Regulating the Covid-19 Pandemic: Forms of State Power and Accountability Challenges

As part of the Verfassungsblog's excellent symposium on legal responses to the Covid-19 pandemic, Dean Knight penned an especially insightful contribution on New Zealand, noting how the response *alla fine del mondo* has taken various forms.

In this post, I hope to expand on Dean's contribution, explaining how governments in Canada have used primary legislation, delegated legislation, soft law and persuasion to respond to the spread of the novel coronavirus, and identifying the different types of accountability challenge attached to these different forms of state power.

My concern is not solely with the risk that state power might be *misused* but also that the response to Covid-19 might be *ineffective*. Abuse of power is certainly a risk to be guarded against but a well-functioning system of accountability mechanisms also helps to ensure that state power is being exercised effectively, for the good of the citizenry. Judicial oversight can counter the risk of misuse but the risk of ineffectiveness is best countered by legislative scrutiny.

Legislation

Current conditions are hardly ideal for scrutinizing primary legislation. If Parliaments are sitting at all, they are doing so in reduced numbers or remotely, with parliamentarians having to adjust to Zoom and other electronic platforms. And, of course, governments have insisted that pandemic conditions require rapid legislative responses, reducing the time available for parliamentary scrutiny.

In Canada, emergency legislation whizzed through legislatures has resulted in the delegation of sweeping powers to ministers. At the federal level, Bill C-13 provides significant fiscal authority; although most of the important provisions are subject to sunset clauses and will expire before the end of the year, the Minister of Finance has been given the power to create and capitalize a Crown Corporation (which is exempted from the usual statutory rules on Crown Corporations) for whatever pandemic-related purpose he deems fit. In Alberta, the legislature modified existing public health emergency legislation to give ministers the ability to amend other parts of the statute book and to make orders with retroactive effect (perhaps motivated by a concern that emergency orders already made might not have had a sufficiently firm legal basis).

Delegated Legislation

Much more of the regulatory activity has occurred, however, at a sub-legislative level. A

great deal of delegated legislation has been given life under the enabling provisions of public health statutes which long pre-date the current crisis. In Ontario, the government has invoked the *Emergency Management and Civil Protection Act*, RSO 1990, c E.9, which has given it the power to close all businesses save those which are essential (O. Reg. 119/20). At the best of times, the scrutiny of delegated legislation is patchy and in the current circumstances scrutiny is extraordinarily difficult. With legislatures unable to meet (or meeting virtually), there is even less opportunity than usual for legislative scrutiny of the exercise of delegated powers. That much of the delegated legislation being adopted does not have to be published on the official record (in Alberta, some of it is extremely hard to access) accentuates these difficulties.

It is worth noting the sweeping nature of some of the emergency delegated legislation. Quebec's emergency decree purports to modify judicial orders relating to child custody arrangements, an obvious breach even of Canada's relatively rudimentary doctrine of separation of powers. Nature (and lawyers) abhorring vacuums, courts are likely to fill the accountability gap created by this lack of legislative oversight. Indeed, it surely will not be too long before (as in the United States) human rights challenges are mounted on the basis that emergency action taken under statutory authority unjustifiably infringes fundamental rights to assemble for the purposes of speech or worship.

On occasion, private bodies have been co-opted into the emergency response. Airlines flying into and within Canada, for instance, are obliged to check passengers for symptoms of Covid-19. The practical effect of such checks might be to prevent Canadian citizens from exercising their right to return to the country or their interprovincial mobility rights. But the fact that the checks are being undertaken by private parties creates the risk of buck passing, as governments and private parties insist in turn that they are not responsible. Making sure that such checks are being done effectively but also fairly and reasonably is a significant challenge, especially given the difficulty of persuading courts to extend the judicial review jurisdiction to contractual relationships.

Municipal by-laws closing or limiting access to public spaces can also be categorized under the broad heading of delegated legislation. Again, opportunities for scrutiny are limited at the moment (though note the emergency Ontario legislation providing for virtual municipality meetings). Based on the reports of over-eager inspectors ticketing individuals who are putting neither themselves nor others in any danger (including, in Ottawa, hoop-shooting teenagers), court cases closely examining the language of these by-laws and exercises of discretion by front-line officials cannot be far off. Here, the accountability gap created by limited political oversight could well be filled by the courts.

Soft Law

A great deal of governmental action has, however, taken the form not of primary or delegated legislation but of soft law. With so many government spending programmes coming on line, put hastily onto the statute-book, soft law (in the form of information on government websites) has been put to good use. However, the fine print of these programmes is often difficult to make out, especially when they are implemented by

government agencies whose existing eligibility policies are more restrictive than the new programmes. Some of the soft law instruments now being put in place are extremely consequential. Innovation, Science and Economics Canada's new guidelines on the "enhanced scrutiny" of foreign investment in Canada are a case in point. Specifically, close attention will be paid to investment in "Canadian businesses that are related to public health or involved in the supply of critical goods and services to Canadians or to the Government", a policy which will continue "until the economy recovers from the effects of the COVID-19 pandemic". The prospect of a 'chilling effect' on inward investment of indefinite duration is obvious. This may well be justified in the circumstances, but ideally would be the subject of sustained parliamentary scrutiny.

Ontario has published pages upon pages of guidance on Covid-19, including documents explaining what is expected of care homes and pharmacies. In our present setting, the familiar benefits of soft law -- the ease with which they can be published and modified as circumstances change -- can become vices. Accountability for writing, updating and applying the guidelines will almost certainly be diffused. If a patient leaving hospital is not allowed to return to a long-term care facility, who is responsible? That the guidelines are published makes scrutiny possible, and maybe even judicial review, but again the accountability concerns are palpable. Public power is being exercised over matters of life and death and the accountability channels are extremely difficult to navigate.

Lastly, one of the fascinating aspects (from a legal point of view) of the current crisis is governmental resort to various forms of persuasion. My daily newspaper invariably features advertisements from the Ontario government urging us all to stay home to 'flatten the curve' of viral spread, thereby protecting vital public services. In early April, our smartphones blared out an emergency alert (sent once in English, once in French) warning us to stay home unless "absolutely necessary". The emergency alert thus suggested that residents of Ontario should not leave their homes at all but in fact circulating freely was not and still is not prohibited as long as large gatherings are avoided; indeed, non-essential businesses were not ordered to close until the day after the alert was sent out. Whereas the channels of accountability in respect of soft law are difficult to navigate, in respect of persuasion there are no legal channels at all, but at least its effects can be measured -- though if legislatures are not functioning at all or even close to optimally, this is difficult.

Conclusion

The point in relation to persuasion, as it is in relation to all of the forms of state power being used in response to the Covid-19 pandemic, is that the current circumstances create significant challenges for the smooth functioning of our accountability mechanisms. Emergency legislation, broad delegations of authority, sweeping executive measures, cooption of private parties, resort to soft law and the use of persuasion are different forms of state power, and they create different accountability challenges.

Two dangers result: that powers might be *misused* or that powers might be used *ineffectively*. Judicial oversight can address the danger of misuse to some degree, though only after the fact. Ineffectiveness is, arguably, the greater danger. The media,

including the public through social media, can help to keep a spotlight on governmental responses to the crisis created by the novel coronavirus, but without ongoing legislative oversight the danger of ineffectiveness might go unaddressed. Well-resourced parliamentary committees can engage in the sort of forensic scrutiny which would ensure that these different forms of state power are actually achieving the goals set by our leaders.

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