

“Social Distancing” of Emergency Legislation during the Covid-19 Pandemic

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Ordinary legislation is different in its content and method of enactment from emergency legislation. But the risk is that the longer the Covid-19 pandemic continues, the less distinct these two types of law become, and that emergency legislation becomes the new normal. The structural solution proposed to this problem is "social distancing" of emergency legislation - that emergency laws are kept separate and distinct from ordinary laws. The more we conceive of them as abnormal, the more we maintain a gap between them and our ordinary laws, the easier it will be to dump emergency laws when the pandemic is over, and the less chance they will be used for [illegitimate purposes](#). As [Khakee](#) put it

Emergency powers have virtually always implied limits on individual human rights and, while intended to secure the survival of the state, such extensive executive powers have not always secured the survival of democracy. In other words, the risk of an undermining of the state's constitutional order, and in particular the role of parliament, the judiciary and other oversight bodies, always looms.

'Ordinary' legislation versus 'Emergency' legislation

The process for making ordinary legislation (in the UK at least) is generally slow and cumbersome by design. It involves policy development within Government, consultation with society and engagement with stakeholders leading, eventually, to a draft piece of legislation. The enactment phase is equally slow; an iterative process between legislature, government, expert witnesses, committees, lobbying groups and citizens. The content of ordinary legislation is occasionally radical, but rarely revolutionary.

By contrast, the process for making emergency legislation is characterised by break-neck speed through all stages of the policy development and enactment process. For example, the UK's Coronavirus Act 2020 was introduced into Parliament on 19 March and had attained Royal Assent by 25 March. There is little to no time for citizen engagement, expert advice or parliamentary deliberation. Content wise, although some of it may make minor administrative tweaks, some of it is revolutionary. The pandemic creates actual lockdown rules - rules prohibiting people from leaving their homes, laws shutting down all but the most vital of businesses. These are laws that in ordinary times would never be countenanced.

Principles for making emergency legislation

Although law may be modified in a pandemic, the fundamental rule is that law still applies, even during emergencies. The key principles are that emergency measures must be necessary, proportionate, connected to the emergency and time-limited. These principles are present in the UK's domestic legislation regulating emergencies generally and public health emergencies in particular. For example, see the conditions laid out in Part 2 of the [Civil Contingencies Act 2004](#), Part 2A of the [Public Health \(Control of Disease\) Act 1984](#)

as well as the [Coronavirus Act 2020](#) itself. Similar protections and safeguards exist at the micro level of [secondary legislation](#) enforcing the [lockdown rules](#) and mandating the wearing of [facemasks](#) .

These same principles are reflected in international law. Both the International Covenant on Civil and Political Rights and the European Convention on Human Rights allow restrictions on rights where these are necessary for the protection of health. More specifically, Article 15 of the [ECHR](#) allows derogation from Convention rights, but only to the 'extent strictly required by the exigencies of the situation'. The [Siracusa Principles](#) state that limitations must pursue legitimate aims and be proportionate, no more restrictive than necessary, with notification of the period for which the emergency is proclaimed and derogations strictly time-limited. In assessing the Siracusa Principles, [Abiola](#) refers to an acknowledgement of the time-limited nature of the emergency with an emphasis on a return to the normal. From the political perspective, the European Parliament has a similar view, [stating](#) that emergency measures must be "in line with the rule of law, strictly proportionate to the exigencies of the situation, clearly related to the ongoing health crisis, limited in time and subjected to regular scrutiny". Politically and legally, domestically and internationally, Government does not have a free hand to do whatever it wants during an emergency.

Social distancing of emergency legislation

I propose a framework of measures to reduce the risk of emergency legislation undermining the normal constitutional order. We need to reduce the risk of emergency measures infecting or contaminating the ordinary process and content of law making. This is to force a change in mind-set, a change in how we conceptualise emergency laws. By clearly differentiating them from ordinary laws, we force ourselves to think differently about them. We can do so by socially distancing emergency laws from ordinary laws. Emergency laws still apply, but we reduce the risk of them crossing over to mainstream law and contaminating ordinary law with their extraordinary provisions and practices. We do this structurally in how we design our emergency measures. This isn't a complete answer to the problem of oppressive emergency laws, but it is one way to mitigate their effect and speed up the return to normal legislative practice. Set out below are several structural techniques for achieving this.

Structural technique 1 - the sunset clause

Emergency measures ought to be temporary. They should have a specified period of applicability, and that period ought to be short. Ackerman, writing in the context of an emergency brought on by terrorist attacks, stated that 'defenders of freedom must consider a more hard-headed doctrine - one that allows short-term emergency measures but draws the line against permanent restrictions'. Emergency laws need a sunset clause - a clause in the legislation stating when the legislation ceases to have effect. This can be an automatic termination, or at least provide a trigger for the legislature to decide the termination date.

Structural technique 2 - self-contained and single legislative vehicle for emergency laws

Ordinary legislation works by accretion, by building layers of law on top of layers of law. The statute book is a coherent whole. But if the power to exercise emergency measures is contained in many different statutes, then it becomes increasingly difficult to keep those powers separate from ordinary laws. Beqiraj cites the Italian example of a multiplicity of sources of pandemic laws and states that this leads to "regulatory and legal chaos". For this reason, emergency measures ought to be contained in a single legislative vehicle. They should all be sourced in the same place, all kept together and separate from ordinary powers. In order to scrutinise, control and ultimately repeal emergency powers, it is necessary to first know where they are.

Structural technique 3 - non-textual amendments

A textual amendment is a direct change to the wording of one statute by another statute, for instance, by adding, deleting or modifying the words of that other statute. The non-textual amendment doesn't change the words of the ordinary law, it simply

modifies how they are applied. The original wording is unchanged. Instead, a transparent slide is laid over it, causing it to work in a different way for now, but when the emergency is over, the slide is removed, and we automatically revert to the original version. There is no long-term damage to the integrity of the original law. Non-textual amendments are ideal for emergency laws.

Conclusion

Emergencies can be used as cover for profoundly damaging changes to the constitutional limits and restrictions on the exercise of governmental power. One way of guarding against these is to ensure that emergency legislation is conceptualised as an aberration, something which is separate and distinct from ordinary laws. One structural way to do this is to keep emergency law socially distant from ordinary law.

This blog post draws from the arguments published in "Keeping Covid-19 emergency legislation socially distant from ordinary legislation: principles for the structure of emergency legislation available" which is available [here](#) .

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