



# Commentary

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## COVID's Collateral Contagion: Why Faking Parliament is No Way to Govern in a Crisis

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The COVID-19 epidemic is the greatest test for the maintenance of Canada's democratic constitutional order in at least 50 years, certainly since the October crisis of 1970. It is also a bellwether for the way the Canadian state manages risk. Risks that stem from globalization have a common denominator: by definition, no state can manage them alone. However, citizens still expect their state to act. Confronted with dire predictions of imminent Armageddon, politicians invoke largely performative measures to signal to citizens that they are acting – to manage a risk that is largely beyond their control.

Managing risk has become to individual citizens the essence of the modern welfare state: unemployment insurance, health care insurance, mortgage insurance, etc. Such is the essence of “risk society”: the expectations by citizens that the state will manage risks, many of which the state cannot control, such as a global pandemic. Paradoxically, the less control and certainty the state has over a risk that is perceived as existential, the more heavy-handed is its approach. Precisely because of the threatening environment in which it exists and because it is shut out of many international organizations, Taiwan was well prepared for the pandemic and its reaction was measured. By contrast, much of the rest of the democratic world was ill-prepared, which explains the heavy-handed measures taken by many of these countries, including Canada.

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The measures are heavy-handed insofar as they supersede the diverse preferences that usually characterize democracies: the imposition of a singular response is like posting a speed limit – too high for some, not high enough for others. Preferences such as speed limits, however, are subject to democratic debate, where different views are represented and legislation is ultimately passed to set or amend a rule. Not so with the response to the virus, where executives centralized decision-making, sidelining basic parliamentary functions such as representation, scrutiny, and the approval of legislation.

As such, the COVID-19 emergency raises fundamental questions about government, federalism, and democracy and challenges key ordering principles of the Canadian state: What is the legitimate extent of the federal government's power during an emergency? Is the federal public service a boon or a bane during a complex multi-jurisdictional and prolonged emergency? What is the appropriate role before, during, and into recovery of the Executive, Judiciary, and Legislative branches in the Westminster parliamentary system? To what extent can the Executive abrogate civil and privacy rights in the public and common interest?

In a democracy, answers to these questions and their underlying rationale must be transparent and intelligible. The unprecedented social and economic disruption occasioned by the pandemic raises questions about the proportionality and suitability of the measures that the federal government is imposing. These circumstances place extraordinary demands on the Canadian federation's democratic constitutional order, primacy, continuity – and on Parliament. They are also a reminder of a conundrum that pervades Canadian federalism: greater intergovernmental cooperation necessarily means less parliamentary scrutiny.

“What is the legitimate extent of the federal government's power during an emergency?”

## The Federal Response to the Pandemic

Canada's government has not only capitalized on the virus to limit democratic debate on measures it has implemented, but also effectively put the very ability of Parliament to carry out its functions up for debate wholesale. One commentator benignly reduced the dispute over how Parliament should function “to contrasting visions of how the House of Commons should conduct its affairs” (Wherry 2020).

Yet the same could be said of Charles I, a believer in the divine right of kings and an unrepentant absolutist. Infamous for quarrelling with Parliament over its attempt to curb the royal prerogative – over the large fiscal deficit that had built up – the tyranny of his personal reign lasted 11 long years until 1649, when he infamously found out the hard way that Parliament, its functions and parliamentary sovereignty were not up for debate. Respect for constitutional convention made Great Britain the most prosperous and stable political and economic system in the world for over 200 years. In Great Britain, the respect for constitutional convention has prevailed continuously through both world wars and the divisive debate over Brexit.

The preceding Conservative government of Stephen Harper prorogued Parliament for two months. Although unusual, the move was in line with constitutional convention of the Westminster parliamentary tradition. Contrary to constitutional convention, by contrast, the minority Liberal government has resolved to impair the regular functioning of Parliament for at least half a year. It has suspended the normal business of the main chamber, reduced the number and frequency with which written questions can be tabled and reduced Parliament to a shadow of its former self in the form of a Special COVID-19 Committee of the Whole.

On May 26 the federal government forced a motion to suspend regular sittings altogether from June 18 through September 21, allowing only four scheduled sittings. The day prior, on June 17, it allocated only four hours for Parliament to debate \$87 billion in supplementary Estimates and total spending of \$150 billion, including about \$6 billion in new spending; this can be compared to total Estimates of \$4.9 billion for the year prior. For good reason, this has been referred to as the most expensive four hours in Canadian parliamentary history – and one conspicuously timed to coincide with the news cycle on the vote for Canada’s bid for a seat on the United National Security Council. Not included are \$60 billion in spending the government authorized under broad provisions approved previously but not subject to specific debate. In addition, the specific standing committees will not have an opportunity to review these Estimates, as is common practice.

At the same time, in unprecedented disregard for parliamentary convention, the government cancelled the budget it had planned to table and refuses to provide a fiscal update. By May 2020 direct federal spending announcements related to the pandemic had amounted to \$152.8 billion (Finance Canada 2020) while the federal deficit is projected to exceed \$250 billion this year (Parliamentary Budget Office 2020). The Government of Canada’s total balance sheet is expected to be \$1 trillion in the red, while total public debt in Canada is anticipated to amount to \$3.2 trillion or 166 percent of GDP (Mintz 2020). A democracy should reciprocate unprecedented restrictions on individual freedoms and unprecedented levels of spending with unprecedented levels of debate and scrutiny. On May 11, the House of Commons Administration (2020a) served notice that it is ready to hold full sessions of Parliament in remote or hybrid form.

Well before the current crisis, Donald Savoie (2008) had already identified the collapse of accountability due to rise of “court government,” in which effective power rests in the hands of the prime minister and his courtiers, as a mounting problem: Court government undermines the basic principles that have guided the development of Canada’s Westminster parliamentary system. Yet, having already exacerbated court government before the emergency, the minority Liberal government has since taken it to a whole new level. Never in Canadian political history has a Parliament sat less: only 40 sitting days between July 2019 and June 2020. Were all sittings currently to go ahead as scheduled, there would still be only 86 sitting days during calendar year 2020 (House of Commons Administration 2020b). In 80 years Parliament has not sat fewer days during a year without an election (House of Commons Administration 2000; Curry 2020).

Although the government consulted the House of Commons in its attempt to legitimize a virtual substitute, its decision to truncate Parliament is arbitrary, defies convention, and prioritizes *governance over representation* (Malloy 2020; Rayment and VandenBeukel 2020).<sup>1</sup> In this trade-off, even governance got short shrift: While the government was prepared to tolerate criticism of its curtailment of Parliament, it effectively moved to limit objections to the way the state manages and contains societal risk. Parliament has a supreme duty to both hold the executive and government of the day to account, and to ensure that the civil service provides high quality and timely advice. Canada’s democracy thrives on a continuous parliamentary audit of the judgment of both the executive and the bureaucracy.

Canadians have the democratic and constitutional right to scrutinize the Canadian government’s handling of the COVID-19 pandemic. After all, other federal democracies such as Germany and Australia have fared better than Canada in the speed and agility with which they have responded to the epidemic.

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Although COVID-19 started locally in Wuhan, the pandemic quickly took on national and global dimensions. It is both an actual disaster and a persistent threat that requires concurrent preventive and recovery measures. The consequences are different in magnitude from previous health pandemics: the SARS coronavirus (2002-03) and the swine flu (H1N1) (2009-10) were effectively contained internationally and locally. By contrast, COVID-19 presents an unprecedented and unknown emergency for all orders of government. The provinces will be expected to table a plan for the reconstitution of civil rights from their temporary suspension, following the concentration of governing power in the hands of the executive – and to do so in a manner consistent with the principles of parliamentary sovereignty and the Canadian Constitution (see Roach 2008).

## Competing methods for governing in an emergency

There are two competing schools of thought on what a government's response should be during an emergency. The first is the extra-legalist. Its best-known exponent is the controversial German legal theorist Carl Schmitt, who famously contended that liberal democracy and emergency powers were simply incommensurable (Dyzenhaus 2006; Posner and Vermeule 2010, 3-24). Under the doctrine of necessity, a political executive can bypass the oversight of Parliament and “take all necessary decisions, even including decisions that are unconstitutional” (Khakee 2009, 19).

According to Schmitt, in extreme situations executives should not be bound by elected assemblies. During the initial weeks of the crisis Canadians repeatedly saw this predisposition by federal and provincial political executives, such as when the federal government attempted to accrue unfettered power to spend and tax without parliamentary approval for 21 months.

By contrast, the legalist position holds that “emergency power can in fact be successfully legalized, and that legal and constitutional mechanisms for emergency power need not self-destruct” (Scheuermann 2006, 62). It explicitly rejects the extra-legalist position that the state of exception necessarily represents a legal black hole. Instead, emergency powers can be pre-emptively defined and carefully and constitutionally crafted to meet the needs of the state in an emergency. Basic legal freedoms can be maintained, although some might have to be diminished and constrained to address the emergency at hand.

Even if one were to sympathize with the extra-legalists, it does not follow that government's power in a crisis should be absolute, unchecked, and without recourse. This said, powers that will be necessary to deal with such a crisis cannot be properly forecasted and thus cannot be written into law. In Canada's constitutional monarchy the Royal Prerogative (exercised by convention by the both the federal and provincial executive) includes “reserve powers which enable the Crown to act in unprecedented emergencies which are not provided for by constitutional convention or existing law” (Smith 2013).

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Yet how these powers are to be exercised and how that exercise is to be appraised by citizens is controversial. In other words, subscribing to the extra-legalist position does not obviate the continuity of constitutional government. The hallmark of a constitutional democracy is that even during an emergency, executive power is contingent: the people have recourse, through their representatives in Parliament as well as through the judiciary, to check executive prerogative.

## Emergency federalism

The federal system is at the crux of Canada's management of the epidemic (Leuprecht, Kölling, and Hataley 2019). On one hand, the federal government has the constitutional power to deal with national disasters or emergencies, which may involve the federal declaration of a national state of emergency, including the imposition of quarantine or criminal sanctions irrespective of whether or not the declaration impinges on provincial powers (Monahan et al. 2017, 264-268; Leuprecht and Russell 2011). On the other hand, many critical aspects of disaster response fall (largely) under provincial jurisdiction: emergency measures, health care, and control over public institutions such as education (Swiffen 2016). In practice, local governments are responsible for the provision of some health care services, public hygiene, and essential services such as water, sanitation, etc. (Armstrong and Lucas 2020).

Instead of a single national emergency response plan, Canada thus has multiple federal and provincial plans (Wilson and Osabu-Kle 1990) and hundreds of local plans, many of them ill-adapted to a public health emergency and out of date. The result has been a confusing cacophony of measures and messaging: from federal, provincial, and local politicians, civil servants, and public health authorities. The emergency thus reveals itself as a complex intergovernmental problem: to manage it well requires considerable vertical and horizontal intergovernmental coordination (Paquet and Schertzer 2020).

Constitutionally, nothing prevents the provinces from coordinating with each other and the federal government. Yet the sovereignty that provincial parliaments enjoy also means that there is no constitutional mechanism to compel them to cooperate (Poirier 2017, 2020). In other words, cooperation is fundamentally political in nature. Such is the conundrum of Canadian federalism, which is why, in the aftermath of SARS, there was a sense that the federal government may need to trade off cooperation for leadership during a crisis (Wilson and Lazar 2006). Yet, in terms of public health, the response to COVID-19 is among the more effective exercises in co-ordinated federalism (among equals) seen in quite some time, internal challenges in Ontario and Quebec notwithstanding. Provincial autonomy and intergovernmental power dynamics are also expected to play a significant role in shaping fiscal federalism, for instance (Beland et al. 2020). Varied levels of provincial resilience and the temptation to use money to exercise leverage are likely to contribute to greater fiscal centralization.

While the provinces and their local governments took the lead on service delivery and supply of related equipment in response to the pandemic, the federal government has been using the power of the purse and spare fiscal capacity to enact financial measures that to-date tally over \$200 billion - with minimal scrutiny or debate. As

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a result, the federal government's total balance sheet is now \$1 trillion in the red. At the same time, the federal government has repeatedly sought exceptional executive powers, acting as if it commanded a majority in the House, initially without consulting Parliament, then curtailing parliamentary debate by imposing unprecedented constraints on question period. Now it is resisting calls to table an overdue budget and restore question period and Parliament in full.

The federal political executive is governing with only a minority. Still, it appears intent on eschewing statutory authority to determine the content, purpose, and extent of its emergency powers. After all, in a Westminster parliament, legislators are sovereign to adopt, amend, and abrogate any law they see fit (Dicey 1982, 3-4). Instead of respecting the constitutional principle of parliamentary sovereignty, federal and provincial political executives are relying on the authority each has been given through previous legislative decisions (Federal/Provincial/Territorial Ministers 2017). For all intents and purposes, these governments are reverting to a doctrine of sovereignty that relies overwhelmingly on vast discretions under the Royal Prerogative.

This may be merely the beginning of a whole-of-government program by political executives across the country to revive the economy. Government will try to "invest" in citizens instead of just protecting them. What are the options that legislatures have if they wish to hold the executive accountable within the prevailing ethical and moral framework, especially given the possibly tempting prospect for them to bankroll a burgeoning health bureaucracy?

For over three centuries, voting supply - Parliament's prerogative to vote on raising and spending public funds - has been the bedrock principle of the Westminster parliamentary system (Franks 1987). The Parliament of Canada has voted on exceptional measures at an unprecedented pace in this emergency, and has thus shown itself to have the knowledge and expertise to uphold Canada's fundamental constitutional principle: responsible government, or the ability of the people, through their elected representatives, to hold the government of the day to account (Aucoin, Jarvis, and Turnbull 2011).

That commitment to constitutional democracy is one immediate reason for the broad popular support that governments across the country enjoy. The speed, efficiency, and unanimity with which the fiscal and legislative measures have been supported by opposition parties - not just in Canada but across the democratic world - belies the pejorative treatment of democratic parliaments by political executives. To the contrary, the events of recent weeks appear to validate the resilience, adaptability, and vitality of Canada's constitutional system.

Yet unknowable is the extent to which the federal government applied legal instruments, prerogatives, and conventions to their full extent. One reason why the federal government may have held off on invoking the *Emergencies Act* is precisely that it would have had to recall Parliament to do so - and report to it. The required consultation with (and in some cases the consent of) provinces would have also raised issues of scrutiny and transparency. At the same time, given how many restrictions provinces have imposed within their own jurisdictions, it is equally important for provincial legislatures to control their own executives.

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## Emergency democracy

The emergency regimes to which the coronavirus pandemic has given rise also raise a host of controversies about fundamental rights and freedoms. For example, it is tempting to curtail individual, collective, civil, privacy, and constitutional rights for the public good of containing the epidemic and nurturing the economy back to health. However, in weighing costs and benefits, decision-makers need to keep in mind the diversity of preferences, for example, in weighing public health benefits against the economic costs of a lockdown (Sweetman 2006). Prior post-pandemic evidence suggests that economies have turned out to be fairly resistant to natural shocks (James and Sergeant 2006). Moreover, restrictive measures should withstand the reasonable-limits test of the *Canadian Charter of Rights and Freedoms*, be fit for the purpose intended and be based on rational evidence, and meet standards of necessity, transparency, proportionality, accountability, and reversibility (Guariglia and Schwartz 2020; Kleber cited in Stelzenmüller and Denney 2020).

What distinguishes Canada from China, Russia, Iran, or North Korea is precisely a functional constitutional democracy: constitutional review and an effective legislative assembly to counteract authoritarian overreach by the executive. Federal Parliament and provincial legislatures, then, ensure the delivery of essential public goods and services to Canadians, such as saving lives, the safety and security of Canadians, and, ultimately, maintaining a vibrant Canadian democracy.

In response to an unprecedented (albeit not totally unanticipated) crisis, the Canadian government has had to make myriad decisions expeditiously. The ramifications of those decisions are difficult to anticipate, let alone control. Confronted with chaos, anger, and distrust, overconfident political executives may overplay their hand, based on imperfect information (Hariri 2020). Populists and authoritarian adversaries are waiting to capitalize on division, derision, polarization, and mistrust in democratic government that decisions made rashly now might foment later on.

Parliament and the courts are the people's bulwark against excesses of executive power. The public trust they enjoy distinguishes constitutional democracies from authoritarian regimes, which renders the former more resilient during times of crisis. Deliberative decision-making through respect for Canada's parliamentary conventions and constitutional principles is indispensable to maintaining the legitimacy of Canada's political regime and the power of the Canadian state.

## Continuity of constitutional government in Canada

The federal *Emergency Management Act* (EMA) mandates "continuity of constitutional government [CCG] in the event of an emergency" (Canada 2007). However, neither the Act nor any subordinate legislation defines the term, nor provides any of the government-wide doctrine, policy, or management frameworks that are necessary to carry out this mandate effectively (see McDougall 2020). The deficiencies of the EMA, especially in the early days of an outbreak, were already flagged in the aftermath of SARS (Wilson and Lazar 2006). Ultimately, it is up to the courts to decide whether one branch can supersede the other in an emergency. Still, that strategy may not necessarily promote the most effective response to a crisis.

For the good of all Canadians and in our own best interest, the way of the courts is likely neither the most efficient nor the most effective way for the country to respond to a national emergency. As the world changes dramatically, federal countries with powers divided among two or more jurisdictions may find it in the interests of their citizens to study how to optimize their federation's response to previously unforeseen demands.

In addition, resting silent is the Royal Prerogative with the power to engage the Queen, her representatives, and the prime minister in having the right to be consulted, the right to encourage, and the right to warn. Such latitude necessitates an extensive role for parliamentary scrutiny of executive power because any “model of emergency power needs to explain which institution can declare an emergency, which institution can end it, what new powers are available during it, which legal protections remain inviolate, and by what standards courts review emergency power” (Heymann 2003).

To this end, a 2012 staff briefing to the federal deputy minister of Public Safety defined CCG as the principle of establishing defined plans and procedures that allow the three branches of the constitutional Government of Canada to continue to conduct essential operations in case of an emergency (Cunningham 2013). The complete CCG plan for Canada includes the full reconstitution of governance in a way that is effective, representative, and constitutional. Since the executive would have to recall and report to Parliament anyway to invoke the *Emergency Act*, a second step should be to reconstitute Parliament quickly and justly.

The Government of Canada has long taken a laissez-faire approach to departmental emergency planning, which facilitates the government’s reaction to emergency events and where what is perceived as urgent trumps what is actually important. The federal government’s broad but inchoate approach to CCG is that of a jack-of-all-trades, master of none. The prime minister’s daily press conference offers a reminder of the extent to which executive decision-making has, for all intents and purposes, been delegated to an unrepresentative, narrow, unelected subset of subject matter experts. Prior to the lockdown, the deputy prime minister repeatedly told Canadians there was no need for concern as the federal government had their back: “I really want people to be confident and reassured that there is a very elaborate, very detailed scenario in place for what we should do” (Harris 2020).

That approach led to the consequences of a political executive under the tyranny of experts: the federal public health bureaucracy and the World Health Organization. When overzealous public health autocrats want to make outlaws out of Canadians who are sharing a beer in their driveway while conforming to physical distancing measures, a politician – Ottawa’s Mayor Jim Watson – was fully within his right to rein them in and insist that common sense prevail (Chianello 2020). Similarly, public policy remains hostage to the dismal science that modelling has shown itself to be throughout this crisis. Time and again, urgent issues are supplanting priorities for long-term planning that should be happening concurrently: for instance, the programmatic focus by governments thus far has largely been on short-term relief measures with little thought given to reviving the economy, sustaining an economic recovery, or how these medium-term priorities may actually be adversely affected by short-term relief.

Thucydides famously recognized that warriors need guidance lest the tactical efficiencies and operational details of plans and operations sacrifice political objectives. Winston Churchill’s generals had believed that Russia would collapse in 1941, that the United States’ entry into WWII would not radically change its course, that

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the Normandy invasion was too risky, and that the pre-eminence of the battleship had not been lost. Churchill was a firm believer in the value of democratic debate, the vitality of parliamentary debate. Military strategy requires civilian perspective and leadership. To paraphrase Clemenceau, a pandemic is too important to defer to health experts and cabinet.

The federal and provincial executives have an obligation to honour the foremost constitutional principle of the Westminster tradition: responsible government. The reserve powers under the Royal Prerogative give the Crown discretion to act in unprecedented emergencies that are not provided for by constitutional convention or existing law. Nonetheless, the executive has an obligation to exercise those powers in a manner consistent with the principles of parliamentary sovereignty and the Canadian Constitution. Four hundred years ago, Charles I refused to learn his lesson. Nowadays, the government needs to heed the legacy of the English civil war, the Glorious Revolution, and the adoption of the principle of responsible government in Canada in 1848.

To that effect, government has an obligation under constitutional convention to:

- reconstitute Parliament in all its functions without further debate or delay;
- ensure transparency and accountability of spending by the executive through Parliament and, to that effect, meet its obligations to table a budget or fiscal update;
- subject the trade-offs between public health measures and economic cost to parliamentary debate so Parliament can perform its representative function of aggregating diverse interests;
- subject current and ongoing restrictions on individual or collective rights to parliamentary debate; and
- subject to proper parliamentary debate any temptation to use the fiscal power of the purse to intrude into provincial jurisdiction.

Instead of shunning Parliament as if it were afraid of it, Canadian democracy would fare better if the current minority government learned to embrace its minority status: *Two Cheers for Minority Government!* (Russell 2008).



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A recipient of RMC's Cowan Prize for Excellence in Research and an elected member of the College of New Scholars of the Royal Society of Canada, he is also Munk Senior Fellow in Security and Defence at the Macdonald-Laurier Institute. An expert in security and defence, political demography, and comparative federalism and multilevel governance, he has held visiting positions in North America, Europe, and Australia, and is regularly called as an expert witness to testify before committees of Parliament. He holds appointments to the board of two new research institutes funded by the German government, including the German Institute for Defence and Strategic Studies.

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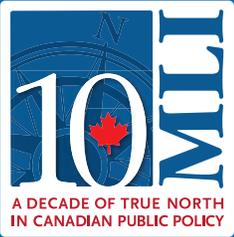
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## Endnotes

- 1 Parliament operates under two competing logics: representation (legislative-centred) and governance (specifically, executive-centred scrutiny and authorizing legislation) (Franks 1987). The government decision has had an adverse impact on all three.



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