Emergencies and the Rule of Learning

The COVID-19 pandemic raises countless legal issues, many of which touch on the distinctions between normality/emergency and the importance of sustaining the commitment to the rule of law and constitutionality during times of crisis. Many excellent blog posts in this series have addressed different dimensions of these sets of issues. This commentary adds to this scholarly conversation by highlighting how the rule of law can and ought to contribute to learning during emergencies.

The role of the rule of law during emergencies is often assumed to be one of preservation. Law contains temporary, exceptional emergency powers, thereby preserving 'normal,' non-emergency legal norms.[1] As we are currently experiencing, the freedom to exercise fundamental rights is curtailed in service of important, exceptional pandemic response measures. In reality, the distinction between exceptional emergency powers and ordinary everyday laws is tenuous (Burningham). But it is a distinction sustained by emergency management and public health legislation across Canada. The "on/off" switch of the state of emergency is a central mechanism in emergency law. The assumption is that, once the state of emergency ends, emergency powers cease to be in effect and we all go back to normal.

As a number of blog posts have canvassed, the preservationist role of the rule of law during emergencies is vital. Constant vigilance is required to prevent unlawful or at least dubious governmental overreaching during emergencies (Fluker) and to ensure that the exercise of fundamental freedoms is eventually restored when the pandemic is brought under control (Kinsinger and Bird; Griffiths).

But understanding the rule of law as only preserving the *status quo ante* is inadequate. That is because, in many cases, what is being preserved is itself woefully inadequate. As 2020 has reminded the entire country through #ShutdownCanada and Black Lives Matter, in addition to COVID-19, the rule of law in Canada is frayed and contested. The coercive powers of the state are disproportionately wielded against Black and Indigenous peoples through injunctions, policing, and incarceration. Spheres of state protection have shrunk through privatization and deregulation, leaving vulnerable populations exposed to life-threatening illness in workplaces and care homes. Canada might be "the Good" when compared to worst-case scenarios. But it is still a state in which, during non-emergency times, the rule of law regularly fails to protect those who are most vulnerable to state action and inaction.

Emergencies, sadly, are often what call sufficient attention to these systemic failures such that institutional change becomes possible. Understood solely in preservationist terms, however, the rule of law can act as a barrier to needed change. In contrast, understanding the rule of law as the requirement of public justification[2] allows us to see how the rule of law can also be the rule of learning. That is, the rule of law can facilitate the evolution of constitutional norms so that they better respond to the lived experience of those oppressed

or marginalized by the state and better reflect the ideals of constitutionalism articulated and defended by these communities.

The rule of law as the requirement of public justification facilitates this learning because, on this view, public officials must be able to provide defensible reasons in light of core constitutional principles, which protect the agency of those affected. Defensible reasons thus must be responsive to the agency of those affected. This view of the rule of law thus conceives of legal subjects (those subject to the law) as active participants in the interpretive process of defining and redefining legal and constitutional requirements.[3]

Legal scholars often assume that courts are the sole or most important sites for upholding the rule of law. Indeed, the Supreme Court of Canada has recently affirmed the important role of the courts in promoting a "culture of justification in administrative decision-making."[4] However, the historical record of courts in times of crisis demonstrates that judges frequently fail to demand such justification of the use of emergency powers.[5]

Relying on courts alone is insufficient to uphold the rule of law. Rather, a culture of justification requires an assemblage of "rule-of-law furniture."[6] David Dyzenhaus points to the Joint Committee on Human Rights (UK) as the type of creative institutional design that represents a normative commitment to uphold rights protection and the rule of law.[7] He writes: "[t]he more constitutional furniture there is in place, the more judges and politicians will look hypocritical if they try to derail the rule-of-law project."[8]

Like home furnishings, different items of rule-of-law furniture have different strengths and functions. Where courts fall short in demanding robust justification – due to the scope of proceedings or expertise, for instance – other types of institutions can and should play a role in demanding public justification for the exercise of public power. In so demanding, public officials and the public learn from past crises and can hold state actors to account.

One primary mechanism for learning from emergencies is the public inquiry.[9] The Ontario SARS Commission, after SARS, yielded critical insight for preparing for a pandemic such as COVID-19.[10] Notably these insights included measures needed to ensure more robust rights protection for those most vulnerable to emergency response: e.g. anti-racism emergency plans and pre-prepared financial and structural supports for those under quarantine.[11] In other words, public inquiries are pieces of "constitutional furniture." Governed by public law and complementary to the known limits of the process and scope of judicial review, they use blended methods to understand and help reform systemic legal and policy issues.[12] Indeed the constitutional value of this kind of hybrid public institution is well understood in other jurisdictions.[13]

Unfortunately, provincial and territorial emergency legislation is sparsely furnished in this regard. Only Ontario and Quebec contain basic Ministerial reporting measures that require the executive to report on the emergency and its response to the legislature.[14] Provincial and territorial emergency and public health statutes contain minimal or no mandatory oversight provisions.[15] And no provincial or territorial emergency management legislation or public health emergency legislation requires independent *ex poste* analysis and critical

reflection.[16] Canada's *Quarantine Act* also lacks any requirements for ongoing oversight, reporting and/or inquiry.[17] This is a striking lack of formal accountability mechanisms for a global pandemic, which has precipitated the activation of emergency powers in every province and territory in the country.

This is not to suggest that public inquiries, or other examples of creative institutional design,[18] offer a simple solution to learning from a pandemic. A common refrain is that the report of a public inquiry will simply "sit on a shelf." Inquiries are also a well-known tactic used to forestall known and needed change.[19] But one plausible explanation for these flaws is that public inquiries, hybrid institutions, and other instances of institutional creativity are seen as misfits rather than necessary rule-of-law furniture in a constitutional order that seeks robust justification of the exercise of public power. One constructive step, then, would be to reform emergency laws to enshrine independent inquiries – or other forms of independent oversight and analysis – as a mandatory feature of emergency law along with specific requirements for public institutions to take up or respond to the recommendations that follow from these oversight mechanisms.

No amount of legislated text can inoculate us against a future pandemic.[20] But legislative reform can certainly better reflect a commitment to emergency governance under the rule of law. These changes can also better hold governments accountable to the rule of learning. Because we must learn – and change – if we are serious about minimizing the deeply unequal impacts of emergencies and the conditions that brought those impacts to the fore.

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[1] Karin Loevy, *Emergencies in Public Law* (Cambridge: Cambridge University Press, 2016).

[2] A theory of legality grounded in common law constitutionalism elaborated and defended by David Dyzenhaus (*The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006)) and many other scholars (e.g. Geneviève Cartier, "Administrative Discretion as Dialogue: A Response to John Willis (Or: From Theology to Secularization)", (2005) 55 UTLJ 629; Mary Liston, "Witnessing Arbitrariness: Roncarelli v Duplessis 50 Years On" (2010) 55 McGill LJ 689; Evan Fox-Decent, *Sovereignty's Promise* (Oxford: Oxford University Press, 2012); Jocelyn Stacey, *The Constitution of the Environmental Emergency* (Oxford: Hart Publishing, 2016)).

[3] Familiar examples of this requirement of public justification are section 1 analyses under the Charter and reasonableness review.

[4] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65 at para 2.

[5] E.g.: Dyzenhaus, *The Constitution of Law, supra* note 2*;* Oren Gross and Fionnuala Ní Aoláin, *Law in Times of Crisis* (Cambridge: Cambridge University Press, 2006).

[6] Dyzenhaus, *The Constitution of Law, supra* note 2.

[7] *Ibid* at 230.

[8] *Ibid* at 233.

[9] Canadian experts have already called for robust, independent inquiry into the vulnerability of care homes to COVID.

[10] The SARS Commission archive.

[11] Estair Van Wagner, "The practice of biosecurity in Canada: public health legal preparedness and Toronto's SARS crisis" (2008) 40 *Environment and Planning* 1647.

[12] Peter Carver, "Getting the Story Out: Accountability and the Law of Public Inquiries" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context*, 2nd ed (Toronto: Emond, 2013) 540.

[13] Trevor Buck, Richard Kirkham & Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Farnham: Ashgate Publishing, 2011) 26–28.

[14] See *Emergency Management and Civil Protection Act*, RSO 1990, c E.9, s 7.0.10(1) (Ont); *Civil Protection Act*, CQLR c S-2.3, s 98 (QC). Note that the reporting requirements in Ontario are carried over into the COVID-19 emergency legislation. See Bill 195, *An Act to enact the Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, 1st Sess, 42nd Leg, Ontario, 2020, cl 13 (second reading 14 July 2020).

[15] Only Quebec and Nova Scotia have direct review requirements for public health emergencies: *Public Health Act*, CQLR c S-2.2, s 129 (QC); *Health Protection Act*, SNS 2004, c 4, s 6(1)(i) (NS). BC can order an inquiry into a matter of public health, but it is not required (*Public Health* Act, SBC 2008, c 28, s 86 (BC)). Most provinces have a requirement for a regular report from the chief medical officer of some kind (either annually, every 2 years, or every 5 years) (*Public Health Act*, RSA 2000, c P-37, s 7 (AB); *Public Health Act*, SNu 2016, c 13, s 44(6)(e)(NT); *The Public Health Act*, CCSM c P210, s 14(1)(MAN)) but only Newfoundland and Nunavut specifically require public health emergencies to be discussed in those: *Public Health Protection and Promotion Act*, SNL 2018, c P-37.3, s 9(3)(j) (NFLD); Nunavut, *Public Health Act*, SNu 2016, c 13, s 43(b) (NT).

[16] As others have noted, Canada's *Emergencies Act* contains greater accountability mechanisms (ss 62-63) but it has not been activated for the COVID-19 response.

[17] *Quarantine Act*, SC 2005, c 20. Noted in Dyzenhaus, Canada the Good?

[18] For some examples, see: Laverne Jacobs & Sasha Baglay (eds), *The Nature of Inquisitorial Processes in Administrative Regimes* (Farnham: Ashgate Publishing, 2013).

[19] Carver, *supra* note 12 at 546.

[20] Many necessary measures happen outside the bounds of legislation: See Da Silva and St Hilaire.