular, the process of applying discretion would have to be clarified.

Yet, neither traditional review mechanisms nor expanded administrative discretion can sufficiently address the problem of risk rhetoric. Courts, the bureaucracy, and the legislature are influenced by the will of the people. Courts will not continually challenge government action if the population is strongly in favour of it. The application of bureaucratic discretion will not be in gross opposition to the people's will. As long as securitising risk rhetoric can be used to create false risk perceptions in the public, it can be used to justify any means to achieve the 'will of the public'.

Chapter Eight will therefore look at ways in which the public's risk assessment and evaluation skills can be enhanced to empower the public and enable it to recognise exaggerated or false securitising risk rhetoric. Risk must be better communicated to the public, and the deliberative and analytical capacity of people must be improved. This will enable the use of deliberative processes to govern the decision-making with regards to risk. Deliberative risk governance requires public decision-making regarding risks to be determined by way of deliberative processes. It recognises that the complexity and ambiguity of systemic risks means that there is no claim on factual 'truths' about risks, and that therefore there cannot be a 'single right response' to systemic risks. Different parts of the population will be differently affected, both by the manifestation of the risk as well as by the way society decides to manage the risk. Different perspectives and interests must therefore be weighed up, in order to arrive at a decision that is acceptable to all affected people.

This educated compromise approach to decision-making can reduce the effectiveness of securitising risk rhetoric. Better risk communication and education will lead to better risk understanding in the population, making it less susceptible to manipulative securitising risk rhetoric. And a better understanding of the disparate needs of all affected people may make people less willing to agree to radical decision-making. Deliberative risk governance can therefore interrupt the power of securitisation. It can empower people to understand risk and influence decision-making regarding risks in a deliberative and participatory way.

1 Methodology and Theoretical Overview

The purpose of this chapter is to explain the methodology used by the thesis to address the research questions laid out in the Introduction, namely to what extent exaggerated or false economic securitisation threatens constitutional and democratic processes and institutions and how such securitisation attempts can be prevented or mitigated. The thesis is based on the premise that governments are increasingly willing to use exceptional measures to address vague and merely potential existential risks to society. They use risk rhetoric to create the public perception that exceptional measures are necessary to address these purported existential risks. In this context, it is possible for political actors to influence the public narrative in such a way that it accepts the use of exceptional measures, irrespective of the actual existence of any existential threats. This legitimises the increasingly frequent use of exceptional measures, which in turn threatens the integrity of constitutional and democratic systems.

The question of risk rhetoric and exceptionalism has been exhaustively discussed in contexts such as crime and terrorism. In contrast, much less attention has been paid to the constitutional impacts of false or exaggerated securitising risk rhetoric in the economic context. Economic considerations are an ingrained part of life in most democratic societies. Many aspects of life are dependent on economic success and well-being. People are therefore sensitive to economic risk and respond strongly to an economic risk narrative. It is therefore more likely for false or exaggerated securitising risk rhetoric to be successful, i.e. to be accepted as true by the public. Therefore, this thesis will particularly concentrate on the use of economic risk rhetoric in securitisation attempts.

The context within which the research questions exist goes beyond traditional legal topics. As such, it must be addressed using a range of interdisciplinary theoretical frameworks. Apart from legal theories, it will heavily utilise theories from the fields of international relations, sociology, economy, and political science. For example, the concept of securitisation was first developed in international relations to address the changing nature of security issues on an international level. Risk Society theory is a sociological concept that describes attitudes in societies towards risk. The concept of deliberative democracy is a sociological and political concept that explores participation in decision-making and political processes. These theories are necessary to explain the phenomenon of the influence of risk rhetoric on the public narrative, which in turn impacts on legal topics such as constitutionalism and exceptionalism. The thesis will also use a number of case studies to illustrate this impact on legal concepts in real life contexts. For that reason, the thesis takes a broad socio-legal approach to answer its research questions.

The research around the theoretical frameworks mainly draws on academic sources such as monographs, textbooks, and journal articles. Examples used in the discussion of theories are mainly sourced from government publications, newspaper articles, and journalistic opinion pieces. Case studies require a different set of sources. The political and legal context of the case studies is mainly drawn from government sources such as cabinet papers, parliamentary discussions, and other legal support documents. The context and circumstances of the case studies are drawn from newspaper articles and journalistic opinion pieces, supported by some academic sources.

In the following, the chapter will first lay out the different theoretical frameworks used in this thesis. It will explain why each was chosen and how it fits into the overall discussion and argument of the narrative. It will also explain the reasons for using case studies as part of its argument. It will discuss the choice of case studies and explain how each fits into the thesis. Finally, it will offer a more detailed overview of the theoretical frameworks. This will provide a foundation on which the substantive parts of the thesis will build.

1.1 Methodology

1.1.1 Theoretical Frameworks

The thesis uses a range of theories to explain and explore the research context of the thesis and to answer its research questions. First and foremost are securitisation theory and exceptionalism. The former explains how risk rhetoric is used to create risk perception in the public narrative; the latter explains the constitutional consequence of securitisation, i.e. the ability for the state to use powers beyond its ordinary limitations during times of crisis. These two theories are supported by a range of other theoretical frameworks. Riskification theory explains the shift of focus in securitisation from existential threats to existential risks. Risk and Risk Society theories explain the concept of risk and why modern societies are becoming increasingly risk averse and thus vulnerable to securitising risk rhetoric. Finally, Economic liberalism and neoliberalism explain why people are particularly sensitive and averse to economic risk rhetoric.

Securitisation theory is used as one of the main theoretical frameworks of the thesis. It posits that political issues only become security issues if they are elevated to that position in the perception of the public by a so-called speech act. Security issues are issues that pose an existential threat to a 'referent object', i.e. something that is of high value to society on a systemic level. The theory therefore explains one of the main contentions of the thesis, that public rhetoric can be used to create the perception of an existential threat that justifies the use of exceptional measures. It is particularly

relevant to the thesis because securitisation does not require an actual threat to exist. An essential feature of the theory is the focus on public perception of threat, rather than on the threat itself. As long as a securitising actor can convince the public of the existence of an existential threat, the public will accept the necessity for exceptional measures. Securitisation is therefore largely independent of real threats. This opens it to manipulation and therefore applies to the thesis' contention that exaggerated or false risk rhetoric can lead to public approval of the use of exceptional measures.

Exceptionalism is the consequence of securitisation and is therefore the second main theoretical framework used to answer the research question. It describes the reasons and mechanisms under which the state may exceed its ordinarily limited powers in times of crisis. Liberal democratic theory and the concept of constitutionalism require state powers to be clearly circumscribed to prevent arbitrary and excessive use of public powers and to protect individual autonomy and self-determination. During crises, however, these limits on public power may keep the state from acting sufficiently swiftly and decisively to avert or mitigate existential threats from the public. Exceptionalism is therefore necessary to allow the state to act appropriately during crises by exceeding its ordinary powers. From a legal perspective, one cannot discuss securitisation without discussing exceptionalism. Securitisation creates the perception of a security issue that poses an existential threat to the public. Its consequence therefore must be exceptionalism. The thesis will therefore explore different mechanisms of exceptionalism to be able to determine the constitutional impact of securitisation.

These main theories are supported by several other theories that are used to explain the willingness with which the public in liberal democracies is likely to accept securitising rhetoric, particularly in the economic context. **Riskification theory** is a modification of securitisation theory. Traditional securitisation theory requires an immediate and acute threat to a referent object. Since the threat must exist on an existential level, successful securitisation of economic issues according to the traditional theory is exceedingly rare. The purported economic issue must threaten the economy as a whole: the economy must be in danger of collapsing for securitisation to be successful. Anything short of that, for example the collapse of an industry, large scale unemployment, or extreme welfare issues are unlikely to pose an existential threat to the economy as a whole. Riskification theory posits that in recent decades, the focus of securitisation has shifted away from the need for an existential *threat* to merely requiring the perceived existence of an existential *risk*. This shift in focus broadens the application of securitisation theory. Unlike threats, which are acute and immediate, risks as potential future events are more diffuse. They are harder to ascertain, and the public's understanding of risks is heavily influenced by the public narrative. Riskification theory therefore makes securitisation more applicable to the context of this thesis. First, it broadens the application of securitisation so that

economic risks become a viable target for securitising rhetoric. And second, it shows that securitisation is a larger constitutional threat, as exceptional measures may be justified not only in the immediate context of an existential threat, but already in anticipation of an uncertain event of a future risk.

Riskification theory's claim that society's focus has shifted towards risk is explained by **Risk and Risk Society theories**. Risk society theory is a sociological theory that explains the increasing aversion to risk in modern societies. It posits that in post-industrialising societies, the perception of risk as an opportunity concept is replaced by the perception of risk as an existential threat to the status quo. Systemic risks are too complex and ambiguous for individuals to understand or control, and are therefore to be avoided at all cost. For the purposes of this thesis, the theory explains the reason for the public's increasing willingness to accept the use of exceptional measures. Risk society theory says that people increasingly realise the reflexivity of risk, i.e. that risks are mainly man-made. People therefore increasingly expect government to address risks. At the same time, the complexity and ambiguity of modern risks creates a dependence on the public narrative to be aware of and understand risks. Risk society theory therefore explains the public's growing susceptibility to securitising risk rhetoric.

Finally, the thesis focusses on the use of economic risk rhetoric. The thesis will utilise **economic liberalism** and **neoliberalism** to explain why securitising economic risk rhetoric is particularly effective in successfully creating public perception of existential risks. They show why economic considerations and pressures are an integral part of everyday life. This creates both an intimate familiarity with economic considerations and an awareness for one's dependence on economic stability. The theories therefore help explain the thesis' contention that the public is particularly susceptible to securitising economic risk rhetoric.

The theoretical frameworks enable the thesis to answer its research question. Risk and risk society theories explain why the public is increasingly averse to modern risks. Economic liberalism and neoliberalism show why the public's risk aversion is particularly strong in the context of economic risks. Securitisation and Riskification theories explain that growing risk aversion makes it easier to use economic risk rhetoric to elevate ordinary politico-economic issues to existential threats in the eyes of the public. The consequence of this securitisation is the justification of the use of exceptional measures. The public's willingness to accept securitising economic risk rhetoric can be exploited by using exaggerated or false rhetoric to gain access to exceptional measures. This undermines constitutional and democratic principles and can lead to a normalisation of exceptional measures.

1.1.2 Case Studies

The thesis uses a range of theoretical frameworks to answer its research question and to support its premise that securitising economic risk rhetoric increasingly affects constitutional and democratic structures and processes. Within the broadly socio-legal approach of the thesis, it also assesses the practical impacts and the real life implications of its premise. For that reason, the thesis investigates three case studies to illustrate the effects of securitising economic risk rhetoric.

The specific case studies have been chosen for a variety of reasons. First, in all three cases legislation was passed that either contained exceptional provisions and/or was passed in an exceptional manner. The three cases occurred in close temporal proximity to each other, within the span of about twelve months. In each case, the exceptional measures were primarily justified using false or exaggerated economic risk rhetoric. It appears that the purpose of the rhetoric and the consequent exceptional measures in all three cases were to facilitate the advancement of an ordinary politico-economic agenda rather than to respond to a genuine existential risk.

Second, all three case studies occurred under the same government in New Zealand. New Zealand was chosen because the country consistently ranks highly of the Economist Intelligence Unit's Democracy Index.⁶ Similarly, it usually ranks at the top of Transparency International's Corruption Perception Index.⁷ It can therefore be assumed that New Zealand has robust democratic features and constitutional control mechanisms of public power. The examples will show, however, that even in a robust democracy with low perceived corruption, false or exaggerated economic risk rhetoric can be extraordinarily effective in creating public acquiescence to the use of exceptional measures.

The first case study concerns the circumstances around the passage of the Employment Relations (Film Production Work) Amendment Act 2010 (NZ). The legislation drastically curtailed labour rights of contractors in the film industry. It was passed in response to a purported threat to remove the production of the film "The Hobbit" from New Zealand. The government used economic risk rhetoric to securitise the issue by repeatedly highlighting the detrimental effect the loss of The Hobbit would have on New Zealand's film industry and the economy as a whole. Both the sincerity of the threat to remove the film production and the economic impact on New Zealand's were likely greatly exaggerated. Despite this, the government took the exceptional step to pass the bill within a single day, bypassing the democratically and constitutionally vital select committee stage. This case study was chosen as it illustrates the ability to use false or exaggerated economic risk rhetoric to securitise

⁶ New Zealand ranked as the fourth strongest democracy in the world in 2020, *Democracy Index 2020 - In sickness and in health?* (The Economist Intelligence Unit, 2020), at 8-9.

⁷ Transparency International "Corruption Perceptions Index" (2021) <transparency.org>.

an ordinary political issue that justified the exceptional acceleration of the legislative process of an ordinary law reform bill.

The second case study regards the replacement of democratically elected local councillors of the Canterbury Regional Council with government-appointed bureaucrats. The councillors were removed in response to an alleged underperformance and strategic deadlock within the council. The government rhetoric stressed the potentially detrimental impact on the local dairy industry and by extension to New Zealand's national economy. The case study will show that by the time the councillors were removed, these claims were at least exaggerated and likely false. The case was chosen as it illustrates the use of false securitising economic risk rhetoric to gain access to exceptional measures for the purposes of furthering an ordinary political agenda. The council had been acting contrary to central government's political interests. Its replacement with central government commissioners enabled central government to align local decision-making with its own political agenda. The case study also shows the semi-permanence of exceptional measures based on economic considerations, as local democracy was not fully restored to the region. for almost a decade.

The final case study will examine the events following the Canterbury earthquakes in 2011. In the wake of the earthquakes, the Canterbury Earthquake Recovery Act 2011 (NZ) was passed. The act's purpose was to facilitate the recovery of the Canterbury region. It included a range of exceptional powers, some of which exceeded the exceptional powers available during and immediately after an emergency event. The need for the act was justified mainly through economic risk rhetoric, as a swift recovery was seen as vital for the local economy. The act's exceptional powers were active for a period of five years. The case was chosen as it illustrates how inaccurate economic risk rhetoric can lead to extended and unnecessarily broad exceptional powers. The government's rhetoric conflated urgent disaster response with non-urgent disaster recovery. It claimed that exceptional powers were necessary during disaster recovery, in stark contradiction to the constitutional principle that exceptional measures must last only as long as strictly necessary. The study also highlights the superiority of economic considerations over other legitimate societal risks and concerns. Although social recovery was at least equally as important as economic recovery, the government's rhetoric concentrated mainly on economic risks while often actively ignoring social risks.

The case studies will show that economic risk rhetoric can be used to frivolously securitise ordinary politico-economic issues. Governments can steer the public narrative towards an exaggerated or non-existent existential economic risk. The public's extreme economic risk sensitivity causes it to accept the purported need for exceptional measures.

1.1.3 Caveat

The purpose of the thesis is to highlight the constitutional dangers of false or exaggerated economic risk rhetoric in order to securitise ordinary political issues. It is not meant to suggest that securitisation attempts are never appropriate or that all use of securitising risk rhetoric is frivolous. There are certainly real security risks that warrant the use of exceptional measures. For example, climate change is such a complex systemic risk that it is difficult for laypeople to recognise the connections between cause and effect. In order to gain popular support for policies that address climate change, the issue has to first be securitised, i.e. it needs to be brought to the public's attention and its risks must be introduced to the public narrative. Similarly, the Covid-19 pandemic posed a real public health risk. At the same time, policies against the spread of Covid-19 posed a genuine threat to national economies. The securitisation of both issues was therefore arguably justified, particularly during the early days of the pandemic. Systemic risks are highly complex and ambiguous and as such they are difficult to predict or assess. Risks may be exaggerated out of ignorance or uncertainty, rather than malevolence. Well-meaning policy can therefore lead to false securitisation.

The focus of this thesis will be the intentional exaggeration or falsification of existential risks through securitising economic risk rhetoric. These instances pose a particular threat to the constitutional order because exceptional measures taken as a consequence of successful false securitisation is not constitutionally legitimate, yet it can be successfully deployed because the rhetoric has created broad public support (or at least acquiescence) to their use.

1.2 Theoretical Overview

So far, the chapter has explained the methodology of the thesis. It has introduced a range of theoretical frameworks that will be used to answer the thesis' research question. For the remainder of the chapter, these theoretical frameworks will be explored in more detail to give an overview of the theoretical foundations and the internal logic of the thesis.

The central contention of the thesis is that governments can endow themselves with extraordinary powers with the public's acquiescence by using emergency rhetoric to create the perception of an imminent economic crisis, irrespective of the existence of such a crisis. This is possible because the public in post-modern societies is becoming increasingly aware of systemic and existential risks, which in turn creates increasing levels of risk-aversion. This particularly affects economic matters in economically liberal societies in which most aspects of life are dependent on financial success and stability. This combination of general risk aversion and economic dependence makes the public

susceptible to securitising economic risk rhetoric that aims to justify and legitimise exceptional measures.

The chapter will now provide an overview of the main concepts that will be used throughout. It will first discuss securitisation theory, which concerns the use of rhetoric to create security issues. It will then explore the concepts of political and economic liberalism as well as neoliberalism to provide information about the politico-economic circumstances in most modern democracies. The concepts of risk and risk societies will also be explored to explain the context of risk-aversion in many modern societies. Together, securitisation theory, economic liberalism and neoliberalism, and risk society theory can be used to explain the willingness of the public to accept economic risk rhetoric irrespective of the actual severity or even existence of such risk. This allows governments to create fake crises to use exceptional measures to further their ordinary political agenda. The constitutional impacts of the use of extraordinary measures in response to fake crises will then be illustrated by explaining the distinction between constitutionalism and exceptionalism. Finally, the thesis will suggest a form of deliberative risk governance to the issue of economic crisis rhetoric. To facilitate understanding of Part Three of the thesis, this chapter will also briefly discuss the concept of deliberative democracy.

1.2.1 Securitisation

This thesis proposes that rhetoric and the public discourse can create an exploitable perception of an imminent or acute crisis. The idea that public utterances can, and in fact do, lift ordinary political issues into the realm of existential security is the basis of securitisation theory.

1.2.1.1 Securitisation Theory

Securitisation theory posits that any public issue is located somewhere on a spectrum of non-politicised to politicised to securitised.⁸ An issue is politicised when it becomes part of and subject to regular public policy. It is securitised when it is elevated into the realm of the extraordinary because it is presented as posing some form of existential threat.⁹ Securitisation theory proposes that issues are not extraordinary in and of themselves, but that they become extraordinary (securitised) by being labelled as such.¹⁰ In other words, a political issue becomes securitised when a so-called securitising

⁸ Barry Buzan, Ole Waever and Jaap de Wilde *Security: A New Framework for Analysis* (Lynne Rienner Pub, Boulder, 1998), at 23.

⁹ At 8, 24.

¹⁰ Clara Eroukhmanoff "Securisation Theory: An Introduction" in Stephen Walters McGlinchey, Rosie Scheinpflug, Christian (ed) *International Relations Theory* (E-International Relations Publishing, 2018), Thierry Balzacq *Securitization Theory: How Security Problems Emerge and Dissolve* (Routledge, New York, 2011), at 3.

actor convinces the public that the issue poses an existential threat, thus legitimising exceptional measures to be taken to avert the threat.¹¹

The purpose of the theory is to show that successful securitisation allows a securitising actor to manipulate the public into acquiescing to the suspension of constitutional and democratic processes, irrespective of whether an existential threat really exists.¹² Proponents are critical of this ability and want the process to be more transparent in order to endow the public with more information and thus agency. The theory's aim is to 'desecuritize' non-existential issues and to strengthen 'normal' political discourse and deliberation.¹³

The theory has its origins in a split between international relations academics during the Cold War period regarding security issues.¹⁴ The traditional 'narrow' approach to security focused primarily on military and political aspects.¹⁵ 'Narrowers' were wary of expanding security studies to other areas as this could dilute their intellectual coherence. The Cold War era was dominated by concerns about nuclear war, and the 'narrowers' feared a broad interpretation of security would make it more difficult to devise solutions to existing existential problems.¹⁶ At the same time, the traditional conceptualisation of security was increasingly challenged by peace research, feminism economics and security studies.¹⁷ 'Wideners' sought to expand the concept of security to include environmental, economic, and societal factors, as these also posed threats to human and regional security.¹⁸ This led to a 'sectorialisation' of security: security issues in different areas were viewed differently to each other due to their divergent features and characteristics. For example, the impact of an economic crisis affects the state and the public differently than a military invasion.

The increasingly wide view of security meant that it became a universally desired condition towards which all relations should move.¹⁹ This resulted in a vast multiplication of potential security issues, which threatened to create a form of constant emergency mode in politics. Securitisation theory developed in response to this proliferation of purported security threats. It highlighted the issue of

¹¹ Olaf Corry "Securitisation and 'Riskification': Second-order Security and the Politics of Climate Change" 2012 40(2) *Millennium* 235, at 236.

¹² Eroukhmanoff, above n 10; Corry, above n 11, at 239.

¹³ Ole Wæver "Securitisation and Desecuritisation" in Ronnie D Lipschutz (ed) *On Security* (Columbia University Press, New York, 1995) 46-86, at 56.

¹⁴ Eroukhmanoff, above n 10, Buzan, Waever and Wilde, above n 8, at 1.

¹⁵ Eroukhmanoff, above n 10; John Chipman "The Future of Strategic Studies: Beyond Even Grand Strategy" 1992 34(1) *Survival* 109, at 19.

¹⁶ Stephen M. Walt "The Renaissance of Security Studies" 1991 35(2) *International Studies Quarterly* 211, 212-213.

¹⁷ Buzan, Waever and Wilde, above n 8, at 1.

¹⁸ Corry, above n 11, at 239; Buzan, Waever and Wilde, above n 8, at 1; Eroukhmanoff, above n 10.

¹⁹ Eroukhmanoff, above n 10.

the ever-widening scope of security issues and its consequences and called for so-called 'desecuritisation', i.e. stopping and reversing the trend of securitisation.

It is important to acknowledge that securitisation of a political issue is not always negative. Buzan *et al* rightly point out that securitisation may be used to create sufficient public awareness for a less visible but nevertheless all too real existential threat such as climate change.²⁰ However, the thesis will focus on the negative use of the concept with its adverse impact on constitutional and democratic processes. It is further important to note that not all security issues are 'fake'. Securitisation theory does not suggest that no issues are security issues, only that issues become security issues through public discourse. The existential threat an issue poses may be real and exceptional measures may be necessary to address the issue. But securitisation theory also warns that the act of securitisation can be used to elevate issues to an exceptional level even though they do not pose an existential threat. This thesis will focus on the latter ability to exploit securitisation, while acknowledging that securitising acts can be genuine.

1.2.1.2 Elements of Securitisation

Securitisation consists of three elements: the 'speech act', the 'audience', and the 'referent object'. The speech act is the rhetoric device that is used to convince an audience that an issue poses an existential threat to something (the referent object) that is valued by the audience.

Eroukhmanoff explains that in securitisation theory "threats are not just threats by nature but are constructed as threats through language."²¹ That means that no political issue is a security issue in and of itself, but that it requires a rhetoric utterance (speech act) to become a security issue that justifies the use of extraordinary measures. Traditional securitisation theory views the speech act not simply as a descriptive statement that describes an existing security issue, but as a performative statement that creates the security issue.²² The perceived security threat is thus a product of semantics, irrespective of an actual threat.

This traditional view on securitisation has more recently been challenged by a sociological approach to securitisation. It disagrees that security issues cannot exist without an establishing speech act, but that they can develop without an explicit discursive design.²³ The approach argues that securitisation depends on pre-existing practices, social context, and on power relations. It exists within a complex social environment, in which certain actions, be they intentional or unintentional, discursive or non-

²⁰ Buzan, Waever and Wilde, above n 8, at 29.

²¹ Eroukhmanoff, above n 10.

²² See, for example Wæver, above n 13, at 55; Balzacq, above n 10, at 12. "Words do not merely describe reality, they constitute reality" Eroukhmanoff, above n 10.

²³ Balzacq, above n 10, 1.

discursive, can activate a so-called security 'dispositif', which makes the audience more receptive to a threat.²⁴ A dispositif is a system of relations established between elements such as discourses, regulatory decisions and administrative measures, expert statements, and philosophical and moral propositions.²⁵

The purpose of the speech act is to construct a narrative that includes an existential threat, a point of no return to instil a sense of urgency, and a way out if exceptional measures are taken.²⁶ The speech act uses linguistic markers that are "intended to recall or direct the attention of the audience" to the purported existential threat.²⁷ As such, if a dispositif already exist in a given society that certain events, people, or activities may pose an existential threat, the securitising actor does not explicitly have to state that an existential threat exists. They can simply direct the public discourse to passively activate the public's perception of such a threat.²⁸

The ability to indirectly activate a security dispositif is particularly pertinent when it comes to the securitisation of economic issues. As will be discussed later, people living in capitalist societies are acutely aware of their dependence on economic factors and of their vulnerability to economic issues. They are therefore predisposed to perceive economic issues as existential threats. A securitising actor need only stress a threat to the economy to conjure the perception of an existential threat that justifies exceptional executive action.

The predisposition of people in economically liberal societies towards economic threats illustrates the importance a receptive audience plays in the process of securitisation. Presenting an issue as an existential threat does not mean that an issue is securitised. Rather, the audience of the securitising speech act must collectively accept the issue as an existential threat.²⁹ For example, many securitising actors have attempted to securitise climate change as an existential threat to the biosphere and ultimately human society for years. But the success of such securitisation attempts has been limited due to the audience's unwillingness to accept climate change as an imminent existential threat.³⁰

The speech act must appeal to the audience's sensitivities and vulnerabilities to be effective. The securitising actor can create a perception of such vulnerability through continuous public discourse

²⁴ Lester M Salamon and Odus V Elliott *The Tools of Government: a Guide to the New Governance* (Oxford University Press, New York, 2002), at 19.

²⁵ Michel Foucault and Colin Gordon *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977* (Harvester Press, Brighton, 1980), at 194.

²⁶ Buzan, Waever and Wilde, above n 8, at 32.

²⁷ Balzacq, above n 10, at 14.

²⁸ Corry, above n 11, at 239; Balzacq, above n 10, at 14.

²⁹ Balzacq, above n 10, 7; Eroukhmanoff, above n 10; Buzan, Waever and Wilde, above n 8, at 26.

³⁰ Due to the negative connotations of the concept of securitisation, using the term in the context of climate change is controversial, see Corry, above n 11, at 237.

directing the audience's beliefs and understanding of the issue. But the securitising rhetoric will be more credible if it fits the audience's narrative probability and fidelity, i.t. it relates to an external reality familiar to its audience.³¹ The existing facilitating conditions within which the audience exists are therefore as important to the successful securitisation of an audience as the speech act is.

The power of securitising rhetoric thus depends on the logical consistency with the public's perception of the 'real world'.³² Its emotional intensity must be sufficient to trigger the audience's fear of the perceived threat. The audience must be sufficiently familiar with the potential threat to which the securitising issue alludes, and the actor must present the existential threat in such a way that it illicit the audience's acceptance of the necessity of extraordinary measures to avert the threat. Securitising actors therefore often cloak their rhetoric in the semantic repertoire of the audience to increase its familiarity with the issue and thus the likelihood of accepting the issue as a security issue.³³

Securitisation can therefore be a "long process of ongoing social construction and negotiations between various actors and audiences."³⁴ In the context of economic issues, this social construction has been happening for many decades in economically liberal and neoliberal societies. The people's dependence on economic factors has left them sensitive to the presentation of economic issues as existential threats.

1.2.2 Economic Liberalism and Securitisation

Although populations in economically liberal societies are receptive to rhetoric regarding economic threats, securitisation theory does not regard most economic threats as sufficiently existential to be valid referent objects of securitisation. As the economic well-being of individual actors generally does not significantly impact the economy as a whole, only threats to the national economy or the inability of the state to function are sufficiently existential to be considered economic referent objects. Traditional securitisation theory is therefore of limited use for the purposes of analysing the use of securitising economic emergency rhetoric.

However, modern societies are becoming increasingly risk averse. That means that the focus of security shifts from existential threats to existential risks. The public is not only willing to accept securitising rhetoric regarding an actual threat but is also becoming increasingly susceptible to accepting mere risks as referent objects of securitisation. This is particular pertinent as economic liberalism and neoliberalism have created an economic security dispositif that elevates economic

³¹ Fisher, above n 2, at 7; Balzacq, above n 10, at 13.

³² Balzacq, above n 10, at 26.

³³ At 10, at 9.

³⁴ Eroukhmanoff, above n 10.

growth above any other value. The public has been primed through decades of neoliberal rhetoric to perceive any economic issue as an existential threat. Consequently, economic issues can be securitised simply by alluding to a risk to the economy. It becomes easy to create fake economic crises to justify exceptional measures.

1.2.2.1 Securitisation and Economic Liberalism

Traditional securitisation theory regards only few economic issues as valid referent objects. The theory requires existential threats to securitise issues. It is insufficient for these issues to only threaten parts of the system, the entire system must be at stake. In economically liberal societies, the economy is only threatened as a whole if its functionality or very existence is threatened. Existential threats only to some individual market participants are therefore not valid referent objects of securitisation.

Economic liberalism is a product of the concept of political liberalism. Liberalism believes that humans are rational beings who require the most possible amount of individual freedom.³⁵ It arose in Europe during the 17th and 18th century Enlightenment period, which saw the continual abstraction of the state from personalities such as monarchs and the clergy.³⁶ Enlightenment thinkers like Locke and Rousseau posited that humans were born inherently free, and only subjugated themselves to government for their personal advantage. An individual's most basic needs were self-preservation and protection. The state's purpose was therefore to provide for these needs in order to facilitate individual self-determination.³⁷

The rationalisation and intellectualisation of society during the Enlightenment led to the conceptual separation of society into distinct spheres of value such as public and private, or religious and scientific.³⁸ That meant that the public sphere of government must be kept separate from the private sphere of the individual as much as possible. John Stewart Mill argued that in order to form an independent mind and autonomous judgement, humans must be able to think, discuss, and act freely. Thus, a 'free marketplace of ideas' was an essential requirement of a rational society.³⁹ This free

³⁵ Andrew Heywood *Political Theory: an Introduction* (3rd ed, Palgrave Macmillan, New York, 2004), at 29.

³⁶ David Held *Models of Democracy* (3rd ed, Stanford University Press, Stanford, Calif, 2006), at 58-59. This abstraction occurred against the backdrop of the Protestant Reformation, which had challenged the authority of the Church and promoted the person as an individual, alone before God and responsible for their own actions.

³⁷ John Locke *Two Treatises of Government* (printed 1689/reprinted the sixth time by A Millar, London 1764), at §§94-97; Held, above n 36, at 45.

³⁸ David Dyzenhaus "The Legitimacy of Legality" (1996) 46(1) UTLJ 129, at 137.

³⁹ Held, above n 36, at 79.

market had to be shielded against state influence and public power and actions therefore had to be limited. Otherwise, humans would be subjected to the arbitrary will of government.⁴⁰

Economic liberalism arose out of the liberal concept of a free market in which individuals are free to act independently according to their personal preferences. It believes that the distribution of scarce resources can most efficiently be achieved by letting the market forces of competition and free trade guide the economy.⁴¹

Economic liberals see the economy as the essential foundation of society. Without the resources that the market provides, individuals cannot be self-determining as they lack access to the necessary tools. Individual security and realisation therefore lie in economic activity and growth.⁴² According to classic economic liberalism, economic stability is best achieved by a 'laissez-faire' government. Rather than imposing its will on the markets and interfering with the economy, it practices a hands-off approach to economic matters. Its influence over economic matters should be limited to facilitating market values such as competition and free trade.⁴³

Economic liberalism competed with other economic ideologies during the 19th and 20th centuries, initially with mercantilist and later with socialist influences. But since the end of World War II and particularly the Cold War, other ideologies have become increasingly marginalised in favour of liberal considerations.⁴⁴ Disagreement about the extent of state involvement nonetheless persists. Modern liberalism tends to be more sympathetic to some level of state interference in the market. It recognises the tension between facilitating the economic freedom of individuals and ensuring the most benefit to all individuals in a community, as illustrated by the Tragedy of the Commons.⁴⁵ There are therefore varying degrees of economic state intervention among modern liberal economies. Nevertheless, the ideals of deregulation, competition, and limited government remain strong.

According to securitisation theory, successful securitisation requires the securitising actor to establish an existential threat to the referent object. The nature and extent of an existential threat depends on the referent object. For example, in a military context, an existential threat likely involves a threat to

⁴⁰ Benjamin Constant *Political writings* (Biancamaria Fontana (ed), Biancamaria Fontana (translator), Cambridge University Press, New York; Cambridge, 1988), at 316-317.

⁴¹ Wendy Brown *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press, Princeton, 2005), at 39.

⁴² Buzan, Waever and Wilde, above n 8, at 95.

⁴³ Vivien A Schmidt and Mark Thatcher *Resilient Liberalism in Europe's Political Economy* (Cambridge University Press, Cambridge, 2013), at 7.

⁴⁴ Buzan, Waever and Wilde, above n 8, at 96; Beth A. Simmons, Frank Dobbin and Geoffrey Garrett "Introduction: The International Diffusion of Liberalism" 2006 60(4) *International Organization* 781, at 781.

⁴⁵ Garrett Hardin "The Tragedy of the Commons" (1968) 162(3859) *Science* 1243, at 1243-1248. The Tragedy of the Commons is an economic hypothetical about the potential for individuals to overuse an unregulated common resource to such an extent that it depletes, or spoils said resource, to the disadvantage of all.

the geographic integrity of the state. In a societal context it may be a purported threat to the cultural integrity to society brought about by immigration.⁴⁶ The threat must be existential, i. e. the referent object must be endangered on a systemic level.

For that reason, valid economic referent objects for securitisation are exceedingly rare. The purpose of an economy is to distribute resources and to provide an acceptable level of welfare.⁴⁷ An economy is only existentially threatened if it cannot provide for society's most basic needs or a complete collapse is imminent. Other economic issues such as questions about levels of welfare or unequal distribution of resources (e. g. access to the first-home buyers' market) remain in the realm of ordinary politics. Threats to personal finance or to the profitability or even viability of individual market actors such as companies generally do not pose an existential threat to the economy and are therefore not valid referent objects in traditional securitisation theory.⁴⁸

1.2.2.2 Risk Societies and Riskification

According to traditional securitisation theory, most economic issues are seen to be merely the product of the ebb and flow of economic market activity. Securitising them would unduly interfere with the market, thus contravening fundamental principles of economic liberalism. Traditional securitisation theory therefore has difficulties dealing with situations in which the individual well-being of members of the population is the referent object. An existential threat to a person's finances can be supremely detrimental, particularly in a liberal economy that focusses on individuality and self-responsibility.

An increasing awareness and consequent aversion to risk in societies with a focus on self-responsibility has enabled political actors to securitise issues beyond traditional referent objects. Scientific and technological progress in combination with mass media has made the public increasingly aware of risk, both on a personal level, as well as on a systemic level. Climate change, economic crises, large scale industrial accidents, and environmental catastrophes are a staple of the news cycle. Many of these risks are outside of most individuals' control. This lack of control creates an aversion to risks, and a desire to avoid taking risks.

At the same time, neoliberal movements in liberal democracies over recent decades celebrate risk-taking, while emphasising self-responsibility. Economic success is regarded as the highest value, yet

⁴⁶ Buzan, Waever and Wilde, above n , at 22-23.

⁴⁷ At 8, 19-20.

⁴⁸ At 8, 104. There may be an argument to include non-existential economic issues that have the potential to lead to an economic chain -reaction which culminate in an existential threat, such as the Great Depression of the 1920s and 1930s. But such economic chain reactions occur rarely and appear to be more easily handled and mitigated, as the events of the Black Monday economic crisis in 1987 and the Global Financial Crisis of 2008 illustrate. While these crises did affect some market actors on an existential level, economies recovered relatively quickly.

many economic factors that influence success are beyond individual control. This tension between expectation to take economic risk and aversion to risks creates uncertainty and high levels of sensitivity to economic issues. Consequently, any economic issue can be directed through security rhetoric to be perceived as an existential threat. Moreover, due to the high levels of risk aversion in risk societies, people are not only sensitive to imminent existential threats, but also to mere potential risks. An acute threat to the economic system is no longer necessary. Any economic risk is perceived as existential and can therefore be used to securitise an economic issue.

This allows securitising actors to use security rhetoric to create the perception of existential risks to justify exceptional measures. The 'riskification' of issues, particularly economic ones, makes the process of securitisation easier and more prevalent. Consequently, securitisation and ordinary economic politics become increasingly difficult to separate.⁴⁹

1.2.2.2.1 Risk Society

In the 1980s, German sociologist Ulrich Beck coined the term 'risk society' to explain the progressively increasing risk sensitivity in modernised societies. He posited that people's attitudes towards risk changed as a society became more technologically and industrially advanced.

A major component of risk society theory is the changing perception of the nature of risks as society advances industrially and technologically. Pre-modern societies tended to regard disastrous events spiritually and attributed them to divine intervention brought upon humans as punishment or retribution for their behaviour.⁵⁰ This meant that humans believed that they had no agency in disasters and therefore no control over the associated risk.⁵¹ In Europe, the 1755 Lisbon Earthquake marked a fundamental shift away from the perception of disasters as Acts of God. The earthquake was one of the deadliest in recorded history, estimated to have a magnitude of 8.5-9.0 on the Richter Scale, and killing up to 100,000 people in Lisbon alone.

The event challenged the common conception of a divine cause for disasters.⁵² Due in part to the extent of the disaster and in part to the explosion of sciences during the Enlightenment period, people

⁴⁹ At 8, 109.

⁵⁰ Kristian Cedervall Lauta *Disaster Law* (Routledge, Milton Park, Abingdon, Oxon; New York, NY, 2015), at 15-16; Peter H Schuck "Crisis and Catastrophe in Science, Law, and Politics: Mapping the Terrain" in Austin Sarat and Javier Lezaun (eds) *Catastrophe: Law, Politics, and the Humanitarian Impulse* (University of Massachusetts Press, Amherst, 2009) 19-59, at 31; Celia Wells *Negotiating Tragedy: Law and Disasters* (Sweet & Maxwell, London, 1995), at 4.

⁵¹ Maciej Pichlak "Regulating Risk and a Theory of Social Reflexivity of Law" in Ubaldus de Vries and John Fanning (eds) *Law in the Risk Society* (Eleven International Publishing, The Hague, 2017), at 88-89.

⁵² At the time, Gottfried Wilhelm Leibnitz provided the most prominent defence that a God in a world befallen by bad events can still be good. In his *Theodicy*, Leibnitz posited that even when God allowed bad things to happen, he could not have acted differently as he was merely working with circumstances available to him.

started questioning the idea that God would cause a disaster of this scale. Famously, Voltaire questioned the divine justice behind an event that caused children to die in Lisbon while parties continued in Paris and London.⁵³ Moreover, the development of advanced mathematical tools, such as Blaise Pascal's probability theory, led to more accurate risk assessment abilities.⁵⁴ Risk assessment therefore began to be a useful consideration in everyday decision-making.

Life at the beginning of European early modernity was characterised by a scarcity of primary goods and a strong hold of political and social traditions over individuals.⁵⁵ The former necessitated a perpetual struggle for survival, while the latter restricted people's ability to self-determine and move outside their social class. The process of industrialisation and its associated burgeoning production brought a gradual end to the issue of scarcity. At the same time, liberalism and democratisation began to break down social and political restrictions to individual autonomy.⁵⁶ This enabled an increasing part of society to shift their attention from daily survival to wealth accumulation. In this context, risk became an opportunity concept.⁵⁷ Risk in early modern wealth societies is perceived as a calculable future hazard that is standing in the way of accumulating wealth. It is a probability that can be managed and tamed.⁵⁸ Since wealth follows the positive logic of acquisition, it is an obviously desirable good; risk presents an opportunity to acquire wealth and is therefore itself desirable.⁵⁹

De Vries points out that in late modern society, the constant progress of industrialisation and advancements in technology produces its own risks.⁶⁰ Industrial accidents lead to chemical contamination. Mass agriculture amplifies the risk and impact of livestock diseases such as foot and mouth disease, which threaten the livelihood of farmers. This is exacerbated if an animal disease transfers to humans, such as Bovine Spongiform Encephalopathy (BSE) or Covid-19. Failure in nuclear power plants can threaten entire regions, such as at Three Mile Island or Chernobyl. And over-

The world was therefore the best possible one, despite the occurrence of disasters, see Susan Neiman *Evil in Modern Thought: an Alternative History of Philosophy* (Princeton University Press, Princeton, N.J., 2002), 21-22.

⁵³ Lauterbach, above n 50, at 18.

⁵⁴ Gabe Mythen *Understanding the Risk Society* (Palgrave Macmillan, 2014), at 13.

⁵⁵ Ubaldo de Vries "Introducing the Risk Society" in Ubaldo de Vries and John Fanning (eds) *Law in the Risk Society* (Eleven International Publishing, The Hague, 2017) 11, at 14.

⁵⁶ At 55, at 15; Ulrich Beck *The Reinvention of Politics: Rethinking Modernity in the Global Social Order* (Polity Press, Cambridge, Mass, 1996), at 38.

⁵⁷ de Vries, above n 55, at 25.

⁵⁸ Pichlak, above n 51, at 89; Mythen, above n 54, at 29.

⁵⁹ Beck, above n 4, at 26.

⁶⁰ de Vries, above n 55, at 16.

industrialisation and farming practices significantly raise the amount of greenhouse gasses in the atmosphere, leading to the potentially catastrophic change of the global climate.

In late modernity, the opportunity risks of early modernity are joined by an ever-growing number of 'systemic risks'. Systemic risks are risks that do not merely threaten individuals locally but risk the breakdown of entire systems.⁶¹ Whereas the opportunity risk in early modernity of, for example, speculative investment effected only the investor and/or the local economy, in late modernity it can cause a global financial crisis; whereas in early modernity industrial pollution affected health and environment mostly locally (or so it was perceived), in late modernity climate change may cause the collapse of the global ecosystem. The effects of modern risks are more severe and longer lasting.⁶²

As will be discussed later, the view of risk as opportunity persists in risk societies because market rationality idolises wealth creation. But de Vries contends that wealth and risk production imply each other: risks taken as opportunities to accumulate wealth create the modern systemic risks of the risk society.⁶³ Modern risks are side effects of modernisation: industrialisation leads to climate change, financial speculation and consumerism lead to financial crises, excessive urbanisation leads to increased flooding damage and earthquake fatalities.

But unlike the opportunity risks of the early modern society that were entered into mainly by personal choice, exposure to modern risks is not voluntary. They are created by human activity and are thus inflicted on society by other humans.⁶⁴ In contrast to the potential benefits of opportunity risks, modern risks pose mainly disadvantages for most of society. They are self-imposed, and their effects are vast and difficult to predict. As the advent of mass media, mobile phones, and the internet increase the public awareness of and knowledge about risks, the public's tolerance for them grows ever smaller.⁶⁵

1.2.2.2.2 Riskification of Securitisation Theory

This increasing sensitivity to risk has led to risk becoming the central focus of security discourse. Security increasingly becomes 'riskified', a term coined by Olaf Corry. He explains that riskification is the "social process of constructing something politically in terms of risk."⁶⁶ In other words, riskification describes the process by which the focus of public discourse shifts from acute existential threats to

⁶¹ Rosa, Renn and McCright, above n 5, at 123; George G. Kaufman and Kenneth E. Scott "What Is Systemic Risk, and Do Bank Regulators Retard or Contribute to It?" (2003) 7(3) *The Independent Review* 371, at 372; de Vries, above n 55, at 16.

⁶² Beck, above n 4, at 22.

⁶³ de Vries, above n 55, at 18, 27.

⁶⁴ At 55, at 21; Beck, above n 4, at 21; Pichlak, above n 51, at 90.

⁶⁵ Anderson (2009) as cited in Mythen, above n 54, at 16.

⁶⁶ Corry, above n 11, at 237.

the mere risk of potential future existential threat, irrespective of the probability that the threat will manifest. This allows a political actor to securitise issues without having to establish an acute existential threats. Security is self-referential - the perception of a security issue does not depend on the existence of an actual threat, but merely on the construction of a public perception of a threat.⁶⁷ It is not in itself a 'good', it is a social construct. Riskification of issues changes the focus of security from preventing threats to managing risks. This enables political actors to securitise issues not only by establishing an actual imminent existential threat, but merely by creating the perception a potential, diffuse existential risk.

Since risks are not acute and imminent, security is increasingly about preventing and managing future diffuse risks rather than clear and immediate threats.⁶⁸ In contrast to threats, risks are ever-present. Risk societies constantly reflect on and monitor risk, while simultaneously generating risk. This is especially the case in the context of economic matters. As will be discussed below, neoliberal ideology values risk-taking as an essential economic driver. The tension between risk-aversion and risk as a value creates high levels of uncertainty which leaves people sensitive to economic risk rhetoric. That means that it becomes easier for a securitising actor to securitise economic issues. The reluctance of traditional securitisation theory to recognise economic issues as referent objects of securitisation disappears as the diffuse and uncertain nature of risk can more easily be presented as a potential future existential threat.

The effect of securitisation's shift to risk is that it shifts from a reactionary device used to deal with an imminent issue to "politics of permanence and long-termism."⁶⁹ Threats cannot be managed, only defended against. Their locus of control is external, as it threatens the referent object from outside. Risks, on the other hand have not manifested themselves yet. They are only potential and can therefore not be addressed directly. Risks cannot be eliminated; they must be managed.⁷⁰ This internal locus of control creates an expectation that government not only manage risk, but also controls it. However, as will be discussed in Chapter Two, risks are often ambivalent and uncertain. Without clear solutions to risks, governments will often resort to arbitrary decisionism based on politics of speed rather than merit.⁷¹

⁶⁷ Buzan, Waever and Wilde, above n 8, at 25.

⁶⁸ Corry, above n 11, at 234, 242.

⁶⁹ At 11, at 245.

⁷⁰ At 11, at 245,247.

⁷¹ Claudia Aradau and Rens Van Munster "Governing Terrorism Through Risk: Taking Precautions, (un)Knowing the Future" 2007 13(1) European Journal of International Relations 89, at 105, 107.

Corry thus surmises that the riskification of security issues leads to a longer, more substantiated form of securitisation.⁷² The distinction between ordinary politicisation of issues and exceptional securitisation blurs, as exceptionalism becomes more widespread and permanent. The ongoing use of securitising rhetoric can normalise securitisation of issues and consequently the use of exceptional measures.⁷³ As will be discussed below, this undermines the distinction between normal and exceptional government and is thus a threat to constitutional and democratic principles.

1.2.2.3 Neoliberalism and Securitisation

The ability to riskify economic issues has been aided by the rise of neoliberal policies in liberal democracies since the 1980's. Neoliberalism is an economic and political ideology based on economic liberalism.⁷⁴ But unlike economic liberalism, neoliberalism extends economic considerations beyond the economic sphere into all parts of life. This results in ever-present economic pressures and facilitates the public's aversion to risk. Economic issues can therefore more easily be riskified and thus securitised.

1.2.2.3.1 Neoliberalism and the Dominance of Economic Rationality

The laissez-faire non-interventionist economic policies of economic liberalism fell out of favour towards the end of World War I. The state was expected to exert more social control over market forces in order to mediate between the market and society and to care for a population that had fought and suffered for the state.⁷⁵ This resulted in the growth of Keynesian economic policies, named after economist John Maynard Keynes. Keynesian economics stressed the importance of government intervention in economic issues, particularly during economic downturns. It advocated the use of public debt to stabilise economic issues such as output, inflation, and unemployment.⁷⁶ However, this economic approach had been under increasing attack during the second half of the 20th century, particularly due to its level of state intervention in economic matters and its willingness to increase

⁷² Corry, above n 11, at 248.

⁷³ Balzacq, above n 10, at 17; Marieke de Goede "The Politics of Preemption and the War on Terror in Europe" 2008 14(1) *European Journal of International Relations* 161, at 162.

⁷⁴ Brown, above n 41, at 39. It is important to note that different normative values may be attached to terms such as 'liberal' and 'neoliberal'. For example, the term 'liberal' is associated with centre left politics in the US, whereas in Europe it is regarded as economically conservative. Moreover, those labelled as 'neoliberal' usually do not apply the term to themselves, see Taylor C Boas and Jordan Gans-Morse "Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan" 2009 44(2) *Studies in Comparative International Development* 137, at 156; Schmidt and Thatcher, above n 43, at 6.

⁷⁵ Jane Kelsey and Foundation New Zealand Law *The Fire Economy: New Zealand's Reckoning* (Bridget Williams Books Wellington, 2015), at 127.

⁷⁶ Alan S Binder "Keynesian Economics" in David R Henderson (ed) *The Concise Encyclopedia of Economics* (2nd ed, Liberty Fund, Indianapolis, 2008).

public debt. The economic crises of the 1970s paved the way for the adoption of a new form of economic liberalism: neoliberalism.⁷⁷

True to its roots, the core principles of neoliberalism are a 'free market' that is regulated as little as possible, market competition, and limited government. But unlike classic economic liberalism, its analytic foundations extend beyond the economic into the social realm. Neoliberalism aims to extend and disseminate market values to all institutions and social actions of society.⁷⁸ This contamination of market pressures into all parts of life, such as healthcare, welfare, and education, contributes to the public's constant exposure to and awareness of economic risks.⁷⁹

The profound impact of neoliberal developments on risk perception warrants a closer look at the main characteristics of neoliberalism. Despite its origin in economic liberalism, neoliberalism does not share classic liberalism's laissez-faire attitude to public policy.⁸⁰ It does not believe that markets and economic behaviour occur naturally and therefore do not require regulation. It believes that markets are constructed through political facilitation and orchestration. The economy must be directed and buttressed against failure by creating and disseminating social norms that facilitate competition, free trade, and rational economic action.⁸¹

That does not mean that the state controls markets as it does in Keynesian economics. Rather it responds to the needs of the market by directing public policy in all social spheres to be advantageous for the economy. The state becomes part of the market-matrix as it must act according to market rationality and entrepreneurial terms. Its legitimacy becomes dependent on the health and growth of the economy.⁸² If the economy is correctly facilitated in this way, neoliberalism is confident in the market's ability to allocate resources fairly and efficiently.⁸³

Neoliberalism's drive to use public policy to facilitate the economy means that economic rationality must extend to all social domains, not just the economic sphere.⁸⁴ It posits that a strong economy and

⁷⁷ George Monbiot "Neoliberalism - The Ideology at the Root of All our Problems" (15 April 2016) <www.theguardian.com>.

⁷⁸ Brown, above n 41, at 40; Stephen Gill "Constitutionalizing Inequality and the Clash of Globalizations" 2002 4(2) *International Studies Review* 47, at 47, Kelsey and New Zealand Law, above n 75, at 133.

⁷⁹ Ronen Shamir "Corporate Social Responsibility: Towards a New Market-Embedded Morality?" 2008 9(2) *Theoretical Inquiries in Law* 371, at 372.

⁸⁰ Brown, above n 41, at 41.

⁸¹ At 41, at 41; Schmidt and Thatcher, above n 43, at 8.

⁸² Brown, above n , at 41-42. Gerber calls this 'economic constitutionalism': in a community that has chosen to be a market economy, the government must act according to the logic of the market, David J Gerber "Economic Constitutionalism and the Challenge of Globalization: The Enemy is Gone? Long Live the Enemy: Comment" 2001 157(1) *Journal of Institutional and Theoretical Economics* 14, at 17.

⁸³ Colin Hay "The Normalizing Role of Rationalist Assumptions in the Institutional Embedding of Neoliberalism" 2004 33(4) *Economy and Society* 500.

⁸⁴ Brown, above n 41, at 42.

economic freedom are the foundation of all other political liberal values. Economic values are therefore paramount in order to facilitate and guarantee a liberal society.⁸⁵ Every public and private action must be considered in the market terms of profitability, productivity, and utility against a micro-economic grid of scarcity and supply and demand. All human life is cast in terms of market rationality.⁸⁶

In the neoliberal view, individuals are entrepreneurial actors, not just when they act economically but in all aspects of their lives. They are expected to act according to market rationality. This has a profound effect on society's morality and value system. Both public and private actions are deemed either 'good' if they are in line with market rationality, or 'bad' if they are not. Moral behaviour is equated to rational economic behaviour, moral considerations are equated to economic rationality.⁸⁷ This subordinates legitimate other value considerations such as moral and cultural values, environmental sustainability, people's well-being, and democratic principles to the standards and measures of the comparative market.⁸⁸

The market is perceived as the medium through which humans realise themselves by making rational choices that advance their interests. As market actors, people are expected to act rationally (in economic terms). They are thus responsible for their own economic success. The state's role is to create 'prudent citizens' and to facilitate a competitive environment within which people can make rational market choices by way of social policies. For example, neoliberal policies favour privatisation of traditionally public services such as education and healthcare, and minimising welfare to 'encourage' people to engage with the market productively. The purpose of social policies is therefore not to support people, but to create rational market actors who calculate their lives based on economic rationale.⁸⁹

By imposing economic considerations on non-economic matters, neoliberalism breaks with classic liberalism's tradition of separating spheres of life. Traditional liberalism separates between spheres to guarantee autonomy and control of each sphere over its own matters. This creates an intentional distance and tension between independent institutions. The purpose is to oppose the dominance of one sphere over the others. As neoliberalism insists on imposing its rationality on all spheres, the ability to oppose the dominance of economic rationality diminishes.⁹⁰

⁸⁵ At 41, at 40.

⁸⁶ Cerny refers to humans who are viewed and measured mainly through an economic lens as 'homo oeconomicus', Philip G Cerny "Embedding Neoliberalism: The Evolution of a Hegemononic Paradigm" 2008 2(1) *The Journal of International Trade and Diplomacy* 1, at 3.

⁸⁷ Brown, above n 41, at 42; Schmidt and Thatcher, above n 43, at 8.

⁸⁸ Kelsey and New Zealand Law, above n 75, at 144.

⁸⁹ At 75, at 133; Brown, above n 41, at 42-43.

⁹⁰ Brown, above n 41, at 45-46.

Neoliberalism is not the only ideology driving governments in liberal democracies. In fact, there is no purely neoliberal government in the world. But neoliberal considerations have taken hold in many governments since the 1980s. Ideals of fiscal responsibility, productivity, and self-responsibility have become so embedded in the political discourse, that political actors across the political spectrum feel impelled to refer to them to at least some extent.⁹¹ Economic rationality has become the 'common sense' mode of governmentality.⁹²

1.2.2.3.2 *Riskification of Economic Issues*

An environment in which economic considerations exude constant pressure on people to perform in a market rational way has created a public that is acutely sensitive to economic issues. It is therefore increasingly susceptible to rhetoric that riskifies economic issues.

Neoliberal tendencies expose the public to paradoxes, which in turn create uncertainty and thus risk-aversion. For example, neoliberalism celebrates risk-taking as fuelling innovation and contributing to economic growth. Risks that lead to successful economic outcomes drive the economy, and the successful risk-taker reaps their 'just' reward of prosperity.⁹³ According to the concept of self-responsibility, the market actor acts economically rationally and is rewarded for that.

However, the focus on self-responsibility also discourages risk-taking. It burdens people with the responsibility over circumstances they often cannot control. A factory worker may suffer the consequences of their employer's risky investment that went wrong; a self-employed contractor may find it hard to find contracts if their industry is suffering a downturn because of unsuccessful market speculations by financial institutions.

This is exacerbated by the privatisation of formerly public services. By outsourcing such services, the state also sheds the responsibility for these services (at least to some degree).⁹⁴ This shifts the risk of failure of these services onto the users. Individuals are thus encouraged to take risks, but at the same time they are burdened with the responsibility of risks that are outside their control. All the while, their social safety net of public services is being disassembled.

At the same time, they are exposed to two contrasting moral narratives: the traditional narrative of social responsibility, human dignity, and reciprocal obligations within the community, and the

⁹¹ Kelsey and New Zealand Law, above n 75, at 126-132.

⁹² Gill, above n 78, at 48.

⁹³ Jane Kelsey *Transcending Neoliberalism: Moving from a State of Denial to Progressive Transformation* (Religious Society of Friends, in Aotearoa New Zealand, Te Haahi Tuahawiri, Wellington, 2017), at 9; Kelsey and New Zealand Law, above n 75, at 141

⁹⁴ Thomas Lemke "'The Birth of Bio-Politics': Michel Foucault's Lecture at the Collège de France on Neo-Liberal Governmentality" 2001 30(2) *Economy and Society* 190, at 201.

neoliberal narrative that all value considerations must be made against the economic considerations of market rationality.⁹⁵

The uncertainty created by these contradictory considerations and by the people's dependence on economic circumstances over which they have little control lead to an ever-increasing sensitivity to economic issues and aversion to economic risk. This makes it exceedingly easy for political actors to securitise economic issues. Economic issues do not have to be explicitly portrayed as existential threats. The dominant neoliberal narrative of the primacy of market rationality has embedded an awareness for the consequences of economic failure, whether on a personal, industry, or national level. This means that people perceive economic risks as existential, particularly on a personal level.

The riskification of economic issues means that political actors need only imply a risk to the economy to conjure assumptions of urgency and threat in the population. In this way, securitisation can become institutionalised.⁹⁶ There is no need to convince the audience that a specific issue poses an existential threat to a referent object. The implicit assumption that economic issues pose existential risks are embedded in the collective consciousness of the community, so that any action that mitigates that risk must be urgent and therefore prioritised. In a market-driven economically liberal society, almost any economic issue can be securitised, irrespective of its actual level of risk or threat.

Neoliberal rationality leads to the riskification of economic issues, which enables easy securitisation of these issues. The extended and semi-permanent, or at least frequent, exceptional government of riskified securitisation poses a significant threat to the integrity of liberal democracy. This is exacerbated by economic rationality that subordinates democratic values and institutions to cost-benefit analyses and efficiency considerations.⁹⁷ The public is exceedingly willing to except a narrative that elevates economic issues into the realm of existential risks, even if the risk is only tenuous or is not existential in reality. Governments can therefore use false or exaggerated economic risk rhetoric to securitise almost any politico-economic issue, thus justifying and legitimising the use of exceptional measures.

1.2.3 Constitutional Impact of Securitising Economic Issues

Securitisation affects the constitutional order because it acts as a justification for the state to take exceptional measures, i.e. to act outside the ordinary constitutional order. The purpose of the constitutional order in liberal democracies is to create a framework of laws and regulations that both facilitate communal coexistence and individual self-realisation as well as limit public power in order

⁹⁵ Kelsey and New Zealand Law, above n 75, at 133-134.

⁹⁶ Buzan, Waever and Wilde, above n 8, at 27-28.

⁹⁷ Brown, above n 41, at 47.

to prevent its arbitrary use. Securitisation can therefore threaten the integrity of the constitutional order, particularly if it has been riskified and therefore made quasi-permanent.

Apart from the abovementioned reasons for the public's willingness to accept economic risk rhetoric as an existential risk to themselves, another substantive reason is an information deficit on the part of the public. Economic risks are highly complex and ambiguous, and the public is often not in a position to assess the veracity of the government's claims regarding economic risks. It may require an overhaul of the public discourse about risks and the economy to address the effects of securitisation. Deliberative democracy theory offers solutions on how to better inform the public and involve it in the public discourse more meaningfully.

1.2.3.1 Securitisation and the Normalcy-Exception Dichotomy

Securitisation and riskification of political issues bear the danger of undermining democratic and constitutional principles. Securitisation elevates a political issue out of ordinary politics into an exceptional realm. Because it purports a threat to be existential, taking exceptional measures is justified to avoid or mitigate that threat. In constitutional terms, exceptional measures are those that are usually not available and would ordinarily be in violation of the law.

By directly or implicitly declaring a political issue a matter of security the state effectively declares a form of state of emergency.⁹⁸ States of emergencies are usually associated with disasters or war. They provide the state with exceptional powers to deal with the effects of a disaster or military incursion. Ordinary constitutional and democratic procedures have built-in safety mechanisms such as consultation or timing requirements that aim to limit government power and ensure the integrity of liberal democratic ideals. However, when faced with crises, these limitations may prevent the state from responding sufficiently swiftly and decisively.

Exceptional powers allow the state to act outside the ordinary constitutional order (or at least outside their ordinary limitations). However, as this weakens the constitutional order, exceptional powers are meant to be temporary and to end once the urgency of responding to the crisis has passed. The so-called normalcy-exception dichotomy, the strict separation of ordinary from exceptional powers, has traditionally been regarded as a vital principle of the constitutional concept of emergency law.

The importance of democratic and constitutional processes and the danger that securitisation and riskification pose cannot be overemphasised. Liberal democracy is based on the ideal that all individuals are intrinsically morally equal, and that no person can inherently rule over another.⁹⁹ In

⁹⁸ Buzan, Waever and Wilde, above n 8, at 21.

⁹⁹ Robert Alan Dahl *On Democracy* (Yale University Press, New Haven, 1998), at 63.

large modern societies, individuals delegate their autonomous self-governance power to elected representatives. The elected government's role is to enable and protect each individual's autonomy and self-determination while facilitating the peaceful and successful coexistence of the community. Yet, due to the size of modern societies and their complexity, a large amount of decision-making power is delegated to a relatively small number of elected officials and bureaucrats. As humans tend to act self-interestedly, wielding such power may lead to tyrannical rule and thus undermine democratic ideals. Constitutionalism and the rule of law are meant to prevent such arbitrary use of public power by creating rules by which government must make its decisions, and by limiting public power by binding governments to legal rules.¹⁰⁰

Democracy and constitutionalism therefore underpin the 'normalcy' of democratic government. They enable the use of public power to facilitate individual self-determination while limiting public power to prevent its arbitrary use. However, these limitations may prevent the state from acting swiftly and decisively when faced with a crisis. In order to be able to avert or mitigate an existential threat to life or property, many constitutional systems provide the state with exceptional powers to act outside its usual legal or constitutional limitations. Importantly, the main purpose of such 'emergency power' is to return government to its status quo, i.e. to a point at which it can manage the situation using ordinary powers. Emergency powers are thus temporary, as their prolonged use would undermine democratic rule of society.

The ability to justify the use of exceptional measures at will, irrespective of the severity or even existence of a risk, makes securitisation of economic issues so concerning. It creates a tool with which the state can activate extraordinary powers simply by conjuring a perception of economic risk. The more often the state takes extraordinary measures, the less 'extraordinary' they are. Moreover, the riskification of issues widens the concept of securitisation and shifts it into a quasi-permanent position, because risks have a more permanent existence than threats. In risk societies, security becomes a universally desired condition that the state is expected to guarantee. Calls for state action by any means necessary become increasingly frequent. Riskification therefore shifts securitised issues into a form of constant emergency mode because risks must be continuously managed.¹⁰¹ Particularly in the context of economic issues, where any politico-economic issue can be securitised, riskification jeopardises the integrity of the normalcy-exception dichotomy by normalising exceptionalism. As

¹⁰⁰ Wil Waluchow "Constitutionalism" (Spring 2018 ed, 22 February 2018) The Stanford Encyclopedia of Philosophy <www.plato.stanford.edu>; Tom Bingham *The Rule of Law* (Penguin, London, 2011), at 3.

¹⁰¹ Buzan, Waever and Wilde, above n 8, at 4.

exceptional measures become normalised, the clean separation between normalcy and exception begins to blur.

The problem is exacerbated by the predominant constitutional method of providing emergency powers in liberal democracies. Some constitutional writers, such as John Locke and Carl Schmitt, suggested that the power to do what is necessary in times of crisis is inherent in the sovereign and is thus located outside the constitutional order.¹⁰² As the locus of exceptional powers is not within the constitutional order, this approach sits uneasily with liberal democracy, because resorting to exceptionalism is entirely unregulated. Liberal democracies therefore tend to provide for emergency powers within their constitutions. Instead, some jurisdictions use superior law to regulate the use of emergency powers. But the most common method today is the so-called legislative model.¹⁰³ Provisions that allow the state to act exceptionally are embedded into ordinary legislation and are triggered by prescribed extraordinary events ('states of emergency'). Ostensibly, this gives exceptional powers more democratic legitimacy because they are established and controlled by the popularly elected legislature. However, by integrating exceptional provisions into ordinary legislation, they run the risk of becoming part of the ordinary legal structure. This further normalises exceptionalism, as the legal language and structure of exceptional provisions contaminate ordinary law-making.

Most importantly for the securitisation discussion, the executive may use the legislature to provide itself with exceptional powers. The executive holds power over the majority in the legislature when it is made up from members of the same political party as the parliamentary majority. This is frequently the case in presidential and semi-presidential systems, and virtually always in parliamentary systems. Governments can therefore utilise securitisation to not only allow themselves to take short-lived exceptional measures, but they can embed mid- or long-term exceptional powers in ordinary legislation.

Securitisation and riskification is a threat to the integrity of the normalcy-exception dichotomy and therefore to liberal democracy. Particularly the ease with which economic issues can be securitised and riskified is of real concern. Neoliberal considerations elevate market values above all else. Other liberal, societal, or environmental values are subordinated, so that the priority of dealing with economic risks becomes almost entirely uncontended. For example, it took a global pandemic like Covid-19 to challenge the near-absolute dominance of market rationality. Economic issues pose

¹⁰² Locke, above n 37, at [160]; Carl Schmitt *Political Theology: Four Chapters on the Concept of Sovereignty* Studies in contemporary German social thought (George Schwab (translator), MIT Press, Cambridge, Mass., 1985) (*Politische Theologie*), at 5.

¹⁰³ John Ferejohn and Pasquale Pasquino "The Law of the Exception: A Typology of Emergency Powers" (2004) 2(2) *ICON* 210, at 217.

existential risks almost by default, as the population has been primed by decades of neoliberal economic discourse and personal dependence on economic factors to accept almost any claim that an economic issue poses a security risk and must therefore be addressed by any means necessary.

1.2.3.2 Deliberative Democracy

There are constitutional mechanisms that are meant to control the use of public powers, such as judicial review and other administrative processes. However, in the face of the public acceptance of the need for exceptional measures to address purported existential risks, their effectiveness is limited. At the heart of modern democracy's vulnerability to economic risk rhetoric lies the public discourse. Economic issues are often highly complex and ambiguous. Even economic experts frequently do not agree on how to approach economic issues, or even whether an economic issue exists. That makes it difficult to evaluate the accuracy of economic risk rhetoric. The public is so willing to accept economic risks as true and urgent, not only because people are dependent on the success of the economy, but also because people lack the required knowledge to critically assess economic issues, let alone to meaningfully participate in the public discourse about them. People are therefore susceptible to exaggerated or invented risk rhetoric.

A solution to the detrimental effects of securitisation may be found in an approach to democratic decision-making called 'deliberative democracy'.¹⁰⁴ Deliberative democracy seeks to improve democratic quality by enhancing the nature of political participation through informed debate, public use of reason, and the impartial pursuit of truth.¹⁰⁵ The approach is based on the commitment of citizens to resolve problems of collective choice through public reasoning. Deliberative democrats regard free and informed deliberation as more resilient to manipulation and abuse, due to their insistence that any deliberative discourse must be reasoned. Arguments presented during deliberation must be rational and acceptable to people affected by the resulting decision.¹⁰⁶

In this way, deliberative democracy can counteract securitisation. Securitisation depends on the audience's acceptance that a particular threat or risk is existential and must urgently be addressed with exceptional means. Involving the public more in the political and economic discourse could address two shortfalls of current democratic systems. It could broaden the public discourse by increasing public understanding of the economic issues and thus enable them to meaningfully assess

¹⁰⁴ Joseph M Bessette "Deliberative Democracy: The Majority Principle in Republican Government" in Robert A Goldwin and William A Schambra (eds) *How Democratic Is the Constitution?* (American Enterprise Institute, Washington, 1980) 102; Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg (translator), Polity Press, Cambridge, 1996), Held, above n 36.

¹⁰⁵ Joshua Cohen *Philosophy, Politics, Democracy: Selected Essays* (Harvard University Press, Cambridge, Mass, 2009), at 16; Held, above n 36, at 232.

¹⁰⁶ Cohen, above n 105, at 26.

the government's risk rhetoric. And it could reintroduce other value considerations into a discourse currently dominated by economic values. This could decrease people's susceptibility to exaggerated risk rhetoric and their uncritical acceptance of exceptional measures.

1.2.3.2.1 *Deliberative Reasoning*

A substantive part of deliberative democracy is the concept of deliberative reasoning. Decision-making must be both deliberative by involving all affected parts of the population in the public discourse, and it must be reasoned, i.e. it must rest both on facts and on the consideration of multiple perspectives. This fosters mutual understanding in all parts of society and can therefore lead to a decision that is acceptable to all parts of society, not just to the majority.

Traditional liberal democratic institutions and processes have difficulties reaching policy outcomes that are satisfactory to all affected parts of the population. The reason is liberalism's emphasis on individual interests and its general distrust of public power. According to Habermas, the role of liberal government is to facilitate a society that functions as a market-structured network of interactions between private individuals. The rights of these individuals vis-à-vis the state are couched exclusively in negative terms, in order to assert and protect their private interests. Public decisions must be determined exclusively based on the aggregation of individual preferences.¹⁰⁷ In other words, in lieu of an unanimous decision, the majority preference must determine policy and any compromise is impossible, because it does not align with the absolute will of the majority of the people.¹⁰⁸

Habermas contends that politics is constitutive of the process of society as a whole. Politics reflects and shapes society by institutionalising the public use of reason, jointly exercised by all people as autonomous citizens.¹⁰⁹ Deliberative democracy's 'principle of reciprocity' posits that "a multi-perspectival mode of forming, defending and thereby refining [society's common] preferences" is necessary to create a mutual understanding and compromise between the competing interests and values of different parts of society¹¹⁰. The principle of reciprocity aims to eliminate fixed preferences by teaching people to understand a range of different perspectives on an issue. This enables them to form their preferences based on reasonable judgement, rather than on preconceived ideas or spontaneous judgement.¹¹¹ It also allows the public better understanding of general issues such as the economy, and thus be more resilient to fake crisis rhetoric.

¹⁰⁷ Held, above n 36, at 246.

¹⁰⁸ Jürgen Habermas "Three Normative Models of Democracy" (1994) 1(1) *Constellations* 1, at 277, 279.

¹⁰⁹ At 108, at 277-280.

¹¹⁰ Claus Offe and Ulrich K Preuss "Democratic Institutions and Moral Resources" in David Held (ed) *Political Theory Today* (Polity, Oxford, 1991) 143, at 169.

¹¹¹ Held, above n 36, at 233-234.

Manin et al explain that “the source of legitimacy [of public decisions] is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself.”¹¹² Deliberative decision-making therefore differs from ‘grassroots’ or ‘bottom up’ democracy, in that it requires more than simple participation. Offe points out that “there is no linear relationship between participation and reasonableness.”¹¹³ The population tends to willingly accept public decisions if they seem to either be in their personal interests or not to affect them directly. It is therefore vital that democratic processes and institutions be built around the ‘rational’ and ‘enlightened’ development of political will: people’s opinions on policy decisions must be informed by a full understanding of the actual effects of the policy on them and on others. Deliberative processes must be fact-regarding (i.e. based on evidence-based information), future-regarding (i.e. not myopic and only based on short-term interests), and other-regarding (i.e. not based solely on personal interests).¹¹⁴

Therefore, the outcome of deliberative decision-making can only be democratically legitimate if it is the object of free and reasoned agreement among equal participants.¹¹⁵ The deliberative decision is free if the participants regard themselves as bound only by the results of the deliberation, rather than external influences such as pre-conceived norms or coercive powers. It is reasoned if only fact-based evidence and free and conscience-based debate determine the outcome of the deliberation. And participants are equal if the rules and procedures of the deliberative process treat each individual equally and participants’ opportunities to contribute are not influenced by existing power and resource distribution.¹¹⁶

Participants must also be willing to accept contrasting modes of evidence, such as anecdotal evidence, personal belief systems, systematic evidence, and abstract knowledge. All parties in a deliberative dialogue must be willing to accept other’s positions and empathise with them in order to establish familiarity and mutual understanding.¹¹⁷ This includes the willingness not to focus on a single mode of deliberation. Deliberative processes must be wary of the fact that dominant culture groups tend to present a specific mode of reasoning as the only valid one.¹¹⁸

¹¹² Bernard Manin, Elly Stein and Jane Mansbridge “On Legitimacy and Political Deliberation” (1987) 15(3) Political theory 338, at 351ff.

¹¹³ Offe and Preuss, above n 110, at 167.

¹¹⁴ At 110, at 156-157.

¹¹⁵ Cohen, above n 105 at 23.

¹¹⁶ At 105, at 24.

¹¹⁷ Rosa, Renn and McCright, above n 5, at 190-191.

¹¹⁸ For example, the Western concept of rationality is rooted in a conflict model of argument based on the marketplace of ideas. The aim of rational debate is to ‘win’ the exchange by presenting the most convincing and compelling evidence in an effort to discover the ‘correct’ solution to an issue, James Tully “The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy” (2002) 65(2) MLR 204, at 223. This

1.2.3.2.2 *Compromise and a Tolerated Consensus*

Ideally, the result of a deliberative process is a true consensus, in which every participant values the result of the process more than their original preference.¹¹⁹ However, this presupposes some form of ‘moral absolutism’ in which a moral solution can be rationally determined through reasoned debates. But critics of this view rightly point out that a true consensus can only be achieved under impossible ‘ideal’ conditions where every person agrees on the same matrix of morals.¹²⁰ As the earlier discussion of neoliberal values shows, morality and values are malleable and differ between people and societies. The very problem with securitisation of economic issues rests on the fact that neoliberal tendencies elevate economic values above other values when they are conflicting.

Instead of insisting on creating an elusive ‘true consensus’, it is more realistic to require participants of a deliberative process to arrive at a ‘tolerated consensus’ based on compromises that allow agreement on what is best for the common good.¹²¹ The required compromises will have to be determined in a form of bargaining process that takes place in an ‘economy of moral disagreement’: conflicting moral perspectives will have to be considered and weight up against each other. The discourse must strive towards minimising the outright rejection of opposing views and avoiding unnecessary conflict in order to arrive at a mutually acceptable position. In the spirit of the principle of reciprocity, any remaining moral conflict must be resolved by seeking accommodating compromises based on mutual respect and empathy for the opposing perspectives.¹²² This requires parties to agree on fair terms of deliberation in advance, so that the outcomes of the discourse minimise the divergence of advantages and disadvantages that the decision effects on each affected social and cultural group. Decisions are therefore at least tolerable and thus acceptable to all affected parties.

Decision-making based on tolerated consensus has the potential to reduce effectiveness of securitising economic risk rhetoric. Deliberative processes do not only lead to a better-informed public that is less likely to uncritically accept risk and emergency rhetoric. They also facilitate better mutual understanding of competing interests and therefore are more likely to result in decisions based on

approach ignores that there are various forms of knowledge and reason, such as systematic evidence, experiential knowledge, and folklore wisdom, Rosa, Renn and McCright, above n 5, at 190. Different cultural and historical forms of knowledge, different social practices and values, and different customary ways of relating to one another all inform both preferences and ways of deliberations in different groups, Held, above n 36, at 243; see also Tully, above n , at 223. Deliberative processes must therefore be inclusive and representative of all affected groups; participants must not be expected to surrender their identities, as every group’s interests must be represented and recognised, Held, above n 36, at 244-245.

¹¹⁹ Rosa, Renn and McCright, above n 5, at 183.

¹²⁰ Amy Gutmann and Dennis F Thompson *Democracy and Disagreement* (Belknap Press, Cambridge, Mass, 1996), at 25-26, 84; Iris Marion Young *Justice and the Politics of Difference* (Princeton University Press, Princeton, N.J, 1990), at 103; Held, above n , at 243.

¹²¹ Rosa, Renn and McCright, above n 5, at 183.

¹²² Gutmann and Thompson, above n 120, at 84; Held, above n 36, at 243, Habermas, above n 108, at 281.

compromise. This has the potential to reintroduce values other than economic ones into the public discourse. It could lead to a public that is more critical of economic risk rhetoric and thus less willing to accept exceptional measures. It is unlikely that such decisions will lead to extreme policies and exceptional measures. Deliberative democracy therefore has the potential to mitigate some of democracy's weaknesses and interrupt the influence of emergency rhetoric.

1.2.4 Summary

This chapter has introduced several key theories that underpin the contentions of this thesis. Securitisation theory establishes that political issues can be elevated to be exceptional security issues by an actor, if they can convince the public that the issue poses an existential threat to a referent object. The threat does not have to be real or as severe as claimed. If the public perceives the threat as real and existential, it accepts the purported necessity to deploy exceptional measures to avert the threat.

Security threats were traditionally limited to military threats or threats to the state. In recent decades they have expanded to also include social, environmental, and economic threats. Economic issues generally are not sufficiently severe to pose an existential threat to a national economy. Traditional securitisation of economic issues therefore appears difficult. However, the advent of risk societies has seen a significant shift from risk acceptance to risk aversion. This, in turn, has led to a riskification of security issues. Security no longer focuses on addressing imminent threats, it is primarily concerned with managing risk. That means that in order to securitise an issue, the state does not have to create the perception of an existential threat, it merely has to establish the existence of a potential risk to a referent object.

Economic liberalism and neoliberalism have imbued the public with an intimate appreciation of economic risk. Particularly neoliberalism has introduced economic considerations into almost every aspect of life, creating an acute awareness for the purported importance of economic success. By elevating economic values over any other value considerations, and by privatising many public services and making each individual responsible for their own economic success, neoliberalism has created a society in which every individual is dependent on economic factors, whether they are within the individual's control or not. This creates a general sensitivity and aversion to economic risks in the population.

The riskification of economic issues thus creates an environment in which securitisation of economic issues is becoming easy. The awareness and aversion to economic risks is institutionalised in society, so that a securitising actor must merely mention an economic issue to conjure an image of existential

risk. The public is willing to accept the risk as real and existential because it has been primed to fear economic risks.

The impact of riskification of economic issues means that securitisation can become more common place. Securitisation allows governments to employ exceptional measures that are not ordinarily available to them. Frequent use of such exceptional measures bears the risk of normalising them, thus undermining the separation of ordinary and exceptional government (normalcy-exception dichotomy). A quasi-permanent exceptional government endangers the principles of liberal democracy, as it significantly reduces the limitations on government that constitutionalism ordinarily provides.

Deliberative processes have the potential to mitigate some of the adverse effects of securitisation and riskification. By creating public processes that share information and perspectives and that pool knowledge to facilitate the understanding of complex policy issues, it can inform and shape the public perception of economic issues. Deliberative processes can create common understanding of complex issues based on different perspectives. They give agency to the populus, thus enhancing the public's resilience to fake crisis rhetoric and strengthening the legitimacy of democracy.¹²³

More deliberative processes in the context of perceived existential risks and threats appear counter-intuitive and counter-productive. After all, the reason for extending exceptional powers to the executive during emergencies is a lack of time and the need to respond urgently and swiftly. But as will be shown in later chapters the need for urgency in many supposed emergency situations is debatable at the very least. There must not be an assumption of urgency by default. Otherwise, the use of exceptional measures becomes normalised.

The theoretical frameworks described in this chapter form the basis on which the substantive parts of the thesis are based. Over the next three parts, the thesis will explore in depths the reasons for the public's willingness to accept risk rhetoric and in particular economic risk rhetoric and the consequent effectiveness of false and exaggerated securitisation attempts, the constitutional impact of such securitisation attempts, and what can be done to mitigate the effectiveness of securitisation.

¹²³ Michael Saward *Democracy* (Polity, Oxford, 2003), at 120-124; Held, above n 36, at 237-238; Rosa, Renn and McCright, above n 5, at 182-183.

Part 1

Risk Rhetoric and

Economic Securitisation

Risk rhetoric has a substantial impact on public opinion and on public policy. For example, the Covid-19 pandemic evoked different responses from different countries during the early months of 2020. Some countries decided to impose varying levels of lockdown restrictions, closing public buildings and allowing people to only leave their houses for a small number of essential activities. Other countries were reluctant to introduce such extreme measures for fear of their impact on the economy and personal liberties. The different approaches to dealing with the pandemic appeared to correlate with the way that the risk of Covid-19 was addressed in the public discourse. In countries with extreme lockdown measures, the public discourse tended to focus on the potential of the virus to overwhelm the healthcare system and to result in many fatalities.¹²⁴ In contrast, governments in countries with fewer lockdown measures tended to stress the negative economic impact of lockdown measures.¹²⁵ The difference in rhetoric was reflected in the popular support for lockdown measures. For example, in New Zealand, which took relatively strong lockdown measures in April and May of 2020, 87% of the population agreed with the measures at the time.¹²⁶ In the United States, about 80% of the population was in favour of strict lockdown measures at the same time. However, when viewed along party lines, 94% of opposition supporters favoured extreme lockdown measures, whereas only 64% of government supporters did so.¹²⁷ Government supporters were also more likely to see the pandemic as a less serious threat than opposition supporters.¹²⁸

The substantial difference in perspectives on the pandemic shows that the public discourse, and especially the government's rhetoric, has a significant impact on the population's views on substantial threats to their personal lives and property and to society in general. Governments essentially securitised either the threat to public health if no action was taken to mitigate the effects of the virus, or the threat to the economy that the implementation of restrictions and lockdowns would pose. This influence gives governments a significant amount of control over the public's perception of risks. It enables governments to inform the population of risks that are invisible or difficult to comprehend due to their complexity, e.g. a potential pandemic that is yet to manifest in a major way.

Government rhetoric can also be used to create the false perception that a crisis is imminent by exaggerating threats in order to make the public more receptive to extreme policy measures. For

¹²⁴ See for example Siouxsie Wiles "Yes, this will hurt our economy. Letting Covid-19 take grip would hurt us more" (14 March 2020) The Spinoff <www.thespinoff.co.nz>; Jacinda Ardern "PM Address - Covid-19 Update" (21 March 2020) New Zealand Government <www.beehive.govt.nz>.

¹²⁵ Elliot Dejen "Trump and COVID-19: The Fierce Interplay of Rhetoric and Realities" (2 November 2020) Harvard Political Review <www.harvardpolitics.com>.

¹²⁶ "Covid Times" (24 April 2020) Colmur Brunton <www.colmarbrunton.co.nz>.

¹²⁷ Bill Chappell "8 In 10 Americans Support COVID-19 Shutdown, Kaiser Health Poll Finds" (23 April 2020) NPR <www.npr.org>.

¹²⁸ Ted van Green and Alec Tyson "5 facts about partisan reactions to COVID-19 in the U.S." (2 April 2020) Pew Research Center <www.pewresearch.org>.

example, as will be shown in Chapter Two, in the aftermath of the terrorist attacks on the World Trade Center in New York on 11 September 2001 (9/11) governments in the United States and the United Kingdom exaggerated the risks of terrorist attacks in order to justify harsher security and law and order measures.¹²⁹ Securitising risk rhetoric makes the public more receptive and accepting of the use of exceptional powers that are not normally available to the government. Using rhetoric to create a false sense of existential risk for the sake of policy convenience does not only circumvent democratic and constitutional restrictions to government powers, it also normalises the use of exceptional measures.

The purpose of Part 1 is to explore the concept of risk and the use of risk rhetoric as a driver of creating fear and justifying exceptional measures, particularly in the economic context. Chapter Two will look at the growing sensitivity to disaster risks in modern societies. Modern disaster risks are often too complex and ambiguous for laypeople to fully comprehend. That creates a high level of uncertainty. The public's perception of risk is dependent on expert advice and the public risk discourse. People therefore increasingly expect their governments to protect them against the impacts of potential risks, i.e. disasters and emergencies.

This expectation makes risk politically significant. The public evaluates the government's performance by how well the government protects it from perceived risks. In this context, risk rhetoric is a powerful driver of risk perception and sensitivity; it can emphasise or diminish risk. Politicians can therefore seize the ambiguity and uncertainty of risk and employ risk rhetoric to influence public perception of risks. They can artificially exaggerate risks in order to create the perception that the government is successfully dealing with threats to society, thus bolstering its popularity. They can also artificially create false risk perceptions that allow the government to justify otherwise unpopular and exceptional policies. Risk rhetoric therefore effects the normalisation of exceptional powers: the more risk rhetoric is used in government communication, the more the use of exceptional measures can be justified and be accepted by the population.

Chapter Three will explore the public's susceptibility to the securitisation of economic issues. People are often intimately familiar with economic risks, as many people's day-to-day life depend on economic factors. Housing, education, and other life essentials depend to at least some degree on fiscal stability and success. Neoliberal doctrine has further normalised the perception of all aspects of

¹²⁹ Gabe Mythen and Sandra Walklate "Communicating the Terrorist Risk: Harnessing a Culture of Fear?" (2006) 2(2) *Crime, Media, Culture: An International Journal* 123, at 131; Gabe Mythen and Palash Kamruzzaman "Counter-Terrorism and Community Relations: Anticipatory Risk, Regulation and Justice" in Hannah Quirk, Toby Seddon, and Graham Smith (eds) *Regulation and criminal justice: Innovations in policy and research* (2010).

life in economic terms of efficiency, productivity, and profitability. This familiarity with economic risks makes people more risk averse. Using economic rhetoric to conjure up perceptions of impending economic doom is therefore an effective tool to influence the public discourse and illicit public support for exceptional measures. Governments tend to resort to economic rhetoric frequently, irrespective of the severity or even the existence of the purported existential economic risk. Its frequent use to justify exceptional measures can therefore accelerate the normalisation of exceptional powers.

2 Risk Sensitivity and Risk Rhetoric

The recent examples of anti-terrorism legislation and the Covid-19 response in many modern democracies show that a large part of public appears to approve or at least acquiesce to securitisation attempts if the public discourse has been heavily focused on portraying issues as existential risks to society. The purpose of this chapter is to establish the reasons for the public's risk sensitivity and its consequent willingness to accept securitising risk rhetoric. It will also explain and illustrate how risk rhetoric can and is used to riskify political issues.

A reason for the public's willingness to accept such securitisation attempts is an increased sensitivity to risk in general and disaster risk specifically. Ulrich Beck and Anthony Giddens propose the concept of 'risk societies' in which attitudes towards risk changes as they progress from industrialisation in early modernity to post-industrial late modernity.¹³⁰ During the period of industrialisation, risks tend to be perceived as an opportunity to accumulate wealth. As societies progress into late modernity, the perception of risk as opportunity turns into a perception of risk as a threat to the status quo. As a result, modern societies grow risk averse.

The process of industrialisation creates a range of new and extreme risks (e.g. climate change, catastrophic nuclear power plant malfunctions, etc.). The risks are not merely personal anymore; they threaten all of society. They are more likely to result in disasters and therefore pose a more existential threat than personal risks, which can be more easily avoided. Moreover, these risks are more complex than pre-industrial risks, which tended to have a more direct and immediate impact on individuals. Modern risks are therefore full of ambiguity as to the likelihood of the manifestation of risk and its subsequent impact. It becomes harder for individuals to assess the severity and likelihood of risks. They are less empowered to control risks and therefore turn to governments to avoid or mitigate them.

This allows securitising actors to riskify political issues by using risk rhetoric to steer the public discourse. Risk rhetoric become a major driver of risk, as it is used to create a 'culture of fear'. Risks to personal safety, economic stability, and societal integrity are central to the public discourse and these risks can be exaggerated to justify securitising specific political issues and further political agendas. Additionally, in line with liberal principles, the population is 'responsibilised', i.e. people are constantly reminded that they are self-responsible. The combination of a culture of fear and self-

¹³⁰ Beck, above n 4, at 20; Giddens, above n 4, at 4.

responsibilisation creates a level of risk-aversion that allows actors to securitise non-existential political issues more easily.

2.1 Risk Sensitivity

A major reason risk sensitivity and aversion in Risk Societies is that systemic risks are complex, uncertain, and ambiguous. The complexity of systemic risks means that risk factors and behaviours are increasingly difficult to link causally to effects, particularly for non-experts. This leads to uncertainty in the population as to the probability and impact of risks. Moreover, the more complex a risk is, the more ambiguous it can become. Experts may disagree on causal links or on the right way to address the risk. In this context, the public discourse and rhetoric around risk are essential in influencing the public's sensitivity to risk.

2.1.1 Complexity and Uncertainty

Opportunity risks of early modern societies were relatively simple in nature: if I spend money to survey land in the hope of finding natural resources that I can extract for profit, I may not find any and therefore lose my investment. If I sail a ship into unknown or treacherous waters to find a new trade route, the ship may sink, and I may lose my investment or even my life. The likelihood and effect of the risks were readily recognisable, and a risk-benefit calculation was possible for most people, irrespective of their expertise. Modern risks, and particularly systemic risks, are much more complex. In late modernity, population size and density are rapidly increasing, and human settlement has encroached onto hazard-prone land. Production and consumption of goods has risen drastically. And there is an increased interdependence between technical, social, and cultural hazards. All of these factors increase the complexity of risk.¹³¹ Due to this complexity there are often too many causal links between the component factors of risks to be able to accurately understand or predict the risk. Some causal links may even be unknown.¹³²

Modern systemic risks are therefore not amenable to the simple reductionism of opportunity risks. The nature of risk as the probability of a future event means that it is neither tangible nor visible.¹³³ It

¹³¹ Rosa, Renn and McCright, above n 5, at 124.

¹³² At 5, At 132, 133. There may also be extended delays between cause and effect. For example, Gulf War syndrome, a chronic and multi-symptomatic disorder, began to occur in military veterans of the 1990-91 Persian Gulf War only years after they returned home. It is now thought to have been caused by exposure to pesticides, smoke from oil fires, and other toxic substances, but due to the long delay between exposure and diagnosis the connection between the causes and their effect were only recognised long after the end of the war.

¹³³ Beck, above n 4, at 23; Pichlak, above n 51, at 93.

is a construction of knowledge, a fiction that cannot be experienced until it manifests itself.¹³⁴ But due to the high complexity of systemic risks, information about it is either difficult to collect or difficult to interpret. Because there may be insufficient or inadequate empirical data on which to base a prediction, modern risks are increasingly difficult to calculate.¹³⁵ For example, during the early stages of the Covid-19 pandemic in 2020, there was insufficient data about the way in which the virus was transmitted. It was therefore difficult to assess whether the use of face coverings would help against the risk of contracting and spreading the virus, or whether it would increase the risk of contracting Covid-19 because people would touch their faces more frequently.¹³⁶

The difficulty of accessing and collecting data is exacerbated by the fact that modern risks such as pandemics, pollution, or economic recessions transcend national borders.¹³⁷ That also makes it more difficult to react to "mega-hazards". Global pandemics, industrial accidents, and climate change cannot be countered with traditional institutional practices.¹³⁸ The combination of complexity and ineffectiveness of traditional responses to the risk lead to uncertainty and a perception of loss of control. Particularly laypeople are often no longer able to accurately assess or even realise the existence of risk.¹³⁹ Both the awareness and the assessment of systemic risk is therefore highly dependent on expert knowledge.

2.1.2 Ambiguity

Uncertainty further increases when the complexity of the risk cannot be resolved by scientific methods and expertise.¹⁴⁰ Due to the complexity and uncertainty of modern and systemic risks there can be a plethora of differing yet seemingly legitimate interpretations of available data, which in turn leads to a variety of opinions on the normative implications of the risk.¹⁴¹ For example, opinions may differ

¹³⁴ de Vries, above n 55, at 24; Pichlak, above n 51, at 93; Beck, above n 4, at 33.

¹³⁵ Rosa, Renn and McCright, above n 5, at 133.

¹³⁶ Aileen Lai-yam Chan and others "To wear or not to wear: WHO's confusing guidance on masks in the covid-19 pandemic" (11 March 2020) The BMJ <www.bmj.com>.

¹³⁷ Beck, above n 4, at 47; Scott Veitch "Law in the Risk Society: Challenging Legal Concepts" in Ubaldus de Vries and John Fanning (eds) *Law in the Risk Society* (Eleven International Publishing, The Hague, 2017) 39, at 41.

¹³⁸ Mythen, above n 54, at 29.

¹³⁹ Beck, above n 4, at 28.

¹⁴⁰ Rosa, Renn and McCright, above n 5, at 135.

¹⁴¹ At 5, 136. Risk can have interpretive or normative ambiguity. Interpretive ambiguity exists when there is dissensus regarding the interpretation of available data, for example whether the ingestion of genetically manipulated organisms has negative impacts on human health. This type of ambiguity is commonly found in the context of techno-scientific risk assessment. Techno-scientific risk assessment focusses on determining the probability and impact of a risk objectively based on statistical analysis and provable facts. It does not consider social factors, but rather views humans as abstract individuals or *homo prudens* – humans who generally make rational decisions. Normative ambiguity, on the other hand, occurs where different interpretations exist as to what level of probability and impact of a risk is tolerable to society. This

about whether the economic and employment benefits of a factory outweigh the general environmental risks of pollution or a catastrophic industrial accident. This, in turn, creates ambiguity as to which policy-decisions will strike the right balance between competing interests: should decision-makers follow the logic of acquisition and prioritise economic benefits of the factory or should they put more weight on environmental protection and human well-being? The more complexity and uncertainty surround the risk, the more diverging yet legitimate viewpoints may exist, which thus seemingly justify a range of contradicting policy decisions.¹⁴²

The ambiguity of systemic risk has increased in recent decades due to the advent of mass media and the internet. New types of media present new public fora in which experts can be seen to disagree.¹⁴³ The public is therefore increasingly exposed to competing and contradicting expert opinions. This bombardment of views has the potential to confuse the public, not just regarding the right course of action to mitigate risks, but whether some risks exist at all.¹⁴⁴ Experts are expected to know the answers to complex problems. If they do not, public trust in expert advice decreases.¹⁴⁵ This opens the door for increased riskification and securitisation of complex issues.

The complexity, uncertainty, and ambiguity of late modern society creates a feeling of general insecurity in risk societies. This is not only due to industrial and techno-scientific progress and the consequent increase in risk production, it is also the result of increasingly rapid social change.¹⁴⁶ While liberalism has enabled people to break free from pre-determined societal roles and traditions, it has also transferred decisions onto individuals that used to be made by the community or were determined by tradition. Liberal society's new-found individual autonomy continuously forces us to make choices, be they trivial such as which fashion to wear or phone to buy, or fundamental such as what type of education to receive, which career to pursue, or which political party to elect.¹⁴⁷ This forced individualisation endows us with freedoms and autonomy and gives us the choices of free self-determination. But it also creates the responsibility of having to make 'correct' choices. Autonomy

ambiguity arises mainly in the context of sociocultural risk assessment, which determines the social impact of risk based on institutional, cultural and political context, at 137; Pichlak, above n 51, at 86-87; Mythen, above n 54, at 16.

¹⁴² Rosa, Renn and McCright, above n 5, at 136.

¹⁴³ Mythen, above n 54, at 16.

¹⁴⁴ See, for example, the ongoing disputation of some that climate change is not caused by human activity, despite the expert opinion of virtually the entire scientific community.

¹⁴⁵ de Vries, above n 55, at 24.

¹⁴⁶ Mythen, above n 54, at 17.

¹⁴⁷ de Vries, above n 55, at 16.

can paradoxically engender feelings of anxiety and powerlessness, as the sheer volume and uncertainty of choices threaten to overwhelm us.¹⁴⁸

Moreover, the rapid growth and dynamism of globalisation is multi-dimensional, in that it does not only affect global trade and economies, but also has political, cultural, and moral effects. Particularly the dependency on private multi-national corporations further contribute to the feeling of powerlessness in society, as they are not subject to the same political control mechanisms, transparency, and democratic oversight that national governments are. Economic and industrial risks undertaken by these corporations (or by national governments pandering to such corporations) can transform themselves into social and political risks due to their potentially wide-reaching and devastating impacts.¹⁴⁹

Due to the combination of increased threats of systemic risk, the insecurity that systemic risk engenders due to its complexity, uncertainty and ambiguity, the distrust in expert opinion, and the overwhelming responsibility of modern choice, late modern society grows increasingly sensitive to risks.¹⁵⁰ Individuals are figuratively bathed in constant perceived risk. Technological and scientific advances mean that we can both detect and quantify risks to a degree that has not been possible in the past. Together with liberalism's drive to make responsible personal choices, people are becoming both more aware and wary of risks. The lack of agency in the creation or mitigation of systemic risks causes society increasingly to turn to politics to protect itself from risks. This makes them vulnerable to emergency risk rhetoric. People cannot understand or even perceive the risks without expert help and are therefore dependent on extraneous information regarding risks. Politicians can provide information on systemic risks. But they can also provide misinformation in order to sway public risk perception and public opinion on government policies.

¹⁴⁸ Ferry de Jong "Late-Modern Complexities and the Need for Critical Legal Scholarship - Some Thoughts in Relation to Professor Veitch's Lecture" in Ubaldo de Vries and John Fanning (eds) *Law in the Risk Society* (Eleven International Publishing, The Hague, 2017) 61, at 61.

¹⁴⁹ de Vries, above n 55, at 20. Risk Society also harbours a surplus of seemingly mutually irreconcilable values. The migration of labour in an increasingly globalised world challenges the homogeneity of societies and thus threatens the integrity of cultural traditions. At the same time, economic values of exploitative production in third world countries and immigration restrictions contradict humanist values. Equal rights movements challenge traditional family values and gender roles, and create uncertainty about self-identity and one's status in society, Ulrich Beck *World Risk Society* (Polity Press, Oxford;Malden, Mass, 1999), at 2; de Jong, above n 148, at 70-71. Bauman calls this "liquid modernity": society is changing at such a pace that it has insufficient time to consolidate into new habits and routines, Zygmunt Bauman *Liquid life* (Polity, Cambridge;Malden, MA, 2005). Irrespective of the quality of societal change, whether it is positive or negative, the volume and speed of the change contributes to a general feeling of uncertainty.

¹⁵⁰ de Jong, above n 148, at 65.

2.2 Emergency Risk Rhetoric

The scope and complexity of modern risk make it difficult for laypeople to assess or even recognise risk independently. Even experts tend to be divided in their opinions on the probability and impact of risks. As there are neither commonly accepted causes nor solutions to the issues of risk, the public is entirely dependent on how risk knowledge is conveyed to them. Due to the ambiguity of modern risks, however, the public's risk perception is greatly shaped by the narrative that is used to describe that risk. This makes risk perception reflexive: depending on the rhetoric around risk, risk sensitivity and perception can decrease or increase. Risk rhetoric therefore becomes a powerful driver of risk perception and sensitivity.

In risk societies, the role of the government with regards to risk is changing, particularly due to the public's perception as to the locus of responsibility for risk. Classic liberal theory lays responsibility for risk with the individual: if someone takes a risk, they are responsible for the impact of the risk's manifestation. However, in risk societies, the responsibility for risks shifts to the government, particularly with regards to their prevention and mitigation. This creates an expectation that the government will take any measure to avert risks, be they ordinary or exceptional. Political actors can take advantage of the ambiguity of modern risks and use risk rhetoric to elicit acceptance for securitising issues. They can create an environment in which the public not simply accepts exceptional measures, but even demands them, even if the actual risk is neither imminent nor severe.

2.2.1 A Shift in Risk Responsibility

The complexity and ambiguity of modern risk means that traditional legal and constitutional notions of causation and liability/responsibility are no longer helpful in dealing with risk.¹⁵¹ As modern risks often consist of multiple divergent systems interacting in a highly complex manner, it can be very difficult to trace causal links within the risk system. For example, it is difficult to determine if the pollution from a specific factory is causally linked to the development of cancer in an individual 100km away.¹⁵² This difficulty of establishing causal links makes it harder to determine responsibility for creating modern and systemic risks.¹⁵³ Traditional concepts of law, such as individual liability or foreseeability of harm, are thus no longer adequate means of redressing the harms of modern risks.¹⁵⁴ These legal concepts were developed in the context of opportunity risks of early modern societies,

¹⁵¹ de Vries, above n 55, at 18; de Jong, above n 148, at 65.

¹⁵² The long delay between cause and effect in modern risks can further obfuscate matters. For example, despite the link between asbestos and lung cancer being known in scientific circles since the 1930s or 40s, the long delay between exposure and the development of symptoms meant that in many countries political action only started to be taken in the 1970s and 80s, Rosa, Renn and McCright, above n 5, at 132-133.

¹⁵³ de Vries, above n 55, at 25; Pichlak, above n 51, at 91; Rosa, Renn and McCright, above n 5, at 131.

¹⁵⁴ Veitch, above n 137, at 43; Mythen, above n 54, at 29.

when personal responsibility was easy to determine. The insistence on applying these anachronistic concepts to the impacts of modern risk has enabled the players of the game of risk to create a sort of 'hot risk potato'.¹⁵⁵ As causality of risk cannot be easily established, the cause of the risk can be assigned at a variety of different places. It can be passed on and everyone can find someone else to blame for the risk. Consequently, nobody is the cause of the risk.

As the traditional legal system proves to be insufficient for dealing with modern risks, public rule is extended into private management in order to control risk. If responsibility cannot be assigned to private actors, the government is expected to intervene and mitigate risks. Politics becomes risk management.¹⁵⁶ Whereas the role of the legal system in early modern society was to facilitate opportunities arising from taking risks, in risk societies it is increasingly meant to avoid potential harm emanating from risk.¹⁵⁷ The consequence is the ever-increasing regulation of the private sector in order to control and minimise risk production. Governments incrementally extend their powers based on the people's expectation to be protected.

This development makes risk politically significant.¹⁵⁸ The expectation that the government will manage risk ties risk to political decisions. Public perception of risk changes: it becomes connected to and flows from political decisions and therefore becomes politically attributable.¹⁵⁹ The government is not only the manager of risk, it becomes responsible for risk.¹⁶⁰ Faced with this responsibility, governments become increasingly eager to tackle risks by any means possible, lest they face political backlash for being too inactive. They are tempted to progressively increase their powers, and this expansion appears legitimised by the public's expectation of risk management.

But this logic bears the danger of creating a positive feedback loop. If the government takes on exceptional powers to mitigate a risk and is successful, the use of these powers is vindicated. The use is perceived as legitimate because it was necessary. Public confidence in the government grows and with it the likelihood to allow similar exceptional action in the future. For example, in the initial stages of the Covid-19 outbreak in New Zealand, the government used exceptional powers under s 70 Health Act 1956 (NZ), among others, to impose a quasi-quarantine order onto much of the population.¹⁶¹ The measures proved effective, and the virus was eliminated by June 2020. When a smaller cluster of cases

¹⁵⁵ Beck, above n 4, at 32-33.

¹⁵⁶ At 4, At 24.

¹⁵⁷ Mythen, above n 54, at 31.

¹⁵⁸ Pichlak, above n 51, at 91.

¹⁵⁹ de Vries, above n 55, at 18; de Jong, above n 148, at 63.

¹⁶⁰ "Business is not responsible for something it causes, and politics is responsible for something over which it has no control." Beck, above n 4, at 225.

¹⁶¹ The initial orders under s 70 Health Act 1956 (NZ) were found to be illegal in *Borrowdale v Director-General of Health* [2020] NZHC 2090, because they exceeded the powers provided by the Act.

appeared in Auckland in August 2020, the population was still willing to accept another regional lockdown due to the success of the first one.¹⁶² In contrast, if the exceptional action is perceived as unsuccessful, governments may be tempted to double down on the exceptional action, despite or even because of the public's loss of confidence in their ability to deal with the risk.¹⁶³ For example, while initial lockdown orders were successful in suppressing the spread of Covid-19 in Victoria, Australia, lockdown measures were less successful during a large resurgence some months later. Despite growing unease and dissatisfaction with the orders, the state legislature enabled the government to extend the state of emergency from the statutory six-month period to up to eighteen months.¹⁶⁴

It appears thus that irrespective of whether the use of exceptional powers is perceived as successful by the public, in a risk society their use legitimises itself. The public's expectation that the government is responsible for risk prevention and mitigation does not change. Successful exceptional measures confirm their own necessity, whereas unsuccessful measures confirm the need for more extreme measures. The use of exceptional powers becomes reflexive as exceptional measures breed further exceptional measures.

2.2.2 Rhetoric as a Driver of Risk

The government's responsibility for managing systemic risks and the people's mandate to seemingly do whatever is necessary to mitigate risks enables governments to riskify systemic issues seemingly at will, making it easier to securitise. The more pressing and imminent a risk seems, the more exceptional measures the public is willing to tolerate. But not all risk influences political action. Threats that are 'invisible' to the public eye do not create an expectation for government intervention. Risk rhetoric can be used to move an 'invisible' risk into the public's awareness. This form of risk communication is an important function of experts and politicians, particularly in the context of complex systemic risks that are not immediately obvious to the public but may affect it adversely, such as climate change. But rhetoric can also be used to exaggerate or invent threats in order to create a false perception of risk. This can be abused for political purposes, for example to securitise a political issue that does poses neither an existential risk nor threat.

¹⁶² Although the lockdown compliance during the second outbreak in Auckland was lower than during the initial, nation-wide lockdown, 80% of Aucklanders retained their level of compliance, Joel Rindelaub "Aucklanders less invested in lockdown #2" (2 September 2020) Newsroom <www.newsroom.co.nz>.

¹⁶³ Rosa, Renn and McCright, above n 5, at 126.

¹⁶⁴ Sushi Das "Victoria's state of emergency extension has received a lot of attention, but that could be due to parliamentary scrutiny" (15 September 2020) Australian Broadcasting Corporation <www.abc.com.au>.

2.2.2.1 Unreliable Perception of Risk

Since systemic risk is highly knowledge-dependent, its likelihood and potential impact must first be brought to the public's attention, so that taking action against the risk is legitimised.¹⁶⁵ The public obviously becomes aware of a risk if that risk manifests itself. For example, an earthquake draws attention to the vulnerability of earthquake-prone buildings, and an industrial accident such as the nuclear reactor meltdown at Chernobyl draws attention to the dangers of industrialisation. In lieu of such manifestations, people must be informed of risks by way of public discourse.

In the context of the knowledge-dependency of risk perception, Foucault highlights the close relationship of power and knowledge.¹⁶⁶ Whoever controls the public discourse controls the extent to which government action can be taken. Discourse can change and manipulate knowledge, it can focus on some areas and neglect others, it can overly dramatise risk or falsely diminish it.¹⁶⁷ The relationship between knowledge and power can thus be used to securitise non-threatening issues by using risk rhetoric to steer the discourse and influence public risk perception and sensitivity. Füredi goes as far as claiming that state institutions and mass media intentionally cultivate a "culture of fear" for the purpose of gaining support and legitimacy for tightening law and order measures and as a way of gaining social control.¹⁶⁸ A perpetual and relentless risk narrative creates a heightened perception of risk. This results in increased risk vigilance, which in turn raises risk sensitivity. The more risk sensitive the population becomes, the more susceptible it is to risk rhetoric and securitisation attempts. Therefore, in the same way that modern risk is politically reflexive because risk is created and managed by humans, risk perception is socially reflexive.¹⁶⁹

Risk perception is highly influenced by social institutions that create knowledge. Laypeople's risk perception tends to be subjective and depends on factors such as familiarity, cultural experiences, socio-economic status, trust in institutions, and dread.¹⁷⁰ The experiences of one's immediate social circle create risk knowledge based on familiarity; for example, if several people in the immediate circle of an individual develop cancer, that person is more likely to have a heightened perception of the risks of carcinogens. Similarly, law and order rhetoric about crime and high penalties for offences create a

¹⁶⁵ Beck, above n 4, at 35; Pichlak, above n 51, at 94.

¹⁶⁶ Foucault, as cited in Mythen, above n 54, at 35.

¹⁶⁷ At 54; Beck, above n 4, at 23.

¹⁶⁸ Mythen, above n 54, at 38, 98. Foucault believes that governments use rhetoric around crime risk as a mode of governance to order and control populations. He posits that risk discourse (such as rhetoric around disease and mortality statistics in the 18th and 19th centuries) is used to distinguish between societal groups and control them by determining normality and thus abnormality, at 33-35.

¹⁶⁹ Beck, above n 4, at 21; Pichlak, above n 51, at 93.

¹⁷⁰ Rosa, Renn and McCright, above n 5, at 138.

perception of risk based on dread and control. Mass media narrative can exacerbate this feeling of dread.¹⁷¹

Humans are prone to misestimate the frequency and impacts of risk due to inherent biases. For example, the optimism bias makes us believe that future risks happen to others but will not manifest themselves for us. This bias is associated with familiar risks that have the potential to yield a benefit, such as a risky investment. The availability bias, on the other hand, influences how we perceive risks based on the data that is available to us.¹⁷² Personal and social experience, and media exposure are the main sources for the available data. The media tends to focus on low probability risks with dire consequences, events that are generally associated with dread and uncertainty. Those risks are therefore constantly brought to the public's attention. The perception of the likelihood of such risks is exaggerated and therefore often overestimated.¹⁷³ In contrast, high probability but low impact risks are underestimated. For example, the extensive and perpetual coverage of terrorism threats in the months following the 9/11 attacks resulted in an almost 20% decrease in airline travel in the United States. Yet at the same time, road traffic deaths increased by 10%.¹⁷⁴

People's inability to accurately estimate the probability and impacts of potential risks is further exacerbated by the ambiguity of experts' opinions on risk. A plethora of contradicting opinions means that expertise cannot claim a monopoly on risk rationality anymore. Rationality is traditionally seen as a way to seek truth but contradicting expert opinions cannot deliver a clear perception of truth. This erodes the public's trust in expertise.¹⁷⁵ There is no accurate shared societal experience around modern risks such as the terrorism threat, and the ambiguity of risk creates no common ground on which to assess decision-making.¹⁷⁶

The distrust in expertise can lead to situations where risk is artificially or intentionally exaggerated or ignored by the population and governments. An example of exaggerated risk is the terrorism narrative in the aftermath of the attacks on the World Trade Center in New York. The terrorist threat to the public was exaggerated to such an extent that the public perception of it was grossly disproportionate to its real impact on public life.¹⁷⁷ On the other hand, risk that has been ignored is illustrated by the Global Financial Crisis of 2008. Standard probability models predicted the collapse of the financial

¹⁷¹ Beck, above n 4, at 35-36, Mythen, above n 54, at 30.

¹⁷² Mythen, above n 54, at 16, 38.

¹⁷³ At 54, At 23-24.

¹⁷⁴ At 54, At 19.

¹⁷⁵ Beck, above n 4, at 29.

¹⁷⁶ Pichlak, above n 51, at 94.

¹⁷⁷ Mythen, above n 54, at 38.

market, but warnings were downplayed and ignored in favour of market profiteering.¹⁷⁸ The vulnerability of subprime mortgages in particular was not brought to the public's attention and did not become a mainstream political issue. The risk remained 'invisible' to the majority of the public.

Mythen believes that this leads to "neurotic citizens" who are deeply distrustful of unknown and unfamiliar people or events and who live increasingly in fear.¹⁷⁹ Everyone feels affected and victimised by uncountable sources of risk.¹⁸⁰ This is exacerbated by the fact that exposure to constant risk discourse can be used to 'responsibilise' individuals.¹⁸¹ Risk assessment has been embedded into our everyday life. Occupational health and safety measures are commonplace at workplaces. Concerns for our physical and mental well-being are becoming ubiquitous as we are reminded to monitor our food consumption, exercise, and happiness. Media and public service announcements remind us of the precariousness of our personal safety. Risk has become "a permanent condition that exists separately from any particular problem".¹⁸² Making individuals responsible for assessing and monitoring risks also shifts at least some responsibility of the impacts if a risk manifests. Public service announcements urging people to report suspicious behaviour ("what can *you* do to prevent terrorism?") therefore responsabilises individuals. This creates more risk sensitivity and anxiety among the population.

In the context of this manufactured anxiety and distrust, people entrench themselves in their normative views, which have been shaped by the predominant risk narrative.¹⁸³ The ambiguity of risk and the consequent distrust in experts create opposing views, which entrench themselves into increasingly hardened positions. Communal bonds grow thin and issues become less about substance and more about identity. The question of whether to wear face masks to prevent the spread of Covid-19 illustrates this point. Particularly in the United States, the view on face masks was informed more by political rhetoric than expert opinion.¹⁸⁴ This creates further distrust, amplifies people's anxiety, and leaves little room for rational debate and understanding.¹⁸⁵ It therefore becomes a fertile ground for misusing risk rhetoric for political purposes.

¹⁷⁸ At 54, At 19.

¹⁷⁹ At 54, At 39.

¹⁸⁰ Barbara Hudson *Justice in the Risk Society: Challenging and Re-Affirming Justice in Late Modernity* (SAGE, London;Thousand Oaks, Calif., 2003), at 65.

¹⁸¹ Mythen, above n 54, at 35-36.

¹⁸² Frank Furedi *Culture of Fear: Risk-Taking and the Morality of Low Expectation* (Rev. ed, Continuum, London;New York;, 2002), at 5.

¹⁸³ de Jong, above n 148, at 72.

¹⁸⁴ Mariel Padilla "Who's Wearing a Mask? Women, Democrats and City Dwellers" (2 June 2020) New York Times <www.nytimes.com>.

¹⁸⁵ Mythen and Walklate, above n 129, at 133.

2.2.2.2 The Culture of Fear

Rather than being a tool of assessing probabilities of harm and to inform policy-decisions based on the findings, risk is becoming a political tool of persuasion.¹⁸⁶ The people's growing anxiety and their distrust in experts makes them susceptible to rhetoric that confirm their anxieties and distrust. De Jong uses the example of the so-called 'safety paradox' to illustrate this: although life in general is becoming safer, anxieties around safety are not only ever-present, they are also increasing due to "multifarious reports, opinions and interpretations" regarding personal and national security.¹⁸⁷ A narrative that exposes society to anxiety over an extended period of time reinforces and therefore conditions the public to fear the subject of the narrative.¹⁸⁸

Instead of experts, political actors can pick up the baton of risk assessment and use it to shape public opinion on policy issues. In the context of terrorism risk in the 21st century, many governments have heavily relied on the rhetoric of terrorist threats to push through their security agendas. Political language has shifted away from appealing to a collective desire to improve people's lives. Instead, it focuses on and facilitating individualised insecurities and fears.¹⁸⁹

The 'New Terrorism' narrative in the United Kingdom in the aftermath of the terrorist attacks on the World Trade Center in New York illustrates this shift in rhetoric. Terrorism had become a focal social concern following the 9/11 terrorist attacks.¹⁹⁰ Political and media rhetoric claimed that the quality of terrorism had changed in the aftermath of the attacks. Terrorist networks with a diversity of agendas employed new and more lethal methods against civilian targets that were aimed at undermining and destabilising the Western way of life. The narrative painted a threat of terrorist attacks that appeared both constant and escalating, and that could not be mitigated by ordinary politics. In reality, the frequency and casualties of terrorist attacks remains relatively low, particularly when compared to the risks of mundane everyday activities.¹⁹¹ Public fears of falling victim to terrorist attacks were substantially disproportionate to the likelihood of the manifestation of the risk.¹⁹² The effect was a

¹⁸⁶ Mythen, above n 54, at 19.

¹⁸⁷ de Jong, above n 148, at 72.

¹⁸⁸ Mythen and Walklate, above n 129, at 133.

¹⁸⁹ George S. Rigakos and Richard W. Hadden "Crime, Capitalism and the 'Risk Society: Towards the Same Olde Modernity?" (2001) 5(1) *Theoretical Criminology* 61, at 63.

¹⁹⁰ Mythen, above n 54, at 92.

¹⁹¹ For example, the risk of being killed by a lightning strike is about four times higher in the United States than being killed in a terrorist attack, Ronald Bailey "How Scared of Terrorism Should You Be?" (6 September 2011) Reason <www.reason.com>.

¹⁹² Mythen, above n 54, at 38.

vast increase in security spending and security measures, an array of anti-terrorism legislation¹⁹³ and public information campaigns to further cement the feeling of fear and anxiety.¹⁹⁴

Since then, the political and media terrorism narrative has positioned 9/11 as a pivotal historical moment that has led to a constant escalation of terrorism risk.¹⁹⁵ The plane attacks on the World Trade Center were an illustration of the new organisation and increased lethality of 'New Terrorism', and smaller yet still devastating attacks in Madrid and London appeared to confirmed this.¹⁹⁶ This new quality of terrorism thus presented a new and increased threat to the public that required extreme responses. The 'New Terrorism' narrative was heavily utilised and disseminated through political discourse and media reporting.

But the accuracy of its claim that terrorism has acquired a new quality that escalates the risk of and from terrorist attacks is at least doubtful. It exaggerates the historical differences of the nature and incidence of political violence.¹⁹⁷ For example, the Irish Republican Army and the West-German Red Army Faction operated in decentralised cells without strict hierarchy, and the Oklahoma bombing and the attack on the Israeli Olympic team in Munich were high-lethality attacks not unlike the Madrid and London bombings.¹⁹⁸ Füredi rightly states that terrorism has been ubiquitous in society for a long time and that the current threat is not substantially different to past terrorist threats. The current focus on terrorism is instead amplified by a culture of fear which state institutions and media outlets promote and exacerbate.¹⁹⁹

This culture of fear is illustrated by the language that is commonly used when talking about terrorism. Politicians and the media routinely use wartime metaphors such as 'a situation of national emergency' and references to a 'common enemy'.²⁰⁰ The United States designated alleged members of terrorist organisations as 'enemy combatants' and the media referred to governments' security actions as a 'War on Terror' or a 'War against Terrorism'. Steinert points out that this narrative appeals to community/patriarchy and warrior/masculinity sentiments of society. It requires the mandatory

¹⁹³ In the United Kingdom, five substantial anti-terrorism statutes were passed between 2000 and 2008: the Terrorism Act 2000 (UK), the Anti-Terrorism, Crime and Security Act 2001 (UK), the Prevention of Terrorism Act 2005 (UK), the Terrorism Act 2006 (UK), and the Counter-Terrorism Act 2008 (UK).

¹⁹⁴ Mythen and Walklate, above n 129, at 127.

¹⁹⁵ At 129, At 126.

¹⁹⁶ At 129 At 125-126.

¹⁹⁷ Jon Burnett and Dave Whyte "Embedded Expertise and the New Terrorism" (2005) 1(4) *Journal for Crime, Conflict and the Media* 1, at 1.

¹⁹⁸ Füredi, above n 182, at 17.

¹⁹⁹ At 182, At 17.

²⁰⁰ Mythen and Walklate, above n 129, at 129.

inclusion of everyone, irrespective of interest positions, and thus silences dissenting opinions.²⁰¹ The wartime rhetoric shapes the public's risk perception and creates a familiar threat image, which contributes to a general climate of uncertainty and anxiety.²⁰² Public fears are further exacerbated by political narrative that connects terrorist groups to so-called 'Rogue States', states considered to be threatening to international peace due to their authoritarian leadership and tendency to restrict human rights, to seek to proliferate weapons of mass destruction, and to sponsor terrorism. The United States also began referring to an 'axis of evil', a group of states which were alleged to harbour and support terrorist organisations.²⁰³

The perception of a war like threat was consequently reaffirmed by the strong military response to some of these states, for example the invasion of Afghanistan and Iraq. At the same time, domestic police in the United States were increasingly militarised in reaction to the purported terrorist threat.²⁰⁴ This emotive language was used to politicise the terrorist threat, often despite insufficient evidence of the veracity or urgency of their claims. United States President George W Bush, for example, warned of a terrorist plot to crash a plane into a Los Angeles office tower in 2006. However, intelligence had reported this plot four years earlier, so that the potential threat had long past by the time Bush reported it to the media. Since he did not mention the age of the report, Bush was using outdated information knowingly to keep terrorism risk in the public awareness and thus to manipulate and skew risk sensitivity.²⁰⁵

The media's tendency to focus on high impact risks contributes to and accommodates risk sensitivity.²⁰⁶ The incremental privatisation of the media over the past few decades has made media outlets dependent on advertising money. The advent of the 24 hour news cycle and the proliferation of competing news media requires outlets to focus increasingly on eye-catching and sensational news events.²⁰⁷ For example, between 1992 and 1997, mention of risk doubled in Australian news reporting.²⁰⁸ During a similar timeframe, the reporting of risks increased nine-fold in the United Kingdom.²⁰⁹ Furthermore, terrorism has become part of our general cultural discourse. Modern

²⁰¹ Heinz Steinert "The Indispensable Metaphor of War: On Populist Politics and the Contradictions of the State's Monopoly of Force" (2003) 7(3) *Theoretical Criminology* 265, at 281.

²⁰² Mythen, above n 54, at 100.

²⁰³ The original states of the 'axis of evil' were Iran, Iraq, and North Korea, Mythen and Walklate, above n 129, at 130.

²⁰⁴ The militarisation of United States police can be traced back to the civil rights movement, and student and anti-war protests of the 1960s, Terry Gross and Radley Balko "Militarization of Police Means U.S. Protesters Face Weapons Designed For War" (1 July 2020) NPR <www.npr.org>.

²⁰⁵ Mythen and Walklate, above n 129, at 131.

²⁰⁶ de Vries, above n 55, at 11.

²⁰⁷ Mythen and Walklate, above n 129, at 130.

²⁰⁸ Deborah Lupton *Risk* (Routledge, New York; London, 1999), at 10.

²⁰⁹ Füredi, above n 182, at xii.

entertainment media are full of references to terrorist plots that are foiled only at the last minute by the hero of the story. This intensified media interest in terrorism and risk in general serves to socially "explode" the likelihood of risks beyond proportion.²¹⁰

The shift to a more threatening and fear based political discourse combined with the media's tendency to focus on high-harm sensational news is contributing to the public's overestimation of risks such as the likelihood and impact of terrorist attacks. Risk communication in the political discourse and media reporting has a decreasing emphasis on past or present risks and instead focuses increasingly on predictions of future risks.²¹¹ But future risks are usually presented as worst-case scenarios, as 'what if' questions become common place. For example, in 2008 the United Kingdom's Minister for Security Tony McNally asked the public to "imagine two or three 9/11s. Imagine two 7/7s. Given the evidence we've got, such scenarios aren't fanciful."²¹² This evidence consisted of a series of 'near misses', terrorist plots such as a light plane attack on Canary Wharf, a bomb attack on the Houses of Parliament, and a bomb attack during a football match at Old Trafford. These terrorist attempts had allegedly been foiled at the last minute by intelligence and security operations, which was dutifully reported as fact by the media. However, none of these 'near misses' were supported by clear evidence as to the actual viability or likelihood of success of the plots.²¹³

The focus on worst-case scenarios creates a vision of a disturbing and dystopian future which blurs the line between fiction and reality.²¹⁴ The representation of the terrorist threat becomes misaligned with the actual potential for a harmful incident. Keeping the (real or fictitious) threat of terrorism fresh in the public's perception makes it easier for governments to take exceptional action. In light of the public's anxiety about security concerns, the threshold for evidence required for exceptional action is lowered, as the above example in the United Kingdom illustrates. The future-oriented worst-case scenario thinking justifies pre-emptive policies and control even in the absence of any imminent risk.²¹⁵ If officials do not act in advance, it may be too late to mitigate the impact of the risk.²¹⁶ In the 'World Terrorist Risk Society', in which the government is responsible if the terrorist risk manifests itself, the government can justify extreme and exceptional measures simply by referencing a semi-fictitious terrorist threat.

²¹⁰ Mythen, above n 54, at 98.

²¹¹ At 54, At 99, with further references.

²¹² Bob Roberts "Ministers warns of 'peril' as he pushes for 42-day lock-up" (4 February 2008) Mirror <www.mirror.co.uk>.

²¹³ Mythen and Kamruzzaman, above n .

²¹⁴ Mythen, above n 54, at 39.

²¹⁵ At 54, At 99-100.

²¹⁶ Bill Durodié "Tempted by terror" (14 November 2006) Spiked <www.spiked-online.com>.

Instead of promising a positive future that facilitates and enhances one's ability to freely self-determine, politicians promise protection from fictitious future harm.²¹⁷ Personal safety becomes the over-arching value. Only one's personal safety and that of one's immediate surrounding matters. All other rights are seen as inferior to security.²¹⁸ The persistent reminders of terrorist risk and the accompanying promises to create safety transform the liberal understanding of personal freedom into a neo-liberal notion of surveillance.²¹⁹ This narrative is effective: a majority of the population of the United Kingdom believes that the government is justified in limiting individual rights and liberties in order to counter potential terrorist attacks; and two thirds of United States citizens believe that torture may be justified for the same reason.²²⁰

In the United Kingdom, the 'New Terrorism' narrative has resulted in extensive anti-terrorism legislation. The statutes create a vast range of exceptional preventative powers such as extended periods of detention of terrorist subjects without charge, powers of intensive data gathering, and expanded pre-emptive police powers.²²¹ For example, s 44 of the Terrorism Act 2000 (UK) extended the time for which a terrorist suspect can be detained without charge from 48 hours to 28 days.²²² The justification of the extension was based on the narrative that the new quality of terrorist organisation created more complexity in the investigation of the suspects and therefore required more time to make a case and charge the suspect. Without the additional time, alleged terrorists would go free and potentially commit further terrorist acts.²²³ Although s 44 was later revoked due to a complaint to the European Court of Human Rights, it illustrates how a 'ticking bomb' narrative combined with a perpetual risk rhetoric can be used to significantly undermine substantial procedural and human rights with the majority of the population's approval.²²⁴

Risk rhetoric is a major driver of a culture of fear. It can be used to riskify political issues, turning them into security issues in the eyes of the public. It is thus capable of convincing people that the use of

²¹⁷ Adam Curtis "Fear gives politicians a reason to be" (24 November 2004) The Guardian <www.theguardian.com>.

²¹⁸ Hudson, above n 180, at 74.

²¹⁹ Mythen and Walklate, above n 129, at 137.

²²⁰ Mythen, above n 54, at 105.

²²¹ D. Thiel *Policing Terrorism: A Review of the Evidence* (Police Foundation, 2009), at 31.

²²² Tony Blair had even suggested that it should be extended to 90 days, wildly out of kilter with most European countries or the United States, Mythen, above n 54, at 101.

²²³ Another negative side effect of expanded stop and search police powers was that it disproportionately affected minority groups. Stop and search incidents involving Black or Asian British people increased at a much higher rate than those involving white British people, Richard Ford and Sean O'Neill "Blacks bear brunt of rise in stop and search" (1 May 2009) The Times <thetimes.co.uk>.

²²⁴ Mythen even goes as far as stating that concentrating on the false domestic risk of terrorism, the government diverted attention from the true issue, that the political and military response to terrorist organisations and rogue States had not reduced but rather escalated the situation, Mythen, above n 54, at 39.

exceptional powers is justifiable. People's risk sensitivity and aversion is heightened by a narrative of an existential risk to values they hold dear, even if that risk is fuzzy and ill-defined. This creates the impression that a disaster is imminent and can strike at any time.

2.3 Summary

This chapter established the reasons for the public's growing sensitivity to risk and the role that risk rhetoric plays in exacerbating that sensitivity. Modern risks tend to be both systemic and reflexive. Systemic risks exist on a societal level. They are not the result of individual risk taking, but the accumulation of a myriad of contributing factors. That makes them highly complex and difficult to assess, particularly for laypeople. At the same time, their complexity also often makes systemic risks ambiguous, as experts cannot agree on the extent and potential solutions of the risk. This creates high levels of uncertainty in the population, as systemic risks can adversely affect individuals, yet individuals rarely have the means to address the risk. It is out of their control, leaving them in a disempowered and vulnerable position. All these factors contribute to the growing sensitivity and aversion to systemic risks.

At the same time, realisation grows that systemic risks are reflexive, i.e. they are human made and thus controllable. This realisation creates an expectation that the state will address and control systemic risks. That makes risk politically relevant. If a government is seen to address risks proactively, it is more likely to gain the public's favour. That also means that governments are incentivised and tempted to securitise issues, in order to gain access to exceptional powers that enable them to appear more proactive in addressing risks. After all, exceptional measures can expedite government measures by bypassing normal constitutional procedures or by enhancing state powers beyond ordinary limits.

In such a context, governments can deploy risk rhetoric to shape the public's perception of risk. As systemic risks are generally complex and ambiguous, the way the public discourse about any given issue is shaped determines how pressing the risk is perceived. In some cases, it can even exaggerate or even entirely invent risk to create public support of exceptional measures. Such false or exaggerated securitising risk rhetoric poses a real danger to the integrity of constitutional and democratic structures.

Systemic risks come in a variety of forms: crime, terrorism, and the environment are examples that are more commonly mentioned. Economic issues are less often discussed in this context. But as will be shown in the following chapter, the perception of economic risks is ubiquitous in economically liberal societies. Economic issues are frequently riskified and the consequent securitisation of

economic issues establishes a sense of a near-constant economic crisis. It is the government's mandate to address the crisis and relieve the population from the impending threat. It is therefore in the government's interest to use rhetoric to emphasise and exaggerate economic risks, particularly when it is running on a platform of 'fiscal responsibility'. By securitising economic issues, it can be seen to be actively and effectively taking on 'impending threats', irrespective of the actual existence of existential economic risks. Riskification and Securitisation can thus be used both to further politico-economic agendas by exaggerating risks and to create an illusion of activity and political success. The public becomes more accepting of exceptional measures to relieve the constant sense of economic danger, while the government creates a sense of danger in order to appear relevant and effective. The resulting executive creep of exceptional powers has the potential to undermine democratic and constitutional principles and to normalise the use of exceptional economic measures.

3 Economic Exceptionalism and Risk Rhetoric

Risk rhetoric is particularly effective in the context of perceptions of economic risks. Due to the complexity of systemic risks, many people often do not directly experience them. Unless an industrial accident occurs in the vicinity, people will only know about them in an abstract way, from news or public safety announcements. Environmental risks such as climate change can be even more abstract. But in economically liberal societies, people generally have direct experience with financial concerns, because financial considerations are central to their lives. They are therefore exceedingly sensitive to economic risks and are susceptible to rhetoric concerning economic emergencies.

The purpose of this chapter is to establish why economic issues are easy to riskify and consequently securitise. There are two main reasons for this. First, economic issues are systemic issues and thus often highly complex and ambiguous. Consequently, there is an extreme information-deficit in the population that prevents it from meaningfully assessing claims about economic risks. The ambiguity also creates further uncertainty and risk aversion, as experts present a variety and often contradictory range of reasons and solutions for the purported risks.

Second, economic liberalism and neoliberalism have created an 'institution-dependent control structure' to which all individuals within market societies must adhere. Their livelihood and self-realisation have become dependent on economic stability and success. They are therefore acutely aware of the adverse effects of economic failure. The combination of economic dependency and ambiguity of economic risks creates high levels of risk aversion regarding economic issues. That means that the mere mention of potential economic risks is sufficient to securitise economic issues. It also enables governments to create the perception of fake economic crises in order to legitimise exceptional measures to further ordinary political goals.

The chapter will first investigate the justifications for economic exceptionalism to show why securitisation of economic issues can be legitimate at all. The use of exceptional measures was traditionally limited to classic crises such as environmental disasters or war, i.e. when an external force actively threatened life or property of the people or the integrity of the state. During the course of the twentieth century acceptance grew that economic crises could also fundamentally threaten these values. The use of exceptional economic measures has become commonplace. They can be justified if urgent politico-economic action is needed to prevent existential harm to the economy. However, since economic issues are often highly complex and ambiguous, it is often difficult to ascertain the urgency of an economic issue. This can lead to an increasing use of exceptional economic measures where an issue does not pose an urgent economic existential threat.

The chapter will then explore the reasons for the effectiveness of securitising economic risk rhetoric. It will explain the impact of the ‘institution-dependent control structure’ on the public’s sensitivity and aversion to economic risks. It will also investigate the extent to which economic risk considerations take priority over other value considerations. The chapter will show that due to the pervasiveness of economic considerations and structures in people’s lives, and because of people’s heightened aversity to economic risks, economic risk considerations often outweigh other considerations when such considerations conflict with each other. That makes economic risk rhetoric more powerful than other risk rhetoric. Economic risk is therefore a form of public bogeyman. It’s mere mention causes risk anxiety and the public is more susceptible to accepting economic risk rhetoric as true and thus acquiescing to exceptional economic measures.

3.1 Economic Exceptionalism

Exceptionalism is the legal concept of exceptional measures taken by the state in order to address an existential crisis. It is the legal consequence of a successful securitisation attempt. The securitising actor has successfully established an existential threat and the public accepts the necessity to employ measures not usually available to the state in order to avert or mitigate the crisis. The most severe crises leading to legitimate exceptionalism are usually some form of emergency or disaster, such as wars or large scale environmental events. According to securitisation theory, the legitimacy of exceptionalism rests on a successful securitisation attempt. While genuine emergencies and disasters justify securitisation and exceptionalism, riskification of political issues also enables an actor to securitise an issue by creating a fake emergency, thus justifying exceptionalism in the eyes of the public.

Emergency law scholars traditionally distinguish between political, environmental, and economic emergencies. Although events in all three categories frequently occur, legal emergency scholarship historically tended to concentrate on political emergencies with an emphasis on violent conflict. More recently, environmental emergencies have also begun to be investigated. In contrast, the legal and constitutional impacts of economic emergencies have so far mostly been neglected.²²⁵ This is somewhat surprising, as economic emergencies can have profound impacts, not just on individuals and property, but also on democracy and constitutionalism. During large scale economic crises such

²²⁵ Bernadette Meyler “Economic Emergency and the Rule of Law” (2007) 56(2) DePaul LRev 539, at 546.

as the Global Financial Crisis, the capacity of legislatures to produce and implement legislation effectively and efficiently decreases.²²⁶

The nature of exceptional emergency measures differs between categories as the necessary actions to counter the situation vary. Social/political emergencies are caused by human agents who intentionally harm other humans, either directly through violence, or indirectly through other behaviour such as civil disobedience, strike action, etc. Government intervention will therefore generally have to be directed against human activities, and as such infringe generally on personal and political freedoms, such as freedom of movement and speech, but also on the right to life and bodily integrity. Due process rules and access to justice may be restricted. Constitutional and democratic structures, such as the separation of powers, the legislative process, or the right to vote, may also be affected. Finally, property rights may be curtailed, for example for the purposes of appropriation.

Environmental emergencies, which are both natural events and human-made events that affect the environment, have no direct human agent. Government action is therefore primarily directed towards emergency relief and recovery. It may include fiscal action to provide funds for emergency relief, to expedite legislative, executive, and judicial processes, as well as manage resource allocation in exceptional ways. It can also affect citizens' rights, such as restricting freedom of movement so as not to interfere with response action, protect people from dangerous situations, or prevent looting, or appropriating private property for response or recovery purposes.

In contrast to social/political and environmental emergencies, economic emergencies affect human life or safety and most physical property only indirectly.²²⁷ Apart from immediate financial support, urgent counter measures are often not immediately obvious. Most political decision-makers are not qualified to understand which exceptional economic emergency measures are necessary or appropriate and must instead rely expert advice. Yet, economic risk is highly ambiguous. Expert opinion on how to address economic risk therefore varies widely. As a result, the necessity and appropriateness of economic emergency measures is surrounded by much uncertainty.

This ambiguity and uncertainty both about the existence or nature of economic risks as well as the solutions to economic risks create an environment in which people do not have sufficient information

²²⁶ Leonardo Morlino and Mario Quaranta "What is the Impact of the Economic Crisis on Democracy? Evidence from Europe" (2016) 37(5) *International Political Science Review* 618, at 7, 9. The state's lack of expedient decision-making ability can disillusion the population's belief in the value of, and its satisfaction with democracy decreases, as has happened during the Global Financial Crisis in European populations. In contrast, as economic performance increases, satisfaction with democracy grows slowly and the people reward the current government with their confidence.

²²⁷ Meyler, above n 225, at 540; see also Oren Gross "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?" (2003)(112) *Yale LJ* 1011, at 1025.

to assess claims of economic risk. Due to the plethora of differing opinions and the resulting ambiguity of the risks, the public grows averse to economic risks. This enables political actors to seize the public uncertainty and create the perception of risk, even if such risk is highly uncertain or even non-existent. Such an environment facilitates the riskification and securitisation of any economic issue, irrespective of their true level of risk.

3.1.1 The History of Economic Exceptionalism

Exceptionalism has traditionally been mainly associated with violent conflict that threatened the existence of the state, such as war, insurrection, or rebellion. It is thus of little surprise that the origin of economic exceptionalism is strongly associated with political emergencies. Prior to the twentieth century, economic emergency powers were exclusively ancillary to wartime spending and used only to stabilise the economy while at war.²²⁸ The justification for exceptional economic intervention was aligned with that of political emergency powers. The existence of the state and the status quo were threatened by a violent political event, which also affected the economy. Exceptional economic intervention was therefore justified by the political emergency.

Towards the late nineteenth and early twentieth century, exceptional economic measures began to be used independently of political emergencies. They were particularly employed against perceived threats to the economic liberal status quo. During that time, labour and socialist movements began to emerge in places like Europe and North America. The resulting formation of unions and strike actions interrupted the free market. Consequently, governments throughout liberal democracies began creating a public narrative that labour movements posed an existential threat to economic liberalism. This justified the use of exceptional powers to quash these movements, as such extreme measures were purportedly needed to restore law and order and a healthy economy.²²⁹ In other words, labour disputes that challenged the economic order were riskified and securitised.

Even after the end of World War Two, when the labour movement was widely accepted and no longer viewed as a fringe activist movement, exceptional powers continued to be employed against strikes. For example, in 1970 Richard Nixon declared a national emergency in the United States in response to strike action by postal workers, deploying around 24,000 military personnel to distribute mail during the strike.²³⁰ Perhaps more egregiously, the New Zealand government used emergency powers

²²⁸ William E Scheuerman "The Economic State of Emergency" (2000) 21(5-6) *Cardozo LRev* 1869, at 1875.

²²⁹ Hans Boldt "Ausnahmezustand" in Otto Brunner, Werner Conze, and Reinhart Koselleck (eds) *Geschichtliche Grundbegriffe: historisches Lexikon zur politisch-sozialen Sprache in Deutschland* (E. Klett, Stuttgart, 1972), at 355-356. Although labour disputes often involved violence, this violence was as often caused by the use of emergency police powers as it was by the labour movement, Scheuerman, above n 228, at 1877.

²³⁰ Scheuerman, above n 228, at 1871.

during the Waterfront Dispute in 1951.²³¹ Dockworkers refused to work overtime during an industrial dispute and were subsequently locked out by their employers, effectively shutting down the use of New Zealand's ports. The government regarded this as a grave threat to New Zealand's export dependent economy and passed a series of severe emergency measures that created offences to aid or support the dockworkers, restricted the media's freedoms to report evenly on the matter, and extended the scope of police search and seizure powers.²³² It justified the extreme measures by claiming that the proper functioning of New Zealand ports was vital for New Zealand's economy, as it was highly dependent on import and exports of goods. Any interruption was a threat to the economy and thus to the nation.

The frequent use of exceptional powers against the burgeoning labour movement in the early parts of the twentieth century mainstreamed the use of economic exceptional powers during peace time. By the 1920s and 30s, the use of exceptional powers to deal with economic issues was ubiquitous across liberal democracies, from the United States and the United Kingdom to France and Weimar Germany.²³³ Franklin D Roosevelt based the implementation of the New Deal on the World War One era Trading with the Enemy Act 1917 (US), France created a series of legislative exceptional powers to deal with "serious economic distress", and successive German presidents made extensive use of broad emergency powers under Art 48 of the Constitution of the German Reich (Weimar Constitution) to combat hyperinflation and other economic woes.²³⁴ The increasing use of economic exceptional powers made it acceptable to fight economic crises with exceptionalism. In the 1970s and 80s, New Zealand's government used emergency regulations to combat the economic crisis caused by the collapsed trade with the United Kingdom after the latter joined the European Economic Community in 1973, the 1979 energy crisis, and a five-fold increase of public debt that increased inflation of an average of 11% per year. Prime Minister Robert Muldoon used the Economic Stabilisation Act 1948 (NZ), a post-war statute that allowed governments to create exceptional regulations to stabilise the war-ravaged economy, to freeze wages and prices, rent, and other income, and to introduce a car free days scheme thirty years after the end of World War Two.²³⁵

²³¹ New Zealand Law Commission *Final Report on Emergencies* (New Zealand Law Commission, 1991), at [4.5].

²³² The Act had originally been passed hastily in response to the 1932 Queen Street riot, which resulted from a protest by public employees and thousands of unemployed. Many people were injured and stores were looted. Parliament rushed the passage of the Public Safety Conservation Act to empower the government to more effectively deal with public disturbances in the future.

²³³ Clinton Rossiter *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Harcourt, Brace & World, 1963), at 117-127.

²³⁴ At 233, At 117-127; Scheuerman, above n 228, at 1878; Alan Greene "Questioning Executive Supremacy in an Economic State of Emergency" (2018) 35(4) LS 594, at 604.

²³⁵ WPL Lawes "The Economic Stabilisation Act 1948 - a Giant's Power?" (1984) 14(2) VUWLR 159, at 159; John F Caldwell "Economic Stability and Carless Days" [1981](15) NZLJ 542, at 542.

Following the experiences of the Depression era and World War Two, economic exceptionalism began to be used not only to fight the effects of existing economic crises but to safeguard against potential future economic crises. Economic exceptionalism became a tool of prevention, a way of managing economic risk so that a potential future crisis does not occur.²³⁶ This type of pre-emptive emergency regulation was popularised in liberal democracies during the Cold War era, not least for ideological reasons. In order to prove the ideological superiority of capitalism over communism, a functioning economy gained increasing priority often to the detriment of other constitutional considerations.²³⁷

More recently, the European Union used its own exceptional powers in response to the Global Financial Crisis.²³⁸ In 2013, it enacted the Fiscal Compact Treaty (FCT) in 2013. The Treaty creates permanent changes to how Eurozone Member States set their budgets: it obliges the Member States to create domestic legislation that triggers ‘automatic correction mechanisms’ if their general budget deficits exceed 3% of the gross domestic value. The FCT is mainly based on Art 122(2) of the Treaty on the Functioning of the European Union.²³⁹ This provision allows the European Council to grant financial assistance to a Member State if it is “threatened with severe difficulties caused by natural disasters or exceptional occurrences.” The FCT thus uses the European Council’s economic emergency powers to permanently change the European Union and its Member State’s fiscal rules.²⁴⁰ It is therefore as much an instrument of economic emergency relief as it is one of preventing unspecified potential future economic crises.

It appears that neither the political system (i.e. parliamentary or presidential) nor political ideology (i.e. economically conservative or progressive) influence the likelihood that economic emergency powers will be employed by liberal democratic governments.²⁴¹ For example, Franklin D Roosevelt used emergency powers to create welfare state policies as part of the New Deal, and Scandinavian countries developed their post-war social democratic policies with the aid of economic emergency powers. On the other hand, Nixon used emergency powers to inhibit trade with Cuba, Libya, and Iran, and many new democracies that formed after the fall of the Eastern Bloc used emergency powers to

²³⁶ Harold Relyea *A Brief History of Emergency Powers in the United States: A Working Paper : Prepared for the Special Committee on National Emergencies and Delegated Emergency Powers, United States Senate* (U.S. Government Printing Office, 1974), at 40-94, 87, 90-91, 106-107; Jules Lobel “Emergency Power and the Decline of Liberalism” (1989) 98(7) *Yale LJ* 1385, at 1400-1421; Arthur S Miller “Constitutional Law: Crisis Government Becomes the Norm” (1978) 39 *Ohio St LJ* 736, at 736-751.

²³⁷ Scheurman, above n 228, at 1879-1880.

²³⁸ The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (opened for signature 2 March 2012, entered into force 1 January 2013).

²³⁹ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union OJ C 326 (opened for signature 25 March 1957, entered into force 1 January 1958, 1 December 2009 under its current name).

²⁴⁰ Greene, above n 234, at 606.

²⁴¹ Scheurman, above n 228, at 1874.

implement neo-liberal policies. Exceptional economic measures have been used in liberal democracies around the world irrespective of political leaning or type of emergency regime.

3.1.2 Necessity of Exceptional Economic Measures

Economic exceptionalism, just like exceptionalism in general, is predicated on legal and constitutional controls to prevent what Hayek calls "economic dictatorship", in which the executive rules over economic matters by decree.²⁴² In many cases, the need for economic exceptionalism may be questionable, because unlike in more traditional emergencies like war or natural disasters, economic crises are often not immediately imminent but merely potential future events. This means that there will often be no urgency to make hasty decisions. Without urgency, the legislature has sufficient time to gather information and expertise regarding the economic risk without the need of resorting to exceptional matters. In the context of the ambiguity of economic issues it is therefore debatable whether deferring to the executive regarding potential future economic risks is appropriate at all.

3.1.2.1 Urgency

The public narrative has long been that economic disaster is almost continuously imminent and that urgent action is required to prevent it. In a report about national emergencies to the United States Senate in 1973, the authors concluded that "emergency government has become the norm in the United States."²⁴³ The constant state of economic emergency alluded to in the United States Senate's

²⁴² Friedrich A. von Hayek *The Road to Serfdom: a Condensation from the Book by Friedrich A. Hayek* (Tolan Printing, Wellington, 1944), at 63-96. Irrespective of the emergency regime in place, even the most stable democracies have not been able to resist the urge to use extreme economic emergency powers under dubious circumstances, as New Zealand's use of emergency powers under Robert Muldoon and the European Union's Fiscal Compact Treaty illustrate. By the late 1970s, four emergency declarations were active in the United States: Franklin D Roosevelt's emergency declarations regarding the New Deal, Harry S Truman's declaration regarding the Korean War, Richard Nixon's declaration dealing with the postal workers strike, and Nixon's declaration regarding the international monetary crisis, US Senate Special Committee on the Termination of the National Emergency *Senate Report 93-549: War and Emergency Power Statutes* (US Government Printing Office, 1973), at [II]. The last provided powers under the International Emergency Economic Powers Act 1977 (US) and enabled Nixon to block or freeze trade with countries that posed a threat to the nation. Nixon thus used economic emergency powers to control international trade with countries such as Cuba, Libya, and Iran, all of which were ideologically opposed to the United States, even though none posed such an imminent threat to the United States that it could be classified as an emergency, Relyea, above n 236, at 87-118.

²⁴³ US Senate Special Committee on the Termination of the National Emergency, above n 242, at [IV]. This is further exacerbated by the tendency of economic emergency legislation to stay in effect long after the crisis has passed. Future governments can thus use exceptional powers based on legislation which had not been designed for future crises. For example, Roosevelt used powers under the Trading with the Enemy Act 1917 (US) to enact his New Deal, although the Act was passed during World War One to give the executive greater control over the economy during wartime, Scheuerman, above n 228, at 1878. The New Zealand's government's suppression of the dockworkers' strike in the 1951 Waterfront Dispute was based on the Public Safety Conservation Act 1932 (NZ), which had been hastily drafted to respond to the Queen Street riot and its overly broad exceptional powers had not been restricted or repealed. Similarly, the Canadian War Measures Act 1914 (CA) continued to be in effect long after the end of World War One and was used in 1970 to combat a Quebecois separatist group, see New Zealand Law Commission, above n 231, at [4.13].

Report is endemic to modern market economies. According to the narrative, market forces are fast-moving and quickly changing in a globalised economic structure that is active around the clock. Expedient decision-making is thus required to respond and adapt the local economy to these changes.²⁴⁴ But legislative decision-making is designed to be slow-moving and therefore incapable to react to fast-moving economic issues.

As a consequence of this narrative, legislatures tend to delegate economic regulatory powers to specialised economic administrative bodies, due to the latter's perceived expertise and faster decision-making processes.²⁴⁵ This form of 'technocratisation' of economic decision-making leads to a legislative decline in economic matters and a corresponding executive creep.²⁴⁶ The deliberative and consultative elements of democracy give way to exceptionalism. Due to the purported constant need for expedient economic decision-making, governments have to recourse to exceptional measures at will, as long as they can claim that the economy is at risk.

Whether an economic crisis requires urgent exceptional intervention mainly depends on whether the crisis has already manifested itself. Unless the economic crisis is acute, recourse to exceptional measures is not usually necessary. Rapidly evolving economic crises such as the events in September 2008 that led to the Global Financial Crisis may require a degree of urgent government response. However, potential future economic crises generally do not require the same degree of urgency. Their manifestation is a matter of probability rather than certainty, similar to security concerns regarding potential terrorist threats that exist within a probability framework. There is therefore generally sufficient time to follow ordinary decision-making processes to respond to potential future economic crises.

3.1.2.2 Information-Deficit

The need to defer urgent exceptional decision-making to the executive during emergencies is based on an information-deficit that the legislature has compared to the executive. For example, response powers required after an environmental disaster are mostly operational, comprising of such things as search and rescue operations as well as logistical and infrastructure support. The political executive's proximity to the bureaucracy places it in a superior position to make urgent decisions than the legislature, which has to follow constitutional law-making procedures. The executive may also be privy

²⁴⁴ Greene, above n 234, at 603.

²⁴⁵ At 234, At 603.

²⁴⁶ Carl Schmitt, cited in Scheuerman, above n 228, at 1884. Scheuerman emphasises that while Schmitt's justifications for Nazism are problematic, his diagnostics of economic emergency powers are useful, at 1883.

to sensitive information regarding the crisis, especially during political emergencies such as war or terrorism.²⁴⁷

However, unlike environmental and political emergencies, which threaten life and property directly and physically, economic emergencies are crises of investor confidence.²⁴⁸ They are brought about by investor concern about the future profitability of investments and the ready availability of credit.²⁴⁹ An economic crisis can therefore be conceived as an information crisis that is influenced by the flow and substance of the information that is available to the economy's stakeholders.²⁵⁰ Since economic information is available to both the executive and the legislature, the legislature does not suffer the same information-deficit as it does with information in other acute emergencies. It is sufficiently competent to process financial information due to its role in scrutinising government expenditure. If the economic crisis is not acute, deferring decision-making powers to the executive during economic crises is therefore not justified.

3.1.2.3 Ambiguity

Finally, another reason that exceptional measures are rarely appropriate in response to potential economic crisis is the ambiguity of economic risk. Economies are polycentric in nature: they are extraordinarily complex systems containing an interdependent web of factors, each of which can influence economic outcomes.²⁵¹ Manipulating one factor influences a multitude of other factors, which in turn influence further factors. The effects of economic measures are therefore exceedingly difficult to predict, particularly during economic crises.²⁵²

The normative ambiguity of economic risks means that there can be vastly different opinions about the appropriate response to an economic crisis. For example, the European Union's answer to the Global Financial crises (and to the question of how to prevent similar future crises) was to impose extreme austerity measures and a dramatic reduction of public spending on its Member States in order to reduce their budget deficits. However, at the same time a major Keynesian resurgence swept

²⁴⁷ Greene, above n 234, at 610.

²⁴⁸ At 234, At 610.

²⁴⁹ The Irish experience during the Global Financial Crisis illustrates the pivotal role that investor confidence plays. Following the collapse of the Irish banking sector in September of 2008, the Irish government decided to guarantee all deposits and liabilities of six Irish financial institutions to restore confidence in the banks. However, due to the insolvency of the institutions, the lack of investor confidence persisted and resulted in a so-called 'sovereign debt crisis'. The resulting increase of bond yield rates to unsustainable levels made it impossible for the Irish government to obtain further loans, thus threatening the solvency of the Irish State, see at 234, at 607, 312.

²⁵⁰ Eric A. Posner and Adrian Vermeule "Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008" (2009) 76(4) U Chi LRev 1613, at 1618.

²⁵¹ Lon L. Fuller and Kenneth I. Winston "The Forms and Limits of Adjudication" (1978) 92(2) Harv LRev 353, at 614.

²⁵² Jeff King "The Pervasiveness of Polycentricity" [2008] PL 101, at 101-102.

through the world of economics. John Maynard Keynes had developed economic policies in response to the Great Depression of the 1930s, based around fiscal stimuli and expansionary monetary policies. Although Keynesian economic policies had fallen into disrepute since the rise of neo-liberal policies in the 1980s, following the Global Financial Crisis many economists and academics started advocating for more fiscal stimuli and more public spending in order to stimulate the faltering economies. These calls stood in sharp contrast to the European Union's strict austerity measures.²⁵³

O'Connell believes that one of neo-liberalism's "most successful ruses" is the definition of economic policy primarily as a matter of neutral, objective, and technical expertise.²⁵⁴ In reality, economic policy is highly ambiguous at the best of (ordinary) times. The question of whether any specific economic measure is necessary to combat an imminent or potential future crisis is therefore exceedingly subjective. Agamben believes that the assessment of the necessity of economic exceptionalism is "relative to the aim that one wants to achieve."²⁵⁵ For instance, if one believes that minimal public spending and government interference in the free market lead to a healthy economy, then austerity measures are necessary to achieve that goal. But that means that the claim that exceptional economic measures are necessary during a crisis or to prevent a future crisis is a subjective assessment. The claim purports that one's own economic views outweigh the normative value of the democratic decision-making process.²⁵⁶

Particularly when an economic crisis is not acute, economic decisions that substantially effect legislative or constitutional change should therefore be left to the institution that holds the most democratic legitimacy.²⁵⁷ It is the legislature's fundamental role to decide on contested issues such as economic policy. Even in parliamentary systems, where the executive regularly commands a majority and parliamentary debate is unlikely to change the executive's policy decisions substantially, oppositional voices must at least have the opportunity to have their objections heard and recorded publicly.²⁵⁸

But even in acute emergencies, the executive should not make decisions that have more than a short-term effect. As will be discuss in Chapter Four, the purpose of exceptional measures should be restorative; they should enable a return to normality and restore the status quo ante. However, the

²⁵³ Greene, above n 234, at 614.

²⁵⁴ Rory O'Connell "Let Them Eat Cake" in Aoife Nolan, Rory O'Connell, and Colin Harvey (eds) *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights* (Hart Publishing, Oxford, 2013), at 69.

²⁵⁵ Giorgio Agamben *State of Exception* (University of Chicago Press, Chicago, 2005), at 30.

²⁵⁶ Greene, above n 234, at 615.

²⁵⁷ Fuller and Winston, above n 251, at 614..

²⁵⁸ Jeremy Waldron *Law and Disagreement* (Clarendon Press, New York;Oxford;, 1999), at 15.

purpose of economic exceptionalism is often transformative.²⁵⁹ Despite their high normative ambiguity, exceptional economic measures are frequently used to effect permanent change, as the European Union's actions in response to the Global Financial Crisis illustrates. They are meant to prevent the reoccurrence of future economic crises as much as they are meant to respond to a current crisis. The narrative of the constant economic emergency therefore allows access to exceptional measures at virtually any time; and the transformative nature of the measures abolishes the traditional requirement of emergency measures to be temporary and conservative. This creates an ideal environment for the riskification and securitisation of economic issues.

3.2 Economic Risk Rhetoric

Despite the lack of necessity around exceptional economic measures, the threat of economic disaster is frequently used in political discourse to justify such measures. If necessity is relative to the political aim of the government, it behoves the government to shape a narrative that creates a reality within which economic exceptionalism is necessary and thus justified. Like security issues around terrorism threats, the threat of an economic downturn is a constant part of the media and political narrative, creating and nurturing a culture of economic fear. During serious economic downturns the discourse often employs war rhetoric. For example, in a speech to the Confederation of British Industry, former United Kingdom Prime Minister David Cameron referred to the Global Financial Crises as the "economic equivalent of war."²⁶⁰ This war rhetoric elevates the urgency of the economic crisis in the perception of the public. In a climate of economic fear, economic issues can be riskified, making it easier to successfully securitise them to justify economic exceptionalism.

3.2.1 The Institution-Dependent Control Structure

Economic emergency rhetoric is particularly effective in stirring people's fear and insecurities as most people have first-hand experience with economic issues. This susceptibility to economic rhetoric is based on the interaction of liberal democracy and capitalism in many modern societies. Neoliberal policies and ideology have imposed economic values such as competitiveness, self-responsibility, and productivity into all aspects of lives. Moreover, Individuals in liberal democracies are greatly dependent on the economy both for their sustenance and their ability to achieve self-realisation. This

²⁵⁹ Relyea, above n 236, at 40-94, 87, 90-91, 106-107; Lobel, above n 236, at 1400-1421; Miller, above n 236, at 736-751.

²⁶⁰ Rebecca Clancy "Debt crisis: CBI Conference as it happened" (19 November 2012) The Telegraph <www.telegraph.co.uk>. The conceptualisation of economic crises as war goes back to the early twentieth century, see Greene, above n 234, at 594; John Reynolds "The Political Economy of States of Emergency" (2012) 14 Or Rev Int'l Law 85, at 85; Franklin D Roosevelt famously described his use of executive powers to create the New Deal as waging a war against economic depression, Scheuerman, above n 228, at 1871.

makes them particularly sensitive to economic risks and economic risk rhetoric, as their livelihood and way of life depends on economic success.

3.2.1.1 Responsibilisation and Economic Dependency

Economic liberalism and neoliberalism have created an environment in many countries of dependency on economic issues over which most citizens have little control, all the while emphasising every individual's responsibility for their own success. Since the Enlightenment period, liberalism's focus on individual autonomy has developed in a mutually dependent relationship with the free market concept of capitalism. The free marketplace of products and opinions is regarded as necessary to protect and facilitate individual liberty and self-determination.²⁶¹ It enables individuals to have the freedom to make their own decisions based on their individual preferences and as a reward for their efforts to achieve their goals and further their development. But this also suggests that the individual becomes responsible for their own decisions and their ability to self-determine.

Veitch suggests that this emphasis on individual autonomy through responsibilisation can paradoxically lead to a process of standardisation that seems to contradict liberalism's aim of self-realisation.²⁶² As every individual becomes responsible for their own success, a standardised optimal approach to life emerges. This creates an expectation as to how every individual should behave and perform in reference to social, economic, and legal institutions. Any individual who cannot, or chooses not to, engage with these institutions loses the support of the free market and thus their access to the tools which enable them to self-realise. As discussed in Chapter One, neoliberalism moralises economic success: not only does the individual lose their ability to self-realise, they also act 'immorally', thus potentially losing societal legitimacy. That means that neoliberal societies have created a so-called 'institution-dependent control structure', which requires everyone to engage with social, economic, and bureaucratic institutions within the standards of economic rationality.²⁶³

Many aspects of liberalism's aim of self-realisation are dependent on the economy. Consequently, in order to achieve self-realisation and self-determination, people are reliant on wealth accumulation. This leads to a dependence on either the job market or the welfare system. As the latter is not seen as conforming with economic values and is thus 'immoral', the need for employment becomes

²⁶¹ Joseph Schumpeter described the liberal democratic method as "that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of competitive struggle for the popular vote." Joseph A Schumpeter *Capitalism, Socialism and Democracy* (Routledge, Chapman & Hall, Georgetown, 2015), at 241.

²⁶² Veitch, above n 137, at 46.

²⁶³ Beck, above n 4, at 130-131. The dependency particularly on economic institutions is amplified in capitalist systems by the increasing commodification of almost all aspects of life. Consumerism as a means of measuring success ("keeping up with the Jones's") and this path to personal happiness is celebrated daily through advertisements at any conceivable venue and media.

paramount. This creates dependence on other institutions. For example, employment opportunities require increasingly more and better education, and remaining physically capable of working requires access to good health care. However, the neoliberalisation of the free market has increasingly privatised education and health care institutions in its drive to responsabilise individuals. Privatisation means that access to vital institutions is becoming more expensive, further deepening our dependence on employment and income. Simultaneously, it makes the ability to achieve well-paying employment more expensive.

Responsibilisation creates an assumption that the lack of a good education and a well-paying job is the result of bad economic decision-making. As autonomous individuals, sound decision-making is our own responsibility, and it is thus our own responsibility to get a good education and a well-paying job. Moreover, in a commodified society, taking economic risks to enhance one's wealth accumulation capabilities is a choice of opportunity. Economic risk-taking is therefore a fundamental function of a liberal capitalist society, as it creates the opportunities for wealth accumulation.²⁶⁴ Managing economic risks and embracing opportunities with uncertain outcomes facilitates our ability to self-determine and self-realise. Taking economic risks is thus a necessary aspect of self-determination, and it is each individual's own responsibility to pursue economic risks in order to increase their own wealth.²⁶⁵

3.2.1.2 Wealth and Risk Inequality

This line of argument has two clear deficiencies: Many aspects of economic risk are outside of an individual person's control, and inequalities of wealth distribution affects the likelihood and severity of adverse impacts of economic risk.²⁶⁶ Risk distribution follows a correlatory line with wealth distribution. The less wealth an individual has, the more vulnerable they are to economic (and other) risks. Moreover, the opportunity risks taken by some have the potential to result in benefits to them, but detriments to others. For example, the reckless speculation leading up to the 2008 Global Financial Crisis resulted in enormous wealth accumulation for some but inflicted substantial economic hardship on many others.²⁶⁷

²⁶⁴ Anthony Elliot "Series Editors Foreword" in Iain Wilkinson (ed) *Risk, Vulnerability and Everyday Life* (Routledge, London;New York;, 2010), at 4.

²⁶⁵ de Vries, above n 55, at 26.

²⁶⁶ Beck, above n 4, at 23.

²⁶⁷ Mythen, above n 54, at 14. Beck believed that this inequality of risk distribution would eventually even out in a so-called 'boomerang effect': writing mainly in the context of environmental risks caused by industrialisation, he claimed that environmental catastrophes affected everyone, including those whose opportunistic risk taking caused the catastrophes, Beck, above n 4, at 38. This is only true for a (near-) extinction level event, however. In any other case, economic safeguards such as insurance, savings, and other investments will soften the impact of disasters for wealthy people and the absence of such safeguards exacerbate the impact on less wealthy people.

As wealth inequality grows, risk inequality grows with it.²⁶⁸ Public awareness of its growing dependency on economic factors and on the inequality of risk distribution thus increases too. People are feeling more vulnerable to a system that seems to be influenced by others and which is mainly outside their control. Yet, they feel (and are being told) that they are mainly responsible for their own economic success. The combination of these factors contributes greatly to a general insecurity and sensitivity to economic risks.²⁶⁹ Paradoxically, this sensitivity affects all socioeconomic strata, although not for the same reasons. People with less wealth are sensitive to economic risks due to the precarious economic position. People with more wealth are sensitive to economic risks because they want to protect their wealth and their ability to continue accumulating wealth.

Economic liberalism and neoliberalism have created a dependence on economic success that is shared by virtually all members of society. The public thus is extremely sensitive to economic threats, and by extension to economic risk rhetoric. By emphasising economic risk, or by creating a narrative of an economic threat, political actors can riskify economic issues by influencing the public's sensitivity to economic risks. This facilitates the securitisation of economic issues at will.

3.2.2 The Dominance of Economic Risk

Generally, there is an overproduction of risk in risk societies. People must face opportunity risks, economic risks, health risks, cultural and social risks, personal safety risks and environmental risks, just to name a few. Because of the complexity of the systems within which these risks exist, addressing and mitigating one risk may influence another. Lowering taxes, for example, may mitigate the economic risk of one group, but the resulting lack of public spending might increase another group's economic risk. Loosening industrial regulations might enhance economic opportunity risk for companies but increase risks to the environment. Because risks describe the possibility of an event that lies in the future, they are not real, not tangible. They merely exist within a probability framework.²⁷⁰ Consequently, the probability and predicted effect of one risk coexists with that of a plethora of other risks, many of which affect conflicting interests.

Competing risks must be weighed up in order to decide which risk to prioritise in terms of mitigation. Risk assessment thus gains an ethical dimension in addition to its scientific one.²⁷¹ For example, during the Covid-19 outbreak, the risk of overburdening the healthcare system and endangering the lives or well-being of the population due to exposure to the virus had to be weighed up against the economic

²⁶⁸ Beck, above n 4, at 20.

²⁶⁹ At 4, At 4, at 130-131; Veitch, above n 137, at 47.

²⁷⁰ de Vries, above n 55, at 21.

²⁷¹ John Rawls "The Justification of Civil Disobedience" in William A. Edmundson (ed) *The Duty to Obey the Law: Selected Philosophical Readings* (Rowman & Littlefield Publishers, Lanham, Md, 1999), at 57; Beck, above n 4, at 29.

risk of widespread quarantine orders. But since causality and responsibility of modern risks (as well as the effectiveness of mitigative action) is so difficult to determine, it is easy to create and steer risk perception by way of emergency rhetoric.

Economic emergency rhetoric can particularly effectively steer public perception, due to economically liberal societies' dependence on economic performance. The polycentric nature of economic emergencies means that their ambiguity is high, which creates high levels of insecurity around economic issues among the population.²⁷² Moreover, economic value preferences and interests diverge widely in society, leading to conflicting views as to what constitutes a fair distribution of risks and benefits.²⁷³ Economic concerns therefore regularly lead the list of perceived political issues in any given year.²⁷⁴ Moreover, neoliberalism moralises economic values insists on supplanting other moral and value considerations. It therefore pushes the dominance of market considerations over any other ethical value considerations. In this context, economic risk rhetoric can be used to influence the public's policy preferences. When conflicting interests must be weighed against each other, exaggerating or creating the appearance of economic risk can steer the public to prioritising their own economic interests over other values.

3.2.2.1 Normative Ambiguity, Risk Abstraction, and Assumptions of Distinction

When economic arguments are weighed up against non-economic arguments in the context of risk assessments, economic arguments carry a disproportionate amount of weight.²⁷⁵ Political decisions regarding irreconcilable risks generally exist within a normative ambiguity. For example, the environmental risk of emitting greenhouse gases must be weighed against the economic risks of increasing emission standards. There is a lack of consensus as to the right course of action to mitigate or avoid these risks. Inevitably, a debate will emerge as to what level of risk on one side is tolerable and thus acceptable in order to mitigate the other risk.

Normative ambiguity can be resolved in one of two ways: 1) action to mitigate the risk is only taken once clear evidence as to the likelihood and severity of the harm has been shown, or 2) action is taken based on the mere suspicion of harm.²⁷⁶ In public risk discourse, the first approach is generally applied to most risk assessment. Risk mitigation action is usually conservative and requires concrete evidence.

²⁷² Fuller and Winston, above n 251, at 614; Greene, above n 234, at 614.

²⁷³ Rawls, above n 271, at 57; Rosa, Renn and McCright, above n 5, at 138.

²⁷⁴ Surveys in New Zealand show that the economic issues of housing, wealth inequality, and healthcare cost are at the forefront of people's worries, "The Ipsos New Zealand Monitor" (July 2019) Ipsos <www.ipsos.com>; in the United States, the economy, healthcare costs, and education lead that list, with 70% of surveyed reporting economic concerns, Kristen Bialik "State of the Union 2019: How Americans see major national issues" (4 February 2019) Pew Research Centre <www.pewresearch.org>.

²⁷⁵ Beck, above n 4, at 45.

²⁷⁶ Rosa, Renn and McCright, above n 5, at 137.

When it comes economic risk assessment, however, the second approach is commonly applied. The mere mention of economic risk seemingly justifies political actionism in an attempt to avert the manifestation of said risk.

The reason for these different approaches is the level of perceived abstraction. Risk to personal safety is, as discussed earlier, an ever-present threat. There is a disproportionate amount of safety risk reporting in the media, and popular culture often focusses on crimes or terrorist threats. Irrespective of the real level of threat, the public experiences these risks as if they were real and imminent. Similarly, financial considerations and concerns are a part of everyday life in economically liberal societies. Our societal dependence on wealth is thus also directly experienced. Security and economic threats are tangible and easily understood. Our shared perceived experiences of economic considerations inform our availability bias, i.e. the way we perceive reality based on available data. This creates a high level of risk aversion to potential economic hardship.

Other types of risk, on the other hand, are perceived more abstractly and are thus less tangible. Beck contends that without common experiences of the impact or likelihood of risk, our understanding depends mainly on how experts transfer knowledge to the public. But abstract predictions of likelihoods of unknown or little-known risks are highly theoretical, such as volcanic eruptions, the long-term effects of climate change, or the societal effects of an ever-widening wealth gap.²⁷⁷ In the absence of practical experience, our optimism bias tends to make us underestimate the likelihood of these risks and lead us to believe that the risks will not affect us. We therefore require concrete and tangible evidence in order to take action. For example, although the effects of rising global temperatures have been known for decades, widespread support for climate action is only slowly emerging due to a slow but constant and tangible increase in extreme weather patterns and wildfires.

The different approaches to risk are further exacerbated by a series of ‘assumptions of distinction’, which the political and media risk narrative uses. According to Veitch, the narrative assumes that issues fall neatly into discourse categories that must not cross-contaminate one another. An issue is either political or legal, technological or ideological, economic or political. Accordingly, issues exist in a form of ideological dichotomy in which they cannot affect more than one aspect of society.²⁷⁸ He explains that these assumptions ignore that a question of whether or how a piece of technology should be used can have a moral dimension, that any large-scale policy decision is inherently political, or that economic decisions will generally impact societal issues. The consequence of such prevalent assumptions is the narrative exclusion of vital perspectives that should be included in the

²⁷⁷ Beck, above n 4 at 28, 33.

²⁷⁸ Veitch, above n 137, at 54.

consideration of the decision-making process. For example, the insistence that the Global Financial Crisis was exclusively an economic issue led to extreme austerity measures that ignored the social and humanitarian dimensions of the crisis.²⁷⁹

3.2.2.2 Priority of Economic Risks

The public's high sensitivity to economic risks, the different approaches to normative risk ambiguity, and the assumption of distinct risk discourse categories mean that economic risk perception is particularly susceptible to manipulation by risk rhetoric.²⁸⁰ The free market's inherent need for competition and capitalism's requirement for constant economic growth create a sense that the economy is perpetually on the brink of crisis.²⁸¹ In this context, measures that mitigate or prevent future risks will generally have a financial cost and as such feed the perception that they will impact the economy negatively. Unless the risk to be mitigated appears more tangible than the perceived risk to the economy, economic arguments will likely outweigh other risk arguments, even if the mitigation of the other risk will prevent future risks to the economy (e.g. climate change action).

The public has been primed through political and media narratives, as well as by experience with personal financial considerations, to value and fear the economy above virtually all else. The commodification and economisation of everyday life means that social goods, which had formerly been viewed as beneficial or even vital to the core values of a free and equal society (such as education, welfare, and health care) are increasingly viewed through the economic lens of profit and loss.²⁸² Any and all public spending must be rigorously economically justified, for fear of 'needlessly' spending taxpayers' money. The economy must be kept in good shape, no matter the cost.²⁸³

Even during the early stages of the global Covid-19 pandemic, the need to mitigate the virus's threat to human life was weighed up by some against economic risks, despite strong expert opinion that containing the virus was paramount. Texas Lieutenant Governor Dan Patrick made headlines during the early months of the pandemic when he announced that he would rather die than damage the economy with widespread quarantine orders, and that he believed that many older Americans would agree with him.²⁸⁴ Some months later, with the global death toll nearing one million and increasing

²⁷⁹ At 137, At 54.

²⁸⁰ Mythen, above n 54, at 14.

²⁸¹ Ulrich Beck and Kathleen Cross *Power in the Global Age: a New Global Political Economy* (Polity, Cambridge;Malden, MA;, 2005), at 118.

²⁸² Veitch, above n 137, at 55.

²⁸³ The austerity measures in many countries following the Global Financial crisis lead to a relatively swift recovery of many economies. But the resultant decrease in public service spending affected lower income earners disproportionately, at 137, at 54.

²⁸⁴ Lois Becket "Older People would Rather Die Than Let COVID-19 harm the US Economy-Texas Official" (24 March 2020) The Guardian <www.theguardian.com>.

evidence of long term health impacts of the virus, former Australian Prime Minister Tony Abbott opined that the "health dictatorship" of the Covid-19 risk responses did not sufficiently take into account the economic impacts and that some elderly people should be left to die in order to save the economy.²⁸⁵

The prominence of economic risk in political decision-making does not only affect immediate policy decisions; it has long-term societal effects. The increasing preference of economic over other considerations can have ongoing legal and constitutional impacts. Economic risks are increasingly viewed equally, or even superior, to the risks of other local or global disasters, such as natural disasters, climate catastrophes, or other life-threatening events. For that reason, governments are increasingly taking exceptional legal and constitutional action in an effort to mitigate risks to the economy. But due to the extreme ambiguity of economic risks and the public's high risk-sensitivity, tenuous risk rhetoric can be used to falsely securitise economic issues that, in reality, do not have the severity to pose existential risks.

3.3 Securitisation and the Economic Bogeyman

Economic risk has become the public's bogeyman. Merely mentioning economic risk triggers the public's risk-aversion response, which makes it exceedingly easy to securitise economic issues. In economically liberal countries, economic issues are continuously riskified, either because of the institutionalised tension between expectations of risk-taking and risk-aversity due to an increasing dependence on economic factors, or because by design. Economic risks affect all facets of life, and their mitigation takes priority over most other value considerations. The complexity of the systemic risks that arise out of economic issues are too difficult for most people to understand, which makes them dependent on expert advice. Yet, the ambiguity of systemic economic risks creates a variety of different and often contradicting expert opinions, which fans the flames of uncertainty in the population. The public thus turns away from experts and towards politicians, who are willing to present clearer "solutions" than experts can.

Economic uncertainty also leads to the notion that governments need to react quickly to economic changes. The fast-moving market compresses the time for economic decision-making, which is exacerbated by a shrinking economic globalised world.²⁸⁶ As legislatures are by design slow-moving decision-making bodies, they are incapable of reacting with the sufficient urgency that modern

²⁸⁵ Patrick Wintour "Tony Abbott: Some elderly COVID patients could be left to die naturally" (1 September 2020) The Guardian <www.theguardian.com>.

²⁸⁶ Greene, above n 234, at 619.

economies ostensibly require. This creates the impression that the executive requires exceptional economic powers in order to adequately control the unpredictable effects of a global economy. But the time and space compression of economic issues is not exceptional; rather, they are symptomatic of modern liberal economies. It follows, then, that economic exceptionalism is permanently necessary and that executives require constant decision-making powers when it comes to economic issues.²⁸⁷

The high sensitivity of the public to economic risk and the resulting progressively higher expectations of governments to manage the impact of that risk changes the purpose of economic emergency response. As will be discussed in Chapter Four, exceptionalism is meant to restore the status quo ante, to return society and the constitutional system to the state in which they were before the emergency. Conversely, economic crises are increasingly used to transform the economic system in order to fortify it against future economic instability.²⁸⁸ An illustration of this is the Irish Minister of Finance's use of section 53 of the Credit Institutions (Stabilisation) Act 2010 (IE) to adjust the Irish economy in the aftermath of the Global Financial Crisis. The Act was passed to enable Ireland to fulfil its obligations under the 'Economic Adjustment Programme' that would allow it to receive loans from the European Union and the International Monetary Fund below market rates.²⁸⁹ Section 53 allowed the Minister to restructure financial institutions permanently without the need for legislative assent. Similarly, the Fiscal Compact Treaty introduced permanent changes to how EU Member States have to set their budgets.²⁹⁰ Rather than being restorative, economic emergency powers tend to be future-oriented and preventative.

The ostensible constant need for a state of economic emergency and its transformational effect increasingly challenges the so-called 'normalcy-exception dichotomy', the strict separation of normal and exceptional government.²⁹¹ Economic emergency adjustments are not exceptional anymore, they become normal.²⁹² This is particularly worrisome in the context of economic crises that have not yet manifested. When the executive takes pre-emptive economic emergency action, it does so based on a dubious notion of necessity that regularly is not indicated due to the ambiguity of economic risk.

As Agamben rightly points out, pre-emptive economic exceptional action is generally only necessary relative to the stated aims of the executive.²⁹³ If the executive creates a narrative under which any

²⁸⁷ At 234, At 608.

²⁸⁸ Oren Gross and Fionnuala Ní Aoláin *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge University Press, Cambridge, 2006), at 22.

²⁸⁹ Greene, above n 234, at 607.

²⁹⁰ At 234, At 606.

²⁹¹ At 234, At 597.

²⁹² At 234, At 613.

²⁹³ Agamben, above n 255, at 30.

economic issue is a potential existential risk that endangers the economy, and, by proxy, the state's ability to guarantee the public's prosperity, then exceptional action is justified in response to economic issues. As the public is overly sensitive to economic risk, economic risk rhetoric is exceedingly effective in controlling the economic discourse and public mood. This expedites a political actor's ability to securitise non-existential economic issues. Pre-emptive economic exceptionalism can thus be a tool to pursue the executive's economic ideology as much as it prevents actual economic instability. There is a real danger that political actors employ economic exceptional powers to abrogate normal legislative procedures and constitutional limitations to further their own political agenda rather than to address an actual imminent economic threat.²⁹⁴

²⁹⁴ Scheuerman, above n 228, at 1871.

Part 2

The Constitutional Impact of Economic Securitisation

The complexity and ambiguity of modern systemic risks, risk aversity in risk societies, and the dependency of the public on economic factors means that economic issues can easily be riskified. This enables political actors to securitise economic issues, even if those issues do not pose an existential risk, let alone an existential threat. In other words, political actors can use economic risk rhetoric to create false or exaggerated economic crises to justify the use of exceptional measures.

The legal effect of securitisation is the legitimisation of exceptionalism in order to address the purported existential security threat/risk. Part Two of the thesis will explore the legal mechanisms surrounding the use of exceptional public powers and the dangers an increased use of exceptionalism can pose to constitutionalism and democracy. It will then use three case studies to illustrate this danger in real life situations.

Chapter Four will address the so-called 'normalcy-exception dichotomy'. The dichotomy posits that the normal constitutional order is separate from the exceptional one. Exceptional measures are only legitimate in cases of existential threats with which the normal constitutional order is unable to cope. They must therefore be restorative and temporary: their purpose is to restore the normal constitutional order, after which they must cease. The chapter will describe the democratic and constitutional principles that underpin the normal constitutional order in liberal democracies. It will then look at justifications for exceptionalism and common models of providing exceptional powers to the state. It will finally investigate democracy's weakness to securitising attempts of fake economic issues and the threat that successful securitisation of fake issues has on constitutionalism and democracy.

The frequent securitisation of economic issues and the consequent use of exceptional measures can lead to the normalisation of economic exceptionalism. Chapter Five will use three examples from New Zealand illustrate this possibility, namely the circumstances surrounding the passage of the Employment Relations (Film Production Work) Amendment Act 2010 (NZ), the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (NZ), and the Canterbury Earthquake Recovery Act 2011 (NZ). Within the span of one year, the New Zealand government introduced and passed three exceptional statutes. Two of the statutes extended exceptional powers to the executive that would have ongoing effects for years to come. All three statutes were justified using economic crisis rhetoric, even though such crises existed in none of the cases.

The chapter uses examples from New Zealand because the country is generally highly regarded with respect to its democracy. It consistently ranks highly of the Economist Intelligence Unit's Democracy

Index.²⁹⁵ Similarly, it usually ranks at the top of Transparency International's Corruption Perception Index.²⁹⁶ The fact that securitisation of fake or exaggerated economic issues can be highly effective in New Zealand illustrates the power and threat that securitisation poses to democracy and constitutionalism.

²⁹⁵ New Zealand ranked as the fourth strongest democracy in the world in 2020, Democracy Index 2020 - In sickness and in health?, above n 6, at 8-9.

²⁹⁶ International, above n 7.

4 The Normalcy-Exception Dichotomy

Securitisation theory explains that once an existential threat/risk has been established, exceptional measures are justified in order to address the crisis. The purpose of this chapter is to provide an overview of the constitutional mechanisms that create exceptional powers and to assess them in the context of securitisation. The reason that securitisation justifies exceptionalism is that the existential threat/risk creates crisis that cannot be sufficiently or appropriately addressed by ordinary public means. In a crisis, governments in modern societies are expected to react swiftly to mitigate adverse effects on the population and economy.

If the crisis is of such an extent that ordinary governmental powers are insufficient to provide relief, the government is expected to take measures that are not ordinarily available to it. Democratic and constitutional decision-making processes are designed to allow for debate, scrutiny, and extended consultation. The source of all public authority is derived from the people's inherent right for self-determination and self-governance. As the latter has been delegated to public officials, constitutional processes are meant to ensure both the transparency of the decision-making process as well as that the decisions reflect (the majority of) the public's will.²⁹⁷ But these thorough processes are inherently and deliberately slow. They may not be able to provide adequate and timely relief in urgent emergency situations.²⁹⁸

Decision-making processes during emergencies are therefore usually expedited and simplified. In order for the executive to be able to respond to the emergency effectively, its constitutional shackles must be loosened and its discretion to act broadened. Exceptional decision-making powers have three principal characteristics: 1) they are extraordinary in scope and are not available outside the immediate crisis; 2) they confer the widest discretion to the executive and normal constitutional limitations do not apply to them (at least partially); and 3) they are available only temporarily, until the end of the crisis or until a set date.²⁹⁹ The distinction between normal and exceptional governance is known as the 'normalcy-exception dichotomy'. This dichotomy has traditionally underpinned most exceptionalism theories.

The exceptional is defined by what is normal.³⁰⁰ This chapter will first investigate normalcy in modern democratic societies. Many modern constitutional systems are built on principles of democracy and

²⁹⁷ Waluchow, above n 100.

²⁹⁸ Ferejohn and Pasquino, above n 103, Oren Gross "The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy" (2000) 21(5-6) *Cardozo LRev* 1825, at 1834.

²⁹⁹ David Bonner *Emergency Powers in Peacetime* Modern legal studies (Sweet & Maxwell, London, 1985), at 7.

³⁰⁰ As will be discussed in Chapter Six, Schmitt disagrees with this assertion, see Lauterbach, above n 50, at 49.

constitutionalism. Axiomatic to democratic societies is the equal moral value of all people. Individual self-determination and autonomy are therefore paramount to democracy, particularly to liberal democracy. Due to the complexity of modern society, individual autonomy is to some extent delegated to a representative government by way of free and fair elections. In order to preserve individual autonomy as best as possible and to prevent arbitrary use of government power, constitutional mechanisms create a framework of rules to facilitate and limit government action.

This chapter will then assess the justifications for exceptionalism and the common models of implementing exceptional powers. John Locke argued that taking exceptional measures was the sovereign's moral duty in order to avert detrimental effects from society. Carl Schmitt saw exceptionalism as an essential power to counter the weaknesses of liberalism and as a tool for constitutional change. Despite Locke's and Schmitt's different grounds for and substantially different ends of exceptionalism, both argued for virtually unlimited executive discretion during crises. However, unlimited executive discretion fits uneasily with democratic and constitutional principles. Most modern constitutional systems therefore rely on models of exceptionalism that have more democratic and constitutional legitimacy. Foremost among these is the legislative model, in which parliamentary legislation creates both exceptional powers and their boundaries.

Despite the legislative model's strife to democratic legitimacy, the chapter will show that it cannot compensate for the susceptibility of populations to risk rhetoric and the consequent ability to securitise political issues. Indeed, the legislative model may exacerbate the problems with securitisation. It gives the appearance of legitimacy to exceptional measures even if they are taken in response to a fake crisis. And the fact that exceptionalism can be created by and inserted into ordinary legislation can normalise it, thus undermining the normalcy-exception dichotomy.

4.1 Democracy and Constitutionalism

In many modern societies, democracy represents the normalcy to the exception of emergencies. Democratic government aims to facilitate the self-determination of all members of society and to protect their individual autonomy. Ideally, political power is equally distributed and not concentrated in a single person or class of people. Constitutionalism provides a framework for government to realise these democratic ideals and to prevent unnecessary state intervention with individual liberties or arbitrary use of state powers. Democratic and constitutional principles are therefore essential to uphold the democratic ideals of autonomy and self-governance.

4.1.1 Democracy

Democracy is based on the assumption that every individual has equal intrinsic moral value and that therefore no person can inherently rule over another. Decision-makers must be representatives of the people, who are chosen by way of regular, free, and equal elections. Decisions must be made by way of majority, so that no individual or class of people may impose their will on the majority of society.

4.1.1.1 Intrinsic Moral Equality and Self-Governance

The way societies are governed differs between constitutional systems. Tyrannical or autocratic states mainly serve the factional interests of privileged individuals or groups. Their constitutional systems facilitate power generation and accumulation in a small group of people with the exclusion and to the disadvantage of a majority of the population. The unequal power distribution tends to be justified by arbitrary factors such as heritage, military or economic power.

Democratic theory rejects arbitrary asymmetric power distribution. Axiomatic to democracy is the assumption that all people have inherently equal value and are intrinsically morally equal. This assumption is necessary because determining the moral value of an individual is ultimately subjective. The arbiters of what is morally valuable therefore must establish moral standards by which they will be evaluated themselves. As humans often act self-interestedly, there is no reliable way of ensuring that these arbiters will act selflessly and not corrupt the evaluation mechanism.³⁰¹ We are left with the presumption of moral equality, regardless of whether people have different moral worth.³⁰²

³⁰¹ Thomas Hobbes *Leviathan* (First Avenue Editions, Minneapolis, 2018), at 86-87; Held, above n 36, at 41.

³⁰² This concept of intrinsic moral equality has been the predominantly held ideal since the Enlightenment, although it is much older. It reflects principles of Judaism, Christianity, and Islam, as well as other major ethical and religious beliefs and has permeated our sense of fairness to the extent that we regard equality as the central pillar of justice. Ronald Dworkin has gone as far as elevating the right to equality above that of general freedom, Stefan Gosepath "Equality" (Spring 2018 ed, Summer 2021) *The Stanford Encyclopedia of Philosophy* <<http://plato.stanford.edu>>, Dahl, above n 99, at 66. Ronald Dworkin *Taking Rights Seriously* (New Impression, with a reply to critics. ed, Duckworth, London, 1978) at 266-269.

Intrinsic moral equality of all implies that there is no legitimate justification for some to be inherently allowed to govern over others.³⁰³

The political system best suited to guarantee these values in the long term is one that is built on the premise that the community governs itself. When all members of a community participate in the process of decision-making, it is less likely that self-interested decisions are made and more likely that the decisions will benefit the greatest number of individuals.³⁰⁴ This idea is reflected in what Robert Dahl calls the *logic of equality*.³⁰⁵ In any system in which members are regarded as equals, they can only be subjected to rules and impositions to which every other member submits as well.³⁰⁶ Every citizen has the same rights of decision-making as any other, and everyone is “treated as if they were equally qualified to participate in the process of making decisions about the policies” of the state.³⁰⁷ In this way, the system does not inherently privilege one individual over another.³⁰⁸

4.1.1.2 Individual Autonomy

The logic of equality aligns democracy with the ideals of liberalism, particularly with the concepts of individual self-determination and self-governance. However, democracy’s focus did not always lie with the individual. Classical and medieval democracies were built around the idea of the common good, rather than the individual good. Popular participation in government was believed to result in common benefit; Machiavelli believed that democracy provided a framework within which citizens could pursue civic glory.³⁰⁹ Political participation was not merely a right, it was every citizen’s duty. As such, the private life of individuals was subordinate to public affairs and the common good. While the well-being of individuals was a major goal of such governments, individuals were seen as a part of the

³⁰³ Dahl, above n 99, at 63. Plato and Aristotle believed that humans were born with different inherent virtues and that treating all humans equally irrespective of their virtues could only lead to disorder and lack of restraint, as less virtuous humans lived only for the pleasure of the moment, Plato *The Republic* (2nd ed, Desmond Lee (translator), Penguin, Harmondsworth, 1974), at 327-334; Aristotle *The Politics of Aristotle: a Treatise on Government* (William Ellis (translator), Floating Press, Auckland, New Zealand, 1912), at 233-237.

³⁰⁴ of Padua Marsilius, Joannes de Janduno and C. W. Previte-Orton *The defensor pacis of Marsilius of Padua* (Cambridge University Press, Cambridge, 1928), at 32, 45.

³⁰⁵ Dahl, above n 99, at 10.

³⁰⁶ HLA Hart “Are There Any Natural Rights?” (1955) 64(2) *The Philosophical Review* 175, at 185. In their social contract theories, Jean Jacques Rousseau and John Locke assumed that the source of the state’s attained power to create security and order was directly derived from individuals who relinquished their absolute power of self-determination and autonomy, Jean-Jacques Rousseau *The Social Contract: and, Discourses* (GDH Cole, JH Brumfitt, and John C Hall (eds), Dent, London, 1973), at 190-193; Held, above n 36, at 46, 63.

³⁰⁷ Dahl, above n 99, at 37.

³⁰⁸ Immanuel Kant “On the Common Saying ‘This may be true in theory, but it does not apply in practice’” in HS Reiss (ed) *Kant: Political Writings* (Cambridge University Press, Cambridge, 1991), at 74-75.

³⁰⁹ Quentin Skinner *Machiavelli* (Oxford University Press, Oxford, 1981), at 51-77.

community which they served. In fact, the private and public lives of citizens were intertwined to such an extent that they were not distinguished.³¹⁰

The rise of liberalism in the 17th and 18th century shifted the focus of democracy from the common to the individual good. According to liberalism, human beings are rational individuals who require the most possible amount of autonomy in order to be able to achieve self-determination.³¹¹ The European Enlightenment period caused the abstraction of the State from personalities such as monarchs and the clergy.³¹² The rationalisation and intellectualisation of the purpose of government during the period led to a separation of society into distinct spheres of value.³¹³ The private sphere of the individual was decoupled from the public sphere of government. Their respective roles were reversed: instead of humans being the means by which the community thrived, the community became the means by which individuals thrived.

Locke and Rousseau posited that humans were born inherently free, and only subjected themselves to government for their personal advantage.³¹⁴ The government's purpose thus was not to *enable* individual liberty, but rather to *protect* inherent individual liberty against infringement from within and without the community.³¹⁵ Public power and actions had to be restricted to protect liberty, lest humans be subjected to the arbitrary will of the government.³¹⁶ Therefore, classical liberalism favoured the idea of a minimal state, whose functions were limited to providing basic infrastructure and personal security in order to facilitate individual self-determination. It relied heavily on a negative theory of liberty, where the government's primary role was to prevent arbitrary influence or coercion of individuals by the state or other individuals.³¹⁷

Modern liberalism has a more sympathetic approach to state interference, as it recognises a tension between ensuring the most benefit to any individual person and the most benefit to all individuals as a community.³¹⁸ Nevertheless, liberalism's focus on individual autonomy aligns it neatly with the

³¹⁰ Held, above n 36, at 14; for further discussion of classical and medieval democracies, see at 36 and Dahl, above n 99.

³¹¹ Heywood, above n 322, at 29.

³¹² Held, above n 36, at 58-59. This abstraction occurred against the backdrop of the Protestant Reformation, which challenged the authority of the Church and promoted the person as an individual, alone before God and responsible for their own actions.

³¹³ Dyzenhaus, above n 38, at 137.

³¹⁴ Locke, above n 37, at §§ 94-97, 143; Held, above n 36, at 45.

³¹⁵ Held, above n 36, at 262.

³¹⁶ Constant, above n 40, at 316-317. Another reason to stress individual liberty is the idea that humans are fundamentally rational creatures. We discuss and analyse our environment and relationships, and the success of the human species rests at least in part on our ability to reason. Therefore, as John Stuart Mill argues, in order to form an independent mind and autonomous judgement, we must be able to think, discuss, and act freely. Liberty is a condition of a rational community, Held, above n 36, at 79.

³¹⁷ Isaiah Berlin *Four Essays on Liberty* (Oxford U.P., New York [etc.]; London, 1969), at 129-134.

³¹⁸ This is illustrated by the Tragedy of the Commons, see Hardin, above n 45, at 1243-1248.

democratic ideals of intrinsic moral equality and self-governance. For that reason, liberal democracies are virtually ubiquitous among democratic nations.³¹⁹

4.1.1.3 Representative Government and Majoritarianism

Modern democratic systems operate on a scale that does not allow every citizen to participate in decision-making, nor is it viable to only make decisions that have universal agreement. In order to uphold democratic ideals, these systems have to compromise in order to protect individual autonomy and self-determination while maintaining an efficient governance and decision-making process. Citizens elect representatives who make decisions on the population's behalf, and decisions do not have to be unanimous in order to make governance processes viable.

In his Gettysburg Address, Abraham Lincoln famously proclaimed a "government of the people, by the people, for the people."³²⁰ Ideal democracy consists of full political equality. According to Dahl, that means that all adult members of society can effectively participate in the decision-making process, have equal say in the outcome of the process, have opportunity to inform themselves sufficiently, and can control the agenda.³²¹ Of course, no democratic government has ever lived up to this standard, nor is it realistic that one ever will.³²² The size of the population of modern states and the sheer number of decisions that have to be made on a daily basis render an ideal democracy on a nation state level practicably impossible.

Governance requires constant and detailed decision-making. Much of the population has neither the time nor the will to be involved in the day-to-day governance of a nation. In fact, requiring unanimous consent from all members of society on every decision would paralyse the decision-making process.³²³ Modern democracies therefore leave governing to a group of professional decision-makers. These are chosen by the people in regular elections and act as representatives of the various interests present in society. Representative government therefore enables democratic decision-making across large populations and territories.³²⁴ Democratic elections enable the population to voice their preferences

³¹⁹ Heywood, above n 322, at 226.

³²⁰ Abraham Lincoln "Gettysburg Address" (19 November 1863) National Geographic Society <nationalgeographic.org>.

³²¹ Even the quintessential example of direct democracy in ancient Athens, which included all of its 6000 eligible citizens in its governance structure, participation was not universal; women, slaves, and foreign residents were excluded from eligibility, see Dahl, above n 99, at 43.

³²² Heywood, above n 322, at 53.

³²³ At 322, at 225.

³²⁴ Thomas Paine *The Rights Of Man* (Infomotions, Inc., South Bend, 2000), at 90. James Madison believed that the larger the population and territory, the more representative the system becomes; larger populations require a larger number of representatives, which likely increases diversity. Moreover, he said that the larger the population, the more likely it produces capable representatives, see Held, above n 36, at 73.

by choosing representatives who will act in their interests, preserving to an extent every person's autonomy and right to self-determination.

Representative democracy is a compromise of convenience. By delegating their decision-making powers to their representatives, the people relinquish most of their control over their own governance. They revert to being the subjects of decisions, rather than their authors.³²⁵ In order to preserve the democratic legitimacy of the system, the election of the representatives must adhere to certain principles, so that the results reflect the will of the people as closely as possible. Elections by themselves are not necessarily free and fair, and thus not democratic. Elections must be general, direct, free, equal, and secret to be considered democratic:³²⁶

These principles ensure that all members of society have an equal ability to directly choose their representative without coercion and to have their preferences become part of decision-making. Elections reduce the number of decision-makers significantly and make governance logistically easier and more efficient. But even a small number of representatives will have difficulties coming to unanimous decisions, particularly as they are representing a variety of different preferences and interests. For that reason, majoritarianism is a commonly accepted tool in modern democracies; instead of unanimous agreement, a majority agreement suffices.³²⁷ Even if the decision does not meet the will of every member of society, it is considered democratic as long as the decision-making process allowed for sufficient consultation and debate.³²⁸

4.1.2 Constitutionalism

Despite democracy's aim to facilitate self-governance and equal power distribution, the size and complexity of modern societies requires governing power to be delegated to and concentrated in a

³²⁵ see Jürgen Habermas "On the Internal Relation Between the Rule of Law and Democracy" in Richard Bellamy (ed) *Constitutionalism and Democracy* (Ashgate, Burlington, 2006) 267-275, at 272.

³²⁶ 1. Elections must be open to all members of society or at least to those affected by the decisions of the representative (*general*);
2. the vote must directly contribute to the election, rather than through an agent who may vote differently to the principal (*direct*);
3. the voters must be free of coercion when making their choice (*free*);
4. each vote must bear equal weight (*equal*); and
5. elections must be held by secret ballot and no voter must be compelled to disclose their vote (*secret*), Aalt Willem Heringa *Constitutions Compared: an Introduction to Comparative Constitutional Law* (4th ed, Intersentia Ltd, Cambridge, 2016), at 101; see for example Basic Law for the Federal Republic of Germany (DE) (*Grundgesetz der Bundesrepublik Deutschland*), art 38.

³²⁷ Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4th ed, Oxford University Press, Melbourne, 2004), at 22. Different majorities are employed throughout democratic systems: 1) simple majorities, in which the decision with the most vote wins irrespective of the amount of votes it received; 2) absolute majorities, where the vote which received more than 50% of the overall vote cast wins; and 3) qualified majorities, in which the vote wins that exceeds a predetermined percentage of the overall vote.

³²⁸ Heringa, above n 326, at 98.

relatively small group of representatives and bureaucrats. This power concentration, and the associated need for majority decision-making, threatens to undermine the principles of democracy. The purpose of constitutionalism is to mitigate these threats.

From a narrow view of the term, a constitution creates, structures, and defines government power and authority.³²⁹ For the purposes of this thesis, however, a broader definition is necessary. Constitutionalism in a broader sense does not only require government powers to be defined, they must also be limited by 'rules of power', which generally take the form of some kind of law.³³⁰ While this law can be written in a central document of fundamental laws, its scope is usually much broader. It comprises fundamental rules from such diverse sources as a central constitutional document, ordinary legislation, case law, constitutional conventions, and even international law.³³¹

The aim of constitutionalism is to establish governmental institutions and to create a legal framework within which the institutions must operate. In this way it confers legitimacy to a system of government: governance is bound by rules that a) have been created (or indirectly acquiesced to in the case of case law, delegated law, and conventions) by the elected representatives of the people, and which therefore b) have been implicitly accepted by the governed.³³² The purpose of constitutionalism is therefore to impose limits on government and prevent the arbitrary use of public powers against private interests.

4.1.2.1 Institutional and Human Rights Law

Constitutions create a framework for governance in two ways: by regulating how the government and its institutions are organised (institutional law), and by protecting individual rights against the influence of the state by regulating the relations between public power and the individual (human rights).³³³ A fundamental pillar of institutional law is the separation of government institutions into three branches: the law-making legislature, the law-implementing executive, and the dispute-

³²⁹ Waluchow, above n 100.

³³⁰ Carol Harlow and Richard Rawlings *Law and Administration* (3rd ed, Cambridge University Press, Cambridge; New York, 2009), at 4, Heywood, above n 322, at 143.

³³¹ Some languages specifically distinguish between the central written constitutional document and the general body of constitutional law. For example, in Germany the collection of constitutional principles and laws is called "*Verfassung*", whereas the central constitutional document is the "*Grundgesetz*"; similarly, Swedish refers to its broad constitution as "*författning*" and to its collection of formal constitutional statutes as "*grundlagar*", see Heringa, above n 326, at 5.

³³² Heywood, above n 322, at 143.

³³³ Heringa, above n 326, at 4. Shane breaks down these categories further into:

- 1.) Implementing the key founding bargains (i.e. values of society),
- 2.) Structuring the exercise of power (i.e. organising the institutions of government),
- 3.) limiting the exercise of power (i.e. Protecting individual rights, and
- 4.) creating affirmative obligations to the citizenry (i.e. public welfare), Peter Shane "Analyzing Constitutions" in RAW Rhodes, Sarah A Binder, and Bert A Rockman (eds) *The Oxford Handbook of Political Institutions* (Oxford University Press, Oxford, 2006) 191-216, at 194-202.

adjudicating judiciary. This separation is meant to prevent the accumulation of too much power within a single institution.³³⁴ In order to ensure the separation of powers and the resulting decentralisation of power, James Madison was of the opinion that "you must first enable the government to control the governed; and in the next place, oblige it to control itself."³³⁵ It is not enough to distribute and dilute government powers, the institutions must also be able and obligated to control each other by way of a system of checks and balances.³³⁶

The concept of human rights originates from the concept of natural law and was popularised in political theory by liberal thinkers during the European Enlightenment period. It posits that a higher law exists that confers both obligations and rights on humans, either because of divine will, or because they are inherent in humans as beings of reason.³³⁷ Human rights therefore act as a check on political authority and are thus a pre-requisite for limited government. Human rights are generally believed to be both universal and fundamental: they are universal because they are inherent in every human, irrespective of gender, race, status, or other intrinsic factor; and they are fundamental as they cannot be relinquished or revoked.³³⁸

The protection of individual and human rights has grown in significance since the second half of the twentieth century. Provisions for the protection of some civil and political rights have existed in some modern constitutional documents since the late 18th century, for example in the French *déclaration des droit de l'homme et du citoyen* 1789 and the United States Bill of Rights 1791.³³⁹ In response to

³³⁴ The concept originates with Enlightenment thinkers such as Locke and Montesquieu, who believed that due to their inherently self-interested nature, humans were prone to corruption. A person with the power to create rules and implement them will be tempted to make and implement rules that benefit them specifically rather than the community as a whole. Similarly, a person with the power to adjudicate would have arbitrary control over rules were they also able to legislate; and they could enable the arbitrary implementation of rules had they executive powers. Governing powers must therefore be diluted and "so distributed and organised that whoever is tempted to abuse it finds legal restraints on his way."Held, above n 36, at 64; Charles de Secondat baron de Montesquieu *The Spirit of Laws* (MobileReference.com, Boston, 2010), at 242-244; John Plamenatz *Man and Society: a Critical Examination of Some Important Social and Political Theories from Machiavelli to Marx* (Longmans, London, 1963), at 292-293.

³³⁵ James Madison "Federalist No 51" in Alexander Hamilton, James Madison, and John Jay (eds) *The Federalist Papers* (Palgrave Macmillan, New York, 2009).

³³⁶ Such checks and balances can take the form of requiring cross-institutional cooperation (e.g. the nomination of judges to the United States Supreme Court, which requires the approval of the US Senate, Constitution of the United States (US), Art II) or the ability of one institution to interfere in the decision-making of another (e.g. the ability of some Heads of States to veto parliamentary legislation, see e.g. Basic Law for the Federal Republic of Germany (DE), Art 82, Constitution Act 1986 (NZ), s 16), among other things.

³³⁷ Brian Bix *Jurisprudence: Theory and Context* (6th ed, Sweet & Maxwell/Thomson Reuters, London, 2012), at 68-69.

³³⁸ Raymond Wacks *Understanding Jurisprudence: an Introduction to Legal Theory* (New York, Oxford, 2012), at 239; Heywood, above n 322, at 188.

³³⁹ Some quasi-human rights guarantees appear earlier in European constitutional history, such as the right of habeas corpus in the Magna Carta 1215. However, they were sporadic and rare, and did not apply universally to all people.

the atrocities committed during World War II and the proliferation of liberal democratic principles around the world, an effort was made to promote human rights and a wave of international human rights instruments appeared, such as the Universal Declaration on Human Rights in 1948,³⁴⁰ the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1953,³⁴¹ and the International Covenant on Civil and Political Rights in 1966.³⁴² These included not just negative political rights, but also positive economic, social, and cultural rights.³⁴³ In addition to classical political rights, many modern constitutions therefore include such rights as the right to education,³⁴⁴ employment,³⁴⁵ public health,³⁴⁶ and welfare,³⁴⁷ among others.³⁴⁸

4.1.2.2 The Common Denominator: The Rule of Law

The implementation of constitutionalism varies greatly between modern democracies. For example, the United States Constitution adheres strongly to both the concepts of separation of powers and checks and balances. The legislature and executive are chosen in separate democratic elections (this also applies to some extent to the judiciary) and they have strong requirements of cooperation. Examples are the Senatorial confirmation of presidential appointments of a range of high ranking public officials,³⁴⁹ and the presidential power to veto bills passed by the United States Congress.³⁵⁰

Parliamentary systems, on the other hand, separate powers to a lesser extent. The head of government is usually not directly elected but rather chosen by a majority of parliament, and thus commands a parliamentary majority.³⁵¹ There is also generally no personnel separation between the legislature and the political executive, as the head of government and other executive members are also members of parliament. This is further exacerbated in parliamentary systems that follow the Westminster system, in which parliament can enjoy virtually unlimited decision-making powers,

³⁴⁰ Universal Declaration of Human Rights GA Res 217A (1948).

³⁴¹ European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953) .

³⁴² International Covenant on Civil & Political Rights GA Res 2200A (XXI) (1966).

³⁴³ Wacks, above n 338, at 239

³⁴⁴ E.g. Constitution of Ireland (IE), Art 42.

³⁴⁵ E.g. Basic Law for the Federal Republic of Germany (DE), Art 12.

³⁴⁶ E.g. Constitution for the Kingdom of the Netherlands (NL) (*Grondwet voor het Koninkrijk der Nederlanden*), Art 22.

³⁴⁷ E.g. Basic Law for the Federal Republic of Germany (DE), Art 20.

³⁴⁸ In recent years, a third generation of human rights innovations has emerged. It adds collective rights to the existing catalogue of human rights, such as rights to social and economic development and the protection of the environment, Wacks, above n 338, at 239.

³⁴⁹ Constitution of the United States (US), Art II, section 2.

³⁵⁰ At , Art I, section 7.

³⁵¹ Although in many systems a separate Head of State has the power to veto parliamentary legislation before it comes into effect, this power is rarely or never used, see for example John E Martin "Refusal of assent – a hidden element of constitutional history in New Zealand" (29 January 2016) New Zealand Parliament Pāremata Aotearoa <www.parliament.nz>.

regulated only by rules it sets for itself. The United Kingdom and New Zealand are examples of this parliamentary supremacy, where the only accepted limitation on parliament is that it cannot bind future parliaments in order to ensure their limitless decision-making powers.³⁵²

Similarly, some constitutions elevate certain constitutional rules to status superior to ordinary parliamentary legislation and allow their courts to review and even overturn ordinary legislation.³⁵³ In other jurisdictions, the judiciary does not directly act as a check on the legislature but can only comment on the constitutionality of legislation.³⁵⁴

Despite these differences, there appears to be no direct correlation between adherence to any particular constitutional mechanism, such as the strict separation of powers or the ability for the judiciary to act as a check on the legislature, with the effectiveness of constitutionalism to guarantee democratic principles. The most democratic countries on the Economist Intelligence Unit's Democracy Index consist of a range of political and constitutional systems.³⁵⁵

One of the major purposes of constitutionalism is to create 'rules of power' in order to facilitate and limit the operations of government. This is similar to the narrow concept of the rule of law. The rule of law has long been regarded as a constituent part of the English constitution.³⁵⁶ It is a much-discussed concept and its specific meaning and extent are widely debated.³⁵⁷ At its core, however, rests the idea that any government is bound by the law and any government action must be sanctioned by a legal rule. This idea can also be found in other European constitutional systems, such

³⁵²Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1915), at 66 (n3); the limit on not binding future parliaments is not uncontested, see Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021), at 563-581.

³⁵³Heringa, above n 326, at 73. For example the United States and Germany allow courts to review parliamentary legislation, see *Marbury v Madison* 5 U.S. (1 Cranch) 137 (1803); Vicki C Jackson and Mark Tushnet *Comparative Constitutional Law* University Casebook Series (2nd ed, Foundation Press, New York, 2006), at 48. {, #241}, Arts 93(2), 100(1).

³⁵⁴See for example, the United Kingdom Human Rights Act 1998 (UK), s 4; and New Zealand *Attorney-General v Taylor* [2018] NZSC 104, [2019] 1 NZLR 213, at [65].

³⁵⁵For example, despite New Zealand's weak separation of power and lack of judicial oversight of Parliament, it ranked as the fourth strongest democracy in the world in 2020, Democracy Index 2020 - In sickness and in health?, above n 6, at 8-9.

³⁵⁶The phrase is often attributed to AV Dicey, but both the phrase and the concept have been known much longer, see Bingham, above n 100, at 3.

³⁵⁷A.V. Dicey described the rule of law in terms of private citizens' relation to the law: in his view, the rule of law protected people from arbitrary prosecution and penalisation by requiring the government to only do so based on pre-existing laws, as well as requiring every person to be treated equally before the law, irrespective of their social status or position, see Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* (7th ed, Macmillan and Co, London, 1908), at 183-190. However, due to its unclear definition, it has been used in a variety of different and sometimes unrelated contexts. This does not only make its application difficult, some commentators even regard it as a meaningless phrase, due to its unclear definition and overuse, see Bingham, above n 100, at 3-9; Judith Shklar "Political Theory and the Rule of Law" in Allan C Hutchinson and Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology* (Carswell, Toronto, 1987), at 1.

as the German *Rechtsstaat* and the French *État de droit*, both translating to ‘law-governed state’. It is also reflected in a range of international treaties such as in the preambles of the Universal Declaration of Human Rights and the European Convention of Human Rights. Thus, the rule of law is fundamentally related to democracy.³⁵⁸ If the members of a representative democratic society have delegated their self-governing powers to representatives and a government, that government must only act if the representatives have created an empowering law on behalf of the citizens.

It is likely that the effectiveness of any given system depends less on which approach to constitutionalism it takes and more to which extent the institutions of government are willing to adhere to the principles of constitutionalism and the constitutional rules and procedures established by the constitutional system. That means that the adherence to constitutional principles is of paramount importance to the operation of a constitutional system. Exceptionalism disrupts the integrity of constitutional principles. This may be acceptable in extreme circumstances when society or the constitutional system itself is in grave danger. But the ongoing normalisation of exceptionalism through riskification and reckless securitisation of economic issues can disrupt the integrity of constitutionalism and democracy unnecessarily, in some cases permanently.

4.2 Exceptionalism

In his seminal article *Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?*, Owen Gross characterises the states of democracy and emergency as existing in a tension of “tragic dimensions.”³⁵⁹ This tension arises out of our commitment to democracy and constitutionalism as the crucial normative basis for limiting executive power on the one hand, and the extraordinary requirements the executive may have in the face of an overwhelming crisis on the other.³⁶⁰ The constitutional order is vital for the stability of social and political foundations of society. Constitutional and democratic principles are designed to ensure consistent, transparent, and considerate decision-making.³⁶¹ The resulting processes deliberately bureaucratise and delay decision-making, to prevent

³⁵⁸ Murray Hunt, Hayley Jayne Hooper and Paul Yowell *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, Oxford, 2015), at 7.

³⁵⁹ Gross wrote the article in the wake of the attacks on the World Trade Center in 2001 and the subsequent invasions of Afghanistan and Iraq. The Bush Administration had made extensive use of extraordinary powers both domestically and in the context of so-called ‘enemy combatants’ and the constitutional discourse in the US (and elsewhere) turned to the question whether it was justified to violate democratic values in the name of the survival of the democratic and constitutional order itself, Gross, above n 227, at 1029.

³⁶⁰ Victor V Ramraj “Emergency Powers and Constitutional Theory” (2011) 41(2) HKLJ 165, at 168.

³⁶¹ At 360, at 168.

government from taking rash and imprudent actions. During crises, the potential need for swift and decisive government action challenges democratic decision-making and constitutional processes.

Riskification and securitisation are located right at the centre of this tension. Security issues are issues that pose an existential threat/risk to a valued good of society. The purpose of securitising an issue is to justify and legitimise the use of exceptional measures in order to address the security issue. As such, securitisation creates the perception of an emergency and claims (rightly or wrongly) that ordinary constitutional processes are insufficient to deal with the security issue. Emergency law is thus the necessary consequence of successful securitisation.

4.2.1 Purpose of Exceptional Powers

While constitutionalism and the rule of law are vital to the integrity of democracy, departure from their norms and principles during times of crisis may be justified according to Cicero's famous maxim *salus populi suprema lex esto*.³⁶² In this view, exceptional government is a form of self-defence, in which the state acts outside constitutional bounds in order to prevent harm to the population or the state.³⁶³ The tension between constitutionalism and exceptionalism can pierce the constitutional veil and expose the underlying structures of power and sovereignty.³⁶⁴ Even when the constitutional order of a state does not provide for the use of extraordinary powers,³⁶⁵ it is likely that when faced with an existential threat, any government will 'do what it takes' to protect the integrity of at least the state. In an emergency, sovereignty, in the form of immediate decision-making powers, shifts to the executive, be it by constitutional design or political reality.³⁶⁶

³⁶² "The well-being of the people should be supreme law", Marcus Tullius Cicero *De re publica ; De legibus ; Cato maior de senectute ; Laelius de amicitia* (Oxford University Press, Oxford, 2006), at 241.

³⁶³ Bonner, above n 299, at 2.

³⁶⁴ Lauts, above n 50, at 41.

³⁶⁵ For example, neither Norway, Denmark, Luxembourg, Sweden, nor Austria allow the use of extraordinary powers, see Ergun Özbudun and Mehmet Turhan *Emergency Powers* (European Commission for Democracy Through Law (Venice Commission), Strasbourg, 1995), at 2.

³⁶⁶ Most democracies consider the derogation from constitutional and democratic values and principles to be justified under certain circumstances. Many Western European systems permit a concentration and expansion of power of the executive in emergency situations by allowing derogations from basic human rights and departures from established constitutional norms and procedures, Bonner, above n 299, at 6. The United Nations *Study of the Right of Everyone to be free from Arbitrary Arrest, Detention and Exile* found that in the 56 countries it observed, a wide range of threats to the well-being of the people permitted the use of emergency powers: internal and external armed conflict, disturbance of the peace and public order, natural disasters, dangers to the economy, the maintenance of essential supplies and services, BWW Walke *Study of the Right of Everyone to be free from Arbitrary Arrest, Detention and Exile* (United Nations Commission on Human Rights, New York, 5 January 1962), at 21ff. Generally, when a threat to the well-being of the people or the state are identified, executive powers and discretion are expanded by transferring some decision-making powers from the legislature to the executive, Özbudun and Turhan, above n 365, at 3. Moreover, many human rights charters provide for the possibility of emergency powers if the life and existence of a nation is threatened, for example Art 4 of the International Covenant

In order to protect the integrity of the ordinary constitutional and democratic system during emergencies, Gross believes that the ultimate goal of exceptional powers must be conservative. Their purpose is to enable governments to prevent or mitigate physical, social, or economic harm to society. They are meant to protect the population and their assets. In other words, emergency powers exist to protect the status quo ante.³⁶⁷ The situation after the emergency is meant to be as similar as possible to the situation before the emergency. That means that exceptional powers should have two core features: 1) their use must protect the status quo ante and leave the normal constitutional system unchanged, and 2) they must be temporary.

Similarly, Locke believed that the original purpose of the royal prerogative, which he saw as the foundation of exceptional powers in times of crisis, was to restore the legal order. If a crisis meant that the legal order could not effectively protect the public good, then extra-legal discretion must be afforded to the executive.³⁶⁸ But since the legal order is fundamental to the public good in times of peace, the purpose of extra-legal executive discretion must be the preservation and restoration of the legal order and thus of liberty and security.³⁶⁹ To prevent lasting effects of the emergency regime, the legal order must be insulated from actions taken under extraordinary powers.³⁷⁰

Therefore, the temporary and limited nature of exceptional powers is an important part of the dichotomy dialectic.³⁷¹ The distinction between normalcy and exception only makes sense if exceptional powers and their effects are clearly delineated from the ordinary. If aspects of exceptional government influenced the ordinary government, it would not be exceptional. Indeed, Locke thought that if extraordinary powers were not used to further public good, they could not be based on a legitimate constitutional prerogative at all. Instead, they were tyrannical acts against which the people had a right to revolt.³⁷²

on Civil & Political Rights GA Res 2200A (XXI) (1966) International Covenant on Civil & Political Rights GA Res 2200A (XXI) (1966), Art 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953) European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953) , and Art 27 of the American Convention on Human Rights UNTS 1144 (opened for signature 22 November 1969, entered into force 18 July 1978).

³⁶⁷ Gross, above n 298, at 1834.

³⁶⁸ Locke, above n 37, at [160].

³⁶⁹ Douglas Casson "Emergency Judgment: Carl Schmitt, John Locke, and the Paradox of Prerogative" (2008) 36(6) *Politics & Policy* 944, at 953

³⁷⁰ Ferejohn and Pasquino, above n 103, at 232.

³⁷¹ Oren Gross "'Once More unto the Breach': The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies" (1998) 23(2) *Yale JInt'lL* 438, at 454-455.

³⁷² Casson, above n 369, at 948.

In contrast, Carl Schmitt believed that rather than conservative and temporary, exceptional powers could be transformative and innovative, and that they were necessary to bring structural change to progressive societies.³⁷³ In his view, the use of exceptional powers was a political choice and thus part of the normal powers of the sovereign. As such, Schmitt rejected the Normalcy-Exception Dichotomy in favour of a dictatorial approach to exceptionalism. In order to respond to current threats and to secure future good, the sovereign must have access to extraordinary powers at any time.³⁷⁴ However, from a liberal democratic perspective it is difficult to agree with Schmitt's views of exceptionalism.³⁷⁵ It fundamentally contradicts liberal adherence to democratic and constitutional principles. If extraordinary measures can permanently change the constitutional order, the people's autonomy to govern themselves is undermined.

Nevertheless, increasing risk aversion of the population and securitisation of political issues by governments have led to increasingly frequent use of exceptional measures. This normalisation of extraordinary measures calls into doubt the temporary and conservative nature of exceptionalism. If such measures become so frequent that they become part of the ordinary system, they will permanently change the system. Therefore the current trend of securitising ordinary non-existential issues may yet lead to the collapse of the normalcy-exception dichotomy.

4.2.2 Constitutional and Democratic Legitimacy

Unlike Locke and Schmitt, most modern scholars believe that exceptional powers should be explicitly provided by the legislature.³⁷⁶ Exceptional powers are not inherent to the executive but rather placed on them by the legislator or the constitution. The executive remains under some constitutional control, even if its exceptional powers may be exceedingly broad in times of crisis. In the context of constitutional law in the influence sphere of Common Law, martial law is an example of such a regime; other examples are the emergency regime of the Roman Republic and its modern ancestor, the Neo-Roman emergency regimes. Nowadays however, the most common emergency regime within the legal order is the legislative model, which provides exceptional powers simply by way of ordinary legislation.

³⁷³ John P McCormick "The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers" (1997) 10(1) CJLJ 163, at 166, 167.

³⁷⁴ Schmitt's approach to emergency powers and sovereignty are discussed below.

³⁷⁵ However, in the wake of the terrorist attacks on the World Trade Centre and the subsequent 'War on Terror', Schmitt's writings have experienced somewhat of a revival, particularly among US scholars, see Casson, above n 369, at 945 with further references.

³⁷⁶ Lauta, above n 50, at 54. A prominent contemporary proponent of extra-constitutional exceptionalism is Oren Gross, Gross, above n 227, at 1089-1095.

4.2.2.1 Martial Law and State Necessity

Martial law is a radical form of prerogative power tied closely to military rule, as it only arises in times of invasion or insurrection.³⁷⁷ Dicey described it as "the power, right, or duty... of the government, to maintain public order... at whatever cost of blood or property may be in strictness necessary for that purpose."³⁷⁸ Martial law extends virtually unlimited powers to the government curbed only by its purpose of maintaining public order in times of violent conflict within State borders. It strongly resembles Locke's prerogative power, with a similar limitation by its purpose to protect the public good. For that reason, Dicey struggled with the concept for much of his career. He initially believed that martial law was unknown to England because it was incompatible with both the rule of law and parliamentary sovereignty; but by the time he wrote his final edition of his seminal textbook on constitutional law *Introduction to the Study of the Law of the Constitution*, he acknowledged the political reality of its existence.³⁷⁹

Despite its apparent proximity to Locke's prerogative, Dicey believed that martial law was not a purely political power in the way that Locke's prerogative was. Rather, it was derived from urgent and paramount immediate necessity due to violent conflict on domestic soil.³⁸⁰ While this gives the appearance that martial law is related to the constitutional concept of state necessity and thus a prerogative of the Crown, Dicey believed that it derived from the *common law concept of necessity*.³⁸¹ Necessity allowed individuals to derogate from legal norms during an emergency, if adhering to the norm would cause a great harm. Therefore, during a violent conflict, every royal subject had the right and duty to preserve and restore the Monarch's Peace. Dicey believed that during emergencies it was therefore incumbent on any person within the government and the military to act as individual citizens according to the law of necessity. They could do this by declaring martial law.

Consequently, martial law justifies any action required by the necessity of the emergency. Since the right and duty to act in necessity resides within the individual, the burden of proof to show that the action was justified also lies with the individual. As such, necessity both enables and limits martial law.³⁸² Only strictly necessary actions are justifiable. That means that it may, for example, be inappropriate to apply Martial Law to the entire country if only a small contained part is affected by the violent conflict.³⁸³ It also puts a temporal limit on martial law, as it becomes unnecessary once the

³⁷⁷ Dicey, above n 352, at 539; Lauterbach, above n 50, at 44.

³⁷⁸ Dicey, above n 352, at 539.

³⁷⁹ Dyzenhaus, above n 38, at 17.

³⁸⁰ Dicey, above n 352, at 539.

³⁸¹ At 352, at 539-540. Necessity as a legal concept exists both in Common Law and Civil Law jurisprudence, Lauterbach, above n 50, at 55.

³⁸² Dicey, above n 352, at 541.

³⁸³ At 352, at 542.

violent conflict ceases. These limitations can be judged and enforced retrospectively by courts during times of peace.³⁸⁴

As martial law is a wartime power, it cannot exist during peace time. It is therefore not applicable in crises other than invasion or insurrection.³⁸⁵ Moreover, necessity only applies to members of the executive individually, not to the executive as an institution. During non-violent emergencies, however, the executive may have recourse to exceptional powers through the doctrine of “state necessity”. In contrast to civil necessity, which is an established and formalised part of the legal order, state necessity sits somewhere in the grey area of prerogative powers, between constitutionality and extra-constitutionality.³⁸⁶ State necessity is available in circumstances in which immediate action is imperative to the protection and preservation of some vital function of the State. It can only be employed for the purposes of promoting peace, order, and good government and must not be used to impair citizens' rights or to consolidate or strengthen a revolution or usurpation.

The doctrine has mainly been used to deal with constitutional crises. For example, in 1954 the Governor-General of Pakistan dissolved the Constituent Assembly of Pakistan. He claimed that the Constituent Assembly was dysfunctional and that a new Assembly needed to be elected. The Constituent Assembly had previously amended the Government of India Act 1935 (Imp) and stripped the Governor-General of the power to dissolve the Assembly.³⁸⁷ Federal Court of Pakistan recognised the Governor-Generals right to dissolve the assembly due to necessity, because the Constituent Assembly had failed to produce a constitution for Pakistan after seven years and had become unrepresentative of the people.³⁸⁸

In another example, the Supreme Court of Canada held in *Re Manitoba Language Rights*, that a range of unconstitutional statutes and regulations in the Province of Manitoba would be deemed valid temporarily due to state necessity.³⁸⁹ Section 23 of the Manitoba Act 1870 (CA) required that all statutes and regulations must be printed in both the English and French languages. Although most statutes had only been printed in one language, the court said that invalidating them would create a legal vacuum in the province. These examples show that the doctrine of state necessity could be used to justify exceptional executive action if an emergency would threaten the State's integrity or functionality.³⁹⁰

³⁸⁴ At 352, at 545-547.

³⁸⁵ At 352, at 544.

³⁸⁶ Joseph, above n 352, at 719.

³⁸⁷ Mark M Stavsky “The Doctrine of State Necessity in Pakistan” (1983) 16(2) Cornell IntLJ 341, at 364-365.

³⁸⁸ *Governor-General's Case* PLD 1955 FC (Pak), at 486-488.

³⁸⁹ *Re Manitoba Language Rights* [1985] 1 SCR 721, at 724.

³⁹⁰ Joseph, above n 352, at 723-724.

Both martial law and state necessity are anchored within the constitutional system and therefore subject to constitutional review mechanisms such as judicial review and parliamentary oversight. Beyond that, however, the powers extended under these constitutional concepts is guided and limited only by what seems necessary to the executive during a crisis.

4.2.2.2 The Neo-Roman Model

Despite Dicey's protestations, his conception of martial law is more political than legal. The executive and/or military unilaterally seizes absolute power without express constitutional mandate. It is thus more akin to Locke's prerogative than to a constitutionally regulated power. In contrast, the Neo-Roman model explicitly provides for the use of extraordinary powers in its constitutional system; the executive is empowered by legal provisions to use any extraordinary measures necessary to avert the emergency and return the state to its *status quo ante*.

The Neo-Roman model is based on the emergency approach of the Roman Republic (ca 509-27 BCE). The Roman Republic had an ever-evolving, precedent based constitutional system in which several institutions such as consuls and magistrates, the Senate, and several legislative assemblies shared governance of the republic. Some of the positions were elected in a proto-democratic fashion, and some constitutional procedures and protections existed in order to limit each institutions power and curb abuses of power. However, during times of crisis the Senate could appoint a so-called "dictator", who would resume full executive and legislative authority over the republic.³⁹¹ The purpose of the dictator was to avert the crisis and to return the republic to its ordinary constitutional order, by any means necessary. As such, the dictator stood outside the constitutional order and their powers were only limited by the purpose their purpose, i.e. whether the exceptional action was harmful to the State or whether it was restoring it.³⁹² However, their powers were temporal; any changes made under the dictatorship were reversed as soon as the crisis was averted, and the dictator relinquished their powers back to the republic.³⁹³ The constitutional order was therefore insulated from cross-contamination by extraordinary measures taken during the emergency. The separation between the declarator of emergencies and the dictator as well as the transient nature of any emergency measures illustrate the clear separation between the normalcy of the Roman Republic and the exception of the dictatorship.

³⁹¹ John Ferejohn and Pasquale Pasquino "Emergency Powers" in Robert E Goodin (ed) *The Oxford Handbook of Political Theory* (Oxford University Press, Oxford, 2006) 333, at 338.

³⁹² McCormick, above n 373, at 164. The Senate retained some influence over the dictator during the crisis by controlling their budget.

³⁹³ Gross, above n 298, at 1837-1838.

The Roman model was brought into modernity by political philosophers such as Machiavelli and Rousseau.³⁹⁴ A major difference between the Neo-Roman model and its predecessor is that the emergency in the Roman Republic was declared by the Senate; in Neo-Roman emergency models the executive declares the emergency and wields the extraordinary powers. As such, the separation between the entity that declares an emergency and the entity that wields emergency powers is abandoned.³⁹⁵ There is also no institutional separation between the ordinary and the exceptional government, as the ordinary executive wields extraordinary powers during the emergency. This creates a potential conflict of interest: the executive imbues itself with extraordinary powers.

Neo-Roman models tend to rely on ex ante constitutional procedures to provide checks on the use of extraordinary powers.³⁹⁶ Specifically, an Enabling Act or some other constitutional provision to empower the executive, thereby specifying the circumstances under which the executive may declare a state of emergency; this places the emergency regime within the ordinary constitutional order and thus creates some legitimacy for the use of the extraordinary powers. Neo-Roman enabling provisions are generally situated at the constitutional rather than the parliamentary legislative level, are entrenched, and are thus a more permanent part of the constitutional structure than ordinary laws. They limit the executive's choice of the circumstances in which it can declare emergencies and may also define the purpose and, at times, the extent of exceptional powers available to the executive.³⁹⁷

The Neo-Roman model has two major weaknesses. Firstly, it is not easy to determine prior to a crisis which powers are necessary for the executive to have.³⁹⁸ Constitutional enabling provisions therefore tend to be exceedingly broad. The result is that the executive has few limitations when given with emergency powers and the extent of these powers may be disproportionate to what is needed in the situation. Secondly, the model has difficulties with coping with long-term crises, such as climate change, economic crises, or terrorist threats.³⁹⁹ The model is designed for emergencies that can be dealt with in a specific, usually short, time frame. Empowering the executive for an extended time, as may be necessary in long-term crises, undermines democracy to an unreasonable extent.⁴⁰⁰

³⁹⁴ Ferejohn and Pasquino, above n 103, at 213; Niccolò Machiavelli *The Discourses* (Bernard R Crick (ed), Penguin Books, Harmondsworth, 1970), at 1513-1517; Rousseau, above n 306, Book IV Chapter VI. It strongly influenced Schmitt's 'commissarial dictatorship', Gross, above n 298, at 1834-1835.

³⁹⁵ Lauterbach, above n 50, at 54.

³⁹⁶ Ramraj, above n 360, at 170.

³⁹⁷ Lauterbach, above n 50, at 54.

³⁹⁸ Ferejohn and Pasquino, above n 103, at 228.

³⁹⁹ At 103, at 228.

⁴⁰⁰ Ackerman suggests a so-called 'super majoritarian escalator' to prevent scenarios in which emergency powers extend ad infinitum. The executive's emergency empowerment should be initially limited to a certain timeframe. If at the end of the period the executive believes that it requires more time to deal with

4.2.2.3 Legislative Model

Although the Neo-Roman model places exceptional powers within the legal order and thus makes it subject to oversight, it still lacks significant safeguards against potential abuses. The executive determines the need for exceptional powers itself while the legislature and judiciary have very little effective oversight. Most importantly, the Neo-Roman model, just like martial law, provide only for very vague and thus overly broad extraordinary powers.

For that reason, most modern democracies tend to use the so-called legislative model of providing exceptional powers in times of crises. Rather than creating a broad constitutional emergency power for the executive, emergency powers are embedded into the legal order, either by convention or case law, but most commonly by parliamentary statute.⁴⁰¹ This gives extraordinary power a degree of democratic legitimacy: even though the powers enable the executive to act outside ordinary bounds, it is still acting within a parliamentary mandate and is thus controlled by parliament *ex ante*.⁴⁰² Similar to the emergency model of the Roman Republic, the representative political body (parliament) gives up power to the executive voluntarily. But since the executive still has to act within the ordinary constitutional system, democratic and constitutional mechanisms are largely preserved. The executive continues to operate in a manner that is mostly consistent with the rule of law.⁴⁰³

By keeping exceptional powers within the constitutional system, oversight functions of the legislature and the judiciary are also preserved. As the powers are provided by parliamentary legislation, the legislature can at any time withdraw the powers with a simple majority decision.⁴⁰⁴ The judiciary is well placed to oversee executive action during crises, as judicial review of executive actions is one of its functions during ordinary times as well. It can control the executive more specifically than the legislature, as it can prevent specific actions or compel the executive to act in certain ways, whereas the legislature is limited to taking broader and abstract measures.⁴⁰⁵

The legislative model thus rests on both a positive and a negative belief: the positive belief that using ordinary parliamentary processes to confer exceptional powers constrains the executive and provides

the crisis, the legislature must approve. In order to prevent the situation where the executive's party controls the legislature, the majority required to extend the executive's powers increases each time it votes to extend the powers (e.g. from 50% to 60% to 70% etc, each time the executive asks for the exceptional powers to be extended). This would emphasise the temporal nature of emergency powers and strengthen the legislature's oversight over the executive's use of exceptional powers. However, the super majoritarian escalator has not been adopted by governments around the world, Bruce Ackerman "The Emergency Constitution" (2004) 113(5) Yale LJ 1029, at 1047.

⁴⁰¹ Ferejohn and Pasquino, above n 103, at 217.

⁴⁰² At 103, at 235.

⁴⁰³ Ramraj, above n 360, at 169.

⁴⁰⁴ Ferejohn and Pasquino, above n 103, at 217.

⁴⁰⁵ Ramraj, above n 360, at 169.

more democratic legitimacy to exceptional actions; and the negative belief that adhering to democratic and constitutional principles during crises will reduce the likelihood that the executive will corrupt the ordinary legal system with its exceptional powers.⁴⁰⁶ Its appeal lies in the compromise between efficiency in the face of a crisis and the preservation of democratic and constitutional norms. This has made the legislative model the most widely used approach to dealing with emergencies in modern democracies.⁴⁰⁷

The legislative model of exceptionalism is most popular around modern democracies because it creates the least tension between democratic and constitutional principles on the one hand, and the need for exceptional action during emergencies on the other. Exceptional powers are created by the popularly elected legislature by way of legislative provisions. Unlike many other models of exceptionalism, where the executive has almost entirely free reign regarding the extent to which it can use exceptional powers, in the legislative model the legislature provides the parameters within which the executive can act. The democratic integrity of the constitutional system is therefore better protected.

Despite these advantages, the legislative model is not without risks. Emergency legislation carries an inconspicuous but subversive and insidious danger. Because exceptional powers are provided within the ordinary legal system, they become embedded within it.⁴⁰⁸ Because of the proliferation of exceptional emergency provisions within ordinary legislation, and because ordinary legal language is used to describe them, the provisions become increasingly hard to detect. They are not always part of a specifically designated emergency statute, and they may not even be signposted as exceptional legislation at all. Exceptional provisions therefore become part of the ordinary legislation system and are therefore normalised.

This is illustrated in the "Interim Report on the Inquiry into Parliament's legislative response to future national emergencies" by New Zealand's Regulations Review Committee.⁴⁰⁹ The report identified 59 pieces of legislation that contain "statutory powers of those exercising public powers in an emergency." The powers identified were typical extraordinary powers, such as ones relating to civil defence, health epidemics, industrial accidents, and war. Notably, however, it did not include powers created by the Canterbury Earthquake Recovery Act 2011 (NZ). The Act had been passed to facilitate the timely recovery of the Canterbury region following the devastating earthquake in February 2011.

⁴⁰⁶ Ferejohn and Pasquino, above n 103, at 219.

⁴⁰⁷ Özbudun and Turhan, above n 365, at 2.

⁴⁰⁸ Ferejohn and Pasquino, above n 103, at 219.

⁴⁰⁹ *Inquiry into Parliament's legislative response to future national emergencies - Interim report of the Regulations Review Committee* (Regulations Review Committee, Wellington, 7 May 2015).

The Act included a wide range of exceptional powers, some of which exceeded even those provided during the response phase of a civil defence emergency. As the Act was intended to facilitate recovery, the powers were not linked to a state of emergency. They were also not specifically designated as exceptional powers. Consequently, the parliamentary Regulations Review failed to identify the powers of the CER Act as exceptional.⁴¹⁰

While the legislative model therefore *appears* to be the ‘solution’ to the tension between democracy and exceptionalism, it has the potential to normalise exceptional powers and thus to undermine democratic and constitutional principles. In the context of riskification and securitisation, the legislative model enables the state to create lasting changes to the legal and constitutional system by way of legislation passed under the pretext of exceptional circumstances. Riskification and securitisation of issues creates the public perception that exceptional measures are necessary to avert an existential threat/risk. Although this may be true at times, it also allows governments to create a false perception of a security risk in order to use exceptional means to further their ordinary political agenda. The legislative model of exceptionalism provides for such exceptional means through ordinary legislation, which can normalise them and make them not exceptional.

4.3 Summary

This chapter showed that securitisation of issues by way of false or exaggerated risk rhetoric has the potential to undermine the normalcy-exception dichotomy. Constitutional processes are vital for facilitating and protecting liberal democracy and individual self-determination. During ordinary times, they determine how and to what extent public powers may be used. However, limited public powers may not be sufficient to deal with existential threats to life and property caused by crises. In certain extreme situations, it may therefore be justified to exceed the limits of public power and modify or even suspend constitutional procedures to be able to react appropriately to the crisis. Traditionally, such exceptional measures are only justified if they are strictly necessary in the face of the crisis and if they are merely temporary, i.e. only available as long as is necessary.

The outcome of successful securitisation is exceptionalism. In cases of real existential threats, securitisation is justified. However, successful securitisation does not require a real existential threat. As was shown in Part 1, securitisation only requires the public’s perception of a potential existential

⁴¹⁰ The committee rectified this oversight in the Final Report, which devoted a part specifically to the Canterbury Earthquake Recovery Act, *Inquiry into Parliament’s legislative response to future national emergencies* (Regulations Review Committee, Wellington, 1 December 2016). This Act will be more thoroughly discussed below in Chapter Five.

risk. Increasing riskification means that securitisation attempts can be successful if the securitising rhetoric creates a perception of existential risk. Particularly in the economic context, where issues have been riskified for decades to such an extent that securitisation has become exceedingly easy, political actors must only mention the possibility of economic risk to convince the public that exceptional measures are necessary. It is therefore possible to securitise economic risks frequently and practically at will. In the virtually ubiquitous legislative model of exceptionalism, such exceptional powers are provided through ordinary legislation. Economic securitisation can therefore lead to an ongoing exceptionalism that is neither temporary, nor aimed at re-establishing the status quo ante.

5 Case Studies: The Impact of Securitisation

The threat that economic securitisation poses to the normalcy-exception dichotomy and thus constitutionalism in general is not merely theoretical. Numerous examples exist that illustrate a tendency to resort to exceptional measures supported by exaggerated or entirely invented rhetoric regarding economic risks. The purpose of this chapter is to illustrate this tendency by using three examples from New Zealand, the Employment Relations (Film Production Work) Amendment Act 2010 (NZ), the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (NZ), and the Canterbury Earthquake Recovery Act 2011 (NZ).

These examples were chosen for a variety of reasons. First, all three statutes contained exceptional provisions and/or were passed in an exceptional manner. They were passed within the span of about twelve months and the exceptional features were primarily justified using economic risk rhetoric. As will be shown, the economic risks were at least exaggerated. It therefore appears that rather than responding to genuine existential risks, the purpose of the rhetoric and the consequent exceptional measures was to facilitate advancing an ordinary politico-economic agenda. Second, as previously mentioned, New Zealand consistently ranks at the top of both democracy and corruption indices. It could therefore be assumed that New Zealand has robust democratic features and constitutional control mechanisms of public power. The examples show, however, that even in a robust democracy with low perceived corruption, economic securitisation attempts can be extraordinarily effective.

The Employment Relations (Film Production Work) Amendment Act 2010 (NZ) illustrates how securitising economic risk rhetoric can be used to bypass important legislative processes, thus undermining democratic and consultative features of the legislative system. The act was passed in October 2010 in response to an employment dispute that had arisen in connection with the filming of the movie 'The Hobbit' between the film production company Warner Brothers and New Zealand Actors Equity (Equity), a local union representing film and television actors. The dispute mainly concerned contractor's rights to collective bargaining and led to an international "boycott" of working on The Hobbit. In response to claims that this "boycott" could damage New Zealand's reputation as a destination for film productions and that Warner Brothers was considering moving the production of The Hobbit abroad, Prime Minister John Key promised a substantive change to New Zealand's employment law in order to appease the production company.⁴¹¹ The Employment Relations (Film Production Work) Amendment Act 2010 (NZ), also referred to as 'The Hobbit Law', was introduced and passed in a single parliamentary sitting on 28 October 2010, thus bypassing public and expert

⁴¹¹ Helen Kelly "Helen Kelly: The Hobbit Dispute" (12 April 2011) Scoop <www.scoop.co.nz>.

input into the matter. It designated all film and television industry workers as contractors by default and thus denied them rights to rest breaks, sick leave, holidays, protection from unlawful dismissal, and, most importantly, collective bargaining. This was likely in contravention of New Zealand's commitments under international law.

The Environment Canterbury case study shows the impact of false economic risk rhetoric on local government institutions and local democracy. Environment Canterbury (ECan) is the name of the regional council for the Canterbury region of New Zealand. Regional councils in New Zealand are mainly responsible for environmental matters, from managing natural resources to ensuring air and water quality. Following a government commissioned report into the performance of ECan in 2010, the government used emergency rhetoric to shape a narrative of an imminent economic and environmental crisis in Canterbury. The report alleged that ECan was dysfunctional, particularly regarding its substantial freshwater management function. At the time of the report, many of the issues that the report identified had already been improved or entirely remedied. Nevertheless, the government passed the Environment Canterbury (Temporary Commissioners and Improved Water Management) Act 2010 (NZ) on 30 March 2010. The Act was introduced and passed in a single day without public or stakeholder consultation. It suspended local democracy by replacing the elected regional councillors with government appointed commissioners. The government justified these extraordinary measures with an economic crisis narrative it had created, despite knowing that no crisis existed.

Finally, the Canterbury Earthquakes case study illustrates the long-term effect of securitising economic risk rhetoric, as well as the primacy that economic risk considerations have over other value considerations. Beginning in September 2010, the Canterbury region experienced a series of strong earthquakes. On 22 February 2011, a major earthquake struck almost directly under the city of Christchurch, killing 185 people and causing major damage to land and infrastructure. After an extended state of emergency, the Canterbury Earthquake Recovery Act 2011 (NZ) was introduced and passed on 12 April 2011. The Act contained a range of exceptional powers which were available for a period of five years after the initial emergency event on 22 February 2011. It curtailed or expedited certain procedures such as resource consents in connection with the recovery of the region, judicial review of many public actions taken in connection with the recovery were severely limited, and the Minister of Canterbury Earthquake Recovery could modify or suspend parliamentary legislation. The government justified these exceptional measures with a narrative of an existential economic risk for the region if fast and decisive action were not taken. However, most if not all of the recovery phase of a disaster is not urgent and thus the use of exceptional measures, which equalled those available during the immediate response to the earthquakes, was likely not necessary.

It is important to stress that this thesis does not purport that securitisation is always illegitimate. Serious existential crises do exist, and their securitisation is not only legitimate, but essential. For example, the New Zealand Parliament declared a 'climate emergency' in 2020, in which it acknowledged the findings of the Intergovernmental Panel on Climate Change regarding the need to severely reduce global emissions of greenhouse gases and recognised the need to implement policies to support that goal.⁴¹² This was an act of securitising the environmental issue of global climate change in order to create awareness and support action to mitigate environmental risks and threats. These risks are real. They are also highly complex risks and as such not easy to experience directly. Securitisation therefore serves the purpose of bringing the risks of climate change into the public eye. Similarly, the Covid-19 pandemic has been securitised since its outbreak in late 2019. In New Zealand, it was used to justify a range of exceptional measures from lockdowns to vaccine requirements.⁴¹³ Like climate change, the public health risk was real and it arguably posed, at least initially, an existential threat to the public health system and to the health and lives of New Zealanders.

In contrast, the purpose of the thesis and this chapter in particular is to show how risk rhetoric can be used to exaggerate or create the perception of existential risks in order to justify exceptional measures that would otherwise not be legitimate. The three case studies in this chapter illustrate the use of economic risk rhetoric to that end.

⁴¹² Jacinda Ardern (2 December 2020) 749 NZPD 237.

⁴¹³ Louise Delany *Covid and the Law in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2021).

5.1 The Hobbit Law: Accelerated Legislation

The consequence of securitisation is the use of exceptional measures. These do not necessarily come in the form of exceptional statutory powers, they can also be the exceptional acceleration of the legislative process. Accelerating legislation is not an extraordinary constitutional mechanism *per se*: there are reasons to legitimately accelerate the passage of bills during ordinary times. For example, bills that are non-controversial and/or of a technical nature may not require the same level of political scrutiny as more controversial or partisan bills do. When controversial or partisan bills are accelerated, however, essential constitutional and democratic control mechanisms can be bypassed. Such steps are generally reserved for extraordinary circumstances in which legislation must be passed as quickly as possible. The exceptionalness of the acceleration therefore stems from the degree to which the legislative process has been accelerated. Securitising risk rhetoric can therefore be used to create the perception of urgency to avoid inconvenient public consultation and expert input phases of the legislative process and to quickly pass ordinary legislation under the guise of a crisis situation.

The passage of the Employment Relations (Film Industry Work) Amendment Act 2010 is an example of the use of economic emergency rhetoric to accelerate the legislative process. The Act fundamentally affected employment rights of film industry workers, was potentially in contravention of international obligations, and was passed in a single sitting day. New Zealand's government justified its exceptionally accelerated passage by exaggerating a potential risk to the country's economy.

In 2010, the film production company Warner Brothers was preparing to shoot the movie 'The Hobbit' in New Zealand. An employment dispute had arisen between Warner Brothers and New Zealand Actors Equity (Equity), a local union representing film and television actors. On recommendation of Equity, the Federation of International Actors (FIA) advised its members worldwide not to work on the Hobbit until the dispute was resolved, effectively halting production of the movie. Internationally renowned film director Peter Jackson and others involved in the production stated publicly that this "boycott" damaged New Zealand's reputation as a destination for film productions and that Warner Brothers was considering moving the production of The Hobbit abroad.⁴¹⁴

In response, Prime Minister John Key met with representatives of Warner Brothers and promised a fifty percent increase of the government's subsidy it was paying for the production (from NZ\$60 million to NZ\$90 million), as well as a substantive change to New Zealand's employment law in order to appease the production company.⁴¹⁵ The Employment Relations (Film Industry Work) Amendment Act 2010, often referred to as 'The Hobbit Law', was introduced and passed on 26 October 2010. It

⁴¹⁴ The veracity of this claim remains uncertain to this day.

⁴¹⁵ Kelly, above n 411.

designated all film and television industry workers as contractors by default and thus denied them rights to rest breaks, sick leave, holidays, protection from unlawful dismissal, and, most importantly, collective bargaining.

While the impact of losing *The Hobbit* would have potentially had a not insignificant impact on New Zealand's film industry, it is unlikely that it would have been substantial enough to warrant the passage of *The Hobbit Law* in a single sitting, particularly given the impact of the legislation on New Zealand's employment law and its obligations under international law. On closer inspection it is likely that the government had ulterior motives in rushing the legislation. It was exploiting public sentiment regarding the popularity of Peter Jackson and *The Hobbit* films to stoke fears about the economic future of the New Zealand film industry. The government was using economic emergency rhetoric to justify its urgency motion and further its political ideology and policy of weakening employment rights in order to make New Zealand more attractive to overseas investors.

5.1.1 Acceleration Mechanisms

There are three major ways in which legislatures control the speed of the legislative process: 1) by limiting the time spent on debates or in committees, 2) by shortening or skipping the stand-down periods between stages of a bill, or 3) by omitting entire legislative stages altogether. Most legislatures limit the duration and frequency each member is allowed to speak on a bill during a debate.⁴¹⁶ This allows any member to comment and prevents filibustering on the bill while limiting the overall length of the debate. Debates are usually brought to an end either by way of an ad hoc time limit or a closure motion.⁴¹⁷ Stand-down periods between stages of a legislative process serve the purpose of allowing members to return to their caucus to discuss and prepare for future debates and consult stakeholders on details of the bill.⁴¹⁸ Many legislatures require at least one or two days to pass between debates.⁴¹⁹

⁴¹⁶ See for example The Norwegian Parliament Rules of Procedure (NO), §§51,52; Dáil Éireann Standing Orders Relative to Public Business 2020 (IE), SO 58; Rules of Procedure of the German Bundestag (DE), r 35.

⁴¹⁷ For example Dáil Éireann Standing Orders Relative to Public Business 2020 (IE) SO 78; The Norwegian Parliament Rules of Procedure (NO), §51; House of Representatives of the Netherlands - Rules of Procedure (NL), ss 43(1), 64.

⁴¹⁸ John Burrows and Ross Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, N.Z, 2009), at 75.

⁴¹⁹ See for example Standing Orders of the Danish Parliament (DK), §§11-13, Rules of Procedure of the German Bundestag (DE), rr 81,84, Knesset Rules of Procedure (IL), ss 88(b); "Legislation" (18 September 2020) Stortinget <www.stortinget.no>. Some jurisdictions have longer requirements: the Danish Folketing requires 30 days to pass between introduction and passage of a bill, Standing Orders of the Danish Parliament (DK), §13; in Israel, if a bill has been amended during the second reading, a week must pass before it is read a third time, Knesset Rules of Procedure (IL), s 92(a). Some jurisdictions allow the stand-down period to be omitted if the bill has not been altered during the second reading. Many legislatures will then also not require the final reading to be held at all, for example Rules of Procedure of the German Bundestag (DE), rr 84,85; House of Representatives of the Netherlands - Rules of Procedure (NL)s 105, Legislation, above n .

New Zealand's legislative process comprises an Introduction stage, a First Reading debate, a Select Committee stage, a Second Reading debate, a Debate of the Whole House, and a Third Reading debate, before it receives royal consent.⁴²⁰ The number of stages and the select committee make New Zealand's legislative process comparatively long for a single chamber unitary legislature. A Minister may at any time move to accord "urgency" to parliamentary business. If passed, the business to which urgency has been accorded has priority and the sitting day is extended until the business has been completed.⁴²¹ The government can accord urgency to individual or multiple stages of a bill; in case of the latter, all stages to which urgency has been accorded have to be debated during the same sitting day, effectively omitting the stand-down periods between stages. Thus, in extreme cases all stages of a bill can be accorded urgency and a bill can be passed in a single sitting.⁴²²

The extraordinary effect on the legislative process suggests that when accorded to all stages of a bill at once, the urgency motion is an emergency mechanism reserved for crisis situations. Indeed, when urgency was first introduced in 1884, Standing Order 331 provided that "bills of an urgent nature are sometimes passed with unusual expedition throughout their several stages."⁴²³ The use of the words 'urgent nature' and 'unusual' suggest that urgency was meant to be an exceptional measure.⁴²⁴

In reality, New Zealand's Parliament sits under urgency surprising frequently. During the years from 2001 to 2010, Parliament sat under urgency for 17.4% of its time on average, reaching 35% in the year to June 2009.⁴²⁵ A major reason for this frequent use of urgency is the perception among parliamentarians that there is insufficient time to deal with the government's legislative business otherwise.⁴²⁶ Most of the time, urgency is used to fast-track bills through the Introduction and First Reading stages or the Debate of the Whole House and the Third Reading stages. While not necessarily desirable, this practice is generally not constitutionally or democratically concerning, as the remaining stand-down periods and the select committee stage allow for sufficient parliamentary and public scrutiny of the bill.⁴²⁷

⁴²⁰ While bills do not have to be referred to select committee, most bills are, see Burrows and Carter, above n 418, at 75.

⁴²¹ Standing Orders of the House of Representatives 2020 (NZ), SO 58.

⁴²² The ease and speed with which legislation can be passed in New Zealand has thus been called "the fastest law in the west" Geoffrey Palmer *Unbridled Power? An Interpretation of New Zealand's Constitution and Government* (Oxford University Press, New York;Wellington;, 1979), at 157.

⁴²³ Standing Orders of the House of Representatives 1884 (NZ), SO 331.

⁴²⁴ John Burrows and Philip Joseph "Parliamentary Law Making" [1990] NZLJ 306, at 306.

⁴²⁵ Sascha Mueller "Where's the Fire? The Use and Abuse of Urgency in the Legislative Process" (2011) 17 CantLR 316, at 320.

⁴²⁶ Claudia Geiringer and others *What's the Hurry? Urgency in the New Zealand Legislative Process 1987-2010* (Victoria University Press, Wellington [N.Z.], 2011), at 124.

⁴²⁷ Notwithstanding, Geiringer *et al* explain why even such seemingly benign use of urgency can create constitutional concerns, at 426, at 139-146.

More problematic is the practice of passing an entire bill under urgency in a single sitting. Apart from reducing the time available for reflection and opposition scrutiny of the bill significantly, this practice crucially omits the select committee stage altogether. The select committee stage plays a vital role in New Zealand's legislative process. It allows for expert and public input on a bill and is the closest that citizens get to being able to directly affect the laws of the country. Moreover, in a unitary and unicameral parliamentary system like New Zealand's, the select committee compensates for the absence of a second chamber by allowing outside scrutiny and slowing down the rapid legislative process.⁴²⁸

The importance of the select committee stage is generally recognised and its omission is exceedingly rare.⁴²⁹ Whereas the use of urgency to omit stand-down periods between debates may, for better or worse, be part of the ordinary legislative process, omitting the select committee stage altogether and passing legislation in a single sitting is an exceptional move, even in New Zealand.⁴³⁰

Most jurisdictions enable legislatures to fast-track legislation, particularly in the context of emergencies or if the bill is entirely uncontroversial. But as omitting time for scrutiny and public deliberation is obviously open to abuse, most legislatures have safeguards in place. For example, the German Bundestag can omit some stand-down periods if two thirds of its members agree, and the Danish Folketing can deviate from the legislative process with a three quarter majority.⁴³¹ New Zealand's accelerated legislative process lacks safeguards almost entirely. The only requirement for a so-called urgency motion is that the responsible minister must "inform the House with some particularity of the circumstances that warrant the claim for urgency" and that the motion has majority support.⁴³² Despite the requirement for "some particularity", the reasons given for the need for

⁴²⁸ At 426, at 140; Geoffrey Palmer *Unbridled Power: an Interpretation of New Zealand's Constitution and Government* (2nd ed, Oxford University Press, Auckland;New York,, 1987), at 236.

⁴²⁹ Despite the ease of according urgency to all stages of a bill, Parliament does so relatively infrequently. Between 1996 and 2010, 59 bills were passed without the select committee stage, Geiringer and others, above n 426, at 81. Some of the bills were passed urgently for relatively benign reasons, such as making necessary but uncontroversial corrections to a recently passed statute or responding to a genuine emergency situation. Other uses are justified with the public sentiment: for example, the 49th government passed eight single-day bills during the initial sittings after its election, reasoning that it had campaigned on the issues the bills addressed and had thus the public mandate to pass them expeditiously, see for example, Simon Power (9 December 2008) 651 NZPD, 483.

⁴³⁰ Geiringer *et al* stress that the omission of the select committee stage should only be possible if there is a genuine reason to expedite the legislative process, Geiringer and others, above n 426, at 153, 157.

⁴³¹ Rules of Procedure of the German Bundestag (DE), rr 81(1), 84(1); Standing Orders of the Danish Parliament (DK), §42.

⁴³² Standing Orders of the House of Representatives 2020 (NZ), SO 57, 58.

urgency are often minimal.⁴³³ Since New Zealand has a parliamentary system in which the government commands a majority in parliament, the motion rarely fails.⁴³⁴

In a parliamentary system with a political constitution such as New Zealand's, the ease with which legislation can be accelerated enables governments to omit crucial democratic control features of the legislative process. The executive's control of parliament allows it to pass bills in a single sitting and there is no independent review of the legality or propriety of the motion.⁴³⁵ The only control mechanism against any parliamentary action in a political constitution is a general election. In theory, a parliament that is abusing the urgency motion and passing legislation too hastily will lose public support and be punished during the next general elections. However, this control mechanism relies on a well-informed population that can reliably assess whether the passage of a bill is genuinely urgent.

In this context, securitisation of economic issues is extremely effective, as economic risk rhetoric can significantly influence public perception. By creating or fostering the public view that an economic crisis is imminent, governments can fast-track legislation that is ostensibly meant to prevent an economic disaster, but which in reality is merely being rushed for ordinary policy reasons. Due to the public's risk sensitivity to economic issues, it is unlikely that it will disagree with the exceptional measures and punish the government at the next election.

5.1.2 Securitising an Employment Issue

In the context of the Hobbit Law, the government used securitising economic risk rhetoric to justify the exceptional acceleration of the act. Despite the government's insistence that the passage of the Hobbit Law was required to avert a looming economic catastrophe for New Zealand's film industry, the underlying motivation for the legislation was likely another: the question of collective bargaining. The governing National Party had been moving towards progressively more neo-liberal ideals since the early 1990s.⁴³⁶ Its economic policies thus preferred individual bargaining rather than collective bargaining in the context of employment relations. The dispute at the heart of the Hobbit Law was the question of whether film industry contractors could engage in collective bargaining. It was therefore

⁴³³ For example, in 2008, the Minister's reason to accord urgency to a bill was simply "to make progress, and as much progress as possible." The Speaker of the House deemed the extent of the reason to be appropriate and informed the opposition that if they disagreed, they were free to vote against the motion, (16 Dec 2008) 651 NZPD 728.

⁴³⁴ Votes on urgency motions are carried out *en bloc* along party lines. Therefore, even if individual parliamentarians disagree, they cannot vote differently to their party.

⁴³⁵ The Speaker of the House has some formal control-abilities, but they are a member of the government party and therefore not independent.

⁴³⁶ Margaret A. Wilson "Constitutional Implications of 'The Hobbit' Legislation" (2011) 36(3) NZJER 90, at 94.

in the interest of the government's policy direction to securitise the employment dispute to justify the Hobbit Law.

Equity had been attempting to negotiate a collective employment agreement with the film industry since 2009 but had repeatedly been met with extraordinarily strong resistance. In early 2010, Equity was notified of standard contracts that Warner Brothers had been using for the engagement of performers on *The Hobbit*. These contracts did not comply with the so-called Pink Book, a non-binding guideline for the engagement of film performers in New Zealand.⁴³⁷ When Equity approached Warner Brothers asking to negotiate a collective agreement for performers on the movie, the production company refused and claimed that it would be illegal under New Zealand law to engage in collective negotiations with contractors.⁴³⁸ Since collective bargaining lessens competition by effectively creating a monopoly on contract negotiations, Warner Brothers claimed that collective bargaining with contractors was prohibited under the Commerce Act 1986 (NZ): section 27 prohibits contracts from substantially lessening competition in the market. This view was later supported by a Crown Law legal opinion that had been created on behalf of Attorney-General Chris Finlayson.⁴³⁹ However, Equity argued that trade unions are exempt from restraint of trade prohibitions under sections 2, 3, and 4 of the Trade Unions Act 1908 (NZ).

Whether collective bargaining for contractors is legal in New Zealand comes down to the definitions of the words 'trade unions' and 'workers' under the Act. Section 2 defines trade unions as "any combination... for regulating the relations between workers and employers..." Whether Equity is a 'trade union' for the purposes of the Trade Union Act depends on whether contractors are 'workers', a word that is not defined in the Act. Contractors have traditionally been distinguished from employees by the different status of their relation to the employer. Employees are in an inferior position to their employers: they must follow their employer's instructions as their salary depends on it and are thus in a form of master-servant relationship.⁴⁴⁰ Contractors, on the other hand, negotiate

⁴³⁷ "The Code of Practice for the Engagement of Cast in the New Zealand Screen Production Industry" (2005) <nzactorsguild.files.wordpress.com>. The Pink Book has been replaced in 2014 by the Individual Performance Agreement, The Screen Production and Development Association and New Zealand Actors' Equity "Individual Performance Agreement" (2014) <www.spada.co.nz>.

⁴³⁸ Helen Kelly "The Hobbit Law" (2010) 17(4) *International Union Rights* 4, at 4.

⁴³⁹ Adam Bennett "Film's backers told NZ law on their side against union" (30 September 2010) *New Zealand Herald* <www.nzherald.co.nz>. Although the legal opinion was never released, Finlayson referred to it in a letter both to the producers of *The Hobbit* and Equity, Wilson, above n 436, at 92. The government continued to insist on the illegality of collective bargaining in this situation throughout the legislative process of *The Hobbit Law*, Kate Wilkinson (28 October 2010) 668 *NZPD*, 14940.

⁴⁴⁰ Michael Wynn "Feudal Societies and Hobbit Law: The Story of 'The Hobbit Amendment'" (2015) 22(2-3) *Small Enterprise Research* 131, at 138.

every task with their employer anew. They are more independent, ostensibly engage in contract negotiations at arm's length, and are seen as equal to the employer.

Contractors are therefore traditionally seen as in a stronger position than employees and not in need of union protection and consequently not exempt from restraint of trade provisions. However, over the past decades 'non-standard' work has significantly increased and begun to replace traditional employment contracts.⁴⁴¹ In non-standard work contracts, workers are employed on termed contracts or project-based contracts rather than in an ongoing employment relationship. They are often in very precarious situations: they are subject to volatile market forces which can see them without work and income at short notice and at any time.

This is particularly the case in the film industry, whose project-based structure leads to cyclical availability and absence of work. This creates an oversupply of workers when a new project starts, which pushes down wages.⁴⁴² As a consequence, this type of non-standard work adversely affects workers' mental health. Due to the trend towards non-standard work, the traditional view that contractors are in an equal bargaining position with employers no longer stands. In fact, contractors are often in a more precarious position than employees yet enjoy fewer statutory protections. The term 'workers' in the Trade Unions Act may therefore need to be interpreted to include contractors in order to reflect the changing nature of modern employment.⁴⁴³

The situation had been further complicated by the Supreme Court's decision in *Bryson v Six Foot Three Ltd* regarding the status of contractors in the film industry under the Employment Relations Act 2000 (NZ).⁴⁴⁴ A model maker, who had been contracted to work on the Lord of the Rings movie, had successfully challenged his employment status in court. Section 6 of the Employment Relations Act 2000 (NZ) provided that when determining whether a person is an employee, the court must "determine the real nature of the relationship" rather than how the contract describes that relationship. The court found that despite the model maker's engagement as a contractor, the actual relationship was one of employment.

New Zealand is also signatory to several international treaties guaranteeing the rights to form and join unions and to bargain collectively, such as the Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on

⁴⁴¹ Wilson, above n 436, at 92.

⁴⁴² Wages in the film industry is well below the New Zealand average, Wynn, above n 440, at 139.

⁴⁴³ Iain Wilkinson *Risk, Vulnerability and Everyday Life* (Routledge, London; New York, 2010).

⁴⁴⁴ *Bryson v Six Foot Three Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

Economic, Social and Cultural Rights (ICESCR).⁴⁴⁵ It has filed reservations to Art 22 ICCPR and Art 8 ICESCR, both of which provide for these rights: it may not apply the articles if they are incompatible with New Zealand legislation if the incompatible legislation is meant to "ensure effective trade union representation and encourage orderly industrial relations."⁴⁴⁶ Because restraint of trade provisions disrupt rather than ensure representation and orderly industrial relations, the reservations do not apply in the case of film industry workers. The obligations to guaranteeing collective bargaining rights under these international treaties therefore bind New Zealand's government.

Domestic legislation needs to be interpreted with a presumption that it is consistent with international obligations. New Zealand is signatory to the International Labour Organisation (ILO) Convention 87 concerning the right to associate and organise and Convention 98 concerning collective bargaining. Although these conventions have never been ratified in New Zealand, the Employment Court in *Kelly v Tranz Rail Ltd* held that because New Zealand is a member of the ILO and has ratified the ICCPR and the ICESCR, it has accepted the principles of the ILO.⁴⁴⁷ Therefore, it is reasonable to interpret the term 'worker' in the Trade Unions Act to include contractors, so as to meet New Zealand's obligations to guarantee the right to collective bargaining according to UDHR, ICCPR, ICESCR, and ILO principles.

Recognising the right is also supported by a trend in overseas jurisdictions to recognise collective bargaining as a human right. Although the right of citizens to participate in political decision-making has long been recognised as a fundamental democratic principle, the right of workers to participate in commercial decision-making has been more contested.⁴⁴⁸ In recent years, however, courts in some jurisdictions have begun to read a right to collective bargaining into the human right of freedom of association. For example, the Supreme Court of Canada decided in *BC Health Services* that in order to facilitate workers' rights of association they must have a right to bargain collectively.⁴⁴⁹ Likewise, the European Court of Human Rights decided in *Demir and Baykara v Turkey* that collective bargaining and the ability to strike are an essential part of the freedom of association.⁴⁵⁰ While this decision has

⁴⁴⁵ Universal Declaration of Human Rights GA Res 217A (1948) Universal Declaration of Human Rights GA Res 217A (1948) Art 22(3); International Covenant on Civil & Political Rights GA Res 2200A (XXI) (1966) International Covenant on Civil & Political Rights GA Res 2200A (XXI) (1966) Art 22, International Covenant on Economic, Social and Cultural Rights GA Res 2200A (XXI) (1966) Art 8.

⁴⁴⁶ Edward Miller and Jeff Sissons "A Human Right to Collective Bargaining?" (2015) 39(3) NZJER 3, at 6.

⁴⁴⁷ *Kelly v Tranz Rail Ltd* [1997] ERNZ 476 (EmpC), at [501].

⁴⁴⁸ Wilson, above n 436, at 91.

⁴⁴⁹ *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia* 2007 SCC 27, [2007] 2 SCR 391. However, in the later decision of *Fraser*, the Supreme Court narrowed this opinion somewhat. It decided that legislation can restrict that right as long as it does not make "good faith resolution of workplace issues between employees and their employer effectively impossible, *Ontario (Attorney General) v Fraser* 2011 SCC 20, [2011] 2 SCR 3.

⁴⁵⁰ *Demir and Baykara v Turkey* [2008] ECHR 1345, (2009) 48 EHRR 54.

been rejected in the United Kingdom with reference to the right to strike, the court did not reject the right to collective bargaining.⁴⁵¹

New Zealand courts have so far not followed this trend. Freedom of association as provided in section 17 of the New Zealand Bill of Rights Act 1990 (NZ) has not been traditionally interpreted to include a right to collective bargaining.⁴⁵² However, due to growing acceptance of such a right overseas it is possible that New Zealand courts will follow and recognise a right to collective bargaining. If they do not, New Zealand will be significantly out of step with comparable overseas jurisdictions. As it stands, the status of contractor's rights to negotiate collective contracts of engagement remains uncertain.⁴⁵³ At the time of the dispute between Warner Brothers and Equity, it was not clear whether Equity could legally engage in collective bargaining or whether that would be in breach of the Commerce Act.

The changing nature of contract work and the potential reinterpretation of contractors as 'workers' under the Trade Unions Act 1908 (NZ) was a threat to the National Party's economic policy. The government therefore chose to securitise the issue. It argued publicly that the situation created uncertainty for production companies; they could not rely on their contracts of engagement and were thus deterred from investing in the New Zealand film industry. It was therefore necessary to clarify the law in order to create certainty, retain overseas investment in the film industry, and thus preserve jobs in New Zealand. Otherwise, it argued, the New Zealand film industry, and important part of New Zealand's overall economy, could suffer heavy losses and potentially collapse.⁴⁵⁴

The government's view relied heavily on comments made by Peter Jackson and other New Zealand-based producers of *The Hobbit*. They claimed publicly that Warner Brothers were unhappy with the ongoing strike and the legal situation in New Zealand and had thus begun to look elsewhere to produce the *Hobbit* films. As will be shown below, this claim appears to have been somewhat exaggerated and inaccurate. But it created the public perception that the production of *The Hobbit* in New Zealand was at imminent risk of being moved abroad.⁴⁵⁵

In response, the government introduced and passed the Employment Relations (Film Production Work) Amendment Act 2010 (NZ) on 28 October 2010. The Act amended the meaning of employee in the Employment Relations Act, by designating all workers involved in film production as non-employees (and thus not subject to the Act), unless the contract specifically created an employment

⁴⁵¹ *Metrobus Ltd v Unite the Union* [2009] IRLR 851; K. D. Ewing and John Hendy "The Dramatic Implications of Demir and Baykara" (2010) 39(1) ILJ 2, at 24.

⁴⁵² Miller and Sissons, above n 446, at 9.

⁴⁵³ At 446, at 13

⁴⁵⁴ Bennett, above n 439; Wilson, above n 436, at 90.

⁴⁵⁵ Radio New Zealand interview with producers Fran Walsh and Philippa Doyens, transcribed in Kelly, above n 411.

relationship.⁴⁵⁶ The Hobbit law thus prevents courts from determining the true nature of the work relationship of film industry workers and interpreting their contracts as employment contracts, as the court had done in *Bryson*. This change, which only applies to workers in the film industry, goes against the spirit of the Employment Relations Act. It also weakens the argument that film industry workers have the right to bargain collectively and could thus be in contravention of New Zealand's international obligations.

5.1.3 Was there an Economic Emergency?

The government securitised the dispute between Warner Brothers and Equity by supporting the public narrative of an impending economic disaster. It used the narrative to justify according urgency to all stages of the bill, omitting all stand-down periods and the select committee stage. As such, it treated the urgency motion as an exceptional tool to avert imminent adverse effects on the economy.⁴⁵⁷ However, it is highly debateable whether such an economic emergency actually existed, or whether the public narrative was influenced merely to facilitate the government's economic policies.

The exceptional use of urgency in this situation would have only been appropriate if an acute threat to the economy existed. Filming the Hobbit movies in New Zealand was thought to contribute NZ\$670 million to New Zealand's economy.⁴⁵⁸ The New Zealand film industry made up 1.4% of the country's GDP at the time.⁴⁵⁹ Losing the Hobbit production would therefore have had a somewhat substantial, if not enormous, impact on New Zealand's economy.

However, it is uncertain whether the threat to the Hobbit production and the economy actually existed at the time of the passage of the Hobbit Law. From statements made by Prime Minister Key after meeting with Warner Brothers, New Zealand's legal employment landscape had only been a minor factor in Warner Brothers' consideration of whether to produce the Hobbit movies there. Of much more importance was the unfavourable exchange rate between the New Zealand and the United States currencies (the New Zealand Dollar had appreciated by 40% over the United States Dollar due to the recent Global Financial Crisis), as well as subsidies that other countries were offering to film productions.⁴⁶⁰ It is thus questionable whether the law change was necessary at all, given the substantial increase of the subsidy New Zealand's government promised Warner Brothers if it retained

⁴⁵⁶ Employment Relations (Film Production Work) Amendment Act 2010 (NZ), s4.

⁴⁵⁷ Minister of Labour Kate Wilkinson referred to the purportedly precarious status of The Hobbit's production specifically when moving that urgency be accorded to the Amendment Act, Kate Wilkinson (28 October 2010) 668 NZPD, 14940.

⁴⁵⁸ Kate Wilkinson (28 October 2010) 668 at 14940.

⁴⁵⁹ PriceWaterhouseCooper "Economic contribution of the New Zealand film and television industry" (August 2012) <www.wcreate.org.nz>, at 2.

⁴⁶⁰ Jonathan Handel "Money Emerges as Key Sticking Point in Bid to Keep 'Hobbit' in New Zealand" (2010) The Hollywood Reporter <www.hollywoodreporter.com>.

the production of *The Hobbit* in New Zealand. Even if the law change was required, Warner Brothers would have been pacified as soon as the government agreed to change the law. It was therefore not necessary to pass the bill within a single parliamentary sitting.⁴⁶¹

Regardless of Warner Brother's intentions, it is doubtful that passing the *Hobbit* law under urgency was appropriate. The substantial long-term impact it had on employment rights and potentially human rights of film industry workers in New Zealand arguably outweighed the limited effect the withdrawal of the *Hobbit* production would have had on New Zealand's economy. It appears that rather than moving urgency due to a sense of impending emergency, the government cut the constitutional process short to further its economic ideology.

New Zealand has a long tradition of protecting labour rights. The exploitation of workers in the 19th century led to the labour movement which resulted in the introduction and incremental strengthening of workers' rights during the 20th century. In New Zealand, the Industrial Conciliation and Arbitration Act 1893 and the Trade Unions Act 1908 provided early strong employment rights in relation to labour disputes and unions. These rights grew throughout the 20th century, with collective bargaining becoming a major factor in employment relations. However, by the 1980, capitalist free market ideals experienced a resurgence in the growing popularity of neo-liberalism, particularly among the economically conservative political ideology. Ideals of competition and self-responsibility began replacing concepts of social solidarity. Collective bargaining was increasingly regarded as anti-competitive and thus antithetical to capitalist ideals.⁴⁶² In 1991, the conservative National Party passed the Employment Contracts Act 1991, which allowed workers to not have to associate with unions and negotiate their contract relations individually. Over the course of the next decades, collective bargaining was progressively replaced with individual bargaining; this also led to the rise of non-standard work such as contract work.⁴⁶³

The *Hobbit* Law follows the neo-liberal logic that strengthening individual contract negotiations is advantageous for investors and thus the economy. Because there appears to have been no crisis that sufficiently justified rushing the bill through the process, it stands to reason that the government used economic risk rhetoric and the consequent public sentiment to expedite the implementation of its ideological agenda. In other words, it used emergency rhetoric to justify the use of an extraordinary measure in order to advance policy rather than to address a genuine crisis.

⁴⁶¹ Wilson, above n 436, at 96.

⁴⁶² At 436, at 93-94.

⁴⁶³ At 436, at 94.

This is further supported by the specific events leading up to the passage of the Hobbit Law. Throughout September 2010, Peter Jackson and other local producers of *The Hobbit* had been airing their frustration with Equity publicly, painting the actors and the union as greedy and exploiting the popularity of the film to create the public perception that the actors' demands were threatening the production of *The Hobbit*.⁴⁶⁴ In reality, and with Jackson's knowledge, Equity had been negotiating with the Screen Production and Development Association and with Warner Brothers, and had come to an agreement. Consequently, Equity had recommended to the FIA that the 'do not work' order against the *Hobbit* production be lifted. However, Warner Brothers asked Equity to delay the public press release of the agreement for a few days. In response, Equity approached the government and asked whether they should publicise the agreement immediately, but the government advised against it.⁴⁶⁵ In the following days, despite knowing of the agreement between Equity and Warner Brothers and the lifting of the 'do not work' order, both Jackson and Minister of Economic Development Gerry Brownlee continued to publicly speak of a union 'boycott' and the resultant threat to the production of the movie.⁴⁶⁶ Jackson even staged a protest march from the Weta Studios into the centre of Wellington.

All of this served to shore up public sentiment against the union and support the government's position that this was an economic crisis. The government was therefore able to use public sentiment and fear of a non-existent threat to New Zealand's economy to justify passing the Hobbit Law under urgency and without public scrutiny by way of a select committee process. Despite the absence of an economic crisis and the government's blatant abuse of constitutional processes, its popularity was not affected. It even managed to increase its representation in Parliament during the next election in 2011.⁴⁶⁷

The passage of the Hobbit Law and its surrounding circumstances illustrate how governments can securitise ordinary politico-economic issues with the use of securitising economic risk rhetoric to influence public risk perception and justify the circumvention of constitutional procedures for their own political and ideological reasons. The heightened public risk sensitivity and the willingness of governments and corporate interests to exploit them expose the vulnerability of constitutional principles, particularly in the context of political constitutions. An exaggerated risk narrative allowed

⁴⁶⁴ Kelly, above n 411.

⁴⁶⁵ At 411.

⁴⁶⁶ Derek Cheng "Sir Peter: Actors no threat to *Hobbit*" (21 December 2010) *New Zealand Herald* <www.nzherald.co.nz>; Wynn, above n 440, at 140.

⁴⁶⁷ "New Zealand Election Results" (17 October 2020) Electoral Commission <www.electionresults.govt.nz>. There are, of course, a multitude of factors playing into the election of parties. The Canterbury Earthquakes of 2010 and 2011 will have played a major role in the 2011 election.

the government to pass substantial law reform legislation exceptionally fast, bypassing democratic and constitutional processes that are meant to ensure public and expert scrutiny of such reforms.

5.2 Environment Canterbury: Suspending Local Democracy⁴⁶⁸

Securitising economic risk rhetoric can also be used to justify undermining or even suspending democratic institutions and representation. The events surrounding the Canterbury Regional Council (Environment Canterbury or ECan) provides an example of how the New Zealand government intentionally exaggerated an economic threat to suspend local democracy in the Canterbury region for almost a decade.⁴⁶⁹

Canterbury's economy is substantially reliant on natural resources, especially fresh water. A significant part of New Zealand's renewable energy is produced by Canterbury's hydroelectric power plants.⁴⁷⁰ The region is also the second largest dairy producer, contributing almost 20% of New Zealand's dairy production.⁴⁷¹ Dairy is New Zealand's main export product, and thus of extreme importance to New Zealand's economy.⁴⁷² In addition, Canterbury is home to more than two thirds of New Zealand's fresh water reserves.⁴⁷³ Efficient, effective and sustainable water management thus carries a high level of significance both for the region and for New Zealand as a whole.

New Zealand's local government structure is divided into two types of authority: territorial authorities and regional councils.⁴⁷⁴ The former consists of city and district councils. Their role is mainly to provide local services, such as libraries, parks, water supplies etc, and to build and maintain local infrastructure.⁴⁷⁵ Regional Councils are mainly responsible for environmental matters, from managing natural resources to ensuring air and water quality.

During the 2000s, dissatisfaction was building around ECan's ability to manage the region's fresh water. In 2009, a joint letter from all mayors in Canterbury to the Ministry of the Environment voiced their concerns regarding ECan's water management.⁴⁷⁶ One complaint concerned the lack of a regional water management plan. The Resource Management Act 1991 allowed for the development of such a plan, but despite the strategic importance of water to the region, almost twenty years later it still

⁴⁶⁸ Elements of this part have previously been published in Sascha Mueller "Incommensurate Values? Environment Canterbury and Local Democracy" (2017) 15(2) NZJPIIL 293 and Sascha Mueller "Local Democracy and the Agency-Model of Local Governance" (2017) 10 JALTA 76.

⁴⁶⁹ The statutory name is 'Canterbury Regional Council', Local Government Act 2002 (NZ), Schedule 2. The Council uses the promotional name 'Environment Canterbury', also shortened to 'ECan'.

⁴⁷⁰ David Carter (18 September 2012) 684 NZPD, 5301.

⁴⁷¹ *New Zealand Dairy Statistics 2018-19* (Livestock Improvement Corporation & DairyNZ, 2019), at 15.

⁴⁷² "New Zealand" (23 December 2020) <www.oec.world>.

⁴⁷³ Wyatt Creech and others *Investigation of the Performance of Environment Canterbury under the Resource Management Act & Local Government Act* (February 2010), at 5; David Carter (18 September 2012) 684 NZPD, 5301.

⁴⁷⁴ Local Government Act 2002 (NZ), s 21.

⁴⁷⁵ "Local Government Basics" (2020) <www.lgnz.co.nz>.

⁴⁷⁶ *Briefing Paper: Further options for investigation of Environment Canterbury* (Ministry of the Environment, 19 October 2009), at [3].

did not exist. The lack of a water plan was also believed to be contributing to the Council's extreme underperformance in terms of processing resource consent applications, the majority of which related to water. A survey of local authorities had found that in 2007/2008, ECan had processed less than one third of its resource consent applications within the statutory time limits provided for in the Resource Management Act.⁴⁷⁷

In response to the mayors' letter, the government commissioned an investigation into the council's performance. The resulting Creech Report, named after the head investigator Wyatt Creech, asserted that ECan was underperforming and alleged that it was effectively dysfunctional as the result of an institutional breakdown.⁴⁷⁸ It found that the Council was evenly split along ideological lines: half its members represented the urban population and thus primarily environmental concerns, whereas the other half represented the rural agricultural part of Canterbury and was concerned mainly with economic interests. Water management created strong tension between the two halves of the council. The agricultural part of Canterbury requires large amounts of fresh water, particularly to irrigate grassland for dairy farming. Canterbury is a relatively dry area compared to other regions in New Zealand and dairy farming is a substantial part of its economy.⁴⁷⁹ Water resource allocation is therefore essential for Canterbury's agricultural sector. However, the vast quantity of water required for irrigation raises concerns about the sustainability of Canterbury's water reservoirs and regeneration capacity. Furthermore, the affluent runoff from dairy farms negatively impacts the water quality of Canterbury waterways, especially due to high nitrate levels from agricultural fertilizers.⁴⁸⁰

According to the Creech Report, the even split between economic and environmental interests on the council, and the unwillingness of either side to compromise, resulted in an inability to reach decisions. It therefore recommended to transfer the council's water management responsibilities to a new central government agency and to replace the councillors with appointed commissioners until the transition of capacities was completed.⁴⁸¹

Following the Creech report, the government used economic emergency rhetoric to shape a narrative of an imminent economic and environmental crisis in Canterbury. Many of the issues that the report identified had already been improved or entirely remedied: ECan had a successful and popular water strategy in place and processing of resource consent had returned to levels comparable with most other regional councils. Nonetheless, the government passed the Environment Canterbury

⁴⁷⁷ *Resource Management Act: Two Yearly Survey of Local Authorities 2007/2008* (Ministry of the Environment, 2007), Appendix 4.

⁴⁷⁸ Creech and others, above n 473, at 8, 9.

⁴⁷⁹ "New Zealand annual rainfall" (23 December 2020) <www.teara.govt.nz>.

⁴⁸⁰ Fiona Proffitt "How Clean Are Our Rivers" (22 July 2010) <www.niwa.co.nz>.

⁴⁸¹ Creech and others, above n 473, at III.

(Temporary Commissioners and Improved Water Management) Act 2010 (ECan Act). The Act was not only passed under urgency in a single day without public or stakeholder consultation, it also suspended local democracy by replacing the elected regional councillors with government appointed commissioners. The government justified these extraordinary measures with the emergency narrative it had created, despite knowing that no emergency existed.

5.2.1 Undermining Local Democracy

Before assessing the case study, it is important to establish the significance of local democracy to liberal democracy in general. It is also necessary to explain the vulnerability of local government structures to securitising risk rhetoric. Securitising risk rhetoric can be used to undermine the autonomy of local democracy and to lower the population's confidence in the ability and value of local governance. Local government is often viewed as a service delivery branch of central government, despite its importance to democratic representation. This results in a tension between local and central government, particularly around the implementation of policy. There is a trend of central governments taking more control over local concerns. Securitising risk rhetoric can help justify such power creep by undermining the believability of local government in the face of a manufactured crisis.

5.2.1.1 Importance of Local Democracy

Local democracy is an essential part of the democratic ideal. The ability to self-govern is a fundamental part of human autonomy and thus of democracy.⁴⁸² John Stuart Mill believed that representative democracy had a 'potential flaw': government attracted people who were mostly interested in governing the state as a whole, focussing on national interests and disregarding local and minority interests.⁴⁸³ This lack of diversity of representation of interests could lead to an increasingly disinterested and uninformed public, which would eventually be unable to critically evaluate the actions of government. Responding to Mill's concerns, James Madison believed that the decentralisation of government could prevent this trend.⁴⁸⁴ The more governance was split and devolved to regions, the more people would be involved in decision-making. This would ensure representative diversity across interest groups and regions and could counter Mill's concern about growing popular disinterest in governance. Local government decisions often affect citizens more directly than central government ones. If people feel that their vote has a tangible effect, they are

⁴⁸² Jack Lively *Democracy* (Blackwell, Oxford, 1975), at 30.

⁴⁸³ Held, above n 36, at 83, 84.

⁴⁸⁴ Madison, above n , at 49-54.

more likely to engage with politics.⁴⁸⁵ Local democracy is thus an important part of the constitutional structure of modern States and essential to democratic health.⁴⁸⁶

For local democracy to engage people and diversify democratic representation, its governance decisions must be meaningful. The will of the local population is only represented if local government can act autonomously, i.e. independent from central government control. In a representative democracy, individual political autonomy is delegated to elected representatives. In order to preserve individual autonomy, the institutions created by the democratic process must themselves be autonomous.⁴⁸⁷ This is true for the legislature, and it must also be true for local government, particularly because of its direct effect on the population. As central government is not solely made up of representatives of a specific region, it does not facilitate local autonomy if it directs local government action, rather than allow local government to act independently. Local decisions are more democratically sound if made by autonomous local government institutions rather than by central government directive.⁴⁸⁸

5.2.1.2 The Agency-Model of Local Governance

Despite this, local government tends to be seen as subordinate to central government, because all governance power is regarded as originary to central government. According to the so-called agency-model of local governance, local governing authority is not an inherent part of democratic rule.⁴⁸⁹ Rather, local elections are enabled and dependent on central government authority and local government competencies are delegated from central government. Consequently, local powers are often strictly prescribed, as central government can expand or restrict them at will.⁴⁹⁰ Despite the importance of local representation to democratic health, the agency model does not foster a cooperative relationship between central and local government. Instead, local government is seen as nothing more than a 'subordinate service delivery arm' of central government, an agent of the latter's will.⁴⁹¹

⁴⁸⁵ Held, above n 36, at 79; John Adler "Efficiency, Autonomy and Local Government" (2001) 4(3) JLGL 61, at 64.

⁴⁸⁶ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016), at 188.

⁴⁸⁷ Adler, above n 485, at 63.

⁴⁸⁸ Command Paper (UK) *Communities in control: real people, real power* (Cm 7427, 9 July 2008), at 13.

⁴⁸⁹ Held, above n 36, at 84.

⁴⁹⁰ Harlow and Rawlings, above n 330, at 84.

⁴⁹¹ Stephen Bailey and Mark Elliott "Taking Local Government Seriously: Democracy, Autonomy and the Constitution" (2009) 68(2) CLJ 436, at 440; Prue Taylor "Who Has the Power? Challenging Traditional State Authority to Regulate GMOs in New Zealand" (2006) 8(3) Env LRev 175, at 179.

In New Zealand, the relationship between central and local government had traditionally followed the agency model closely.⁴⁹² This ostensibly changed with the Local Government Act 2002 (NZ). The act provides local government with a so-called 'power of general competence';⁴⁹³ as long as local government acts within the confines of its competencies, it has "full capacity" to conduct its business as it sees fit. This suggests a high level of discretion and autonomy.

Although this appears to be a significant step away from the agency model, in reality local government remains highly dependent on central government. Two factors indirectly significantly restrict local decision-making powers. First, central government has the power to intervene in local government affairs if it perceives the local authority to "have a problem."⁴⁹⁴ This is a very broad power of intervention, due to a broad interpretation of the term 'problem': a problem is any circumstance that detracts from a council's ability to give effect to the purpose of the Act, a persistent failure to perform its functions, and a failure to demonstrate prudent management of its finances, among other things.⁴⁹⁵ The subjective nature of this definition gives central government wide discretion as to when it considers intervention necessary. When it does, it can deploy observers or a review team to the local authority, direct the authority to act in specific ways, and even temporarily suspend councillors and appoint commissioners to take over the functions of the authority.⁴⁹⁶ The autonomy of local authorities is therefore conditional on central government's view that no 'problem' exists that requires intervention.

Second, the ability of local government to raise funds are quite limited. Its main income consists of local rates, a form of land tax.⁴⁹⁷ Any fees imposed for delivering services to the local community must only be compensatory.⁴⁹⁸ That means that local authorities' abilities to raise funds for the development of new amenities or infrastructure is severely limited. Incurring large debts risks central government's perception that local finances are not managed prudently. Not engaging in local development may appear as though the authority is not giving effect to the purpose of the Act or that it is failing to perform its functions. Any of the above may appear to central government as a 'problem' and thus give reason to intervene in local government business. For local government to implement large or innovative projects or policies, it often has to rely on central government grants or

⁴⁹² Palmer and Butler, above n 486, at 189.

⁴⁹³ Local Government Act 2002 (NZ), ss 12, 14. Its predecessor, the Local Government Act 1974 (NZ), clearly subordinated local to central government. It provided that local government acted "on behalf of central government" when providing public services, s 37K.

⁴⁹⁴ Local Government Act 2002 (NZ), s 254(2).

⁴⁹⁵ At , s 256.

⁴⁹⁶ At , Part 10.

⁴⁹⁷ See Local Government (Rating) Act 2002 (NZ).

⁴⁹⁸ Local Government Act 2002 (NZ), s 150(4).

subsidies.⁴⁹⁹ But if central government contributes substantially to the costs of a local project, it will demand to be part of the decision-making regarding that project.⁵⁰⁰ Therefore, while local government has broad discretion regarding operational matters of local service delivery, its autonomy regarding substantial and meaningful strategic decisions is limited due to central government's power of intervention and local governments lack of adequate funding streams.⁵⁰¹

Central government's broad powers of intervention and the limited ability of local government to raise funds shows that local government's 'power of general competence' gives local governments full autonomy only on paper. In reality, it is still highly dependent on, and at the mercy of, central government. Local governance in New Zealand therefore continues to follow the agency model closely.⁵⁰²

5.2.1.3 Local Democracy and Risk Rhetoric

The agency model of local governance has a negative impact on local democracy. Central government wants local government to act along central rather than local interests.⁵⁰³ The threat of intervention and the dependence of central government funding means that local authorities tend to stick closely to its service delivery mandate rather than to provide for local interests more broadly. They become overly bureaucratic and risk-averse, in order to not run into financial troubles or otherwise draw the attention of central government.⁵⁰⁴ The agency model thus stymies local autonomy and damages the democratic health of the constitutional system.

The agency model makes local governance and democracy vulnerable to central government risk rhetoric. As central government can intervene in local government competencies if it perceives a 'problem', it can use risk rhetoric to securitise any issue to create such a perception and thus justify the intervention. This allows central government to intervene in local democracy if local government acts against central policy interests. The public perceives local government mainly as the aforementioned service delivery arm, due to the inability of local government to act independently and make meaningful local decisions. This view is exacerbated by risk narratives in which the central government must intervene in local matters in order to avert a crisis. The public consequently loses confidence in the effectiveness of local democracy.⁵⁰⁵ Relatively low voter turnout of local government

⁴⁹⁹ "Local Government Finance" (23 December 2020) <www.lgnz.co.nz>.

⁵⁰⁰ Bailey and Elliott, above n 491, at 189.

⁵⁰¹ Harlow and Rawlings, above n 330, at 85; Graham Bush "A Battle Won - or Just Begun?" (2003) 39(1) *New Zealand Local Government* 32, at 32; Palmer and Butler, above n 486, at 189.

⁵⁰² Palmer and Butler, above n 486, at 189.

⁵⁰³ Bailey and Elliott, above n 491, at 454.

⁵⁰⁴ Palmer and Butler, above n 486, at 189.

⁵⁰⁵ Bruce Hayward and others "The 2006 Local Elections and Electoral Pilot schemes" (2006) <www.electoralcommission.org.uk>, at 17.

elections when compared to central government elections reflect this loss of confidence.⁵⁰⁶ In a form of vicious circle, this increases the susceptibility of the public to central government's risk rhetoric. The public is thus vulnerable to false or exaggerated securitisation attempts by central government actors.

5.2.2 The ECan Act: A Manufactured Crisis

With the importance of local democracy and the precariousness of local government in mind, the circumstances surrounding the ECan Act are an example of securitising an exaggerated issue merely to facilitate the government's politico-economic agenda. The government based its reasoning for the ECan Act and justification for its urgency motion mainly on the findings of the Creech Report. It alleged that ECan had failed to adequately and effectively manage Canterbury's water resources, that it had not created a water management plan, and that the Council was overall dysfunctional and incapable of making important decisions.⁵⁰⁷ In the context of the strategic importance of Canterbury's water resources, the government argued that it was therefore necessary to take immediate and direct action.

It is far from certain whether ECan had actually mismanaged water in Canterbury, or whether such mismanagement was sufficiently severe to warrant extreme government intervention. Similarly, there is doubt that the lack of formal water plan justified intervention, as ECan had developed a highly successful water strategy, despite its purported dysfunctionality. It thus appears that the government used economic and environmental emergency rhetoric to create the narrative of a crisis that did not exist; this served to justify not only intervening in local government processes, but to take the extraordinary measure of suspending local democracy altogether.

Leading up to and during the debates of the ECan Act, the government based much of its rhetoric on the findings and recommendations of the Creech Report. The narrative focussed on three main themes: a failure to effectively manage the allocation of water resources, the absence of a Regional Water Plan and its economic and environmental consequences, and the inability to reach decisions

⁵⁰⁶ The local government elections in 2019 had a voter turnout of 41.7%, whereas the general elections in 2020 had a voter turnout of 82.2%, see "Local Authority Election Statistics 2019" (4 December 2020) <www.dia.govt.nz>; "2020 General Election Official Results" (6 Nov 2020) <www.elections.nz>. This disillusionment with local democracy creates a vicious cycle. The public realises the impotence of local government and thus blames central government for the failings of local governance. In order to deflect the blame, central government tightens its control of local affairs. But this further reduces local autonomy and only shifts more blame and responsibility on central government, Bailey and Elliott, above n 491, at 451. The only way to prevent the slow demise of local democracy is for central government to restrain itself and allow local authorities as much autonomy and discretion to act with their competencies as possible.

⁵⁰⁷ Nick Smith (30 March 2010) 661 NZPD, 9927.

due to a dysfunctional council. The underlying tenor of this narrative was that without urgent action the situation in Canterbury would unjustifiably damage Canterbury's environment and economy.

However, many of the government's claims appear to have been somewhat exaggerated. The accuracy and thoroughness of the Creech Report are questionable. The findings of the Report were mainly based on stakeholder interviews.⁵⁰⁸ During the parliamentary debate, opposition MP Brendon Burns pointed out that only twenty stakeholders were interviewed.⁵⁰⁹ Although the Report claimed to have attempted to seek a balanced range of interviewees, the small number of interviewees casts doubts on that assertion: for example, of the territorial authorities, only the mayors were interviewed. As the mayors were the cause of the investigation in the first place, alternative local government views should have been sought. Similarly, the Report appears to have limited its definition of what an external stakeholder outside of government agencies is to resource consent applicants, even though ECan's external stakeholders are the regional community as a whole.⁵¹⁰ This ensured that most interviewees had reason to be upset with ECan and helped create a narrative that ECan had lost the trust of the community.

Moreover, the report's recommendations seem to contradict its own findings at time. It reports of many worthwhile improvements and innovations at ECan, only to recommend without further explanation or justification that the Council is dysfunctional and needs to be replaced. For example, it recommended that the water resource consent process should *urgently* be reviewed despite recognising that the backlog of water consent applications was not exclusively ECan's fault, that the consent process had already been improved, and the Council had made good progress reducing the backlog.⁵¹¹ Similarly, despite praising the success of the Canterbury Regional water strategy, it baselessly doubted the strategy's efficacy in the future.⁵¹² Altogether, the Report appears almost as though it was written with a specific outcome in mind. Its interview base was biased and its reasoning often critically unsound.

The government therefore based much of its rhetoric on biased and outdated information. It did so knowingly, because the Creech Report itself highlighted the improvements at ECan and the opposition repeatedly stressed these points during parliamentary debates. As mentioned before, the government's interests were heavily in favour of economic development along neoliberal ideology. ECan was increasingly dominated by councillors who focussed on environmental concerns and

⁵⁰⁸ Creech and others, above n 473, at ii.

⁵⁰⁹ Brendon Burns (30 March 2010) 661 NZPD, 9930.

⁵¹⁰ Creech and others, above n 473, at 8.

⁵¹¹ At 473, at 47.

⁵¹² At 473, at 19.

sustainability. Therefore, the policy direction of ECan was increasingly at odds with the government's economic policies. It was in the government's interest to uphold the narrative of a looming economic and environmental crisis in Canterbury to justify its interventions.

5.2.2.1 Exaggerated Consent Inefficiency

One of the government's assertions that purportedly showed that the Canterbury region was at the brink of economic disaster was that ECan had failed to effectively manage its water allocation. This claim was based on a 2008 survey of local authorities, which found that ECan had processed only 29% of resource consent applications within the statutory guidelines of the Resource Management Act.

The Creech report explained the reason for the delays were in part historical and in part "attitudinal".⁵¹³ Historical reasons mainly concerned a substantial increase in rural development in Canterbury since the early 2000s. Particularly the rapid conversion of land into dairy farms led to markedly increased demand for water for irrigation purposes. In 2002, about 70% of New Zealand's irrigated land was in Canterbury, as was 58% of all water allocated for consumptive use.⁵¹⁴ Yet, the amount of consented irrigated land in Canterbury increased by about 80% between 1999 and 2010.⁵¹⁵ During this period, the water allocations by the Council were close to or exceeding the "sustainable take limits" of the Natural Resources Regional Plan, putting pressure on the reserves and supply of fresh water. The Resource Management Act takes a "first come, first served" approach to resource allocation. Water resources reaching sustainability limits thus caused a form of "gold rush" on water resources as irrigators sought to secure access to water, particularly for water-intensive dairy farming.

Consequently, the amount of water resource consent applications to ECan increased by almost 80% between 2002 and 2008.⁵¹⁶ ECan had been slow to respond to this sharp rise in applications and only began hiring additional application processing staff later in the decade.⁵¹⁷ Once it did, however, compliance with Resource Management Act timelines started to improve. By the time the ECan Act was passed, compliance was above 80%; this placed ECan's compliance rate in the midfield of local authorities.⁵¹⁸ This was also recognised in the Creech report, which stated that ECan had been addressing the issues regarding consent processing and time management and was continuing to

⁵¹³ At 473, Part 3.

⁵¹⁴ Matthew Morgan and others *Canterbury Strategic Water Study - Report No 4557/1* (Lincoln Environmental, August 2002), at 1.

⁵¹⁵ As a matter of fact, several of Canterbury's water reservoirs were already substantially over-allocated, Bill Kaye-Blake and others *Water management in New Zealand - A road map for understanding water value* (New Zealand Institute for Economic Research, Wellington, March 2014), at 9-12, 14.

⁵¹⁶ Creech and others, above n 473, at 27, n7.

⁵¹⁷ At 473, at 30.

⁵¹⁸ *Annual Report 2009/2010* (Environment Canterbury, 23 September 2010), at 70; Creech and others, above n 473, at 33

improve.⁵¹⁹ However, the government continued to use the argument to support its narrative of an incompetent regional council which threatened the prosperity of the region and the nation.⁵²⁰

The Creech Report also alleged that the attitude of ECan workers contributed to the delayed consenting process. Specifically, the report said that the ECan leadership did not have sufficient resource management background, while the consenting staff were too technically focussed.⁵²¹ The lack of resource management experience led to a lack of competent leadership at the Council, so that decisions regarding consenting functions were left to lower tier management and team leaders. As staff on this level were mostly 'technically qualified" rather than having planning or resource management qualifications or experience, the Report found that the resource consenting process was "science led rather than science informed."⁵²² Allegedly, this led to an over emphasis on getting the environmental science right and an extended cycle of repeatedly requiring further information before being able to reach a decision. Since the purpose of the Resource Management Act required environmental, economic, social, and cultural considerations to be weighed up equally, the main focus on environmental science was regarded as unjustifiable.

However, as timeframes for considering resource consent applications had significantly improved by early 2010, the impact of the 'science led' approach on consenting processes was either exaggerated or had been mitigated in other ways by the time the Creech Report was prepared and before the ECan Act was passed. The backlog of applications in 2007/2008 most likely had to do with a sharp influx of applications and a council stretched beyond capacity. Since the issue had been remedied by 2010, there was no urgency or need for central government intervention based on this problem. Insisting on this narrative was therefore part of the government's rhetoric to exaggerate the economic threat to the region and thus to create the perception of an imminent economic disaster.

5.2.2.2 Ignored Water Strategies

Another justification for the ECan Act was the absence of a Natural Resource Regional Plan in Canterbury. ECan had been developing such a plan since early 2009, but the Creech Report claimed that its implementation was still years away.⁵²³ The Resource Management Act allows local authorities to create regional plans for any of its functions.⁵²⁴ Given the strategic and environmental importance of Canterbury's water resources, the development of a regional water plan would be highly beneficial for the reason and thus was desirable and of high importance. The lack of a water plan "led to

⁵¹⁹ Creech and others, above n 473, at 33.

⁵²⁰ Nick Smith (30 March 2010) 661 NZPD, 9927.

⁵²¹ Creech and others, above n 473, at 26, 29.

⁵²² At 473, at 26.

⁵²³ At 473, at 6.

⁵²⁴ Resource Management Act 1990 (NZ), s 65.

uncertainty, increased costs, and time delays not only for resource consent applications, but also submitters, community and environmental groups, as well as the public generally.”⁵²⁵ The Minister therefore saw its absence almost 20 years after the passing of the Resource Management Act as a significant failure of ECan to perform its duties.

But ECan’s water management was not entirely aimless. In lieu of a regional water plan, ECan had created the Canterbury Water Management Strategy in conjunction with the Canterbury Mayoral Forum and local territorial authorities. The strategy eschewed the more adversarial approach to water management and resource consenting of the Resource Management Act and favoured a more collaborative approach.⁵²⁶ Independent research based on interviews with local stakeholders showed that the Strategy was popular and highly successful.⁵²⁷ The interviewees, who consisted of industry and farming representatives, residents and non-governmental groups, and government representatives, also believed that the Strategy could be developed into a more formal water plan in the future.

Although the Creech report recognised the success of the Strategy, it had no confidence that the Strategy was a viable replacement for a formal water plan.⁵²⁸ As the Strategy stood outside the framework of the RMA, the Report thought it difficult to predict how the Strategy would relate to local and regional Resource Management Act plans, and whether the collaborative approach would work in an environment of competing interests and entrenched views. However, considering the popularity and success of the Strategy, this concern appears to be unfounded, particularly as other local authorities also use alternative resource strategies rather than Resource Management Act plans.

Central government’s interest in furthering the emergency narrative around ECan had mainly to do with ECan’s popularity in the wider community. In contrast to the negative government narrative, ECan had polled favourably in the years prior to the ECan Act, and its environmental focus seemed to increase its popularity. Between 2005 and 2009, the percentage of Cantabrians believing that ECan was providing good value for money increased by 6 percentage points from 63% to 69%, and the percentage of people believing that the Council acted in the best interest of the community rose by 19 percentage points from 48% to 67%.⁵²⁹ 70% also approved of ECan's leadership.

⁵²⁵ Creech and others, above n 473, at 5.

⁵²⁶ At 473, at 19.

⁵²⁷ Cameron Holley and Neil Gunningham “Natural Resources, New Governance and Legal Regulation: When Does Collaboration Work?” (2011) 24(3) NZULR 309, at 321.

⁵²⁸ Creech and others, above n 473, at 19-20.

⁵²⁹ *Annual Report 2006/2007* (Environment Canterbury, 19 September 2007), at 23; *Annual Report 2008/2009* (Environment Canterbury, 30 September 2009), at 16.

ECan's popularity in the wider community was a threat to central government and local mayors' focus on economic development. The significance of water issues to Cantabrians had been illustrated by the election of two councillors who were part of the 'Save Our Water' initiative during 2007 local government elections ; two further Save Our Water candidates missed election by only a small margin.⁵³⁰ Concern around the quality of New Zealand's waterways was thus growing generally, and there was a good chance that more environment-focussed candidates could be elected in the next local government elections, which were scheduled to be held only months after the enactment of the ECan Act.

More environmental councillors would have resolved the Council's deadlock in favour of environmental considerations rather than central government's and local mayors' economic development agenda. This may be a reason for the government's rush to pass the ECan Act despite the evident improvement of ECan issues and the lack of justification for central government intervention. The Act suspended Cantabrians' right to elect their regional councillors, making it impossible to manifest the population's growing interest in protecting their water resources. Central government therefore securitised ECan because it was concerned that ECan would increasingly act against central government's policy interests.

5.2.2.3 Dysfunctional Council

Finally, the Creech Report and the government alleged that ECan was a "dysfunctional" council. This was based on purportedly bad relationships with territorial authorities and stakeholders, as well as a split council that could not make important decisions due to ideological differences.

5.2.2.3.1 *Bad Relationships*

ECan's relationship with territorial authorities have historically been strained, as the aforementioned complaint letter from the Canterbury mayors to central government illustrates. Moreover, Christchurch City was substantially underrepresented on regional level, even though it comprises over 60% of Canterbury's population.⁵³¹ This led to significant political tension both on territorial and regional level. The bad relationships between local government institutions were thus not solely ECan's fault. However, relationships visibly improved since 2009 under ECan's Chair Alec Neill.

The reason for bad relations with external stakeholders was purportedly that ECan was not sufficiently balancing its environmental perspective with economic, social, and cultural perspectives, as required

⁵³⁰ *Declaration of Result of Election* (Christchurch City Council, 17 October 2007).

⁵³¹ Creech and others, above n 473, at 7; Christchurch electorates had almost 10% more people per councillor than the mural constituencies, see *Determination of representation arrangements to apply for the election of the Canterbury Regional Council to be held on 12 October 2019* (Local Government Commission, 10 April 2019), at 1.

by the Resource Management Act.⁵³² The Creech Report suggested that the statement by ECan's CEO illustrated that imbalance: the CEO had claimed that the main role of the Council was to protect the environment.⁵³³

Yet, emphasising environmental considerations appears justified in light of the abovementioned demand on, and limitations of, Canterbury's fresh water. Section 5 of the Resource Management Act requires local government to manage the provision of social, economic, and cultural well-being of the community "while ... safe-guarding the life-supporting capacity of ... water ... and avoiding, remedying, or mitigating any adverse effects of activities on the environment." Not only was Canterbury's ability to sustainably supply fresh water approaching its limits, but its water quality had also been declining. According to the National Institute of Water & Atmospheric Research, one significant reason for the continual decline was the rapid increase in nitrate levels caused in large parts by fertilisers used in the expanding dairy industry.⁵³⁴ The precarious state of Canterbury's water shows that ECan's emphasis on the environment was not only justified, but statutorily required. Had it prioritised economic considerations, it would not have acted in line with the purpose of the Resource Management Act.

In this context, Minister of the Environment Nick Smith's insistence that the passage of the legislation was urgently needed to protect the environment was outright cynical.⁵³⁵ There were few signs that the central government intended to address water quality concerns. The Creech Report mentioned deteriorating water quality merely in passing, while consistently stressing the need for water management to facilitate "significant opportunity for future agricultural development in Canterbury."⁵³⁶ Indeed, in the years following ECan's takeover by commissioners, it consented several large-scale irrigation and dairy conversion proposals, the main consumers of already stressed water reservoirs and contributors to the deterioration of Canterbury's water quality.⁵³⁷ During the same time, Canterbury's dairy herds increased by more than 30%. It seems clear, then, that central government used environmental rhetoric to take advantage of New Zealand's awareness and concern about environmental risks. Had the ECan Bill been subject to the select committee process, it is likely that it would have publicly exposed the Bill's likely negative effect on Canterbury's water resources and quality. It was therefore important for the government to be able to bypass the select committee stage by using urgency.

⁵³² Resource Management Act 1990 (NZ), s 56(2).

⁵³³ Creech and others, above n 473, at 9.

⁵³⁴ Proffitt, above n 480.

⁵³⁵ Nick Smith (30 March 2010) 661 NZPD, 9927.

⁵³⁶ Creech and others, above n 473, at 5.

⁵³⁷ Joanne Webber "Re: Representation Review Objection" (26 September 2018) <www.greenpeace.org>.

5.2.2.3.2 *Deadlocked Council*

The Creech Report also highlighted the purported inability of the Council to make important political decisions.⁵³⁸ The Council was evenly split between "pro-environment" and "pro-development" councillors and there was a perception that the ideological differences were so polarised that the Council became dysfunctional. Even though ECan was meeting its obligations under the Local Government Act 2002, the Report found that the lack of water plan was illustrative of that dysfunction. Yet, despite the ideological differences, the Council had made important decisions, particularly in the area of water management. While the Creech Report laments ECan's apparent indecision regarding a regional water plan under the Resource Management Act, it also praises the success of the Canterbury Water Management Strategy. The Strategy was passed in the Council by a vote of 10: 2, showing that ECan was indeed capable of moving past its ideological divide.⁵³⁹

Irrespective of ECan's decision-making ability, the notion that the solution to an evenly split Council is to disestablish the elected councillors is an affront to democratic principle; it fits neatly with the agency model and its view that local government is purely a service delivery institution. The very purpose of representative government is to give opposing interests a forum for discussion and decision-making. Unless more than half of representatives agree on a decision, the status quo must prevail lest a minority of representatives make decisions which bind the majority. This may not always lead to the economically most optimal outcome, but that is not the purpose of representative democracy. The *raison d'être* of democracy is the preservation of autonomy and self-governance; in lieu of unanimous decision-making, a majority is required to change the status quo.

Even if the Council were entirely deadlocked and unable to make any decisions, less intrusive changes to the council structure were available that would not have suspended local democracy. For example, the issue of an evenly split Council could be overcome by having an uneven number of councillors. Indeed, during the 2018 review of ECan's representation arrangement, one of the options for its membership arrangement provided for a Council with thirteen members.⁵⁴⁰ Such a membership would have made majority decision-making significantly easier as it would have been impossible to have an evenly split council.

None of the reasons the government gave for rushing the passage of the ECan Act and for suspending a significant part of local democracy in Canterbury justified either of these actions. Consent processing

⁵³⁸ Creech and others, above n 473, at 8.

⁵³⁹ At 473, at 50.

⁵⁴⁰ Determination of representation arrangements to apply for the election of the Canterbury Regional Council to be held on 12 October 2019, above n , at 3; Regional councils are required to review their representation arrangement at least once every six years, Local Electoral Act 2001 (NZ), s 19I.

issues had been largely rectified and the backlog of consent applications was continually decreasing. Although ECan was emphasising environmental over economic considerations in its consent process, this was in line with the Resource Management Act's requirements in light of the pressures on Canterbury's freshwater capacity and quality. And although the Council was split along ideological lines, it was capable of reaching important decisions, as the development of the Canterbury Water Management strategy shows.

5.2.3 Securitising a Manufactured Crisis

The ECan Act shows how governments can use securitising economic risk rhetoric to justify suspending democratic processes. Cantabrians regained their right to elect a full regional council in the 2019 local government elections, nine and a half years after elected ECan councillors were disposed by the ECan Act. The main motivation of New Zealand's government was clearly economic policy. Its narrative revolved mainly around the strategic importance of Canterbury's water resources to the national economy and the dairy industry.⁵⁴¹ Although the scope of the Creech Report was to investigate whether there were wider issues at the Canterbury Regional Council, the investigation concentrated mainly on economic factors. It almost entirely, and most likely intentionally, neglected environmental considerations, repeatedly dismissing them as disproportionate to economic development. This highlights that economic risks generally have primacy over other risk considerations and lend themselves more to influencing the public perception.

The economic rhetoric combined with the urgency of the passage of the bill and the extreme effect of the provisions of the ECan Act created the impression of an impending economic emergency. Yet, such an emergency did not exist. By the time the ECan Act was passed, ECan was performing equally or better than many other local authorities. The only 'problem' remaining was the Council's conservative and environmental approach to issuing water consents to large scale irrigation schemes and dairy conversion proposals. While this approach certainly endangered the rapid development of the agricultural sector, it was not an emergency by any of the accepted definitions. There was not existential threat or risk to life or property; there may have been a risk to the rate of economic growth in Canterbury, but this risk was not existential to the economic system of New Zealand.⁵⁴²

Particularly in the context of local democracy, conjuring environmental and economic risk imagery to convince the public that such extraordinary steps were necessary for the economic and environmental

⁵⁴¹ *Joint Ministers meeting with Ministry of Agriculture and Forestry and Ministry for the Environment - Briefing Paper 08-b-0620* (28 March 2008), at 4; Nick Smith (30 March 2010) 661 NZPD, 9927; Amy Adams (30 March 2010) 661 at 9930; Collin King (30 March 2010) 661 at 9930.

⁵⁴² Agriculture is only the sixth largest sector in Canterbury's economy, contributing about 6.6% to the region's GDP, see "Which Industries Contributed to Your Region's GDP?" (31 March 2020) <www.stats.govt.nz>.

wellbeing of the nation can be very effective. Interest and confidence in local government is traditionally low; this is exacerbated where local government has little autonomy even during ordinary times, like is the case in New Zealand. Consequently, the government's economic risk rhetoric was largely accepted by the public. Apart from a few small protests in Christchurch and the rare media opinion, there was very little resistance to the ECan Act. The following year, central government would go on to comfortably win the next general election.⁵⁴³

Creating a false emergency narrative around ECan enabled central government to advance its policy interest by suspending local democracy in Canterbury. It weakened local democracy by signalling that if regional policy did not align with central policy, central government will take extraordinary measures to impose its will on the region. The securitisation of ECan's situation by manufacturing an public narrative of economic crisis was so successful that the public accepted it with little to no resistance.

⁵⁴³ "2011 General Election - Official Results" (31 January 2012) <www.electionresults.govt.nz>.

5.3 The CER Act: Normalising Exceptionalism⁵⁴⁴

Securitisation of ordinary issues can lead to the normalisation of these exceptional powers.⁵⁴⁵ Disguising extraordinary measures as ordinary bears the risk that the extraordinary becomes embedded in the fabric of the ordinary legal system. This normalisation of extraordinary powers is perhaps best illustrated by the Canterbury Earthquake Recovery Act 2011 (CER Act). The Act was passed to facilitate and expedite the recovery process in the aftermath of the February 2011 Canterbury Earthquake that had a devastating effect on the Canterbury region and the city of Christchurch. Despite its application to the recovery phase, which generally does not require urgent decisions regarding matters immediately endangering life or property, the Act contained a range of broad extraordinary powers. These powers were available to the executive for a period of five years after the initial emergency event. While some extraordinary powers may have been justified in the early recovery phase, particularly to address wide-spread wellbeing issues in the population, the Act's powers were primarily used to make economic and infrastructure-related decisions. The government justified these extraordinary powers with a narrative of an economic disaster for the region if fast and decisive action were not taken. However, the kinds of decisions taken during the recovery phase often have a long-term effect and therefore require sufficient consideration and consultation. The use of extraordinary powers to effect these decisions was therefore constitutionally inappropriate.

5.3.1 The Canterbury Earthquake Acts

In the early hours of 4 September 2010, an earthquake with a magnitude of 7.1 on the Richter-scale hit the Canterbury region of New Zealand,⁵⁴⁶ The earthquake was centred about 40km west of Christchurch. Due to the shallow nature of the earthquake, the shaking intensity was classed as 'extreme' on the Modified Mercalli Intensity scale.⁵⁴⁷ As the epicentre of the earthquake was in a remote area and most people were asleep, few people were injured and no one lost their life. However, the damage to property was significant, from broken windows and fallen chimneys to collapsed masonry shop façades and widespread roading damage and liquefaction.⁵⁴⁸

The monetary value of the rebuild was estimated to be several billions of dollars, an unprecedented amount in New Zealand's disaster history. Just ten days after the event, the government moved to

⁵⁴⁴ Elements of this part have previously been published in {Mueller, 2016 #158} and {Mueller, 2017 #159}.

⁵⁴⁵ Ferejohn and Pasquino, above n 103, at 219.

⁵⁴⁶ Michael Ardagh and others *Rising From the Rubble: a Health System's Extraordinary Response to the Canterbury Earthquakes* (Canterbury University Press, Christchurch, New Zealand, 2018), at 21-27.

⁵⁴⁷ The Modified Mercalli Intensity scale measures effects on the earth's surface, on people, and on human-made structures, at 546, at 21, n1.

⁵⁴⁸ Liquefaction is a process in which a mixture of silt, sand, and water erupts through cracks in the ground due to the shaking and repeated compression of subterranean layers.

pass the Canterbury Response and Recovery Act 2010 (CERR Act) to expedite the response and recovery efforts.⁵⁴⁹ The CERR Act mainly allowed the Governor-General to pass Orders in Council on the recommendation of government ministers that could "grant exemption from, or modify, or extend any provision of [almost] any enactment", and were intended to be unchallengeable in court.⁵⁵⁰ It also established a Recovery Commission to act as advisor to the Minister of Canterbury Earthquake Recovery and as a contact point between local and central government.⁵⁵¹ The severity of the earthquake was perceived by the Members of Parliament as so strong that the bill passed with overwhelming cross-party support under urgency in a single day.⁵⁵²

Five months later, on 22 February 2011, the Canterbury region was hit by an aftershock with a magnitude of 6.3 on the Richter-scale. Despite the lower magnitude, its impact on property and human life was significantly more severe than the September earthquake. Two large buildings in the central business district collapsed, taking a combined 133 lives. A further 52 people lost their lives due to falling masonry, rocks, or other debris. The vast majority of buildings in the central business district would have to be demolished. Most residential dwellings suffered damage and whole suburbs would be deemed uninhabitable and would have to be abandoned. Infrastructure and essential services such as power and water supply were also severely affected. A 2016 report estimated the overall reconstruction cost to exceed NZ\$40 billion, about 20% of New Zealand's GDP.⁵⁵³ To enable the safe demolition of high-rise office buildings, a cordon was established around the central business district, excluding the public from the heart of their city, and preventing many businesses from retrieving their property and leaving them without premises. While more and more parts of the central business district became accessible as the demolitions progressed, some areas remained cordoned off until June 2013, almost 900 days after the February earthquake.⁵⁵⁴

In response to the February earthquake, the government declared a national state of emergency under s 66 of the Civil Defence Emergency Management Act 2002 (CDEMA).⁵⁵⁵ Under a state of Emergency the government has access to a range of extraordinary powers to facilitate a swift disaster

⁵⁴⁹ Gerry Brownlee (14 September 2010) 666 NZPD, 13899.

⁵⁵⁰ Canterbury Earthquake Response and Recovery Act 2010 (NZ), s 6.

⁵⁵¹ At , ss 9, 10.

⁵⁵² The Green party voiced some concerns about the extent of extraordinary powers under s 6 at , Kennedy Graham (14 September 2010) 666 NZPD 13899.

⁵⁵³ Amy Wood, Ilan Noy and Miles Parker *The Canterbury rebuild five years on from the Christchurch earthquake* (Reserve Bank of New Zealand, 18 February 2016), at 3; Annabel Begg and others "Wellbeing Recovery Inequity Following the 2010/2011 Canterbury Earthquake Sequence: Repeated Cross-Sectional Studies" (2020) *Australian and New Zealand Journal of Public Health* 1, at 1.

⁵⁵⁴ Begg and others, above n 553, at 1.

⁵⁵⁵ It was only the second time in New Zealand's history that a nationwide state of emergency had been declared. The only other state of emergency was declared during the Waterfront Dispute in 1951, New Zealand Law Commission, above n 231, at [4.13].

response. These powers include evacuating or entering premises, closing or restricting access to roads or public areas, and requisitioning private property if that is necessary to preserve human life.⁵⁵⁶ Due to extent of extraordinary powers, a state of emergency automatically expires after seven days unless it is extended by the Minister.⁵⁵⁷ The disastrous effects of the February earthquake were so great that the state of emergency was extended nine times.

As the state of emergency had been in place for ten weeks and with immediate response and relief action accomplished, the government decided to let the state of emergency expire on 30 April 2011. However, as the central business district was still inaccessible, large residential areas uninhabitable, and major infrastructure repair and rebuilding projects necessary, a long and arduous recovery process lay ahead. In order to facilitate and expedite that process, Parliament passed the CER Act under urgency on 14 April 2011.⁵⁵⁸ The CER Act provided the Minister of Canterbury Earthquake Recovery and the Canterbury Earthquake Recovery Authority *Te Mana Haumanu ki Waitaha* (CERA) with a range of powers to enable a swift and decisive recovery. These powers included powers of entry onto premises,⁵⁵⁹ to close roads and to restrict access to buildings,⁵⁶⁰ and to compulsorily acquire real and personal property,⁵⁶¹ among others. It also required the Chief Executive of CERA to develop a recovery strategy and the Minister to develop recovery plans in cooperation with local government entities.⁵⁶² Appeals against decisions by the Minister of the Chief Executive were mostly excluded.⁵⁶³ Finally, the Minister could, by way of Orders in Council, effect any provision deemed necessary or expedient that could grant exemptions from, modify, or extend from any parliamentary enactment.⁵⁶⁴ The CER Act included a sunset clause that the Act expired five years after its commencement and that any active Orders in Council would be revoked upon expiry of the Act.⁵⁶⁵

5.3.2 Exceptionalism During Disaster Recovery

The government securitised the recovery of Christchurch and the Canterbury region to pass the exceptional CER Act. This raises the question of the risk of disaster recovery. Constitutionally, the securitisation was appropriate if the disaster recovery process posed an existential risk to some

⁵⁵⁶ Civil Defence Emergency Management Act 2002 (NZ), part 5.

⁵⁵⁷ At , ss 70, 71.

⁵⁵⁸ Canterbury Earthquake Recovery Act 2011 (NZ), s 3.

⁵⁵⁹ At , ss 33, 34.

⁵⁶⁰ At , ss 45, 46.

⁵⁶¹ At , ss 52-59.

⁵⁶² At , ss 11-26.

⁵⁶³ At , ss 68-70. The exclusion of appeals presumably had the purpose of to prevent jeopardising swift and decisive action by the Minister, CERA, and persons acting towards recovery.

⁵⁶⁴ At , s 71.

⁵⁶⁵ At , s 93. The CER Act was replaced on 19 April 2016 by the Greater Christchurch Regeneration Act 2016 (NZ).

referent object. It must therefore be investigated whether disaster recovery can post such a risk and thus justify urgent exceptional measures.

When talking about sudden disasters, modern disaster management research usually views them in specific phases: mitigation, preparedness, response, and recovery.⁵⁶⁶ The mitigation phase deals with reducing and mitigating risks to human life and property posed by potential disaster events. Preparedness refers to the development of operational systems and capabilities that will aid in dealing with the event once it occurs. During and in the immediate aftermath of the event, actions will be taken to save lives and protect property in the response phase. In the mid- to long-term after a sudden disaster event, the recovery phase, coordinated efforts and processes are put in place to regenerate the stricken communities. Disasters tend to recur, particularly those connected to natural events; the recovery phase therefore often leads into or coincides with the mitigation and preparedness phases. Lessons from disasters inform the ways the impact of future disasters can be mitigated. This means that the disaster phases can be viewed as a cycle in which one phase invariably follows the next.⁵⁶⁷

Disaster recovery follows the response phase in the disaster cycle. That means that the immediate event that led to the disaster has likely passed, and most urgent disaster response actions have been completed. Recovery is thus generally associated with the process of returning to normality. In the context of a destructive environmental event such as an earthquake, recovery generally involves repairing or demolishing damaged buildings and restoring infrastructure, removing debris, new construction, etc.⁵⁶⁸ But post-disaster recovery is more complex and multi-dimensional than the rebuilding of property and infrastructure.⁵⁶⁹ It must also restore cultural assets and ecological conditions, as well as aim to rebuild people's lives and livelihoods.⁵⁷⁰ The latter, psychosocial recovery, refers to communities' and people's return to a relatively stable pattern of functioning by enabling them to regain a sense of control and orientate themselves towards their future.⁵⁷¹ Psychosocial

⁵⁶⁶ Barry Flanagan and others "A Social Vulnerability Index for Disaster Management" (2011) 8 *Journal of Homeland Security and Emergency Management* 1, at 2; Damon P. Coppola *Introduction to International Disaster Management* (2nd ed, Butterworth-Heinemann, Boston, 2011), at 10. In New Zealand, the phases of the disaster cycle are often referred to as the '4Rs': reduction, readiness, response, recovery, "The 4 Rs" (24 April 2021) National Emergency Management Agency Te Rākau Whakamarumarū <www.civildefence.govt.nz>.

⁵⁶⁷ New Zealand Law Commission, above n 231, at [2.27].

⁵⁶⁸ Coppola, above n 566, at 378.

⁵⁶⁹ Diana Contreras "Fuzzy Boundaries Between Post-Disaster Phases: The Case of L'Aquila, Italy" (2016) 7(3) *Int J Disaster Risk Sci* 277, at 278; Lianne Dalziel (12 April 2011) 671 NZPD, 17898.

⁵⁷⁰ Contreras, above n 569, at 279; Coppola, above n 566, at 377.

⁵⁷¹ Jane Morgan and others "Monitoring wellbeing during recovery from the 2010–2011 Canterbury earthquakes: The CERA wellbeing survey" (2015) 14 *Int J Disaster Risk Reduction* 96, at 98; *Recovery Strategy for Greater Christchurch Mahere Haumanutanga o Waitaha* (Canterbury Earthquake Recovery Authority, Christchurch, May 2012), at 17; *Community in Mind: Hei Puāwai Waitaha - a flourishing Waitaha* (Canterbury Earthquake Recovery Authority, Christchurch, June 2014), at 4.

recovery is complicated by the fact that it can be impacted by persisting trauma and factors that emerge after the initial event or because of the recovery process.⁵⁷²

The recovery phase of a disaster is generally not classed as part of the emergency event. The CDEMA requires an emergency to be a situation that “causes or may cause loss of life or injury or illness or distress or in any way endangers the safety of the public or property”.⁵⁷³ As the emergency event will generally have passed by the time of the recovery phase, there is no imminent danger to life or property anymore. However, reality does not neatly distinguish between disaster phases. There is no clear line between the response and recovery phase.⁵⁷⁴ Some recovery decisions may still require urgent decision-making, particularly early in the recovery process.⁵⁷⁵

The United Nations Development Programme (UNDP) distinguishes between 'early recovery' and 'recovery'.⁵⁷⁶ During early recovery, quick and often temporary decisions are made to enable some form of normal live, whereas the recovery phase aims to build a sustainable, lasting normality over a longer period of time. There may therefore be some justification to allow extraordinary powers for specific urgent short-term decisions during the early part of the recovery process, as long as they are strictly necessary to preserve life or property, and their effect is temporary. Most long-term decisions, on the other hand, do not fall under the Law Commission's and CDEMA's definition of emergency and thus do not justify the use of extraordinary powers, particularly not Henry VIII clauses. They are lasting decisions that are aimed at contributing to the community's long-term development.⁵⁷⁷ Even if the executive experiences pressure to move the recovery process at haste in order to rebuild and bolster employment and the economy, substantive long-term decisions require due consideration and the

⁵⁷² Peter Gluckman *The psychosocial consequences of the Kaikoura earthquakes - A briefing paper* (Office of the Prime Minister's Chief Science Advisor, 2016), at 3.

⁵⁷³ Civil Defence Emergency Management Act 2002 (NZ), s 4.

⁵⁷⁴ Contreras, above n 569, at 280; RW Kates and DJ Pijawka “From Rubble to Monument: The Pace of Reconstruction” in JE Haas, RW Kates, and MJ Bowden (eds) *Reconstruction Following Disaster* (MIT Press, Cambridge, 1977), at 1-23.

⁵⁷⁵ Sarah Kerkin “Earthquake Recovery Legislation: Learning from Experience” (2018) 14(1) Pol Q 50, at 53.

⁵⁷⁶ The UNDP divides the post-disaster period into four phases: 1) Relief, in which lives are saved, shelters established, and essential services re-established; 2) Early Recovery, when some form of normality is re-established by removing debris, completely restoring essential services, disestablishing emergency shelters, and reactivating local business operation; 3) Recovery, the slow process towards a new actual normality by implementing recovery plans and (re)constructing buildings and public areas; and 4) Development, where the recovery phase is assessed in order to improve preparedness, mitigation, response, and recovery for future disasters. Relief corresponds to the response phase of the disaster cycle, early recovery and recovery correspond to the recovery phase, and development corresponds to the preparedness and mitigation phases, “UNDP Policy on Early Recovery” (22 August 2008) <www.reliefweb.int>, at 29.

⁵⁷⁷ Coppola, above n 566, at 380.

legitimacy of the constitutional and democratic process. There is no urgency during the long-term recovery process like there is during the immediate response after an emergency event.⁵⁷⁸

At least during the early recovery, some of the extraordinary powers of the CER Act may have been constitutionally appropriate. It is arguable that there were situations during early recovery that required urgent decisions to enable swift early recovery. For example, several of the initial Orders in Council enabled or expedited the removal of debris and silt and the demolition of dangerous buildings.⁵⁷⁹ While these orders may have been ill considered and poor decisions, the urgency of the initial decision-making process may have justified their use. However, as the CER Act established extraordinary powers for the duration of five years, it is unlikely that extraordinary measures were justified beyond the early recovery stage. The emergency event itself had long passed and the early recovery phase would have ended within weeks of the passing of the Act.

Unlike its stated purpose, its real purpose was primarily to facilitate a swift economic recovery. General economic recovery is a long-term project. While timely and decisive decisions may be desirable during recovery, their long-term impacts require both due consideration and the legitimacy of a proper bureaucratic and democratic decision-making process. The CER Act's primary function therefore was never to be an emergency statute, but rather to expedite ordinary executive functions and to relieve the executive from inconvenient bureaucratic and constitutional procedures. The securitising risk rhetoric was therefore at least to some extent disingenuous. By including exceptional powers in the CER Act, it contributed to a normalisation of exceptionalism in ordinary times.

5.3.3 Constitutional Impact of CER Act Powers

The securitisation of the Canterbury earthquakes for an inappropriately long time had significant and lasting effects on New Zealand's constitutional system and institutions. Particularly the CER Act's extensive privative clauses and Orders in Council are examples of long-term exceptional powers that were almost entirely constitutionally inappropriate in the context of disaster recovery.

Although the CER Act was passed with an overwhelming majority of parliament, there was extensive debate about the extent of powers that the Act provided.⁵⁸⁰ The Act created several extraordinary powers and limited the ability to appeal actions taken under the Act. Particularly the necessity for the wide-ranging Orders in Council was questioned. Many of the powers conferred under the CER Act

⁵⁷⁸ Kennedy Graham (12 April 2011) 671 NZPD, 17898.

⁵⁷⁹ See for example the Canterbury Earthquake (Land Transport Rule; Operating Licence) Order 2011 (NZ); Canterbury Earthquake (Port of Lyttleton) Order 2011 (NZ); Canterbury Earthquake (Historic Places Act) Order 2011 (NZ); Canterbury Earthquake (Burwood Resource Recovery Park) Order 2011 (NZ); Canterbury Earthquake (Building Act) Order 2011 (NZ).

⁵⁸⁰ The CER Act passed with 109 Ayes to 11 Nays, (12 April 2011) 671 NZPD 18198.

closely resembled those conferred by the CDEMA during states of emergencies. Both statutes conferred powers of information gathering,⁵⁸¹ entering premises,⁵⁸² and closing roads and public areas as well as restricting access to buildings.⁵⁸³ All of these powers have been classified by the Law Commission as exceptional powers, which should only be used during emergency situations.⁵⁸⁴

5.3.3.1 Expiration

The primary safeguard against abuse of these extraordinary powers in the CDEMA is their expiration after seven days, unless the government extends the state of emergency for another seven days.⁵⁸⁵ Because of the frequent requirement to renew the state of emergency, the need for a continued state of emergency and the corresponding extraordinary powers remains open to scrutiny and must continually be justified. In contrast, the CER Act expired after a five-year period, during which extraordinary powers equivalent to those in the CDEMA were available to the executive. The CER Act thus effectively extended the state of emergency for five years, without the need for continual justification for the necessity of extraordinary powers, and despite the absence of a justifying a state of emergency.

5.3.3.2 Privative Clauses

This situation was exacerbated by the inclusion of extensive privative clauses in the CER Act. Under the CDEMA, both the determination of whether a state of emergency is required and the use of powers during a state of emergency can be appealed. In contrast, the CER Act excludes appeals against most actions taken under the Act.⁵⁸⁶ Appeals are only allowed against certain actions in connection with the recovery plans, against the amount of compensation in the context of compulsory acquisition of property, against certain decisions in connection with the Resource Management Act, against the Minister's decision to assume council competencies, and concerning disputes regarding the surveying of land.⁵⁸⁷ Courts are ousted from hearing any other complaint concerning the Act.

⁵⁸¹ Civil Defence Emergency Management Act 2002 (NZ), s 76; Canterbury Earthquake Recovery Act 2011 (NZ), s 29-32.

⁵⁸² Civil Defence Emergency Management Act 2002 (NZ), s 87; Canterbury Earthquake Recovery Act 2011 (NZ), s 33, 34.

⁵⁸³ Civil Defence Emergency Management Act 2002 (NZ), s 86, 88; Canterbury Earthquake Recovery Act 2011 (NZ), s 45, 46.

⁵⁸⁴ New Zealand Law Commission, above n 231, at [3.106].

⁵⁸⁵ Civil Defence Emergency Management Act 2002 (NZ), ss 70, 71.

⁵⁸⁶ Canterbury Earthquake Recovery Act 2011 (NZ), ss 68-70.

⁵⁸⁷ At , s 69.

These privative clauses caused some concern among the opposition and constitutional experts.⁵⁸⁸ The government had justified the inclusion of privative clauses with its emergency narrative that swift recovery decision-making and action were necessary because of a crisis in the region. If these decisions could be appealed, it could slow down the recovery process and potentially stifle decisive recovery action. The government promised that powers would be used responsibly, and that public pressure would ensure that powers would not be abused.⁵⁸⁹

However, formal safeguards exist for the sole reason that informal assurances such as the promises are insufficient to prevent the improper use of extraordinary powers.⁵⁹⁰ While it may be helpful to expedite recovery by removing some bureaucratic hurdles, eliminating all safeguards around executive powers is not. The point of formal safeguards in a constitutional democracy is to ensure that individual interests are not favoured over broader public interests.⁵⁹¹ Especially in the context of sweeping extraordinary powers, comprehensive appeals possibilities are thus of vital importance.⁵⁹²

5.3.3.3 Orders in Council

The most concern was caused by the Minister's ability to use Orders in Council. The Orders in Council under both the CERR Act and the CER Act were so-called "Henry VIII clauses": such clauses allow the executive to modify or suspend parliamentary legislation.⁵⁹³ Henry VIII clauses are contentious, because they counter the constitutional separation of powers principle that only the legislature is allowed to create or alter primary legislation.⁵⁹⁴ The Law Commission has therefore recommended that in the context of emergencies, Henry VIII clauses should only be available when either the nature of the emergency is unknown in advance or it is uncertain which specific measures are going to be needed in response to the emergency.⁵⁹⁵ Such a clause is justified in those circumstance because the urgency of the emergency situations makes it unviable to rely on the slow parliamentary process to create the powers needed to effectively and swiftly respond to the emergency.

⁵⁸⁸ see for example David Parker (8 December 2016) 719 NZPD, 15733, who voiced that concern about similar provisions in the Hurunui/Kaikōura Earthquakes Recovery Act 2016 (NZ), legislation passed to facilitate the recovery of the Hurunui and Kaikōura regions following the Kaikōura Earthquake.

⁵⁸⁹ Kate Wilkinson (12 April 2011) 671 NZPD, 17898.

⁵⁹⁰ Andrew Geddis "An Open Letter to New Zealand's People and Their Parliament" (2010) <www.pundit.co.nz>.

⁵⁹¹ Kennedy Graham (14 September 2010) 666 NZPD 13899.

⁵⁹² New Zealand Law Society "Law Society Comments on Canterbury Earthquake Act" (2010) Scoop <www.scoop.co.nz>.

⁵⁹³ Kerkin, above n 575, at 50.

⁵⁹⁴ David G. McGee and others *Parliamentary Practice in New Zealand* (Fourth ed, Oratia Books, Oratia Media Ltd, Auckland, New Zealand, 2017), at 465.

⁵⁹⁵ New Zealand Law Commission, above n 231, at [5.78-79].

To some extent, the government explained the need for Orders in Council with the uncertainty regarding measures that would be necessary for recovery. During the aftermath of the September earthquake, it had invited local government entities to create a 'wish list' of statutes and provisions that they deemed to be hindering the response and recovery process. The aim was to create a limited list of statutes that could be modified by Orders in Council. However, the response by local government was unfocused and mostly revolved around bureaucratic inconveniences. The government took that to mean that it was too difficult to ascertain specific recovery needs in advance. Consequently, a broad Henry VIII clause was required to effectively deal with the recovery of the Canterbury region.⁵⁹⁶

The government further justified the clause by saying that it was both pragmatic and principled to include it in the legislation.⁵⁹⁷ Suspending or altering existing legislation (and excluding liability for person's acting under the Act) allowed the Minister and CERA to create a situation in which recovery workers act without hesitation for fear of breaking the law. If a swift recovery process required a person to act in contravention of an existing law, it would neither make sense to hold persons liable, nor would it be fair. Although adhering to constitutional standards was important to ensure public trust in the constitutional system, under certain circumstances, such as during the aftermath of a major catastrophe such as an earthquake, adhering to procedure may undermine public trust, particularly if the procedure is perceived as too cumbersome, too slow, or requires a disproportionate investment.⁵⁹⁸ Using a Henry VIII clause under such circumstances in order to expedite procedure was thus in line with New Zealand constitutional values and appropriate.

The inclusion of the Henry VIII clause was criticised on the basis that its application to almost all legislation was unnecessarily broad.⁵⁹⁹ Opposition Member of Parliament Clayton Cosgrove alleged that the clause made the Minister of Canterbury Earthquake Recovery an 'Earthquake Tsar', because it gave him both executive and legislative powers.⁶⁰⁰ This enabled a single person to create their own boundaries and restraints, which was in contravention of constitutional and democratic principles.⁶⁰¹ Moreover, although Orders in Council had to be reported to Parliament on a quarterly basis, there

⁵⁹⁶ Meg Gall "A Seismic Shift: Public Participation in the Legislative Response to the Canterbury Earthquakes" (2012) 18 CantLR 232, at 234; Gerry Brownlee (12 April 2011) 671 NZPD, 17898. The criticism of the breadth of the clause led to a Henry VIII clause in the Hurunui/Kaikōura Earthquakes Recovery Act 2016 (NZ) to be limited to an exhaustive list of statutes, Schedule 2.

⁵⁹⁷ Nick Smith (14 September 2010) 666 NZPD, 13899.

⁵⁹⁸ Kerkin, above n 575, at 51.

⁵⁹⁹ Only five statutes were exempt from modification: the Bill of Rights 1688, the Constitution Act 1986, the Electoral Act 1993, the Judicature Amendment Act 1973, and the New Zealand Bill of Rights Act 1990, Canterbury Earthquake Recovery Act 2011 (NZ), s 71 (6)(c).

⁶⁰⁰ Clayton Cosgrove (12 April 2011) 671 NZPD, 17898.

⁶⁰¹ New Zealand Law Society, above n .

were no requirements to give reason as to why the Orders in Council were necessary and appropriate.⁶⁰² As a group of constitutional experts pointed out in an open letter to Parliament, it was not sufficient to extend such powers to a member of the executive without proper safeguards in place. Such law-making powers needed to be tightly proscribed, and the Minister must have to give clear and precise reasons for their necessity and justification.⁶⁰³

As Member of Parliament Kate Wilkinson had promised, the extensive and extraordinary powers under the CER Act have mostly been used responsibly. Orders in Council have generally been used within the spirit and purpose of the Act, to expedite the demolition and rebuilding of buildings and the repairing of infrastructure. Although judicial review procedures found that the Minister had acted outside the scope of the Act on a few occasions, the wrongdoing was generally merely of a procedural nature.⁶⁰⁴ But the fact that improper constitutional powers have not been clearly abused and have been used mostly responsibly does not in itself justify their existence. Just because they have not been misused this time does not mean that they will not be misused when a similar situation arises again. Including such powers in non-emergency statutes creates precedent.

The exceptional powers that the CER Act provides are ordinarily only available during states of emergency because the urgency of the situation demands immediate and decisive action. The possibility of executive abuse is accepted as a trade-off to enable effective emergency response. Without the urgency of an ongoing emergency, such a trade-off is not required. The use of exceptional powers outside an emergency situation can only be justified if it can be shown that they are necessary in order to cope with an existential threat. It was therefore necessary for the government to use securitising risk rhetoric to facilitate a narrative that stressed economic recovery at all costs. However, a truly immediate existential threat for Canterbury's and New Zealand's economy did not exist, particularly not for the duration of the CER Act. The narrative of continued economic crisis enabled the government to extend exceptional measures for at least five years. This illustrates the danger of securitising economic risks. The Canterbury earthquakes thus show that by creating the perception of an ever-present economic risk, exceptionalism can be extended from the temporary to the long-term.

⁶⁰² Canterbury Earthquake Recovery Act 2011 (NZ), s 88.

⁶⁰³ Geddis, above n 590.

⁶⁰⁴ See for example *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2012] 2 NZLR 57: the Court of Appeal found that the Minister had modified a local government zoning plan under s 27, but had not sufficiently considered alternatives before using his CER Act powers, at [104-109] and [125-135]. See also *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2005] NZSC 27, [2016] 1 NZLR 1: the Supreme Court found that the designation of large areas as the Residential Red Zone had not been properly done under the CER Act, as it should have been created as part of a formal recovery plan, at [112], [121], [124], and [127].

5.3.4 The Primacy of Economic Considerations

The Canterbury earthquakes also illustrate the primacy of economic risk rhetoric over other value considerations. As discussed in Chapter Three, it is easier to securitise economic issues successfully because of the public's ubiquitous experience and consequent risk aversion to economic risks. Throughout the entire recovery process, a variety of issues other than economic considerations. Particularly psychosocial recovery quickly became a pressing issue that needed to be addressed. It is even arguable that at least during the early stages of recovery, psychosocial issues were so urgent that exceptional measures may have been justified. However, government rhetoric focussed almost exclusively on economic recovery while consistently downplaying psychosocial issues. Indeed, Minister Brownlee was frequently accused of branding any criticism of decisions that appeared to favour economic over other kinds of recovery as "politically motivated", thus shutting down any discussion about the right recovery balance.⁶⁰⁵ This highlights the threat of exaggerated economic risk rhetoric not just to constitutional and democratic processes and institutions, but to social needs altogether.

5.3.4.1 Psychosocial Recovery

Throughout the post-earthquake period, community well-being was of fundamental concern. It was repeatedly stressed by Members of Parliament during the debates for both the CERR Act and the CER Act.⁶⁰⁶ Despite these concerns, post-earthquake mental recovery was slow, particularly caused by a lack of affordable housing and by difficult interaction with the Earthquake Commission (EQC).⁶⁰⁷

Most residential homes in Christchurch were damaged to at least some extent by the February Earthquake. Whole neighbourhoods were declared uninhabitable. In the months and years following the earthquake, many people were displaced and housing stock was limited. Moreover, many people had to move out of their homes while they were repaired, sometimes for several months, during which they had to live in short-term rental accommodation. This lack of housing stock and demand for rental accommodation led to a rental crisis in the months after the February earthquake.⁶⁰⁸ Within only two months, demand for rental accommodation had increased by 40% and supply had decreased by a

⁶⁰⁵ Clayton Cosgrove (12 April 2011) 671 NZPD, 17898.

⁶⁰⁶ See (14 September 2010) 666 NZPD 13899 and (12 April) 671 NZPD 17898. CERA conducted regular wellbeing surveys of the local population on a biannual basis between 2012 and 2015, "CERA Wellbeing Surveys" (2012-2015) <cerarchive.dpmc.govt.nz>.

⁶⁰⁷ Begg and others, above n 553, at 5.

⁶⁰⁸ Amanda Morrall "Tenants Protection Association urges Government to consider rent freeze in earthquake ravaged Christchurch" (3 March 2011) <www.interest.co.nz>.

similar amount. During the same time, rental prices had increased by 15%.⁶⁰⁹ Particularly lower socioeconomic households were affected by the rental crisis.⁶¹⁰

The sudden increase in rental prices represented a heavier burden on low-income households. Soon after the earthquake, reports of increasingly overcrowded households and people having to sleep in their cars emerged.⁶¹¹ These households were also disproportionately affected by the earthquakes, because many socioeconomically disadvantaged areas lay in the eastern parts of Christchurch; due to the local geology, the earthquake had its most severe impacts there.⁶¹² Despite warning of dramatic increases in rental prices and calls from the Tenants Protection Association to freeze rent increases as early as March 2011, Minister Brownlee denied the existence of such a crisis.⁶¹³ Although he acknowledged that rising rental prices were a problem, he did not want to influence the rental market as he feared that it would artificially lower the appetite for private investors to provide a solution for the limited housing stock in Christchurch.⁶¹⁴ It was more important not to endanger the economy and let the market take care of the rental crisis than to facilitate psychosocial recovery.

Unsurprisingly, the rental crisis and the lack of housing stock had a profound effect on the people of Christchurch. The government reacted to the issue by promising to increase the housing stock by fast tracking the development of new residential areas in the West and north of Christchurch. However, these were long-term measures that did not address the immediate housing needs, thus stifling and delaying psychosocial recovery.

Another reason for the slow recovery of the population's well-being were the often lengthy and difficult communication and negotiation between people with earthquake damaged houses and EQC and private insurers. The Canterbury earthquakes resulted in around 500,000 insurance claims from around 160,000 residential dwellings.⁶¹⁵ New Zealand has a form of compulsory public earthquake insurance, managed by the Crown entity EQC. EQC covers up to NZ\$100,000 (plus goods and services tax) of damage to a dwelling; any access damage is covered by private house insurance. For that

⁶⁰⁹ Olivia Carville "‘Pontius’ Brownlee sees no rental housing crisis" (15 April 2012) <www.stuff.co.nz>.

⁶¹⁰ Begg and others, above n 553, at 3.

⁶¹¹ Carville, above n 609.

⁶¹² Begg and others, above n 553, at 1. The rental crisis illustrates the so-called Inverse Response Law: during the response and recovery phase, disadvantaged groups are more likely to experience hardship and disparities in service provisions, likely due to systematic issues associated with enduring socioeconomic inequalities, Suzanne Phibbs and others "The Inverse Response Law: Theory and Relevance to the Aftermath of Disasters" (2018) 15(5) *Int J Environ Res Public Health* 916, at 916; Michael Marmot "The Health Gap: The Challenge of an Unequal World: the Argument" (2017) 46(4) *Int J Epidemiol* 1312, at 1312.

⁶¹³ Morrall, above n 608; Carville, above n 609.

⁶¹⁴ Michael Berry "Christchurch rent crisis 'best left to market'" (21 March 2012) <www.stuff.co.nz>.

⁶¹⁵ Andrew King and others "Insurance; Its Role in the Recovery from the 2010-2011 Canterbury Earthquake Sequence" (2014) 30(1) *Earthquake Spectra* 475, at 476.

reason, claims that were around the NZ\$100,000 mark often led to disputes between EQC and the private insurers about the exact value of the damage, thereby delaying the resolution of insurance claims and creating extended periods of uncertainty for the building owners.⁶¹⁶ EQC and private insurers at times also refused to accept certain kinds of damage as not covered, delayed agreeing to and paying out claims, or delayed repairs, often unreasonably.⁶¹⁷

Many of the people affected by this behaviour were vulnerable, such as older people.⁶¹⁸ Vulnerable people can be defined as people who have reduced "capacity to anticipate, cope with, resist and recover from the impact of a hazard."⁶¹⁹ Although EQC made efforts to identify vulnerable people, a recent inquiry into EQC found that there was no tangible difference in the treatment of people identified as vulnerable.⁶²⁰ The difficulties in dealing with EQC affected many Cantabrians' wellbeing and contributed to the slow psychosocial recovery process. Although one of CERA's stated aims was mental wellbeing, little was done to address the issues with EQC, and private insurers and the needs of vulnerable people were persistently deprioritised.⁶²¹

During the recovery, many people's mental wellbeing in the Canterbury region suffered, either due to trauma from the earthquake events themselves or from the effects of the recovery process. At least during the early recovery, the use of extraordinary powers may therefore have been justified to control the rental market and the EQC/private insurer process in order to aid the psychosocial recovery process.⁶²² Yet, despite using continuing economic risk rhetoric to create the perception of an economic crisis, the government refused to take extraordinary social recovery measures. Instead of focussing on the actual psychosocial crisis developing in Canterbury, the government instead created a narrative of the need for exceptional measures for an economic non-crisis.

⁶¹⁶ Morgan and others, above n 571, at 97; Stephanie E. Chang and others "Urban Disaster Recovery in Christchurch; the Central Business District Cordon and Other Critical Decisions" (2014) 30(1) *Earthquake Spectra* 513, at 517.

⁶¹⁷ Sarah Miles *The Christchurch Fiasco: the Insurance Aftershock and its Implications for New Zealand and Beyond* (Dunmore Pub, Auckland, N.Z, 2012); Jeremy Finn "Insurance Issues" in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters New Zealand Ltd, Wellington, 2015), at 196; Natalie Baird "Disasters, Human Rights and Vulnerability: Reflections from the Experiences of Older Persons in Post-Quake Canterbury" (2021) 2(1) *Yearbook of International Disaster Law* 314, at 330.

⁶¹⁸ Baird, above n 617, at 330.

⁶¹⁹ Benjamin Wisner *At Risk: Natural Hazards, People's Vulnerability, and Disasters* (2nd ed, Routledge, New York, NY, 2004), at 11. The concept of vulnerability is complex and subject of continuous debate, see Baird, above n 617, at 330.

⁶²⁰ *Report of the Public Inquiry into the Earthquake Commission* (Public Inquiry into the Earthquake Commission, March 2020), at 180.

⁶²¹ Baird, above n 617, at 329.

⁶²² The CER Act's purpose specifically allows for the restoration of social well-being, s 3.

5.3.4.2 The Residential Red Zone

A similar attitude can be seen in the handling of the so-called Residential Red Zone. The February earthquakes caused severe ground damage in large areas in Christchurch's east, around the Waimakariri river in the north, and in the Port Hills to the south. The ground remediation work and building repairs required to make the areas suitable for human occupation again was so extensive that the government decided it was too difficult to fix.⁶²³ It designated these areas as the Residential Red Zone, within which new construction was prohibited. The Residential Red Zone affected around 8,000 properties, the vast majority of which were residential. It created enormous pressure on homeowners, as they now had unrepairable houses on devalued land.

In order to provide relief and certainty about their future, the government offered to buy red-zoned properties at the value of their most recent council valuation.⁶²⁴ While the buy-out offer facilitated psychosocial recovery to some extent, it was in no small part an economic decision. Due to the severe damage to the ground in the affected areas, repairing and maintaining infrastructure and providing essential services would be exceedingly expensive due to the amount of ground remediation required. Moreover, leaving a substantial part of the local population in financial strife and uncertainty would have a significant impact on the economic recovery of the region.

While framing the offer as voluntary, the government and CERA therefore made sure to disincentivise rejecting the offer. The CERA webpage indicated that there was no guarantee that council services would continue in the red-zoned areas and emphasised the possibility of compulsory acquisition under the CER Act; these 'suggestions' were supported in public statements by CERA chief executive Roger Sutton and Prime Minister John Key.⁶²⁵ In *Quake Outcasts v Minister of Canterbury Earthquake Recovery*, the Supreme Court therefore found in 2015 that the offers could not be regarded as voluntary, because CERA's and the Prime Minister's comments suggested to homeowners that there was no real alternative to selling to the government.⁶²⁶

The vast majority of homeowners in the Residential Red Zone accepted the offer. However, a small number of homeowners rejected the offer. They were mainly people whose houses were not insured during the time of the earthquake. Because the government did not want to set a precedent that

⁶²³ Margaret MacDonald and Sally Carlton *Staying in the Red Zones - Te manawaroa ki te pae whero* (New Zealand Human Rights Commission, Auckland, October 2016), at 13.

⁶²⁴ Baird, above n 617, at 329. In a 2016 CERA survey, 79% of respondents reported that these offers gave them certainty of outcome, *Residential Red Zone Survey (of those who accepted the Crown offer)* (Canterbury Earthquake Recovery Authority Te Mana Haumanu ki Waitaha, Christchurch, February 2016), at 10.

⁶²⁵ MacDonald and Carlton, above n 625, at 37; Glenn Conway "Outcasts win High Court battle" (26 August 2013) <www.stuff.co.nz>.

⁶²⁶ *Quake Outcasts v Minister of Canterbury Earthquake Recovery*, above n , at [140].

would, as it claimed, disincentivise people from insuring their properties in the future, it offered only 50% of the properties council valuation.⁶²⁷ In *Quake Outcasts*, the Supreme Court rejected the government's reasoning for the lower offer and decided that the government had not sufficiently considered the circumstances and alternative solutions to justify differentiating offers based on insurance status.⁶²⁸

Despite this decision, the Minister of Canterbury Earthquake Recovery continued the differential treatment of uninsured homeowners and delayed resolution and certainty for those affected for another two years.⁶²⁹ During that time, people in the Residential Red Zone had to live in effectively abandoned communities, with degenerating services and infrastructure.⁶³⁰ A report on the Residential Red Zone by the Human Rights Commission found that the reduced offer for the remaining residents significantly exacerbated their stress.⁶³¹ The red-zoning decision delayed resolution of insurance claims for years, and the uncertainty about the continuation of the provision of services had a lasting negative effect on residents' wellbeing.

Even for a significant part of homeowners who did accept the government offer and for many tenants of rental properties, the establishment of the Residential Red Zone had detrimental effects. The sudden loss of housing stock in Christchurch's eastern suburbs, where many lower socioeconomic households lived, contributed to the rental crisis. It also inflated house prices, which meant that the buyout offer was not sufficient for some to purchase a new home.⁶³² Many of the affected were vulnerable, particularly low-income households and older persons. The ongoing effects of the red-zoning decision continue a decade later: in 2020, the UN Independent Expert on the Enjoyment of All Human Rights by Older Persons voiced her concern that the housing situation of many older persons in Christchurch was still inadequate.⁶³³

The government actions regarding the rental crisis, EQC and private insurers, and the Residential Red Zone illustrates the government's primary focus on economic recovery at the cost of other types of recovery, especially psychosocial.⁶³⁴ Despite the CER Act's stated purpose of facilitating economic,

⁶²⁷ *Quake Outcasts v Minister of Canterbury Earthquake Recovery* [2017] NZCA 332, [2017] 3 NZLR 486, at [83].

⁶²⁸ *Quake Outcasts v Minister of Canterbury Earthquake Recovery*, above n , at [167].

⁶²⁹ *Quake Outcasts v Minister of Canterbury Earthquake Recovery*, above n , at [82].

⁶³⁰ *Quake Outcasts v Minister of Canterbury Earthquake Recovery*, above n , at [176].

⁶³¹ MacDonald and Carlton, above n 625, at 15.

⁶³² Natalie Baird "Housing in Post-Quake Canterbury: Human Rights Fault Lines" (2017) 15(2) NZJPIIL 195, at 203.

⁶³³ Eleanor Ainge Roy "New Zealand's 'intention' to improve older people's lives is falling short, says UN expert" (12 March 2020) <www.theguardian.com>.

⁶³⁴ Melissa L. Finucane and others "Short-Term Solutions to a Long-Term Challenge: Rethinking Disaster Recovery Planning to Reduce Vulnerabilities and Inequities" (2020) 17(2) Int J Environ Res Public Health 482, at 487-488; Begg and others, above n 553, at 6.

social, cultural, and environmental recovery, its focus was primarily infrastructure repair and construction. In contrast to the psychosocial crisis, economic recovery cannot be regarded as an emergency, despite the government's rhetoric to frame it as such. Although economic recovery of Canterbury was of vital importance to the region, the decisions to be made were not urgent and therefore did not warrant the use of exceptional powers. Instead, framing economic recovery as a crisis while mostly ignoring psychosocial recovery did not just hinder the latter, it made it worse.

Government members of parliament consistently stressed the importance of a swift rebuild of Christchurch.⁶³⁵ Their focus lay with enabling efficiency and reducing bureaucracy to expedite infrastructure work and construction rather than on social recovery.⁶³⁶ Due to the dominance of the economic risk rhetoric, recovery decisions mainly ignored the real psychosocial crisis in favour of economic policy interests. This was reflected in the provisions of the CER Act: all of the specifically named exceptional provisions extend powers that facilitated infrastructure recovery and construction.⁶³⁷ None dealt with psychosocial recovery (or cultural or environmental recovery for that matter). Similarly, most of the Orders in Council were infrastructure or construction related.⁶³⁸

5.3.5 Normalising Exceptionalism

The CER Act illustrates how governments can use securitising economic risk rhetoric to normalise extraordinary powers. The government argued that the swift economic recovery of the Canterbury region was of vital importance to the prosperity of the region, thus playing on the economic risk aversion of the population. It used this rhetoric to justify the extension of extraordinary powers that are usually reserved for (and only justified during) the response phase into the recovery phase of an emergency.

This normalisation is exemplified by the review of emergency powers in New Zealand statute law. In its interim report, the Regulations Review Committee did not list provisions from the CER Act in its comprehensive overview of emergency powers.⁶³⁹ Although it corrected this mistake in its final report, this illustrates the creeping normalisation of exceptionalism.⁶⁴⁰ The CER Act acted as a blueprint for subsequent statutes, such as the Greater Christchurch Regeneration Act 2016 and the

⁶³⁵ See (14 September 2010) 666 NZPD 13899 and (12 April) 671 NZPD 17898.

⁶³⁶ Finucane and others, above n 634, at 487-488.

⁶³⁷ Canterbury Earthquake Recovery Act 2011 (NZ)

⁶³⁸ The remaining Orders in Council were mostly of a financial nature, such as tax-related orders and financial assistance; see for example the Canterbury Earthquake (Tax Admin Act) Order 2011 (NZ), the Canterbury Earthquake (Inland Revenue Acts) Order 2012 (NZ), and the Canterbury Earthquake (Social Security Act) Order (No 2) 2010 Amendment Order 2012 (NZ).

⁶³⁹ Inquiry into Parliament's legislative response to future national emergencies - Interim report of the Regulations Review Committee, above n , Appendix A.

⁶⁴⁰ Inquiry into Parliament's legislative response to future national emergencies, above n , at 6.

Hurunui/Kaikōura Earthquake Recovery Act 2016. Both Acts provided similar exceptional powers as the CER Act despite the absence of a justifying emergency event.⁶⁴¹

Once an emergency has passed and there are no more urgent decisions regarding immediate threats to life or property left to take, the provision of exceptional powers must cease.⁶⁴² Exceptionalism is only appropriate for the shortest time necessary. It must only be use for particular specified purposes (as opposed to broad purposes with wide discretion) and be subject to frequent parliamentary oversight and judicial review.⁶⁴³ Only then can exceptional powers be constitutionally justified and their danger to contaminate ordinary powers be contained.

⁶⁴¹ In the case of the Greater Christchurch Regeneration Act, five years had passed since the February 2011 earthquake.

⁶⁴² Kennedy Graham (14 September 2010) 666 NZPD 13899.

⁶⁴³ MacDonald and Carlton, above n 625, at 20.

5.4 The Collapse of the Normalcy-Exception Dichotomy

The Hobbit Law, the ECan Act, and the CER Act addressed very different issues: employment relations, local government issues, and post-disaster recovery respectively. But all three case studies had in common that exceptional powers were used to address them, and that these powers were justified at least in part by securitising economic risk rhetoric. Even in situations where the economic rhetoric was not stated explicitly, the public's sensitivity to economic risk allowed the government to merely insinuate economic impacts of inaction to make people support exceptional measures. For example, although government rhetoric concentrated on local government inefficiencies and environmental risks of mismanaged water resources, the suggestion that the dairy industry suffered under ECan's purported incompetency made it clear to New Zealanders that an industry important to New Zealand's economy was at risk. Similarly, the government's focus on the importance of a swift and efficient rebuild of Christchurch's central business district and the focus of the revised Christchurch Central Recovery Plan on mostly economic anchor projects insinuated that a slower more deliberate approach to the recovery process would come at an economic cost. The aim of the economic rhetoric around each of the examples therefore was to justify the use of exceptional powers, even though the situations in which they were used were not exceptional.

Each of the situations required a resolution: the employment dispute prevented a large scale film productions from proceeding, water management is an important environmental and economic factor in the Canterbury region, and the recovery from a series of devastating earthquakes was vital to the rehabilitation of communities in Christchurch. It was therefore reasonable for the government to act on these issues. However, the fact that action was required in each of the examples makes the improper use of exceptional powers more insidious: the population realised the need for decisive measures and was therefore more likely to accept them as justified.

At the same time, as the measures were not formally designated as exceptional, they appeared ordinary and decisive actions. This illustrates the danger that the legislative model of exceptionalism poses: by providing exceptional powers by way of ordinary law, it becomes normalised and contaminates the ordinary legal system. The measures used in each of the case studies should have used only in exceptional situations, such as during the response to an emergency event. But as they were included in ordinary legislation (or used to pass ordinary legislation) with little to no reference to a state of emergency, they were effectively exceptional measures posing as ordinary measures.

Securitisation of exaggerated or false economic crises muddies the line between normalcy and exception. In an increasingly risk sensitive and risk averse society, the frequent use of economic risk rhetoric creates the perception of constant risk of economic disaster against which the population

must be protected. As an economic crisis is constantly imminent, the use of exceptional measures is constantly justified. The more frequent such securitising economic risk rhetoric becomes, the more often exceptional measures are used. In that way, exceptional powers become ordinary powers and the normalcy-exception dichotomy is in danger of collapsing.

Part 3

Interrupting Securitisation

The case studies in Chapter Five show how popular risk perception can be exploited by governments to circumvent inconvenient constitutional and democratic process for political ends. Although the case studies are of events in New Zealand, the issue of economic risk rhetoric and normalisation of exceptional powers are global. The uncertainty, complexity, and ambiguity of modern systemic risks leads the population to be averse to economic risks. The public is therefore vulnerable to risk rhetoric and manipulation, as it is increasingly difficult to evaluate the seriousness and effect of a risk or to weigh up the impact of competing risks, such as risks to the environment versus risks to the economy. Irrespective of the actual severity (or even existence) of a crisis, the public is more likely to accept the government's use of exceptional powers the more it perceives a risk to be severe.

A consequence of the ever-increasing risk aversion in modern risk societies is that governments resort to exceptional measures more and more frequently. The regular use of exceptional powers to accommodate crises (whether real or manufactured for political purposes) bears obvious dangers. Exceptional powers act as precedents for future emergencies: If the use of such powers appears to have worked to mitigate the effects of a purported crisis, their use will become a benchmark for future crises. If the powers did not prevent or insufficiently mitigated the impacts of the crisis, they are deemed to have been inadequate and will be more extensive in future crises. Either way, the use of exceptional powers is normalised.⁶⁴⁴ The problem is exacerbated by the fact that modern democracies tend to embed emergency powers in ordinary legislation. Statute law is a fundamental part of the constitutional system. Normalising exceptional statutory powers thus intrinsically has the potential to change the legal system permanently.⁶⁴⁵

The purpose of Part 3 of this thesis is to explore ways to mitigate the effects of securitisation and to interrupt its effectiveness. Chapter Six will investigate traditional constitutional review mechanisms that are intended to prevent the misuse and/or lasting effects of exceptional action. The courts, specialised public review bodies such as ombudsmen and councils of state, and parliamentary committees may all be tasked to varying degrees with reviewing and controlling the provision of exceptional powers by the legislature and the use of exceptional measures.

Another way of mitigating misuse of exceptional measures comes from within the executive itself. Rather than creating exceptional legislation to empower crisis response and in order to depoliticise crisis management, ordinary executive discretion can simply expand the the bureaucracy's ability to meet the needs of the situation. Chapter Seven will explore this so-called interpretative

⁶⁴⁴Gross, above n 227, at 1091.

⁶⁴⁵ Ferejohn and Pasquino, above n 103, at 236.

accommodation of emergency response that enables the bureaucracy to use ordinary means to respond to crises.⁶⁴⁶

However, neither traditional review mechanisms nor administrative discretion can sufficiently cope with the issues of increasing risk aversion and the resulting effectiveness of securitising risk rhetoric. Chapter Eight will explore the potential of ‘deliberative risk governance’ to interrupt the effectiveness of securitising risk rhetoric. No review procedures, be they external by dedicated review bodies or internal to the executive itself, can prevent exploitative or abusive exceptional measures if the population has been manipulated into agreeing with and supporting these measures. It is therefore important to address how risk itself is governed: how risk is assessed, risk-knowledge is communicated, and appropriate policy responses are determined. The population must be educated both about risk knowledge and about political decision-making, so that it can be included in a deliberative risk governance system. This will enable people to understand risks and their impacts on all parts of society, making them more resilient to exploitative risk rhetoric.

Neither traditional review mechanisms or expanded administrative discretion approaches, nor a more deliberative risk governance structure will be able to stem the effectiveness of securitising risk rhetoric and the associated executive creep on their own. All three approaches are necessary to handle the systemic risks facing modern societies.

⁶⁴⁶ Gross, above n 227, at 1045 ff.

6 Traditional Review Mechanisms

Most democracies incorporate exceptional government into their constitutional system to some extent.⁶⁴⁷ The legislative model of exceptionalism, which is the favoured model in modern democracies, accommodates the executive's needs for exceptional powers during crises by creating and providing such powers by statutory means.⁶⁴⁸ According to liberal democratic theory, government power must be limited by law and the constitutional order must be upheld by organs of state exercising control over each other. Two aspects of emergency regimes must be controlled in this way: the provision of exceptional powers by the legislature and the use of exceptional measures by the executive. These control functions are performed by the judiciary, parliamentary committees, and other constitutional review bodies.⁶⁴⁹

The purpose of this chapter is to review these control mechanisms as to their ability to mitigate the effectiveness of securitising risk rhetoric. It will first examine constitutional review mechanisms such as legislative review by the judiciary or other constitutional bodies, as well as non-legal, political review. The chapter will then explore administrative review mechanisms of executive actions. It will conclude that while traditional review mechanisms are an essential part of liberal democratic constitutional and political systems, they cannot withstand the effectiveness of securitisation.

6.1 Constitutional Review

In constitutional systems that use the legislative model of exceptionalism, it is important to control the legislature's power to create exceptional legislative provisions. This power allows the legislature to suspend the ordinary constitutional system in order to facilitate the executive's response to a crisis. However, this potentially contradicts the liberal view that no government branch may alter certain constitutional protections, particularly with regards to individual liberties. Especially in parliamentary systems, in which the executive generally commands a majority of the legislature, the executive can create its own exceptional powers by using their majority in parliament to create empowering legislation. Some constitutional systems therefore allow their judiciary to review legislative instruments. Legislatures also sometimes have their own internal review mechanisms in form of special parliamentary committees.

⁶⁴⁷ Ferejohn and Pasquino, above n 391, at 336.

⁶⁴⁸ Gross, above n 227, at 1064-1066.

⁶⁴⁹ Maartje De Visser *Constitutional Review in Europe: a Comparative Analysis* (Hart Publishing, Oxford, 2014), at 11.

6.1.1 Legislative Review

In constitutional system with so-called strong form judicial review, legislation may be invalidated either by the ordinary courts or a specialised constitutional court if it is found to be constitutionally inconsistent. For constitutional rules to be enforceable against the legislature, they are given a superior position relative to ordinary legislation. They require a qualified majority to be altered and ordinary legislation must not conflict with these entrenched constitutional provisions.⁶⁵⁰ That way, judicial review of legislation can review legislative provisions that extend exceptional powers to the executive. Courts are not the only legislative review mechanism in modern democracies. Some systems have other specialised constitutional review bodies, such as Councils of State or Chancellors of Justice.

6.1.1.1 The Courts

When constitutional norms are collected in a central constitutional document, they are often given a special status and require a special procedure to be altered or amended.⁶⁵¹ Unlike ordinary legislative procedure, which generally requires an absolute majority to pass, these special procedures can require a qualified majority,⁶⁵² two parliamentary acts that are separated by a general election,⁶⁵³ or a popular referendum,⁶⁵⁴ among others modified mechanisms. Some constitutional norms may even be excluded from amendment altogether, such as the constitutional provision establishing Germany's federal and democratic nature.⁶⁵⁵

When constitutional rules enjoy a status superior to that of ordinary parliamentary legislation, the role of the judiciary may be extended to control parliament's adherence to these constitutional rules and even invalidate laws that are in contravention of these rules. Some jurisdictions allow their ordinary courts to review legislation, such as courts in the United States.⁶⁵⁶ In other jurisdictions,

⁶⁵⁰ Palmer and Butler, above n 486, at 13-18.

⁶⁵¹ Heringa, above n 326, at 7, 73.

⁶⁵² E.g. Basic Law for the Federal Republic of Germany (DE), Art 79.

⁶⁵³ E.g. Constitution for the Kingdom of the Netherlands (NL), Art 137.

⁶⁵⁴ E.g. Constitution of Ireland (IE), Art 46.

⁶⁵⁵ E.g. Basic Law for the Federal Republic of Germany (DE), Art 79, Art 20. Non-centralised constitutions are often more flexible as they do not require special procedures for constitutional amendments. For example, due to their strong political constitution and adherence to the doctrine of parliamentary sovereignty, constitutional norms can be amended via ordinary legislation in the United Kingdom and New Zealand. Parliamentary sovereignty does not exclude the ability to "entrench" a legislative provision (i.e. to require a qualified majority to change it), as long as the provision providing for the entrenchment is not itself entrenched (single entrenchment). This way, the supremacy of parliament is preserved, as it can revoke the entrenchment provision by way of ordinary majority. For example, section 268 of the Electoral Act 1993 (NZ) provides for the need of a 75% majority to alter certain parts of the Act, but the section itself is not entrenched.

⁶⁵⁶ See *Marbury v Madison*, above n ; Jackson and Tushnet, above n 353, at 48.

dedicated constitutional courts outside the ordinary court structure are tasked with legislative review duties.⁶⁵⁷

An example of the effectiveness of judicial review of exceptional legislation is the German Federal Constitutional Court's (*Bundesverfassungsgericht*) aviation security case.⁶⁵⁸ In the aftermath of the 9/11 terrorist attacks in New York, the issue of terrorism was heavily securitised in most liberal democracies around the world. As part of a worldwide push to create specific anti-terrorism legislation, the German Parliament (*Bundestag*) passed legislation to amend the Aviation Security Act and allow the armed forces to shoot down aircraft if they were intended to be used as weapons against other human beings.⁶⁵⁹ The *Bundesverfassungsgericht* reviewed the amended provisions and found that the use of such exceptional powers conflicted with the Basic Law (*Grundgesetz*), specifically with Arts 1(1) and 2(2), which guarantee a right to dignity and to life respectively. Shooting down an aircraft would invariably infringe on the crew's and passengers' lives, particularly if they were innocent.⁶⁶⁰ Moreover, every human's right to be treated with dignity dictated that the state must never treat human lives as objects for the ends of the state. Even if shooting down the plane would save the lives of other human beings, it would relegate the innocent people on board of those planes to being objects of the pursuits of the state's efforts to rescue others, which violated those crew and passengers' right to dignity.⁶⁶¹ The amended provisions were thus invalidated.

Even in jurisdictions in which constitutional law does not enjoy superiority, for example if parliament reigns supreme, courts may still comment on the constitutionality of legislative norms. In the United Kingdom and New Zealand, courts have the ability to find a legislative norm to be inconsistent with their respective human rights instruments, the Human Rights Act 1998 (UK) and the New Zealand Bill of Rights Act 1990 (NZ).⁶⁶² As these findings are only declaratory, they are referred to as 'weak-form judicial review', as opposed to the strong-form judicial review of constitutional systems in which the courts can invalidate legislation.

⁶⁵⁷ For example, the German Federal Constitutional Court (*Bundesverfassungsgericht*) can decide on the constitutionality of a law generally (abstract review, { #241}, Art 93(2)) or on whether a law interferes with constitutional rights of an individual specifically (concrete review, { #241} Art 100(1)). Not all constitutional systems with a central constitutional document allow the judiciary to review legislation. For example, while The Netherlands have a central constitutional document (the *Grondwet*), the courts have no ability to rule on the constitutionality of laws, Constitution for the Kingdom of the Netherlands (NL), Art 120.

⁶⁵⁸ BVerfGE 115, 118 (2006) available at <English translation at: www.bundesverfassungsgericht.de>.

⁶⁵⁹ Aviation Security Act (DE) (*Luftsicherheitsgesetz*), s 14(3).

⁶⁶⁰ above n , at [87].

⁶⁶¹ At , at [118-124].

⁶⁶² Human Rights Act 1998 (UK), s 4; *Attorney-General v Taylor*, above n , at [65].

The effectiveness of such declarations differs between systems. For example, whereas in the United Kingdom parliament frequently responds to judicial declarations of inconsistency by changing or amending the inconsistent provisions, the impact of such declarations on governmental actions in New Zealand is much less.⁶⁶³ The reason for this discrepancy may lie in the fact that the United Kingdom is signatory to the European Convention on Human Rights⁶⁶⁴ and violations of the Convention can be adjudicated in the European Court of Human Rights and, since the implementation of the Human Rights Act 1998 (UK), in UK courts. According to the judicialisation theory, the threat of judicial censure can act as a passive control mechanism against overzealous exceptional legislation. For example, de Visser contends that German parliamentarians more seriously consider the potential constitutional implications of bills for fear of judicial criticism or even veto. They also tend to heed the *Bundesverfassungsgericht's* judgements for fear of public backlash.⁶⁶⁵ Similarly, UK parliamentarians may be more willing to respond to the judiciary's declarations of inconsistency due to the possibility of adjudication in the European Court of Human Rights, the decision of which is binding on the United Kingdom.⁶⁶⁶

In contrast, the only consequence for ignoring declarations of inconsistency in New Zealand is the possibility of public backlash, of which there appears to be little as the examples in Part Three show. Although the New Zealand Bill of Rights Act 1990 has required the Attorney-General to assess each new bill for inconsistencies with the Act, judicial declarations of inconsistency have only officially been recognised in New Zealand since the Supreme Court's 2018 decision in *Attorney-General v Taylor*.⁶⁶⁷ The effect of such declarations is as yet uncertain. While some have led to changes in the law, courts have also denied such declarations where the inconsistent provision had already been recognised by the government under section 7 of the New Zealand Bill of Rights Act 1990 when the bill was introduced in Parliament.⁶⁶⁸ At the time of writing, an amendment bill to the New Zealand Bill of

⁶⁶³ Mark Elliott "Interpretative Bills of Rights and the Mystery of the Unwritten Constitution" (2011)(4) NZLR 591, at 612-613. This may be changing with the passing of the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Bill (NZ) that is expected to happen in late 2022.

⁶⁶⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953) European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953) .

⁶⁶⁵ De Visser, above n 649, at 34, with further sources in n 151, and at 45. See also Georg Vanberg *The Politics of Constitutional Review in Germany* (Cambridge University Press, Cambridge, 2004), Chapter 5.

⁶⁶⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953) European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5 (opened for signature 4 November 1950, entered into force 3 September 1953) , Art 46; Jo Eric Kushal Murkens "Constitutionalism" in Mark Bevir (ed) *Encyclopedia of Political Theory* (Sage Publications, Thousand Oaks, CA, 2010), at 293.

⁶⁶⁷ New Zealand Bill of Rights Act 1990 (NZ), s 7; *Attorney-General v Taylor*, above n .

⁶⁶⁸ E.g. *Bouwer v Police* [2022] NZCA 166..

Rights Act 1990, which will require the Attorney-General to bring any judicial declaration of inconsistency to the attention of Parliament, is due for its third reading. However, in light of the negligible impact of the Attorney-General's requirement to report inconsistencies during the passage of new bills, it is uncertain that the amendment will aid declarations of inconsistencies in New Zealand of having any meaningful impact on New Zealand law-making.⁶⁶⁹

Between strong and weak-form judicial review systems sits the Canadian model. Canadian courts can find legislation to be invalid if it is inconsistent with the Canadian Bill of Rights as a sort of strong-form judicial review process. But the Canadian Parliament retains its supremacy because it can include a so-called "notwithstanding clause", indicating its explicit intention for the provision to contradict the Canadian Bill of Rights.⁶⁷⁰ If it does, the courts cannot invalidate the provision. The assumption therefore is that Parliament generally does not intend to regulate in contradiction to the Bill of Rights and if it does, it must clearly declare this.

It appears thus that in order to ensure that the courts are able to act as an effective control on the provision of exceptional powers by the legislature, it requires the ability to substantially restrain the legislature, either directly or with the threat of outside intervention (such as through the European Court of Human Rights). In fact, former Law Lord in the United Kingdom House of Lords Tom Bingham asked whether parliamentary sovereignty could coexist with the modern "thick" rule of law. He argued that as parliament could conceivably infringe on fundamental rights with impunity, parliamentary sovereignty was no longer in harmony with the modern conception of the rule of law.⁶⁷¹

6.1.1.2 Councils of State and Chancellors of Justice

Councils of State and Chancellors of Justice can also play a role in the constitutional review of exceptional legislation. The Dutch *Raad van State*, for example, has a constitutionally guaranteed position as independent advisor to the government and must deliver advisory opinions on the constitutional impacts of bills before they are debated in parliament.⁶⁷² If the *Raad* has significant or fundamental objections to provisions in the bill, it must be reassessed by the executive before going to parliament.⁶⁷³

⁶⁶⁹ Joseph, above n , at 1174.

⁶⁷⁰ Peter W Hogg *Constitutional Law of Canada* (4th ed, Carswell, Scarborough, Ont, 1997), at 312.

⁶⁷¹ Bingham, above n 100, at 161; see also Francis Geoffrey Jacobs *The Sovereignty of Law: the European Way* (Cambridge University Press, Cambridge, 2007), at 5.

⁶⁷² Constitution for the Kingdom of the Netherlands (NL), Art 73(1); Council of State Act (NL) (*Wet op de Raad van State*), Arts 17(1)(a), (c), and 18.

⁶⁷³ De Visser, above n 649, at 14.

In Finland and Estonia, the Chancellor of Justice (*Oikeuskansleri / Õiguskantsleri*) is a form of specialised ombudsman who focusses on monitoring the constitutionality of bills and statutes.⁶⁷⁴ Whereas the parliamentary ombudsman’s review powers are limited to investigating the use of public powers by the executive and the judiciary, Chancellors of Justice tend to monitor and report on parliamentary actions. In combination, the ombudsman and Chancellor of Justice have therefore similar competencies to Councils of State. The main difference is that Councils of States tend to be staffed by a mix of politicians and constitutional experts, whereas ombudsmen and Chancellors of Justice have no political background and may therefore be perceived as more independent.⁶⁷⁵ As such, Chancellors of Justice may be in a better position to review exceptional provisions than a Council of State, as they act more independently and are often regarded as having more constitutional expertise.

6.1.2 Political Review

Providing exceptional powers by way of legislation can also be monitored by the legislator itself. The United Kingdom Public Law Committee, for example, reviews the operation of the United Kingdom’s constitution. *Inter alia*, it examines public bills that come before the House for constitutional significance, i.e. for any substantial impacts that provisions of the bill may have on constitutional norms and principles.⁶⁷⁶ If it finds provisions of constitutional significance, it may request further information from relevant ministers and seek input from other external experts and the public. The Committee then publishes a report on the constitutional significance of the bill that is published prior to the second reading of the bill before the House of Lords.⁶⁷⁷ Although the report has no legal effect on the passage of the bill, it can influence its passage by raising awareness of potential constitutional issues.

Similarly, the Finnish Constitutional Law Committee (*Perustuslakivaliokunta*) can issue “statements on the constitutionality of legislative proposals.”⁶⁷⁸ Legislative proposals (bills) can be referred to the Committee either by the Speaker of Parliament (often on the recommendation of the Chancellor of Justice) or by another parliamentary committee. Like its counterpart in the United Kingdom, the Constitutional Law Committee conducts formal hearings with the drafters of the bill and with constitutional law experts and drafts a report on the constitutionality of the bill. Although the report is non-binding, it is customarily accepted by the Finnish Parliament (*Suomen eduskunta / Finlands*

⁶⁷⁴ The Constitution of Finland (FI) (*Suomen perustuslaki, Finlands grundlag*), s 108; The Constitution of the Republic of Estonia (EE) (*Eesti Vabariigi põhiseadus*), Art 142; Chancellor of Justice Act (EE) (*Õiguskantsleri seadus*), ss 19-21.

⁶⁷⁵ Council of State Act (NL), Arts 1, 2(1); Council of State Act 1973 (BE) (*Wetten op de Raad van State, Lois sur le Conseil d'Etat, Staatsratsgesetz*), Arts 69, 70.

⁶⁷⁶ “Constitution Committee - Role” (13 March 2021) <www.parliament.uk>.

⁶⁷⁷ De Visser, above n 649, at 68.

⁶⁷⁸ The Constitution of Finland (FI), s 74.

riksdag).⁶⁷⁹ Acceptance means that the bill becomes an ‘exceptive’ legislative proposal, which can only be passed using a qualified voting procedure.⁶⁸⁰ In contrast to the United Kingdom’s House of Lords Constitution Committee, the Finnish Constitutional Law Committee therefore has a more significant impact on the passage of exceptional legislation.

6.1.3 Insufficiency of Constitutional Review

Both legislative and political constitutional review mechanisms play an important part in controlling exceptional statutory provisions. As the *Bundesverfassungsgericht*’s aviation security case shows, the judicial review of exceptional legislation can effectively control the legislature’s attempt to provide improper exceptional powers to the executive. While the opinions of Councils of States, Chancellors of Justice, and parliamentary committees are not binding on the legislatures, they nevertheless influence parliamentary debate about exceptional bills.

However, courts are not always reliable guardians of constitutional principles. In the heat of a crisis, courts tend to defer to the expertise of the executive.⁶⁸¹ As the European Court of Human Rights explained in *Ireland v United Kingdom*, courts allow the executive a ‘margin of appreciation’, due to judges’ concern to be seen as standing in the way of effective crisis management.⁶⁸² On an operational level, the executive is the closest of the government branches to the crisis. It is thus in a better position to assess and determine the necessity of exceptional measures than the judiciary. Courts are reluctant to second guess decisions that the executive has taken with better expertise and against the urgency of the crisis. This tendency of courts to afford the executive wide discretion may lead to an overly deferential judiciary that does not want to be seen to be standing in the way of the emergency relief effort.⁶⁸³

The effectiveness of constitutional review is strongest when controlling exceptional provisions *ex ante*. When reviewing exceptional provisions abstractly and without imminent emergency, the courts are not bound by their deference to executive emergency expertise and thus do not need to consider its ‘margin of appreciation’. Councils of States, Chancellors of Justice, and parliamentary committees can

⁶⁷⁹ De Visser, above n 649, at 27.

⁶⁸⁰ If there is a general election between the committed report and the parliamentary route on the bill, the bill requires a 2/3 majority to become law. Otherwise, parliament can declare the bill urgent with a 5/6 majority vote, after which the bill can be passed immediately with a 2/3 majority vote, The Constitution of Finland (FI), s 73.

⁶⁸¹ Gross, above n 227, at 1034; Ramraj, above n 360, at 173.

⁶⁸² *Ireland v United Kingdom* (1979-80) 2 EHRR 25, at [207]; Casson, above n 369, at 946; Ferejohn and Pasquino, above n 391, at 342.

⁶⁸³ Gross, above n 227, at 1034; Ramraj, above n 360, at 173. In *Rex v Halliday* the House of Lords did not believe that it was appropriate to limit executive action during the First World War, as the powers enabling said action were granted through parliamentary legislation. While the powers had been broadly phrased, in the opinion of the House of Lords it was not up to the judiciary to challenge the empowering legislation, *Rex v Halliday* [1917] AC 260.

influence parliamentary debate about exceptional bills with their expert opinions and advice. But during and after an emergency, the legislative review bodies are more likely to allow the executive leeway, as they do not want to appear to be standing in the way of effective emergency response. Moreover, opinions and advice from Councils of States, Chancellors of Justice and parliamentary debates require time for sufficient consideration. This time is generally not available during emergencies.

Even the effectiveness of *ex ante* review of exceptional provisions may be limited by securitising risk rhetoric. Decisions of courts and other public bodies are routinely affected by public sentiment. German *Bundesverfassungsgericht* judges report that they feel that they cannot diverge too far from public opinion, as their judgements need to be able to be perceived as fair and acceptable by the public.⁶⁸⁴ This allows the executive to use risk rhetoric to steer the public opinion in favour of the exceptional provisions, thereby limiting the ability of the judiciary to act against them. Reliance on the constitutional review bodies as consistent control-mechanism on exceptional provisions is therefore insufficient.

⁶⁸⁴ De Visser, above n 649, at 45.

6.2 Administrative Review

Administrative law acts as another limit and review mechanism of executive action. Harlow and Rawlings refer to the focus on using law to restrict government power, and using courts and other review bodies to enforce adherence of public power to the rule of law, as the 'red light theory'.⁶⁸⁵ It arises from the *raison d'être* of liberal democracy: the focus on negative individual rights, which the government must guarantee and protect. The purpose of the rule of law is thus to create a framework of rules which allow individuals to enjoy their freedoms and prevents public power from encroaching on these freedoms.

Red light theory developed during the burgeoning welfare state and reflects a liberal attitude towards the role of the state.⁶⁸⁶ In addition to viewing individual rights negatively (protecting individual freedoms from encroachment), the welfare state believed that individuals had positive rights (obliging the state to provide for individuals' needs). The state therefore took on more public power to be able to establish a welfare system, support individual and community needs, and redistribute wealth. This growth of public power was perceived by red light theorists as an unjustified threat to private property and individual rights.⁶⁸⁷ They believed that the administrative welfare state was dangerous and needed to be kept in check by law. As such, the executive should have as little discretion as possible when resolving questions of rights and liabilities. Rather, it should have to follow not only the letter of the law, but also be bound by natural rights, such as fundamental individual freedoms.⁶⁸⁸ This so-called 'thick rule of law' is regarded by some scholars as a constituent part of democracy.⁶⁸⁹ For that reason, red light theorists regard the primary role of administrative law to be controlling excess state power by way of adjudication in the courts.⁶⁹⁰

6.2.1 The Courts

The courts are regularly involved in enforcing the rules around the use of exceptional powers, and in controlling and limiting government action in order to protect the autonomy and freedoms of individuals against state power.⁶⁹¹ During ordinary times, either ordinary courts or specialised administrative courts can intervene if the executive decision-maker misinterprets or exceeds their

⁶⁸⁵ Harlow and Rawlings, above n 330, at 25; Harry Woolf and others *De Smith's Judicial review* (6th ed, Sweet & Maxwell, London, 2007), at [5-106].

⁶⁸⁶ Michael Taggart "Reinvented Government, Traffic Lights and the Convergence of Public and Private law" [1999] PL 124, at 125.

⁶⁸⁷ Harlow and Rawlings, above n 330, at 32.

⁶⁸⁸ Adam Tomkins "In Defense of the Political Constitution" (2002) 22(Generic) OJLS 157, at 67.

⁶⁸⁹ Bingham, above n 100, at 67; Jeffrey Jowell "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] PL 671, at 671.

⁶⁹⁰ Harlow and Rawlings, above n 330, at 23; see also William Wade and Christopher Forsyth *Administrative law* (10th ed, Oxford University Press, New York, 2009), at 4, 5.

⁶⁹¹ Ferejohn and Pasquino, above n 391, at 342.

statutory power, does not follow appropriate procedure, or exercises their discretion arbitrarily or unreasonably.⁶⁹² In such situations, courts can invalidate executive decisions or compel the executive to act. In the same way, exceptional executive measures can be reviewed by the courts. For example, courts can investigate whether an exceptional provision was available to the executive or whether the exceptional measure fell within the powers provided for by the exceptional statutory provision.

However, as previously discussed, courts tend to be reluctant to interfere with exceptional executive action during or after crises, and courts often allow the executive a wide ‘margin of appreciation.’⁶⁹³ Moreover, exceptional provisions that empower the executive are often intentionally vague and the resulting scope of exceptional powers is remarkably broad. The reason for this is the prevailing belief that the nature of measures needed to respond to crises is impossible to predict. For example, the only restriction on the use of the Henry VIII clause in the CER Act was that Orders in Council had to be “reasonably necessary and expedient for the purposes” of the Act.⁶⁹⁴ The broad and vague nature of the exceptional provisions makes it difficult for courts to determine whether the executive has exceeded their powers when taking exceptional action.

The courts fulfil an important role within the rule of law and the review of executive action. They act as a safeguard against misuse of executive power. However, due to their deference to the executive during emergencies and their tendency to respect the executive’s ‘margin of error’, they cannot sufficiently control exceptional executive measures.

6.2.2 Other Review Bodies

The provision and use of exceptional powers can also be overseen by state bodies other than the judiciary. Many countries have institutions independent from the three branches of government that are tasked with ensuring compliance with constitutional norms and principles.

An oversight institution common to many European countries is a Council of State, which is often tasked with adjudicating administrative disputes as well as providing opinions on the constitutionality of legislation.⁶⁹⁵ The French *Conseil d’État*, for example, is the highest administrative jurisdiction for cases relating to executive power and any other agencies invested with public authority.⁶⁹⁶ It also provides advice to the French government on administrative and public policy issues.⁶⁹⁷ As such,

⁶⁹² Joseph, above n 352, at 907-908.

⁶⁹³ *Ireland v United Kingdom*, above n , at [207].

⁶⁹⁴ Canterbury Earthquake Recovery Act 2011 (NZ), s 71.

⁶⁹⁵ De Visser, above n 649, at 13.

⁶⁹⁶ “Conseil d’État” (15 May 2021) European Law Institute <www.europeanlawinstitute.eu>.

⁶⁹⁷ The Dutch *Raad van State* and the Belgian *Raad van State/Conseil d’Etat/Staatsrat* also act as final adjudicators on administrative decisions and provide advice on draft general administrative orders, Council of State Act (NL), Chapter III; Council of State Act 1973 (BE), Title III.

Councils of States can therefore oversee exceptional executive measures by advising the government on the measure's constitutional propriety *ex ante*, or by reviewing exceptional measures as part of their judicial review role.

Ombudsmen can also act as a control-mechanism on exceptional powers.⁶⁹⁸ They are generally independent public servants whose role is to investigate grievances with local and central government decisions, actions, or omissions.⁶⁹⁹ They join the judiciary in overseeing executive action, but they can also be empowered to review judicial decisions.⁷⁰⁰ Unlike decisions by the judiciary, decisions by Ombudspersons are usually non-binding.⁷⁰¹ Their role is to monitor, investigate and report on public action, not to enforce the law against public bodies. Although this reduces their effectiveness in controlling the use of exceptional powers, they can still influence the executive's decision to resort to exceptional measures. Particularly if the ombudsperson is publicly well regarded and their reports are widely published by the media, the executive may consider carefully when to use exceptional powers for fear of the ombudsperson's criticism, for similar reasons as provided by the judicialisation theory.

Both Councils of State and ombudsmen play a role in controlling exceptional executive action. Councils of State can influence the executive's decision to resort to exceptional measures through their *ex ante* advice and they can judicially review executive action. However, it is unlikely that the Council of State's interim and *ex post* review powers are used to invalidate improper exceptional executive actions for the same reasons that the judiciary does not tend to do so. Ombudsmen can disincentivise the inappropriate use of exceptional measures due to their ability to draw public attention to it. But the inability to make binding decisions means that the ombudsman's findings can be ignored by the executive. Neither the courts, a Council of State, or the ombudsman can therefore control exceptional executive measures reliably and sufficiently.

6.3 Traditional Review Mechanisms and Risk Rhetoric

This chapter assessed traditional constitutional review mechanisms that are designed to oversee and control the use of public power. Depending on the jurisdiction, both the legislature and the executive can be subject to such review mechanisms. The judiciary, Councils of States, Ombudsmen, and parliamentary committees may be entrusted with reviewing legislative instruments and executive

⁶⁹⁸ For a general overview of the different roles of ombudsmen across the world, see W John Hopkins "Ombudsman" in Rüdiger Wolfrum, Rainer Grote, and Frauke Lachenmann (eds) *Max Planck Encyclopedia of Comparative Constitutional Law* (Oxford University Press, New York, 2017).

⁶⁹⁹ Palmer and Butler, above n 486, at 178.

⁷⁰⁰ See for example The Constitution of Finland (FI), s 109.

⁷⁰¹ Palmer and Butler, above n 486, at 178.

actions. Some jurisdictions allow these institutions to make binding decisions, others rely on a more political approach. Traditional review mechanisms can be an effective tool against legislative or executive overreach, as the German aviation security case illustrates. Even non-binding decisions can have great persuasive effect, as they put public pressure on the legislature or executive.

It is, however, uncertain whether stricter or different traditional review mechanisms than are already available in New Zealand would have changed the outcome of the previously discussed case studies. New Zealand adheres firmly to the concept of parliamentary supremacy. There is no superior law against which primary legislation can be evaluated and which courts or other review bodies can enforce against Parliament. Short of significantly changing New Zealand's constitutional system, only soft review mechanisms are available, such as declarations of inconsistency with the New Zealand Bill of Rights Act by courts, the reports when a bill appears to be inconsistent with the New Zealand Bill of Rights Act by the Attorney-General, or statements or reports by other review bodies, such as the Human Rights Commission or the Ombudsman, that bring attention to potential cases of overreach.

Soft review mechanisms are unlikely to be effective against the use of securitising risk rhetoric. Successful securitisation creates the public perception that an existential risk exists and that responding exceptional measures are therefore justified. Even if review bodies do not allow the government a 'margin of appreciation', government and/or Parliament have little incentive to respond to concerns raised by soft review mechanisms. For one, the broad public acquiescence to the exceptional measures lends them some degree of democratic legitimacy. More importantly, the government does not need to fear significant public backlash and thus any consequences for their overreach. The vast majority of the public in each of the case studies was unconcerned with the exceptional measures used in each case. Soft review mechanisms may have been able to raise some awareness about the exceptional nature of these measures. But it is doubtful that they can lead to a significant backlash if the public has been convinced of the necessity of the exceptional measures. Soft review mechanisms are therefore unlikely to be effective at limiting securitising risk rhetoric.

Hard review mechanisms would require significant constitutional change in New Zealand. Constitutional provisions would have to be entrenched and remedies against violations of such provisions would have to be enforceable by the courts or some other form of constitutional review body. Depending on the nature and content of the entrenched provisions, they may have influenced the events of the case studies to some extent. If constitutional principles such as the rule of law and democracy or the structure of local democracy were entrenched, both the ECan Act and the CER Act may have been able to be challenged. The ECan Act ousted democratically elected officials and undermined the structure and representative nature of local government without substantial reason

or justification. The CER Act included several constitutionally concerning provisions such as Henry VIII clauses and restrictions to the access to courts. Hard review mechanisms may have been able to challenge some of these provisions and may thus have effectively prevented some of the more egregious exceptional measures.

Whether hard review mechanisms could have prevented the extreme use of urgency in the case studies also depends on whether and how the legislative process were entrenched in New Zealand. If the rules were entrenched in their current form, it is unlikely that the use of urgency in the case studies could have been challenged. The current rules include virtually no requirements or restrictions on the use of urgency, other than that the moving Minister has to give reasons as to why the use is necessary. If the review body were allowed to review the veracity or reasonableness of these reasons, its use in the passage of the Hobbit Law and the ECan Act may have been successfully challenged. Similarly, if urgency required a qualified majority, the urgency motions would not have been successful in these case studies, as the opposition opposed it in both cases. The use of urgency in the passage of the CER Act may have been more difficult to challenge. The vast majority of Parliament voted in favour of the motion, so it would have likely passed a qualified majority vote. It may also have been difficult to challenge the reasons for the motion, as at least initially there may have been need to quickly pass some form of legislation to replace the state of emergency and facilitate response and recovery.

Traditional review mechanisms play an important role in democratic and constitutional systems. They can act as a check on the executive and legislature, and they can raise public awareness for dubious government measures and overreach and thus put political and public pressure on governments. However, their effectiveness in the face of securitised risk rhetoric can, at times, be limited. The usefulness of soft review mechanisms is by its nature dependent on public opinion. If the public does not react to the findings of soft review bodies, there is little or no pressure on the government to change its behaviour. If exceptional measures are based on successfully securitised risks, the public has accepted the risk and regards the measures as justified. Hard review mechanisms may be somewhat more effective as they are based on more procedural mechanisms of review and because they can be enforceable against governments and legislatures. However, in the face of perceived emergency situations, courts have at times awarded the executive significant 'margins of appreciation' when it comes to exceptional response measures. They are also not immune to the 'court of public opinion'. For example, German *Bundesverfassungsgericht* judges have stated that they cannot diverge too far from public opinion, and the *Bundesverfassungsgericht* held that its constitutional

interpretation must be informed by current societal attitudes.⁷⁰² If a risk has been successfully securitised, the public accepts its necessity and courts may be reluctant to act against an overwhelming public acquiescence to exceptional measures. Thus, traditional review mechanisms, while valuable, are not sufficient to limit the effectiveness of securitising risk rhetoric.

⁷⁰² BVerfGE 45, 187 (1997), discussed in Donald P. Kommers and Russell A. Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed, Duke University Press, New York, 2012), at 365; De Visser, above n 649, at 45.

7 Administrative Discretion

Constitutional and administrative review mechanisms attempt to limit the government's ability to act in exceptional situations by enforcing legal rules and principles. This creates an uneasy tension in which the government is given broad exceptional powers during crises which review bodies are meant to limit and control.

Proponents of interpretative accommodation mechanisms for exceptional events believe that there should be no need for exceptional powers during a crisis. Crisis response should instead be facilitated by the ordinary legal system using ordinary mechanisms.⁷⁰³ The bureaucracy must have broad discretion during crises, but the legal system must not change so as not to jeopardise its integrity by normalising exceptional powers. Instead, existing legal provisions must be interpreted more broadly to allow the executive more discretion to be able to accommodate a crisis. As Chief Justice of the United States Supreme Court Chase noted in *Ex Parte Milligan* that the United States Constitution must not change during an emergency, but that executive powers must expand.⁷⁰⁴ Despite broader discretionary powers, interpretative accommodation mechanisms do not intend to make the resulting executive action more arbitrary or unreviewable. Instead of controlling the substance of the executive decision, they are meant to control the process of decision-making. Thus, the focus of interpretative accommodation rests on regulating discretionary decisions.

The purpose of this chapter is to explore to what extent broad administrative discretion can effectively limit securitising risk rhetoric. It will explore the nature of administrative discretion and the rules that govern the application of discretion in an administrative and a crisis context. From the perspective of securitisation, the advantage of expanded administrative discretion is that it reduces the need for exceptional measures, thus reducing the power of securitising risk rhetoric. If the existential threat can be dealt with through ordinary administrative measures, exceptional measures are unnecessary. Moreover, the bureaucracy is ideally apolitical (or at least somewhat removed from the political executive). Expanded administrative discretion would therefore depoliticise securitisation to some extent.

The chapter will show that broad administrative discretion governed by a robust set of rules can reduce the frequency and extent of exceptional powers. It will discuss different approaches to administrative discretion and explore ways of regulating expanded discretion in order to limit abuse. However, the chapter will also show that expanded administrative discretion suffers similar

⁷⁰³ Gross, above n 227, at 1059.

⁷⁰⁴ Dissenting opinion in *Ex Parte Milligan* 71 U.S. (4 Wall.) 2 (1866), at 141, later confirmed in *Wilson v New* 243 U.S. 332 (1917).

weaknesses as traditional review mechanisms when faced with securitising risk rhetoric. The pressure of the securitised public discourse undermines the effectiveness of a discretionary approach. Irrespective of the rules and procedures of applying of administrative discretion, public opinion can still legitimise and justify the use of exceptional measures when political issues are securitised.

7.1 Discretion and Green Light Theory

The interpretative accommodation model focusses on facilitating the government's ability to respond to crises rather than on limiting state power. As such it has parallels to green light theory, which sees administrative law as a vehicle for political progress rather than for controlling the executive.⁷⁰⁵

Tomkins explains that in contrast to red light theory, green light theory does not see the administrative state as "a necessary evil, but a positive attribute to be welcomed."⁷⁰⁶ Leon Duguit saw the role of the state not merely as enabling and protecting personal freedom, but also as providing valuable public services that were "indispensable to the realisation and development of social solidarity."⁷⁰⁷ The state was essential to the well-being of the population as a whole and therefore a significant expression of democracy.⁷⁰⁸ It could enhance both individual *and* collective liberties by conceiving rights not merely in negative terms (protections) but also in positive terms (obligations).⁷⁰⁹

Green light theory seeks to minimise the influence of courts, as it sees them as standing in the way of progress and thus as anti-democratic. That is not to say that state power is seen as absolute. Rather, it is subject to inherent limitations such as the notion that the state must only act in the public interest and for the public good, and that it must always observe the law. The state is still responsible for its actions, which are adjudicable in administrative courts. But the courts are not to assess the substantive measure taken by the state, but merely pronounce on the legality of the process by which the state had made the decision to act.⁷¹⁰

Administrative law and administrative discretion have the ability to eliminate bad executive practices, such as the improper or extensive use of exceptional powers, better than the judiciary. Rosenbloom contends that judges and lawyers "focus on overhead and control functions, not on implementation and service delivery," whereas administrators use the law as pegs on which to hang their policies or

⁷⁰⁵ Harlow and Rawlings, above n 330, at 31.

⁷⁰⁶ Tomkins, above n 688, at 157.

⁷⁰⁷ Léon Duguit *Law in the Modern State* (Harold Joseph Laski (translator), B.W. Huebsch, New York, 1919) (Transformations du droit public), at 48.

⁷⁰⁸ William Alexander Robson *Justice and Administrative Law: a Study of the British Constitution* (3rd ed, Stevens, London, 1951), at 421

⁷⁰⁹ Tomkins, above n 688, at 157.

⁷¹⁰ Harlow and Rawlings, above n 330, at 34, 35, 41.

as hurdles to overcome to implement policies.⁷¹¹ Facilitating good administrative practice by providing a framework for state action is thus more effective in ensuring good executive practice than adjudicating each specific state action after the fact.⁷¹²

Applying green light theory and the interpretative accommodation model to the use of exceptional powers can resolve one of the limitations of traditional review mechanisms: the deference that judges and other non-executive actors pay to the executive during or after emergencies. The deference is a recognition of the proximity of the executive to the emergency and the resulting expertise with regards to the necessary action. Courts and other review bodies often do not feel that they can or should second guess executive decisions that were taken during a crisis.

Green light theory does not expect the courts to assess the substance of the decision. Rather, the control and monitoring function should focus on the process of the decision-making. This gives the judiciary the freedom to only having to assess the executive's adherence to process rules, rather than having to evaluate the decisions themselves. In order to objectively assess the decision-making process of an executive decision, however, the framework of executive discretion must be clearly defined. The goal of interpretative accommodation therefore is to grant the executive sufficient discretion to act urgently and decisively during crises, while sufficiently controlling the decision-making process to prevent unfair or arbitrary executive decisions.

7.2 Rules of Discretion

The traditional perspective on law-making says that policy and associated rules are developed on a hierarchically senior level such as the political executive and the legislature, and passed down to the bureaucracy to be applied by public servants.⁷¹³ However, this view does not take into account two important features of law-making. First, legislation must consist of generalised rules in order to regulate the vast number of possible events it applies to. For that reason, the policies that a statute intends to implement will often be too broad to effectively apply to real life situations. The bureaucracy is usually tasked with developing the details of legislation and with making both strategic and specific decisions as to when and how to apply it. This potentially means that the bureaucracy has substantial discretion regarding the implementation of policy and the application of legislative rules. An officer of the executive has discretion "whenever the effective limits of [their] power leave [them]

⁷¹¹ David H Rosenbloom, Rosemary O'Leary and Joshua Chanin *Public Administration and Law* (3rd ed, Routledge, 2010), at vi, vii.

⁷¹² Harlow and Rawlings, above n 330, at 34.

⁷¹³ At 330, At 196.

free to make a choice among possible courses of action and inaction.”⁷¹⁴ Second, Page notes that due to this broad discretion, the bureaucracy de facto influences higher level decision-making. The bureaucracy’s decisions and experience filter upwards and effect senior level policy and law-making decisions.⁷¹⁵ The traditional top-down view of policy and law development is thus inaccurate.

It is particularly this broad discretion of public officers and the unchecked influence it creates over law making and application about which red light theory and liberal democratic theory are concerned and which they seek to control. Because the bureaucracy creates its own informal rules as to how to apply its discretionary powers, these rules can be outside legal and constitutional processes. Discretionary decision-making can thus be, or at least appear to be, secretive, opaque, and arbitrary.⁷¹⁶

In an effort to restrict bureaucratic discretion as much as possible, modern legislation tends to be specific.⁷¹⁷ The more specific the legislative rules are, the more they can be enforced by courts. But this form of ‘over-regulating’ also has drawbacks. The general nature of rules means that they can never be sufficiently precise to cover all possible real-life situations. Discretion is required to adapt the policy on which the rules are based to individual cases and bureaucratic decision-making. It is inherent in the system that rules can therefore never eliminate discretion entirely.⁷¹⁸ The less discretion a statute provides, the more likely it is that an officer of the bureaucracy will have to compensate for the lack of discretion by enforcing overly specific legislation only when they deem the enforcement appropriate. This kind of ‘selective enforcement’ does not only negate the attempt to limit bureaucratic discretion, but it can also result in discriminating decisions based on individual and systemic biases.⁷¹⁹

In contrast to the overregulation of ordinary legislation, emergency legislation tends to intentionally grant overly broad discretionary powers to the executive, in order to accommodate the need for urgent and unpredictable action in the face of a crisis. An overreliance on judicial review therefore leaves the system with few or no control mechanisms during emergencies. Courts require clear rules against which to assess the discretionary decisions. Exceptional provisions create broad discretionary powers that are difficult to assess by courts and are therefore hard to challenge.

⁷¹⁴ Kenneth Culp Davis *Discretionary Justice: a Preliminary Inquiry* (University of Illinois Press, Urbana, 1971), at 215.

⁷¹⁵ Edward C. Page “The Civil Servant as Legislator: Law Making in British Administration” (2003) 81(4) *Pub Admin* 651, at 651.

⁷¹⁶ Robert E. Goodin “Welfare, Rights and Discretion” (1986) 6(2) *OJLS* 232, at 232.

⁷¹⁷ Harlow and Rawlings, above n 330, at 207.

⁷¹⁸ At 330, At 209.

⁷¹⁹ At 330, At 208.

Kenneth Davis thus thought it important to regulate the use of executive discretion generally, by creating procedural rules that govern the application of discretionary powers.⁷²⁰ He was concerned that courts could not sufficiently control discretion, as their perspective was mainly retrospective, and their expertise and control was external to the operational reality of the bureaucracy.⁷²¹ Because most members of the public would never encounter courts, Davis believed that justice to individuals was mainly administered outside the courts through administrative decisions.⁷²²

Discretion therefore needed to be organised into rules, not simply on the abstract legislative level on which the judiciary operated, but on the bureaucratic level. Policy decisions made by the bureaucracy should be formulated as rules to prevent arbitrary discretionary decisions and thus internally control discretionary powers. Similar to Dworkin, who believed that rules and discretion were co-dependent in that both shaped each other, Davis believed that the experience and use of discretion could inform the development of 'rules of discretion', which in turn would guide public officials and limit arbitrary decision-making.⁷²³ Such discretionary rules could also be published and thus address the intransparency of discretionary decision-making.

However, rule-based discretion does not resolve the issue of arbitrary and unfair decision-making. For one, it mirrors the insufficiencies of over-specific legislation. Internal bureaucratic rules of discretion can become so specific that it limits or even eliminates discretion altogether. Not only does that undermine the purpose of discretion (i.e. to enable a public officer to adapt their decision to the specific circumstances of a case), it also violates the administrative principle that public entities must not disable their discretion by adopting fixed rules of policy.⁷²⁴

This issue may be ameliorated if the substance of discretion were regulated by principles, rather than by specific rules that circumscribe the exact discretionary decisions a public officer may make. Harlow and Rawlings suggest principles-based discretion is more flexible than rule-based discretion and can thus provide for better individuated justice.⁷²⁵ Principles are broad normative (and moral) standards on which policies and legal rules rest.⁷²⁶ Principles of administrative discretion that are of particular importance are: equal treatment, consistent policies and consistency of the administration of policies, and proportionality between citizens' rights and policy goals.⁷²⁷ In contrast to the prescriptive nature

⁷²⁰ Davis, above n 714, at 17.

⁷²¹ Harlow and Rawlings, above n 330, at 201.

⁷²² Davis, above n 714, at 215.

⁷²³ At 215; Ronald Dworkin *Law's Empire* (Belknap Press, Cambridge, Mass 1986), at 31.

⁷²⁴ Woolf and others, above n 685, at [9-002].

⁷²⁵ Harlow and Rawlings, above n 330, at 203; Richard M Titmuss "Welfare "Rights", Law and Discretion" (1971) 42(2) Pol Q 113, at 131.

⁷²⁶ Jeffrey Jowell "The Legal Control of Administrative Decisions" [1973] PL 178, at 223.

⁷²⁷ Harlow and Rawlings, above n 330, at 205.

of rules-based discretion, principles-based discretion guides a public officer's decision, providing a framework within which the discretionary decision must reside without unduly restricting the officer's ability to adapt their decision to the individual circumstances of their case.

7.3 Procedural Rules of Discretion

Yet, neither rule-based nor principle-based discretion can truly eliminate discretion's negative traits of intransparency and arbitrariness.⁷²⁸ Limiting discretion by rules enforced by the judiciary makes it difficult to individuate justice through adaptation of the bureaucratic decision to the specific needs of a situation. It may also result in selective enforcement of rules, which can create inconsistencies and arbitrary decisions. The same issue exists if the bureaucracy develops its own internal rules.

Moreover, an over reliance on internal bureaucratic rules of discretion has the potential to entrench bad faith decision-making. It can create an institutional culture in which rules become an end of themselves or are even used as a social control.⁷²⁹ On the other hand, discretion based merely on vague principles may lead to inconsistent and arbitrary decision-making, as principles do not provide for sufficient guidelines to ensure that citizens are treated equally and their rights are sufficiently protected. This creates a dilemma: the more rules are created, the less discretion is available to deal with the needs of individual situations. But the more discretion the bureaucracy has, the more scope there is for inconsistent and arbitrary decision-making.⁷³⁰

A solution may be to disregard the concept of substantive rules of discretion altogether. Instead of proscribing the content of discretionary decisions, discretion is constrained by procedural rules. Discretionary decisions must be made following a process that incorporates both the purpose and goals of the policy as well as general administrative and human rights principles. They can be challenged in court or other review mechanisms, but the decision must only be assessed as to its adherence to procedural rules. The substance of the decision is not reviewable, thus preserving the discretionary powers of the bureaucracy.⁷³¹

A procedural approach to reviewing executive discretion would make it possible to require fewer exceptional powers during emergencies and increase the likelihood that the courts or similar review

⁷²⁸ Goodin, above n 716, at 232.

⁷²⁹ Albert J Reiss "Book Review of Discretionary Justice: A Preliminary Inquiry" (1970) 68 Michigan LRev 789, at 795; Goodin, above n 716, at 232.

⁷³⁰ See Michael Adler "Fairness in Context" (2006) 33(4) JLS 615, at 626. Adler discusses the computerisation of the United Kingdom Department of Social Security. The programming gave priority to administrative savings over the interests of the claimants, thus eliminating the department's discretion to the disadvantage of the affected individuals.

⁷³¹ Harlow and Rawlings, above n 330, at 223, 226.

mechanism would effectively control exceptional action. Instead of creating broad exceptional powers for the political executive, the discretionary powers of ordinary administrative actors could expand to meet the needs of the crisis. This would mean that the usual administrative processes for decision-making would stay intact. Although the requirements of these processes may be loosened to facilitate urgent decisions, fundamental administrative principles would remain in force, increasing the legitimacy and acceptability of discretionary decisions.⁷³²

Courts would continue to review these administrative decisions. Instead of reviewing the substantive content, they would be limited to reviewing the process by which the decision was made. Exceptional measures taken with exceptional powers currently exist in such a broad discretionary context that they can only be reviewed substantively, because procedural rules by which exceptional decisions have to be made barely exist. As courts therefore have little ability to assess the legitimacy of the exceptional decision-making process, they are left only with reviewing the content of the decision. As previously discussed, courts are reluctant to sanction executive emergency measures as they do not wish to challenge the executive's opinion of the necessity of the action to address a crisis. For that reason, it is more likely for courts to control administrative measures if they have a procedural standard against which to assess the discretionary decision.

As such, the legislative accommodation and interpretative accommodation approaches can complement each other in terms of monitoring and controlling executive extra ordinary action. Courts or other non-judicial actors can monitor and/or control the provision of exceptional powers through legislation *ex ante*. During and in the aftermath of a crisis, ordinary administrative actors can deal with the emergency with expanded discretionary powers while their decision-making processes are supervised by the courts. Exceptional powers would then be reserved only for the most extreme situations.

7.4 Administrative Discretion and Risk Rhetoric

Expanding administrative discretion in times of emergencies gives the bureaucracy the freedom and flexibility to appropriately respond to the needs of the crisis without having to resort to exceptionalism. As long as the use of discretion is sufficiently regulated and controlled, expanded administrative discretion arguably has a lesser impact on the constitutional integrity of governmental system than barely controlled exceptionalism. For example, the extremely exceptional measures of the CER Act may not have been necessary (or at least not to their extent) if the

⁷³² For a discussion of the importance of administrative processes during emergencies, see W John Hopkins "The First Victim : Administrative Law and Natural Disasters" (2016)(1) NZLR 189, at 195-198.

bureaucracy had had a broader discretion in the context of the aftermath of the earthquakes. Local government bodies could have had more scope to react appropriately to the needs of the recovery. They could have adjusted procedures to meet the urgent demands, such as expediting planning and resource consents processes, and they could have affected staffing needs independently of central government oversight. Moreover, if administrative discretion that is able to respond and adapt to the needs of emerging situations were normalised and properly regulated, the public may become used to the bureaucracy's ability to respond appropriately. This may make it more difficult for political actors to justify exceptional measures in situations with which the bureaucracy can appropriately cope.

However, it is uncertain whether expanded administrative discretion can sufficiently mitigate the effects of false securitised risk rhetoric. Expanded administrative discretion is useless when the potential crisis does not really exist or is vastly exaggerated. Similar to traditional review mechanisms, structuring and controlling administrative discretion focuses on controlling the provision and application of executive power. It does not deal with the underlying problem of false securitising risk rhetoric: the falsely created perception of an existential risk which creates the justification for extreme measures in the minds of the public. Expanding administrative discretion would not have changed the outcome of the Hobbit Law, as the situation could not be remedied by bureaucratic means. And while more discretion may have helped Environment Canterbury with its backlog of resource consents in the mid 2000s, by the time the ECan Act was passed in 2010 Environment Canterbury was performing similarly to other regional councils. The issue in both cases was not that exceptional measures were necessary because ordinary measures could not sufficiently cope with the situation. The issue was that in both cases the government had succeeded in convincing the public that the situations presented a threat to New Zealand's economy. This shows that expanding administrative discretion cannot by itself mitigate the impact of false securitising risk rhetoric.

8 Deliberative Risk Governance

While both review mechanisms and administrative discretion play a role in facilitating proper and adequate emergency response, neither can satisfactorily address the vicious cycle of risk aversion and securitising rhetoric in modern risk societies. Both approaches concentrate on controlling the provision and application of executive powers by assessing them against legislative or constitutional standards. But they do not take into account the influence that political actors and the public exert on each other.

As seen in Chapter Two, risk societies establish risk feedback loops: science and the media raise the population's awareness of potential risks, thereby increasing its risk aversion. The public expects its government to address the perceived risks, which makes the government more responsive to policies regarding risk reduction in order to be re-elected. This responsiveness reaffirms the population's perception of the risk and increases its risk aversion. The population is therefore more likely to accept exceptional measures, if they are seen to be necessary to address the perceived risk.

While review and discretionary control mechanisms can mitigate this trend to some extent, they cannot prevent it. Courts may apply human rights and administrative principles to their assessment of the propriety of any given exceptional action, but their decision is not only influenced by their deference to the executive, but also by the public mood. Meanwhile, Harlow and Rawlings believe that the "strongest influences on [public] decision-making are social conditioning, group morality, attitudes of mind and prejudices."⁷³³ It is therefore necessary to not only control the state's creation and use of exceptional provisions and measures, but also to address the power of securitising risk rhetoric over the population.

In order to interrupt the cycle of securitising risk rhetoric and exceptional response it is important to manage public risk awareness and perception. As was established in Part 1 of the thesis, the growing risk sensitivity and aversion in modern societies stems from several factors. The complexity of modern systemic risks makes it difficult for laypeople to assess the extent and immediacy of risk. The complexity also makes systemic risks ambiguous, as there is no general consensus either about the extent of the risk, nor about its solution. This creates an information-deficit in the public, which makes individuals dependent on expert opinions in order to understand risk. But the ambiguity of systemic risks and the resulting variety of contradicting expert opinions undermines expert authority. The resulting authority vacuum can be filled with securitising risk rhetoric. In the context of economic risks, the insistence of neoliberalism on inserting economic considerations into all aspects of life also creates

⁷³³ Harlow and Rawlings, above n 330, at 217.

an imbalance in value considerations when risks are assessed. As economic values become increasingly equated with moral standards, economic considerations begin to trump other value considerations. This makes securitising economic risk rhetoric increasingly powerful.

As seen in the preceding chapters, traditional legal and administrative review and control mechanisms have only limited effect mitigating the increasing effectiveness of securitising risk rhetoric. This chapter will explore the extent to which alternative methods such as risk communication and deliberative processes may be able to complement more traditional methods. It will suggest a form of 'deliberative risk governance', which combines better public risk communication and education with more participatory and deliberative decision-making processes. A better understanding both of risk and of the moral perspective of other parts of society can positively influence the public discourse and make it more resilient and resistant to false and exaggerated securitising risk rhetoric.

Rosa *et al* explain that we must improve the way we govern risk overall. We need to assess and evaluate the nature and potential threat of risks better; we must communicate these findings to the public in a way that informs it and enables it to make educated decisions based on that information; and we must use a more deliberative and inclusive approach when deciding how to respond to risks.⁷³⁴ Particularly deliberative decision-making can play an essential role in informing and improving people's perspectives on risk and risk management, making it less likely that they demand exceptional action or that they can be manipulated into believing that exceptional measures are necessary.

A good risk governance system must facilitate all four 'foundations of society': effectiveness, efficiency, legitimacy, and social cohesion.⁷³⁵ Each of the foundations is associated with a different social system. Effectiveness refers to the confidence that human activities will result in their intended consequences, which is ensured by scientific research and expert knowledge. Efficiency is the degree to which resources are used to reach the intended goals of the activity; resource distribution is handled by the economy. Public decisions require legitimacy, which is the moral or normative right to impose decisions on the population and the acceptance of that right by those that are affected by the activity. Political and legal systems provide the framework to facilitate legitimacy. Social cohesion is social integration and identity in the context of a diverse society with plural values, which is the domain of the social sphere.

Systemic risks affect all four foundations of society and thus all social systems.⁷³⁶ Decisions and policies regarding systemic risks must therefore take input from all social systems, as each generates and

⁷³⁴ Rosa, Renn and McCright, above n 5, at 123-194.

⁷³⁵ At 5, at 173-174, with further sources.

⁷³⁶ At 5, At 173.

provides functional and useful information for the decision-making process.⁷³⁷ For example, prioritising political and economic over scientific and social perspectives cannot sufficiently inform the process of risk governance. It is necessary to use the collective pool of experience and problem-solving capacities of all social systems. Knowledge acquisition and distribution and a participatory deliberative process are necessary in the decision-making process regarding systemic risks.

Habermas contends that deliberative discourse does not inherently grant decisions democratic legitimacy. Rather, it creates a network of regulated bargaining processes, each of which relies on communicatively established presuppositions and procedures.⁷³⁸ Democratic institutions must provide a framework for these bargaining processes that ensures the participants' equality and autonomy and enables free and reasoned discussion.⁷³⁹ The challenge of implementing deliberative decision-making processes is how to ensure well-informed reasoning and to create deliberative procedures in large societies in a way that is logistically viable. Decision-making processes from the field of deliberative democratic theory can be used to create a system of Deliberative Risk Governance.

It may seem counter-intuitive to emphasise deliberative processes when talking about crises. Crises are by their very nature urgent events that require swift response. Even if risk rhetoric is misused by governments, during bona fide crises the slow process of deliberation will hinder rather than further effective response. However, securitisation's focus on risks rather than threats means that securitised issues may not be urgent issues. Risks are merely potential threats that have not yet manifested and are therefore not imminent. In the context of securitised risks, deliberative processes are entirely appropriate. They can inform people better of the real probabilities and impacts of potential risks. This denies governments the ability to exploit the public's information-deficit by using exaggerated or false emergency rhetoric. Deliberative processes can also create better mutual understanding of conflicting interests between groups of society and create fairer and mutually acceptable policies to mitigate risks and potential future emergencies.

8.1 Risk Communication and Education

The public's information-deficit regarding systemic risks and emergencies makes it vulnerable to risk and emergency rhetoric. In modern risk societies, there is an awareness of an increasing number of risks ranging from minor threats such as product safety to systemic risks such as environmental or

⁷³⁷ Kenneth D Bailey *Sociology and the New Systems Theory: Toward a Theoretical Synthesis* (State University of New York Press, Albany, 1994), at 285-322; Carlo C Jaeger and others *Risk, Uncertainty and Rational Action* (Earthscan, New York, 2013), at 193 ff.

⁷³⁸ Habermas, above n 325, at 281.

⁷³⁹ Cohen, above n 105, at 29.

economic collapse. Awareness about the effects of human actions on society increases as well, whether the actions originate from individuals or corporations, or from within or outside of society. This means that society has to grapple with an increasing number of political matters that tend to be very complex. Even if diverse sources of information are available, the enormous scale, complexity, and quantity of information makes it difficult for most people to understand and evaluate the likelihood that the risk will manifest and the impact that manifestation will have on society and on them specifically.⁷⁴⁰

Society is thus dependent on experts, not only to identify and analyse the risk, but also to communicate it to the population. In order to reduce the public's vulnerability to emergency rhetoric, risk and emergency information must be clearly communicated to it. This is not only important to reduce the information-deficit, but also to allow more competent deliberation.

However, the final decisions regarding risks must not only rest on the communication of expert opinion. For one, experts disagree on causes and effects of systemic risks, making the decision-making process ambiguous. Moreover, potential responses to risks can affect parts of society differently than others. As it is important to include the affected public in the decision-making process, the public must also be competent to analyse contradicting information and to consider competing interests. Wide-spread civic education can increase the public's capacity to understand and analyse contrasting information and perspectives. It can also assist in developing mutual understanding between competing interests and thus enable resolutions that are acceptable to all. Better risk communication and education can therefore reduce the public's vulnerability to exaggerated emergency rhetoric.

8.1.1 Communication

A proper deliberative process requires effective communication of available risk knowledge. Due to their complexity, knowledge around systemic risks tends to be extremely fuzzy. Systemic risks often have far-reaching consequences and most people's knowledge of secondary and tertiary impacts are severely limited. Therefore, the boundaries as to which information is legitimate and can further the public discourse is unclear. Rosa *et al* point out that this can lead to pseudo-rational legitimization of inaccurate or even manipulative and intentionally misleading information.⁷⁴¹ Distinguishing between evidence-based legitimate information and pseudo-rational nonsense can thus be difficult. The way in which information is communicated can influence trust between the participants of the deliberative process. Good communication between policymakers, experts, and the public is therefore vital.⁷⁴²

⁷⁴⁰Dahl, above n 99, at 187.

⁷⁴¹ Rosa, Renn and McCright, above n 5, at 171.

⁷⁴² At 5, at 167.

Good risk governance requires both experts and the public to arrive at mutually acceptable decisions. The aim of deliberative discourse is to establish a risk response that is acceptable and tolerable to all affected.⁷⁴³ However, it is important that information does not flow in a single direction.⁷⁴⁴ Traditionally, the need for risk communication has been framed in a ‘deficit-model of communication and engagement’.⁷⁴⁵ The difficulty in distinguishing between legitimate and false information creates a knowledge gap in the population as to the relevant factors that should influence risk management. The deficit-model assumes that successful risk communication therefore only requires education and persuasion of the public by experts. There is merit to this approach: people’s risk perception is often based on personal interests. A lack of information about the hazard itself as well as secondary and tertiary concerns can therefore lead to oversimplified and extreme positions (e.g. that any risk to the environment must be eliminated, or that economic opportunity must be protected at all cost).⁷⁴⁶

On the other hand, due to the ambiguity of systemic risks, experts can generally not agree on a single course of action either. Various perspectives caused by different types of knowledge and expertise means that determining ‘truth’ or the ‘correct response’ to a risk is unfeasible. Because of the range of diverse scientific, economic, and social perspectives on risk, both educated *and* moral judgement are required to achieve that outcome. Rosa *et al* point out that “for rational politics of risk, it is ... imperative to collect both ethically justifiable evaluation criteria and standards and the best available systematic knowledge.”⁷⁴⁷ Determining acceptable risk requires factual knowledge about the impacts of the risk, as well as attitudes and moral standards about the acceptability of potential risk responses. We must overcome the assumption that experts’ knowledge is superior to laypeople’s attitudes and that both groups stand in opposition to each other. Both perspectives are valuable and must be considered.⁷⁴⁸ For that reason, public risk discourse must include a robust deliberative component that informs risk governance and decision-making.

Nevertheless, current risk rhetoric tends to deal in absolutes such as ‘truth’ and ‘correct responses’. According to Rosa *et al*, risks tend to be communicated either by way of doomsday scenarios, or by almost complete acceptance and dismissal of the risk.⁷⁴⁹ Doomsday scenarios focus on communicating fear. The conveyed knowledge is framed in worst-case scenarios which require extreme action or

⁷⁴³ Terje Aven and Ortwin Renn *Risk Management and Governance: Concepts, Guidelines and Applications* (Springer, Heidelberg, 2010), at 181 ff.

⁷⁴⁴ Nick F Pidgeon and others “Using Surveys in Public Participation Processes for Risk Decision Making: The Case of the 2003 British GM Nation? Public Debate” (2005) 25(2) *Risk Analysis* 467, at 467.

⁷⁴⁵ Rosa, Renn and McCright, above n 5, at 166.

⁷⁴⁶ At 5, 171.

⁷⁴⁷ At 5, 172.

⁷⁴⁸ At 5, 170.

⁷⁴⁹ At 5, 173.

inaction in terms of response. In contrast, risk acceptance communicates risk response as inhibiting opportunities. Any danger to society, the environment, or to other values is portrayed as exaggerated, red herrings that must be dismissed. Criticising risk acceptance is seen as hindering progress or damaging the economy unduly.⁷⁵⁰ Current risk discourse thus illustrates how extreme risk rhetoric can influence the public's perception of systemic risk. The focus on fear in doomsday scenarios leads to overreactions to the risk, while the focus on opportunity of risk acceptance causes inaction.

8.1.2 Education

Deliberative and participatory processes can only successfully counter and mitigate current risk rhetoric if risks are not only properly and comprehensively communicated to the public, but the public also has the capacity to understand the risk and engage objectively and empathically with it. As discussed in Chapter Six, the current political public discourse is dominated by superficial opinion polling, marketing speech, and uncritical reporting. This lack of meaningful public discourse leads to a feeling of disenfranchisement and the consequent political disengagement of the public. In addition, increased awareness and knowledge about risks, the sheer amount of data available, and expert disagreements all contribute to public concern and risk aversion.⁷⁵¹ They outstrip most people's capacity to understand and evaluate the risks and thus to determine the adequacy and propriety of decisions made regarding the risk. Dahl therefore contends that in order for people to be able to meaningfully participate in democratic decision-making, their capacity to engage with political issues and in reciprocal deliberation must be improved by way of civic education.⁷⁵²

Deliberative decision-making depends on the participants' ability to engage with complex issues using fact-based evidence as well as understanding and considering different perspectives. Everyone must therefore have equal and effective opportunity not simply to participate in the decision-making process, but also to be able to acquire the skills and capacities to do so. General education and particularly civic education are therefore vital to the deliberative process. All citizens must be able to learn how to form opinions based on information and multiple perspectives, how to defend their opinion or argument, and how to adapt and refine their preferences based on the available information and perspectives. It is therefore essential that both civic and general education receive adequate funding, and other sources of civic education and engagement are well-supported.⁷⁵³

Apart from formal education, the population requires easy and affordable access to diverse information sources. The Internet provides a broad forum for cheap and accessible information, but

⁷⁵⁰ At 5, 173.

⁷⁵¹ At 5, 166.

⁷⁵² Dahl, above n 99, at 187.

⁷⁵³ Held, above n 36, at 251; Dahl, above n 99, at 185.

it is important impartial and apolitical sources of trustworthy and reliable information are maintained (which in turn requires adequate funding of impartial institutions like public media outlets and universities).

Moreover, a pluralist and competitive political landscape supports deliberative processes by providing generalised perspectives on political issues.⁷⁵⁴ The sheer amount and complexity of political issues make it difficult even for knowledgeable people to form opinions on all matters relevant to their interests. Political parties are able to curate the specific knowledge needed to assess a wide range of issues and distribute political information in more digestible form along predefined interest lines. However, Cohen points out that political parties can be contaminated by the influence of private interests, particularly because of their need to fundraise their campaigning expenses. In order to avoid oversimplification and manipulation of information by private interests, political parties must therefore be well and fully funded by public funds.⁷⁵⁵

A public that is better trained and educated in engaging in the public discourse is also better able to understand and evaluate the complexities of modern risks. Better risk communication and better public education means that people will be better capable of engaging in deliberative processes. This will allow us to create a more effective and deliberative system of governing the perception of and reaction to risks.

8.2 Risk Governance

At the heart of the issue of risk perception and risk management lies the need for the integration of risk analysis and deliberative risk decision-making. This is particularly important in the context of systemic risks such as substantial risks to the economy and environment. The complexity and ambiguity of systemic risks requires substantive expert analysis in order to understand the threat and the impact of different possible responses. Deliberation is also needed between the experts and both those affected by the risk threat as well as those affected by the potential responses. Otherwise, the eventual decision is likely to be unacceptable to the public or to unduly disregard the interests of a part of the population (particularly if that part is vulnerable).⁷⁵⁶

It is thus important to create a robust system of risk governance. Risk governance is the coordination, steering, and creation of regulatory processes involved in decision-making around uncertainty. It includes institutional structures and policy processes which aim to reduce, regulate, or control risk

⁷⁵⁴ Dahl, above n 99, at 186.

⁷⁵⁵ Cohen, above n 105, at 36.

⁷⁵⁶ Rosa, Renn and McCright, above n 5, at 139-140.

problems.⁷⁵⁷ In its 2005 report, the International Risk Governance Council (IGRC) suggested a framework for risk governance that comprises four categories: pre-assessment of general risk issues, assessment of the nature and impact of specific risks, evaluation of specific risks, and risk management.⁷⁵⁸

Pre-assessment requires the framing of risk issues. Entman explains that “to frame is to select some aspects of a perceived reality and make them more salient in a communication context, in such a way as to promote a particular problem definition, casual interpretation, moral evaluation, and/or treatment recommendation for the item described.”⁷⁵⁹ In other words, good risk governance requires that the definitions, goals, and parameters of risk management are considered and implemented in advance. This does not mean that specific decisions about risk responses are anticipated, only that a decision-making framework has been developed based on a common understanding of the potential risk problems.

Good risk governance must also assess specific risks systematically. This includes the causes and nature of the risk as well as its potential impact of people’s life and health, and public and private property. It must also assess related concerns such as social and economic impacts. Especially systemic risks affect not only life and property, but all aspects of society due to their complexity and far-reaching impacts.⁷⁶⁰

In addition, risk assessment must include a ‘concern assessment’. This assesses the probability that the risk, or potential responses to the risk may generate social conflict and/or psychological reactions among the public. A broad approach to risk assessment is required to enable risk governance to establish subjects of concern that are to be considered and addressed as part of the risk management.⁷⁶¹ Especially the distribution of costs and benefits of managing the risk must be carefully considered, because any public perception of inequity and injustice can create pressure on the government to act.⁷⁶²

⁷⁵⁷ At 5, 150.

⁷⁵⁸ Ortwin Renn *Risk Governance: Towards an Integrative Approach* (The International Risk Governance Council, Geneva, September 2005), at 12.

⁷⁵⁹ Robert M Entman “Framing: Toward Clarification of a Fractured Paradigm” (1993) 43(4) *Journal of Communication* 51, at 52.

⁷⁶⁰ Rosa, Renn and McCright, above n 5, at 160.

⁷⁶¹ The United Kingdom Cabinet Office has identified six factors that may influence public concern: 1) public perception of familiarity and experience with a risk hazard, 2) actual understanding of the hazard and its effects, 3) wider repercussions of the hazard’s effects beyond its direct impact, 4) public perceptions of fear and dread, 5) perception of personal and institutional control, and 6) the degree of trust the public has in public risk management, *Risk: Improving government’s capability to handle risk and uncertainty* (UK Cabinet Office Strategy Unit, London, November 2002), at [5.5].

⁷⁶² Rosa, Renn and McCright, above n 5, at 161.

The subjects of concern identified in the risk assessment must be evaluated before deciding how to respond to them. Systemic risks must be evaluated beyond immediate issues of probability and direct impact.⁷⁶³ They will invariably have significant impacts on society, the economy, and/or the environment. Therefore, the evaluation has to consider a range of incommensurate and competing values, as well as cost and harm the hazard can cause to different interests.

Risks must be distinguished between 'acceptable', 'tolerable' and 'in acceptable' in a way that does not create a perception of unnecessarily inappropriate, inequitable, or unjust distribution of risks and costs to one societal subgroup. It follows that risk evaluation must include a range of normative and moral judgements based on causal beliefs: to what extent will the hazard cause harm, how much harm is acceptable in light of other interests, and how much safety must be assured to feel sufficiently safe from the hazard? These judgements require extensive and broad consultation with both experts and the public. They must involve some deliberative process in order to base them on shared ontological and ethical convictions, lest they are perceived as illegitimate and unacceptable.⁷⁶⁴

Risk management thus relies not only on political decision-making but also on a broad public discourse about the risks, their potential impacts, and possible responses. Which shape the discourse takes depends on the level of uncertainty, complexity, and ambiguity of the risk. If the risk or its impacts are uncertain, the public discourse must be reflective. As the causal connections regarding the cause of systemic risks are difficult to determine, the aim of reflective discourse is to clarify available knowledge and to assess the potential trade-offs between the impact of the risk and of possible responses. This can inform the subjective and normative judgements as to what the appropriate actions are.⁷⁶⁵

If the risk is complex, the focus of the discourse must be on resolving disputes about the multitude of available information and evidence. As the amount of available information makes it difficult to establish causal links, it is important to isolate an adequate description of the risk and its consequences, in order to be able to make decisions regarding risk response.⁷⁶⁶

Highly ambiguous risks require a participatory discourse based on broad deliberative considerations. The ambiguity of what the right course of action regarding the risk is requires a range of ethical and normative judgements that must be informed by the views of those who will be affected by the risk response (or lack thereof). Common values must be identified inclusively in order to define options

⁷⁶³ At 5, 163-164.

⁷⁶⁴ At 5, 163.

⁷⁶⁵ At 5, 144.

⁷⁶⁶ At 5, 145.

that allow people to live ‘good lives’ without unjustifiably compromising the lives of others.⁷⁶⁷ The participatory discourse has to consider unequal distribution of resources and wealth among the population, economic risks and environmental justice, and differing preferences about desirable lifestyles and community life. These considerations require broad public representation to be inclusive and thus adequately conclusive.⁷⁶⁸

Systemic risks are invariably uncertain, complex, and ambiguous. The different types of discourse must therefore be combined and integrated to be able to produce an adequate framework for risk governance. Available knowledge must be clarified and assessed, the risk and its consequences must be evaluated, and the best response to the risk must be determined in a participatory manner. All three types of discourse are served best by the deliberative processes developed by deliberative democratic theory.

8.3 Deliberative Processes

Although deliberative decision-making processes have the aim of involving a greater part of the population in governance, they differ from direct or grass-roots democracy. Direct and grassroots democracy movements try to increase popular involvement in politics by increasing the number of citizens involved in decision-making. The focus is mainly on the quantity of participation, not the quality.⁷⁶⁹ However, the difficulties of risk governance established in this thesis cannot be mitigated merely by increasing participation in decision-making. A larger quantity of participants does not inherently change the risk-perception and aversion of people, the pressure on government based on perceived risks, or the ability of interest groups to exploit the risk aversion. Deliberative decision-making, on the other hand, does not focus on quantity. Rather, its focus is on inclusive participation aims to raise the quality of decisions based on representative participation and deliberative reasoning.

Once it is ensured that the population has the capacity for deliberative reasoning, it is possible to introduce structured and moderated deliberation into the decision-making processes. It is unlikely that there will be time for deliberative decision-making in the context of risk governance if an emergency requires swift and urgent response. For the other phases of the disaster cycle, however, deliberative processes can be introduced into risk governance. The likelihood and impacts of risks can

⁷⁶⁷ At 5, 146.

⁷⁶⁸ Aven and Renn, above n 743, at 181 ff.

⁷⁶⁹ James S Fishkin *Democracy and Deliberation: New Directions for Democratic Reform* (Yale University Press, New Haven, 1991), at 21; see also Philip Pettit “Deliberative Democracy, the Discursive Dilemma, and Republican Theory” in James S Fishkin and Peter Laslett (eds) *Debating Deliberative Democracy* (Wiley, Malden, 2008) 138, at 154.

be deliberatively discussed in round tables and open forums; conflicts around risk impacts can be debated in deliberative mediation; and appropriate risk responses can be determined by mixed advisory committees. The appropriate type of deliberative process and level of public inclusion will depend on the context of the required decision, which can be at least broadly determined by a deliberation itself.⁷⁷⁰

For more fundamental and complex decisions, the deliberation can take the form of a so-called ‘deliberative poll’.⁷⁷¹ Deliberative polls are deliberations comprising a representative sample of society affected by a pressing matter of public concern; examples of such matter are the water allocation issues in Canterbury or the rebuild of Christchurch and the surrounding region following the 2011 earthquake. They can stretch over multiple sessions and days depending on the complexity and ambiguity of the decision. Participants are exposed to and can question experts before leading a debate aimed at producing a mutually tolerable and acceptable position. The goal of deliberative polls is to provide a form of ‘reflective judgement’ on a political issue determined by a representative cross-section of society.⁷⁷² This can improve the ‘recommending force’ of the result of the deliberation. It may be able to counter the current risk and emergency rhetoric and the overwhelming representation in political decision-making by elites.

Even though only a representative sample of the population take part in deliberative polls, deliberative democrats hope that they will not only stimulate political reflection in the participants themselves but also spread to those with whom participants get in contact. Deliberations are expected not only to shift the participants’ preferences, but also those of the general public due to participants relaying their experiences to the community and via the publication of the results of the deliberation.⁷⁷³ Indeed, there is some evidence that deliberative polls change their participants’ views on matters such as electricity prices, foreign aid, and appropriate tax levels.⁷⁷⁴ There is less evidence that deliberation encourages a wider public debate; however, this could be because deliberative processes are quite new and not widely known yet, or because broader civic education does not yet encourage engagement with political issues.

It is unrealistic to expect that deliberative forms of decision-making can replace the aggregative modes of governing based on traditional democratic institutions and majority voting. Ultimate responsibility

⁷⁷⁰ Ortwin Renn *Risk Governance: Coping with Uncertainty in a Complex World* (Earthscan, London, 2008), at 332 ff.

⁷⁷¹ Held, above n 36, at 247.

⁷⁷² Fishkin, above n 769, at 81.

⁷⁷³ Held, above n 36, at 247, 251; Bruce Ackerman and James S Fishkin “Deliberation Day” in James S Fishkin and Peter Laslett (eds) *Debating Deliberative Democracy* (Blackwell, Oxford, 2003) 7, at 25.

⁷⁷⁴ Ackerman and Fishkin, above n 773, at 7-30, with further references.

for public decisions will continue to lie with the government, due to its role as guarantor of public safety and well-being.⁷⁷⁵ But deliberative processes enable people to make better informed decisions. Complex and ambiguous issues concerning complex risks can be debated at round tables, mixed advisory committees or optimally by way of deliberative polls. Deliberative reasoning ensures that the participants are well informed and understand and consider different perspectives on the issue.⁷⁷⁶ Thus, external influences and constraints can be minimised and manipulation by interest groups prevented. Participants are free to autonomously form or adapt their preferences.⁷⁷⁷

Deliberative decision-making does not need to replace majority decision-making. By improving the public discourse on complex and ambiguous public issues, it can inform and influence more traditional authoritative administrative decision-making processes. It can improve people's ability to make an informed voting choice by making the outcomes of deliberative processes publicly available. Deliberative risk governance therefore has the potential to break the cycle of emergency rhetoric and ever-increasing exceptional powers. It creates a better-informed public that has more agency in the decision-making process regarding risks and emergencies. The deliberative processes in this risk governance model create better mutual understanding of competing interests and are thus focused on creating compromises that are acceptable to all involved. This undermines the government's current ability to exaggerate or invent risk in order to convince the public of a necessity for exceptional measures.

⁷⁷⁵ Heiko Garrelts and Hellmuth Lange "Path Dependencies and Path Change in Complex Fields of Action: Climate Adaptation Policies in Germany in the Realm of Flood Risk Management" (2011) 40(2) *Ambio* 200, at 207-208.

⁷⁷⁶ Held, above n 36, at 254.

⁷⁷⁷ Cohen, above n 105, at 31.

8.4 A Combined Effort

Legislative review mechanisms, adaptive administrative discretion, and deliberative risk governance are all necessary to control the provision of exceptional powers by the legislature and the use of exceptional measures by the executive. Each is specialised to deal with an aspect of exceptional response to crises and can both facilitate good response and prevent misuse of powers. Legislative review mechanisms protect the liberal focus on restricting government overreach. Facilitating administrative discretion enables the developmental green light approach of empowering government to actively help and support the population. Deliberative Risk Governance mitigates the impact of emergency rhetoric by educating the population about likelihood and impacts of risks and involving it in the decision-making process.

None of these mechanisms can effectively control exceptional powers by themselves. All three are needed to prevent the misuse of exceptional measures for political gain. But they can only be truly meaningful if the population has equal access to opportunities to be well-informed and sufficiently economically secure to form independent assessments of risks and risk responses. In order for truly free and equal deliberation to inform risk governance, democracy's focus must be better balanced between furthering community interests and protecting individual liberties; it must actively work towards closing economic disparities and creating a more equal distribution of economic and thus political resources.

Deliberative risk governance can counteract the influence of systemic risks on decision-making, particularly in relation to risk perception and aversion and the associated risk rhetoric. Evidence-based and multi-perspectival deliberation can create better understanding of risks and their potential impacts on society and individuals. This, in turn, makes participants less susceptible to sensationalist or over-dramatised risk rhetoric. Particularly in the context of economic risks, to which the population is particularly sensitive and therefore vulnerable to manipulative emergency rhetoric, deliberative processes have been shown to be effective in helping participants form and adapt their preferences.⁷⁷⁸

In order to have entirely free and reasoned deliberation, participants must be free of external influences and equal to one another. The procedures and rules of the deliberative process can create formal equality between participants. But for deliberation to be truly free and equal, all participants must not only be formally equal, but also substantially.⁷⁷⁹ External influences such as economic and political power are difficult to eliminate from deliberations. Ideally, participants should set aside

⁷⁷⁸ Ackerman and Fishkin, above n 773, at 7-30.

⁷⁷⁹ Cohen, above n 105, at 18, 24; Held, above n 36, at 238.

preconceived ideas and be open to alternative perspective; but it is unrealistic to expect participants to ignore their personal life experiences and the associated (often subconscious) biases.

Particularly in the context of economic risks, economic disparities between participants may undermine the advantages of deliberative processes. Political opportunities and powers (e.g. ability and capacity to influence political deliberation) are closely linked with economic standing.⁷⁸⁰ Ideally, political influence in deliberative processes must not depend on the economic and social position of the participant. But participants of deliberative processes with fewer economic concerns will be less influenced by existential considerations and thus be less susceptible to manipulation by economic emergency rhetoric; and participants with better access to education will be better able to present supporting and critical reasons for their perspective and preference.

Unregulated markets inevitably create inequalities which lead to the concentration of power and disparities in the distribution of economic and political power. The competitive nature of market-capitalism means that initial unequal distribution of resources is compounded over time. Liberal (and particularly neoliberal) thinking has shifted democratic focus too far away from supporting the common good and towards protecting individual freedom. In market-centric democracies, individual actors are economically motivated and encouraged to act in self-interest, and they have little incentive to consider the needs and interests of others or of the wider community.⁷⁸¹ This inevitably leads to a progressively disparate distribution of wealth. As economic power is intricately linked to political power, unequal distribution of wealth equates to an inequitable distribution of political power.

While deliberative methods of decision-making can improve the democratic quality of the outcomes, it cannot overcome the unequal distribution of political influence inherent to market-driven society. Unequal distribution of economic and political resources particularly affects decision-making in the context of systemic risks. People whose mere existence is dependent on economic factors, for example because they need to feed a family, pay rent or a mortgage on their house, etc., are in an economically more precarious position than someone who is affluent. As such, they are more susceptible to economic risk rhetoric and less likely to have the time or education present a convincing argument in defence of their political perspective and policy position in a deliberation context.

Nevertheless, legislative, administrative, and deliberative approaches can play valuable and complementary roles in controlling exceptional executive action. Legislative review mechanisms

⁷⁸⁰ Held, above n 36, at 269. As early as the late 18th century, Mary Wollstonecraft criticised the importance accorded to property in liberal theory. She believed that poverty brutalised the mind and made enjoyment of liberty impossible, Mary Wollstonecraft *Vindication of the Rights of Woman* (Infomotions, Inc, 2000), at 110-111. Similarly, Rousseau believed that “no citizen shall be rich enough to buy another and none so poor as to be forced to sell themselves,” Rousseau, above n 306.

⁷⁸¹ Dahl, above n 99, at 174.

restrict the legislature's and executive's ability to create exceptional powers or use exceptional measures inappropriately. Broader administrative discretion allows the bureaucracy to act within the ordinary constitutional framework when responding to exceptional situations.

But only deliberative risk governance addresses the questions of risk perception and securitising risk rhetoric. Risk perception and rhetoric exist in a mutual feedback loop. Securitising risk rhetoric can amplify and exploit the public's aversion to systemic risks, particularly those concerning their personal and financial well-being. This allows the government to employ exceptional measures more frequently. The frequent use of exceptional powers or broad discretion can have a normalising and thus tranquilising effect on the general public's opinion.⁷⁸² The public's risk concerns appear to be confirmed by the government's exceptional actions, which are thus accepted as necessary. The feedback loop of normalising and consequently increasing exceptional powers continues.

Resolving these issues requires improved general risk governance. Perception of and aversion to risk must be better managed to help the population be able to evaluate risks better. This not only requires better risk communication and education, but also more participatory deliberation regarding how the government, and by extension society as a whole, should react to imminent or potential crises. Theories of deliberative democracy can thus aid in creating a framework of deliberative risk governance. Decisions regarding systemic risks must be informed by inclusive deliberative processes that involve evidence based and multi-perspectival deliberation and compromise.

None of the case studies could have been affected if deliberative risk governance structures had been implemented in response to them, or even if they had been established only shortly before 2010. However, if they had been well established, legislation such as the ECan Act or CER Act may not have been as well received by the public as they were. The situation around Environment Canterbury would have likely been approached in an entirely different manner. Deliberative processes would have been set up to deal with the perceived issues with Environment Canterbury's performance when they arose in the mid 2000s, likely preventing the "need" for the drastic measures taken with the ECan Act. In the aftermath of the Canterbury earthquakes, deliberative processes could have been included in the CER Act to help with the mid- to long-term recovery process. At the very least, the CER Act would not have had to extend to five years but could only have been active for a much shorter time. But more importantly, a deliberative decision-making culture may have built resilience against false urgent risk rhetoric, making successful securitisation harder. If the public discourse is influenced by deliberative processes and better risk communication, the public will likely have a better understanding of financial

⁷⁸² Gross, above n 227, at 1093-1094.

and economic risks and be more resilient to unsubstantiated or exaggerated claims of impending economic disaster.

Deliberative risk governance is not the panacea to false securitising risk rhetoric. Neither is it a quick fix solution or an ad hoc measure. It cannot prevent any particular government action, and neither is it meant to. Unlike traditional review mechanisms, deliberative risk governance is not an active check on government action. It is meant to build communication between parts of society affected by risks and understanding of those risks and of other people's perspectives and positions. This requires time. Deliberative processes are therefore unsuited to genuine crisis situations. They are deliberately slow processes that would not achieve the urgent action required during an active emergency. However, they can build resilience against the use of false securitising risk rhetoric by nurturing better understanding of risk and a more consultation-oriented decision-making culture. Together with robust traditional review mechanisms and well regulated broad administrative discretion, deliberative risk governance has the potential to mitigate the worst effects of false securitised risk rhetoric.

Conclusion

This thesis set out to investigate the impact of false or exaggerated economic securitisation attempts on constitutional and democratic processes and structures. It has shown that exaggerated and false economic risk rhetoric can effectively be used to successfully gain public support for the use of exceptional measures, irrespective of the real severity of the economic risk. The increasing use of securitising economic risk rhetoric poses a considerable threat to constitutional and democratic processes, as the use of exceptional powers ceases to be neither temporary nor exceptional. Particularly in the economic context, exceptional measures are becoming a normal political tool, thus normalising them.

Part One of the thesis explored the concept of risk and showed that risk rhetoric can be successfully used to influence and steer public risk perception. Modern systemic risks tend to be highly complex and ambiguous. Their complexity means that it is nigh impossible for laypeople to understand the causal connections of systemic risks. In many cases that means that the public may even be unaware of the risk's very existence. The causal connections between human activity and systemic risk are difficult to see. At the same time, the complexity of systemic risks leads to ambiguity. Experts may not agree on the causes of or solutions to risks. There is therefore no clarity on how to address modern systemic risks.

Due to the complexity and ambiguity of modern systemic risks, the public grows increasingly more risk averse. Individuals lack the power to address those risks, or to protect themselves against the affects of risks if they manifest themselves. Consequently, the state is increasingly expected to address the risk to avert its effects from the public. At the same time, the public's risk perception is dependent on the public narrative as they are unable to understand systemic risks on their own. However, Due to the ambiguity of systemic risks, experts often do not agree on matters of risk. This increasingly undermines the authority of expert opinions in the eyes of the public. The public narrative therefore becomes increasingly susceptible to risk rhetoric, irrespective of its accuracy.

This is particularly true for economic risk rhetoric, as the public is intimately familiar with economic risks. Economic liberalism has created an environment in which many aspects of life dependent on economic success and stability. In addition, neoliberal narratives have introduced economic considerations such as productivity, competition, and profitability into nearly all areas of life, replacing or superseding other value considerations. This creates an extreme sensitivity to economic issues and thus leads to the public's extreme aversion to economic risks. Economic risk rhetoric can therefore more easily be used to exploit public sentiments when securitising economic issues.

Part Two of the thesis explained the impacts of securitisation on the constitutional order. Securitisation is successful if it creates the public perception of an existential risk or threat. As an existential threat often justifies the use of exceptional measures, a consequence of securitisation is generally exceptionalism. The ease with which economic issues can be successfully securitised therefore means that the state can gain access more easily to exceptional measures, thus undermining the principle of exceptionalism that such measures should be exceptional and temporary. If governments therefore use securitisation frivolously, i.e. by exaggerating or falsifying claims of economic risks, they can normalise exceptionalism, which weakens the normalcy-exception dichotomy and liberal democratic principles. That this danger is not merely theoretical was illustrated by the three case studies. In all three cases, the government (at least) exaggerated economic risks in order to gain access to exceptional measures.

Parts One and Two of the thesis answered the first part of the research question, to what extent securitising economic risk rhetoric threatens constitutional and democratic processes and structures. In order to address the second research question, Part Three explored ways in which the effects of false or exaggerated securitisation can be prevented or at least mitigated. It first investigated existing constitutional control mechanisms for the use of exceptional powers. Traditionally, this has been controlled by a range of legal and judicial review mechanisms. The judiciary, various specialised public review bodies, and parliamentary committees are tasked with overseeing, supervising, and reviewing the creation of exceptional powers and the use of exceptional measures. These review bodies can be effective when controlling gross or drastic misuse of exceptional powers *ex ante*. However, these control mechanisms have not prevented the recent trend of securitisation. The judiciary tends to defer to executive expertise during crises and often does not want to challenge exceptional measures for fear of appearing to stand in the way of effective crisis response. Similarly, other review bodies tend to broadly decide in line with public attitude, which is influenced by securitising risk rhetoric.

A possible way of limiting the effects of securitisation could be the reduction of the need for exceptional measures during crises. Broadening the administrative discretion of the bureaucracy during crises could reduce the justification for the political executive to require exceptional powers, as the bureaucracy would be able to effectively handle the crisis. Since the bureaucracy is (at least ostensibly) apolitical, this would depoliticise securitisation and reduce the constitutional impact of successful securitisation attempts. However, the bureaucracy is similarly susceptible to public pressure as constitutional review mechanisms are. While expanding its discretionary powers could therefore be helpful, it will not by itself resolve the issue of false or exaggerated securitisation.

The problem of securitisation can only be resolved by creating a more deliberative system of risk governance. The feedback loop of risk sensitivity and risk rhetoric must be interrupted with better communication about the nature and likelihood of risks. The public must also be more extensively involved in risk governance because responses to modern systemic risks affect parts of the population differently. The ambiguity of systemic risks such as economic or environmental threats means that there is no single 'right' response to potential crises. The public's capacity and ability to evaluate policy choices and to understand divergent perspectives and interests must therefore be enhanced. This will allow a more deliberative and participatory approach to risk governance. The people's knowledge of risks, their enhanced ability to evaluate that knowledge and understand and empathise with different perspectives, and their active involvement in risk decision-making will make the population more resilient to the manipulative use of risk rhetoric.

Carl Schmitt once wrote that "sovereign is he who decides on the exception." In a way, the power of securitisation proves Schmitt's assertion right. If a government controls the risk narrative, it controls the degree to which the people will accept its use of exceptional measures. Deliberative risk governance has the potential to interrupt the power of securitising risk rhetoric has over constitutional systems in liberal democracies.

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