

"The New Normal": COVID-19 and the Temporary Nature of Emergencies

In the inaugural post for this series on Canadian law and the COVID-19 pandemic, David Dyzenhaus argued that the federal government should not invoke the federal *Emergencies Act*, but rather, Canadian responses to COVID-19 should continue to employ our usual constitutional and legal frameworks. Dyzenhaus identified four reasons to be cautious about employing the *Emergencies Act*. I agree with his post, and I want to highlight another consideration that should inform the debate around whether to employ emergency frameworks: namely, the likelihood that the threat of COVID-19 is a long-term reality or, in the words of our Chief Public Health Officer, Dr. Theresa Tam, “the new normal”.^[1] This blog post draws on scholarship from the security and anti-terrorism field to caution about operating outside the usual legal frameworks to deal with the pandemic. To be clear, I recognize that governments may need to employ exceptional measures to tackle the destructive spread of the virus. However, I suggest that these exceptional measures should be taken through usual constitutional and legal frameworks and we should resist changes to legal or constitutional norms, such as, for example, erosion of constitutional and Indigenous rights, employment of the notwithstanding clause, departures from federalism constraints, or violations of unwritten principles like the rule of law.

In the context of the state’s response to terrorism, an ongoing debate centres around whether emergency powers are necessary to properly deal with the threat or whether terrorism can be sufficiently addressed within usual criminal frameworks. Invocation of exceptional measures is typically justified on the basis that the ordinary system is not up to handling the threat and that, once the crisis passes, the usual state of affairs can and will return. However, some anti-terrorism scholars have argued that using emergency powers entails risks to ordinary legal frameworks. There’s the real possibility that measures introduced as emergency ones may become permanent. This has certainly been the case for many anti-terrorism measures across the globe.^[2] Invocation of emergency powers also relaxes social prohibitions against their use, facilitating use of greater powers in the future. Oren Gross & Fionnuala Ní Aoláin observe:

What were deemed exceptional emergency actions in the past may now come to be regarded as normal, routine, and ordinary, in light of more recent and more dramatic emergency powers. As our understanding of normalcy shifts and expands to include measures, powers, and authorities that had previously been considered special, exceptional, and extraordinary yet necessary to deal with emergency, the boundaries of new exceptions are pushed further to include new and more expansive powers and authorities.^[3]

Some scholars have questioned the premise underlying emergency powers, namely the notion that there is a tidy and clear-cut separation between “normalcy” and “emergency”.^[4] But urgent circumstances and the powers invoked to deal with them tend not to have clear end points. Emergency is less easily separated from normalcy than we might assume.^[5]

The threat of violence from extremism differs, of course, from the threat of illness from a virus in several significant ways, but the lessons learned from the anti-terrorism field ought not be ignored completely. It seems increasingly likely that the threat presented by the novel coronavirus is not going to end anytime soon. An official at the WHO has warned that the virus may become “endemic”, meaning it is ever-present in communities.^[6] Herd immunity is far from an ideal solution: the number of people infected by the virus so far is much lower than what is needed to achieve herd immunity (and that’s leaving aside the number of people that will die with widespread infection, as well as uncertainties about the length of immunity).^[7] A vaccine is thought to be necessary for us to return to our pre-pandemic lives, with 12-18 months often given as a timeline.^[8] But that’s a best-case scenario.^[9] A more realistic time frame places vaccine development at several years.^[10] For other diseases, five years to a decade is a normal time frame to develop a vaccine.^[11]

If the crisis is no longer temporary, one of the justifications for employing emergency powers falls away. How our society looks in 12 months, in two years, and even further down the road, is uncertain. But it seems clear that the virus and its accompanying societal changes are not short-term and require us to think and act on the scale of years. Accordingly, we should keep in mind the real possibility that any laws or constitutional changes brought in to fight the virus are going to be with us for a long time. During a time of uncertainty and death, we are likely to let these changes slide with little objection (see the quick passage of anti-terrorism legislation across the western world after 9-11 as an example). As we live with these changes for a long time, the possibility of normalization increases. As much as we can deal with the situation under usual frameworks, we should strive to do that, and resist the upending of these frameworks when we may not have the time or political will to question those changes closely.

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[1] Peter Zimonjic, Rosemary Barton & Philip Ling, “Tam says the pandemic will bring a 'new normal' to workplaces, defends WHO's performance”, CBC News (28 April 2020), online: <https://www.cbc.ca/news/politics/tam-who-defend-new-normal-pandemic-covid-coronavirus-1.5548285>.

[2] Oren Gross & Fionnuala Ní Aoláin, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (Cambridge: Cambridge University Press 2006) at 176-79.

[3] *Ibid* at 228.

[4] See e.g. David Dyzenhaus, “The Permanence of the Temporary: Can Emergency Powers be Normalized?” in Ronald J Daniels, Kent Roach & Patrick Macklem, eds, *The Security of*

Freedom: Essays on Canada's Anti-Terrorism Bill (University of Toronto Press, 2001) 21 at 45.

[5] Dyzenhaus, *ibid* at 45-48; Gross & Ní Aoláin, *supra* note 2 at 171-73.

[6] "WHO emergencies chief says novel coronavirus may be here to stay", CBC News (14 May 2020), online: <https://www.cbc.ca/news/world/who-novel-coronavirus-1.5569227>.

[7] Kaleigh Rogers, Julia Wolfe & Laura Bronner, "Without A Vaccine, Herd Immunity Won't Save Us", *FiveThirtyEight* (13 May 2020), online: <https://fivethirtyeight.com/features/without-a-vaccine-herd-immunity-wont-save-us/>.

[8] Brian Platt, "'The new normal': Prepare for smaller COVID-19 outbreaks for months to come, Trudeau says", *National Post* (9 April 2020), online: <https://nationalpost.com/news/the-new-normal-prepare-for-smaller-covid-19-outbreaks-for-months-to-come-trudeau-says>.

[9] Shannon Palus, "It Will Probably Take Longer Than 12 to 18 Months to Get a Vaccine", *Slate* (1 May 2020), online: <https://slate.com/technology/2020/05/vaccine-timeline-coronavirus.html>; Rob Picheta, "What happens if a coronavirus vaccine is never developed? It has happened before", *CNN* (4 May 2020), online: <https://www.cnn.com/2020/05/03/health/coronavirus-vaccine-never-developed-intl/index.html>.

[10] *Ibid.*

[11] *Ibid.*