
International Affairs

The Usage of Canadian Emergency Powers: Limitations and Issues to Distribution of Authority

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Reilly Nicholls

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The last two years have been filled with unforeseen circumstances continuously.

Governments on a global scale have had to re-evaluate their policies for the events that have occurred with the pandemic. Emergency powers tend to lead to controversial conversations resulting in sometimes problematic outcomes. Although there are countries with different constitutional frameworks, the usage of the emergency powers are similar. The separation of jurisdiction is a fundamental principle to understanding the Canadian governmental framework (Lafrance, 2021). The Canadian and American emergency power systems are vastly different and the examination of these differences allows for the understanding of how the different entities hold onto their power during emergencies.

Criticisms of both Canadian and United States governments in the 1970s have led to the reform, prior to this the Canadian government was using the emergency powers so regularly that they

appeared to be a part of standard governance in the year (Scheppelle, 2006). The War Measures Act established in 1914, which was enacted during the First and Second World Wars

(Scheppelle, 2006) . The COVID-19 pandemic has led the now called Emergency Act to be invoked for the first time since its creation in 1988 (Tasker, 2022). The interest in emergency powers has been renewed due to the pandemic as well as questioning if the current political system is adequate to manage these emergencies (Lafrance, 2021). Historically, the concept of a politically-important emergency originated from the Roman Republic where the elected Senate decided to shift all of its power to the dictator during emergencies (Scheppelle, 2006). Carl Schmitt, who is commonly referred to as “the father of contemporary constitutional exceptionalism” in the early 20th century claims that a state of emergency reveals the limitations of the law in a liberal democracy (Lafrance, 2021). By granting temporary necessary powers to

the federal branch when the provincial and municipal tools are no longer sufficient to deal with the problems that are occurring, this act can be used when public health along with economic issues are at an uncontrollable state (Dept. of Justice Canada, 2022). Recently, there has been a growing amount of controversy surrounding the use of this act in Canada. The Charter does continue to protect the individual rights of the Canadian citizens as the government will use the temporary powers to repair the issues affecting the well-being of Canadians (Dept. of Justice Canada, 2022). When the Emergency Act is in place there are limits on the standard freedoms

provided to Canadian citizens by the Charter (Dept. of Justice Canada, 2022). Clearly outlined in the Emergency Act, the government should only take necessary actions that are appropriate to addressing the risks that are jeopardizing the safety of Canadians (Dept. of Justice Canada, 2022). There are safeguards in place to ensure government accountability while the Emergency Act is invoked (Dept. of Justice Canada, 2022) which ensure that Canadian citizens' rights are not being infringed upon during this time but that the government is able to remedy the issue.

The United States and Canada have previously held similar methods to countering war, although their constitutional framework tends to differ (Scheppele, 2006). Examining the concern that many Americans had; is how long a state of emergency will remain in place before needing to be renewed or if it is an indefinite measure and who deems it no longer necessary (Weiss, 2021). For the COVID-19 pandemic it remains up to the individual state, there are nine states that will not allow the governor to renew the emergency powers unless there is legislative approval (Weiss, 2021). What tends to be overlooked is when the discussion of emergency powers takes place all minds shift to a sole individual holding the power when in fact "Virtually all statutes that give the legislature power to override the executive do so by granting the legislature power to "terminate [the] state of emergency by concurrent resolution." (Weiss, 2021). This term does not mean that the legislature provides input into the actions that the

governor may take during the global health pandemic (Weiss, 2021). This indicates that there was an underlying fear by legislators that the state governors would declare a state of emergency and continue to exercise the powers after the fact that were granted during the state of emergency (Weiss, 2021). When the pandemic struck, the government agreed that there was in fact a massive public health emergency. Many states in the United States acted promptly and responded similarly at the early stages (Weiss, 2021). When the pandemic made no improvement as time went on many Americans began to question the actions that were being taken mainly in lockdowns. These opinions tended to relate back to political affiliation and the pandemic began to become politically divisive on many fronts (Weiss, 2021). Questions concerning where the government planned to move next and what could be done arose. Concerns regarding what percentage of Americans actually agreed with the measures being put in place circulated as

well. The problem was that, although the powers were granted, in terms of a public health crisis a lot of the responsibility relied on the societies cooperation to endure the lockdowns, submit to contact tracing and take other precautions (Weiss, 2021). Mask mandates were prime examples of emergency powers rendering useless when individuals refused to cooperate with the precautions the government had put in place. The Emergency Act was recently invoked by the Canadian federal government in response to a protest that claims to be an anti- mandate protest. The Prime Minister claimed that he had to act in response to the protest becoming out of control. The powers from this act were used to remove the groups of people that they had reason to believe that the public assembly would lead to a breach of the peace (Tasker, 2022). Naturally this led to further controversies.

This is a crucial concept while discussing the emergency powers that the Canadian government will hold when the Emergency Act has been put in

place. The Emergency Act will give the necessary powers to the federal government as the branches are no longer sufficient to deal with the emergency that is present (Dept. of Justice Canada, 2022). This allocation of powers has recently led to backlash from the public as they feel that the government should not be able to obtain absolute power.

The reason that the topic is so controversial is that with the amount of power that this Act holds and the conditions that it is able to impose, the citizens feel threatened more so than the actual reason for the Emergency Act being invoked. The Canadian law “demonstrates how there can be a creative blurring of all three branches of government that may be particularly helpful to supervise the state during emergencies.” leading the executive to absolute control, as the Emergency Act grants authority to exercise powers that have been constitutionally reserved to the provincial governments (Lafrance, 2021). This idea links to the concepts of limitations with constitutional change, the War Measures Act changed to what is now being used as the Emergency Act. This reform occurred to provide objective restraints on the exercise of the power granted (Lafrance, 2021). This limitation was a positive change to the act to recognize legitimacy within the government to the society.

Although mentioned specifically in the States there are legislative powers that intend to ensure that there is no abuse of the power. There are instances where extra legal framework put a definitive constraint on the executive power (Lafrance, 2021). For Canada, Gross who is recognized as an expert in international law, advocates for an extra-legal model, this allows the public officials to respond to matters when they feel ‘that such action is necessary for protecting the nation and the public in the face of calamity, provided that they openly and publicly acknowledge the nature of their actions’ (Lafrance, 2021). Gross believes that this is the way to preserve the fundamental principles of the constitutional order, he views emergency powers and emergency order as a problem to give individuals the ability to shape and mold the legal system (Lafrance, 2021). This theory can be well expressed by William Shakespeare: “to do a great right, do a little wrong.”, this truly expresses how limits to constitutional change could aid those individuals to not possess as much power but what repercussions it would open up (Lafrance, 2021).

Ultimately, emergency powers cause mass amounts of confusion and concern to its

citizens by allocating that amount of power. A problem remains that there is dated material throughout these acts

and as times advance the need for constitutional change with certain limitations imposed is crucial for legitimate purposes. Canada and the U.S historically have tended to approach crises similar when emergency powers were concerned however different mechanisms were used between the two for the most recent pandemic. Distributing this amount of authority differently would give the citizens ease of mind regarding the emergency that is

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occurring. As they know that they are not at risk and those in control are seeking best interest solutions, there are more parties involved over current decision makers giving simply the federal government power. There is still a long way to go to create an Emergency Act that remains flawless but the road to recovery needs to begin by learning from the mistakes made during the COVID-19 pandemic.

Legitimacy. Columbia Law Review, Vol 121(6), 1853-1894.