

Emergency Powers and Legal Principle

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The COVID-19 Pandemic

- War on COVID-19 \neq War on Terror
- Restrictions on civil liberties, property rights, economic freedom
- Restrictions applying (for now, for the most part) across the board - though burdens not evenly distributed
- Official responses involve imperium but also dominium & suasion
- Normal channels of accountability not functioning optimally

Proportionality as Tool

- Most familiar from use by courts in human rights cases
- Could be used in *Charter* challenges
- Also a useful analytical tool for thinking about emergencies
- A *tool*, not a formula; aids analysis, does not compel conclusions

Proportionality as Tool

Legitimacy

- Is the state pursuing a legitimate objective (or a “pressing and substantial” objective)?
- Defining the objective is important - and hard
 - Eliminating COVID-19?
 - Minimizing harm from COVID-19?
 - “Flattening the curve” or “keeping Canadians safe”?

Proportionality as Tool

Rational Connection

- Is there a rational connection between the objective pursued and the measures being used to pursue it?
- E.g.
 - **Essential services:** note US cases on church services
 - **Economic measures:** quantitative easing; Bill C-13's Crown Corporation

Proportionality as Tool

Necessity

- Is the state action **necessary** to achieve the objective
 - Are measures minimally impairing of any rights infringed?
 - Are there alternative, less dramatic means of achieving the objective?
 - Sometimes built into framework legislation for emergencies
- Margin of appreciation large in emergency context, but...
 - Sunset clauses, pre-conditions and oversight provisions in legislation
 - Harder questions will be posed as pandemic drags on

Proportionality as Tool

Fair Balance

- Public interest in fighting COVID-19 versus interference with individual interests
- Various interests at stake
 - Bodily integrity: mandatory testing
 - Privacy interests: track and trace
 - Personal liberty: quarantine
 - Economic freedom: closure of and restrictions on commerce
 - Property interests: business and travel restrictions

Proportionality as Tool

- Certainly **possibility** of *Charter* challenges:
 - Sections 2, 6, 7, 8 and 15 spring immediately to mind
 - Do not forget restrictions must be “prescribed by law”
- But judicial involvement likely to be limited
 - **Imperium**: permissible to delegate plenary power to ministers
 - **Dominium**: contracting and resource allocation not susceptible to JR
 - **Suasion**: provision of information and guidance is non-binding
- Proportionality can be useful in **public & political** debate

Further thoughts

- [The COVID-19 Pandemic and Proportionality: A Framework](#)
- [Regulating the COVID-19 Pandemic: Forms of State Power and Accountability Challenges](#)
- [Governmental Responses to COVID-19 and the Limits of Law \(NB Update link when available on Tuesday\)](#)
- [Emergency Economic Powers in Canada: Bill C-13's Crown Corporation](#)

See also

- [United Kingdom Constitutional Law Association Blog](#)
- [Verfassungsblog](#)
- [Centre for Constitutional Studies Blog](#)