The Rule of Law in a Pandemic

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How does a pandemic inform our understanding of the Rule of Law? Part I explores how government orders issued in response to the pandemic may not have been legally in good shape. Part II explores the consequences of possible departures from the Rule of Law for legal subjects, who may fail to do their legal duty but not for lack of commitment to the law. Part III examines possible justifications for departures from the Rule of Law in an emergency, including how the changing nature of the best available evidence and the need for quick action in response to an emergency may begin to justify a state of affairs that is not legally in good shape. Part IV concludes with the thought that achieving a legal system that is legally in good shape may be contingent on a community's affairs being in good shape.

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I. Legally in Good Shape

How many lawyers could confidently report the state of the law in their community on social gatherings, business closures, and related provincial or municipal orders made in response to the COVID-19 pandemic? If unsure, how many lawyers would know where to look to find the authoritative source for such orders—not the press conference or media summary or government website or social media post, but the source recognized by law? When asked about the state of the law on such matters, how many lawyers could confidently say that the provincial and municipal orders remain the same as they were when the lawyer last consulted the authoritative sources? Or that the orders found just now are the only orders that will govern conduct today without risk of delayed promulgation or retroactive application? In turn, when asked whether a stay-at-home order really does order one to stay at home, how many lawyers would hesitate to affirm a clear or coherent answer after consulting an order with nearly thirty exceptions?[1]

The questions raised in our first paragraph track the various desiderata of the Rule of Law (capitalized to avoid confusion with any one particular rule of law) traced with great care by the American jurist Lon Fuller in his celebrated parable of King Rex.[2] The story of the fictional monarch begins with Rex's desire to be a great lawgiver. His first official law-making act is to repeal all law then in force in the kingdom, so that he can begin anew by drafting a modern code. After discovering that drafting a new code is a greater challenge than he had anticipated, Rex abandons the code in favour of adjudicating each case on its merits, but it soon becomes apparent that there is little consistency from one decision to the next. After returning to the idea of a code, Rex completes a draft, but declares that it will not be published and its contents will be known only to him. In the face of great opposition from his subjects, Rex reverses himself and commits to publishing the code, but only after disputes arise and are adjudicated by him. In the face of his subjects' opposition to this alternative, Rex relents and publishes the code, only to discover that his subjects find it incomprehensible. Rex withdraws the code and tasks a team of legal drafters to clarify the language, the result of which is to reveal contradictions throughout the code's many provisions. Frustrated by his subjects' lack of appreciation for

1. See *Stay-at-Home Order*, O Reg 11/21.

2. See Lon L Fuller, *The Morality of Law*, revised ed (New Haven and London, UK: Yale University Press, 1969) at 33–38.

his many law reform efforts, Rex reintroduces a new expertly drafted code, but adds new penalties for coughing or sneezing in the presence of the King. Realizing the error of his ways, Rex withdraws this code and tasks a team of legal experts to return to the original draft and to make it clear and coherent and possible to comply with. Once published, it becomes evident that the original code is now outdated and requires thoroughgoing amendment and so, for a time, a series of daily reforms are made to the code. Once the amendments are all complete, Rex assumes the role of adjudicator of disputes under the code. But his skills here fail him again and it becomes obvious to all that there is no congruence between the resolution of disputes under the code and the rules set out in the code. Shortly thereafter, Rex dies of old age, leaving his subjects with a memory of him as a great failure in all things law reform.

Among the lessons in Fuller's parable of King Rex is this one: the Rule of Law speaks differently to law's makers (legislators, including ministers exercising delegated law-making powers) and law's administrators (officials, including municipal and provincial enforcement officers). Among the desiderata of the Rule of Law, one set relates to the design and formal features of legal rules by lawmakers; another to their administration. As the Latin *desiderare* signals, each member of the two sets is understood by way of degree of achievement, aptly captured by Fuller's formulation of the Rule of Law as "a morality of aspiration".[3] The desiderata pertaining to the design or formal features of legal rules include the following: that legal rules be promulgated, clear, coherent (do not contradict each other), prospective, not (otherwise) impossible to comply with, and—with the understanding that legal systems subsist *in* time—that rules be stable *over* time. In turn, the desiderata pertaining to the administration of legal rules include the following: that rulings and decisions applicable to legal subjects be guided by rules complying with the first set of desiderata and that legal officials charged with the responsibility to administer the legal rules actually do so and do so consistently.

Against these desiderata of the Rule of Law, many of the provincial and municipal orders issued since March 2020 in response to the COVID-19 pandemic may leave much to be desired, as does the administration of those orders by enforcement officers. Though provincial and municipal orders have been *published*, their promulgation and diffusion has been imperfect, with some confusion among community members who would otherwise seek to abide by their duties under law. "17-year-old fined for shooting hoops", reads one media report from April 2020, which documents the absence of clear communication on what was prohibited or permitted in city parks.[4]

3. *Ibid* at 43.

4. Joanne Chianello, "'I Was Scared': 17-Year-Old Fined for Shooting Hoops", *CBC News* (20 April 2020), online: <www.cbc.ca/news/canada/ottawa/complaints-fines-parks-covid-19-1.5537814>.

The need for quick action in response to rapidly changing circumstances may disrupt any sense of *stability* in the state of the law, such that the community's members may have little confidence that yesterday's set of orders remains the same today. As reported in a compendium of emergency orders made in response to the pandemic, the Government of Ontario made twenty-three orders in the final two weeks of March 2020 and a further twenty in the month of April 2020.[5] Given the sheer number of orders made in quick succession, the risk of *contradiction* between orders or between orders and other parts of our law and the lack of *clarity* in any one order or set of orders increases. Such lack of clarity or coherence may have been at the root of disputes surrounding some enforcement decisions—"people . . . fined $880 for sitting on park benches", reads one media report.[6]

What is more, the need to adapt to quickly changing circumstances may require those with the responsibility to govern to communicate the content of an order before formally enacting it, with the possibility that the directive will be given *retroactive* effect or near so. The *Stay-at-Home Order* of January 13, 2021, for example, was announced on January 12 and it was said that the Order would come into force at 12:01 a.m. on January 14. On January 13 at 5:56 p.m., the Order was formally made according to the applicable legal procedures.[7] The Order's content was communicated to the public some time thereafter, so that the residents of Ontario could become aware of their new duties some time before the stroke of midnight.

Putting aside for the moment any possible justifications for this state of affairs, the good lawyer may conclude that whatever else may be said about the legal systems in our provinces and municipalities, the set of provincial and municipal orders made in response to the COVID-19 pandemic is not "legally in good shape".[8] That is not to say that the various measures fail to comply with the law authorizing the making of orders by ministers or the legal procedures for exercising such law-making authorities. Rather, the conclusion draws on the desiderata of the Rule of Law. Those desiderata are themselves grounded in the very reasons to have law, reasons captured in part by Fuller's appeal to the reciprocity between those in authority and those subject to law, so that voluntary compliance with one's duties under law is facilitated by laws

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5. See Craig Forcese, "Repository of Canadian COVID-19 Emergency Orders" (last modified 8 June 2020), online (blog): *Intrepid* <www.intrepidpodcast.com/blog/2020/3/19/repository-of-canadian-covid-19-emergency-orders> [perma.cc/QK5X-7JMD].

6. Hillary Johnstone, "City Vowing to Pursue All Pandemic Fines", *CBC News* (18 January 2021), online: <www.cbc.ca/news/canada/ottawa/pandemic-fines-first-wave-ottawa-bylaw-1.5875415> [perma.cc/5DUA-UG4H].

7. See *Stay-at-Home Order*, *supra* note 1.

8. The expression is employed in John Finnis, *Natural Law and Natural Rights*, 2nd ed (Oxford, UK: Oxford University Press, 2011) at 270.

apt to be followed.[9] The importance of that reciprocity is on vivid display in relation to the provincial and municipal orders we have been discussing, for the point of emergency measures in response to the pandemic is not to collect fines from those who sit on park benches, but to save lives and protect the health of each one of the members of our community. Rule of Law failures are failures to facilitate voluntary compliance with orders that, if reasonable, every good member of our community would see fit to comply with.

Such compliance is facilitated by adherence to the Rule of Law and frustrated by departures from it. A legal system that is not legally in good shape is one in which voluntary compliance with the law by community members is impeded by a break in the norms governing the reciprocal relationship between those who make the rules and who are to follow them. As Fuller would put the point, if "this bond of reciprocity is finally and completely ruptured by government, nothing is left on which to ground the citizen's duty to observe the rules".[10] One need not contemplate a complete rupture to appreciate how the ground of the community members' duty to observe the rules is weakened by departures from the desiderata of the Rule of Law, for how is one to comply with a rule that is not publicized or understandable or part of the law at the time one acts, among the different ways in which a set of legal rules may fail to be legally in good shape?

II. Law in an Emergency

If it is the case that the set of provincial and municipal orders that constitutes our governments' response to the COVID-19 pandemic is not legally in good shape in some measure or measures, can any such departures from the desiderata of the Rule of Law be justified? Given the relationship between those desiderata and compliance with one's duties under law, what would any such justification look like?

In exploring these questions, we return to the idea captured by Fuller's appeal to reciprocity between those in authority and those subject to law, a reciprocity that recalls the very reasons to have law. What are those reasons in the face of a health pandemic? Among them is the need to settle on patterns of human conduct, a need vividly expressed by actions taken in the face of incomplete or imperfect information during and since March 2020. The candidate patterns of human conduct all contemplate coordination between means-and-ends and between persons, including how to flatten the curve, how to increase the

9. See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford, UK: Hart Publishing, 2012).

10. Fuller, *supra* note 2 at 40.

capacity of our hospitals, how to address economic loss, who to classify as an essential worker, who to test, and who is to self-isolate and for how long.

The range of possible patterns of human conduct is highlighted by the different strategies pursued in different jurisdictions within and beyond Canada. Even if some fare better by the metrics of health or the economy or liberty of movement or government support, no one pattern of coordination can be said to be superior to all the others in respect of every metric taken together. While keeping businesses open favours our economy and the livelihood of shopkeepers and employees in the immediate term, it risks increasing the prevalence of viral transmission in our community with consequences for the health of the community's members and the capacity of our hospitals. In turn, closing businesses and restricting social interactions better protects the immediate health of our members, but it does so at significant short-term economic cost and has a direct impact on the viability of small and medium businesses. Among many considerations live in the minds of those who examine different strategies in response to the pandemic, health and the economy are but two, which highlights the challenge of developing and designing patterns of human conduct and the vast range of possible patterns, none of which can be held out confidently as the only reasonable pattern, all things considered.

Any one member of the community can contemplate independently of the others which pattern or patterns of human conduct should be chosen for the community, with the more imaginative identifying a greater range of candidate patterns. But that independence cannot be maintained when one moves beyond contemplating different possibilities to determining which pattern of means-to-ends and which roles for which persons should be favoured, not only by oneself, but by everyone. The practical question thus confronting each member of a community is not best captured as "What should *I* do?", but rather as "What should *we* do?". What should we do about social gatherings, hospital capacity, business openings, and public schools? Though the answers about what to do admit of a wide range of reasonable alternatives, the need to settle on a pattern of human conduct is required if the goods of health and economic viability and liberty of movement and hospital capacity are to be responsibly pursued. Without settling on a pattern, the advantages of coordination will be frustrated or attained imperfectly or too late. The failure to settle upon a pattern of human conduct will be, in many instances, unreasonable, even if reason identifies no one pattern as *the* pattern that should be selected.

When these various considerations are situated in a frame of reference that emphasizes the quickly changing public health advice in the early days of the COVID-19 pandemic, the imperfect state of our law comes readily into view. Without excusing errors in decision-making that should be judged to have been errors at the time the decision was made because, even without the benefit of hindsight, the reasoning supporting the decision was unsound, it remains that the responsibility to govern in the face of a rapidly fluid situation helps to explain and to justify the near daily or weekly shifts in direction on the size

of permissible gatherings, the duration of school closures, the merits of mask-wearing, and the management of risks of viral transmission indoors and out, among other subject matters of provincial and municipal orders.

To return to the desideratum of stability in the state of the law, what is a government to do after concluding that the decision taken yesterday on the size of social gatherings, a decision that itself amended another recent decision on the size of gatherings, is no longer aligned with the best evidence now available and the best advice now submitted? Should government delay a shift in direction on account of the Rule of Law desideratum of stability in the state of the law? Or should government act on what it now judges to be the right action? If your inclination lies with the second of these two possibilities, then the justification for a state of affairs that is not legally in good shape begins to take shape.

To return to the *Stay-at-Home Order* of January 2021 and its twenty-nine exceptions to the requirement that individuals are to "remain in their place of residence at all times", the good lawyer may indeed hesitate before affirming whether the Order really does require one to stay at home, with possible consequences for the desideratum of clarity. Yet, in reviewing the Order, the good lawyer will note that the exceptions pertain to travel to work and school and childcare facilities, to obtain food and goods and services necessary for the health and safety of persons, to assist others in need, to seek emergency assistance, to protect oneself or others from domestic violence, to move residences, to care for animals, and to exercise, among other matters. In reviewing all this, it is open to the good lawyer to conclude that the Order seeks to communicate clearly the importance for the community's members to "stay at home" all the while recognizing the merits of exceptions that, though numerous, are not infinite. Each one of these exceptions anticipates some degree of risk to one's health and the health of others in one's community, for each exception increases the risk of viral transmission. Yet, the government can be understood to be attempting to hold in view a range of considerations relevant not only to health (which includes accessing food and getting exercise and escaping domestic violence), but also to livelihood and education and care for others and for oneself. The good lawyer may conclude that, while the Order's title may over-simplify the content of the directives, there is no more lack of clarity or coherence in the Order than in any scheme of any complexity pursuing more than one objective. If one arrives at this reading of the Order, then again one begins to give shape to a possible justification for a state of affairs that may not quite be legally in good shape.

III. Law-Making in an Emergency

The possible justification for a state of affairs that is not legally in good shape extends beyond the content of any provincial or municipal orders to their status

as *orders*, that is, as measures made by the executive rather than enacted as Acts of the legislature. What justifies abandoning the legislature and its emphasis on deliberation and free debate in favour of law-making by ministers? The question is important, for it is this mode of law-making that explains in part the quick succession of provincial orders in March and April 2020 and the comparatively less salient promulgation of regulations as compared to legislative enactments.

In our constitutional order, the institution with primary law-making responsibility is the legislature, not the executive. The legislature is designed to promote responsible law-making, recognizing that the responsibility to govern will be frustrated by incompetent, imprudent, or unwise rules of law. The legislative process emphasizes deliberation in the chamber and in committee, including by reserving pride of place in debate to the opposition, so that reasons for and against a legislative proposal are heard.[11] Such a deliberative process will expand the time needed to make law, but it will help ensure that the law is based on sound reasons and conforms to the desiderata of the Rule of Law.

So why abandon this mode of law-making in favour of law-making by executive orders, a mode of law-making generally unburdened by a process that emphasizes deliberation and debate and that is free from the scrutiny of a parliamentary opposition? A main reason recalls again the need to settle patterns of human conduct quickly, without delay. Where that need is pressing, a form of law-making more expedient that the legislative process may be called upon. Under Ontario's *Emergency Management and Civil Protection Act*, an order declaring a state of emergency may be made only if: (1) there is "an emergency that requires *immediate action* to prevent, reduce or mitigate a danger of major proportions that could result in serious harm to persons or substantial damage to property"; and (2) if the resources normally available to the ministries, agencies, boards, or commissions of the Government of Ontario "cannot be relied upon without *the risk of serious delay*" or are "insufficiently effective to address the emergency".[12] Time is of the essence in justifications for law-making by executive order.

Here, an animating thought is that a single person (such as the Premier) or small group of persons (such as the cabinet or a committee of ministers) will have greater capacity to respond to changing circumstances than would a large deliberative body. The legislature is not particularly apt for quick decision-making and an emergency situation may require rapid decisions on which direction to issue to members of a community. Yet, having set aside the slower, more deliberative legislative process in favour of more rapid and decisive ministerial action, extraordinary law-making by executive order is liable to depart from the desiderata of the Rule of Law. But if such law-making is called

11. See Grégoire Webber, "Loyal Opposition and the Political Constitution" (2017) 37:2 Oxford J Leg Stud 357.

12. RSO 1990, c E.9, s 7.0.1(3) [emphasis added].

for by the exigencies of the situation, the justification for a state of affairs that is not legally in good shape may again begin to take shape.

IV. A Community in Good Shape

We conclude by reflecting on the organizing idea we have been pursuing, namely that the set of provincial and municipal orders made in response to the COVID-19 pandemic may be judged to be legally not in good shape and yet departures from the Rule of Law may be justified. What may this suggest about the Rule of Law itself?

It may suggest this: that realizing a legal system that is legally in good shape may be contingent on a community's affairs being in good shape. The root of many departures from the desiderata of the Rule of Law in response to the pandemic—departures in relation to promulgation or clarity or coherence or non-retroactivity or stability in our laws—may be traced to the justified need to adapt to rapidly changing circumstances in response to dangers to life and health. If this is the case, then it may be the case that a community's legal system will be in a position to realize the Rule of Law only when the community's affairs are themselves sufficiently stable.

This idea finds a ready analogue in part of the justification for awarding to ministers exceptional emergency powers: they are to exercise such powers with a view to ending the emergency situation.[13] Their mandate is, in this sense, fundamentally conservative—it is to return the community to the normal situation, a situation of stability apt for the realization of the desiderata of the Rule of Law. Once the normal situation is re-established, the justification for exceptional powers is spent as is any justification for departures from the Rule of Law.

13. See John Ferejohn & Pasquale Pasquino, "The Law of the Exception: A Typology of Emergency Powers" (2004) 2:2 Intl J Constitutional L 210.