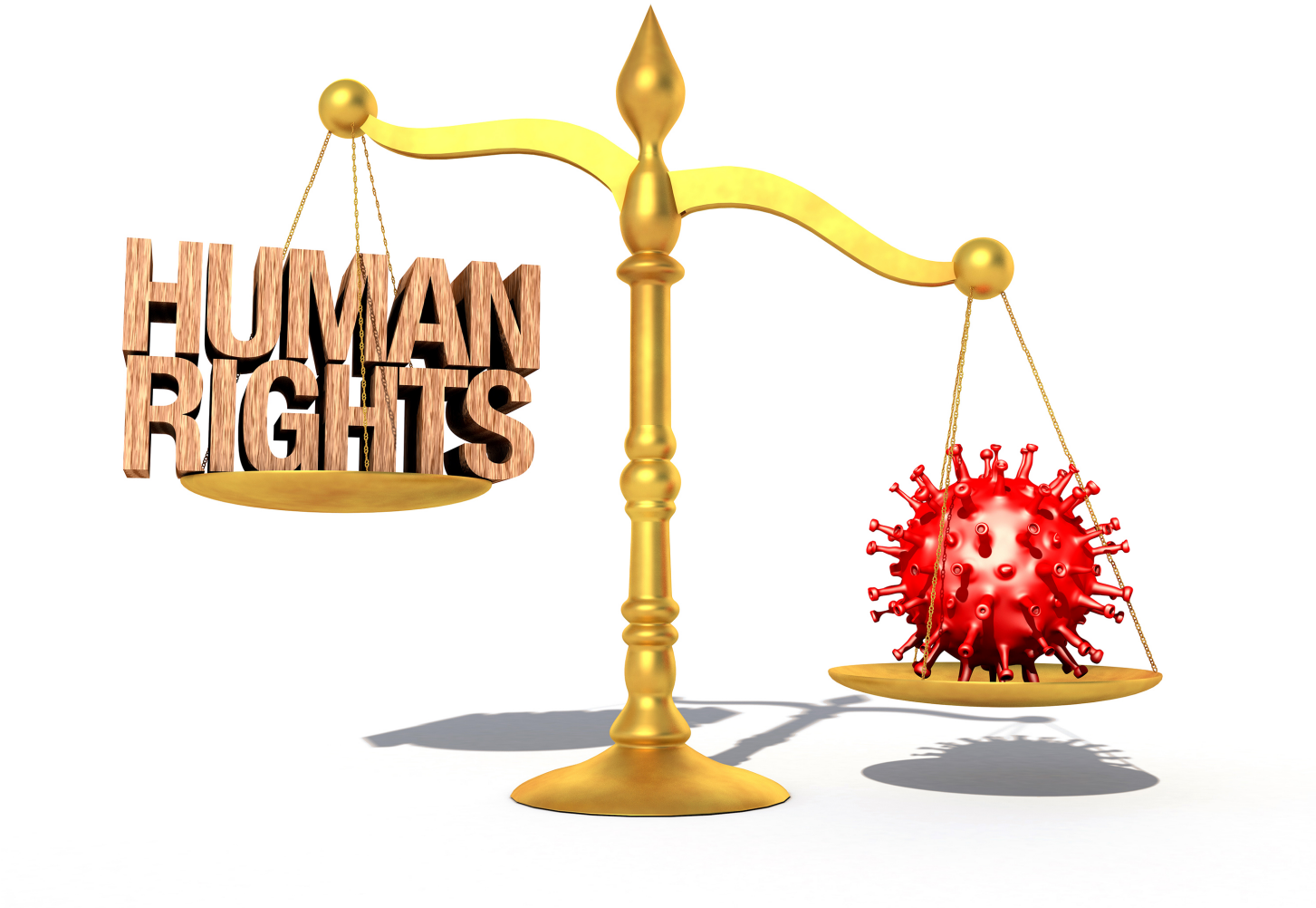


Human Rights Approaches to Covid-19: Opening Remarks to a Canadian Law School Conference

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By: Quinn Brown

Introduction

On February 24, 2020 Pearl Eliadis, a Montreal-based human rights lawyer, delivered the opening address to “Human Rights in Pandemic Times: A Canadian Law School Conference.” Ms. Eliadis serves as Full Member of the McGill Centre for Human Rights and Legal Pluralism and as Adjunct Professor at McGill’s Faculty of Law. The three-day conference, hosted virtually by Queen’s Human Rights Law Club, brought together 17 Canadian common-law school clubs that each organized one-hour panels on topics that intersected domestic and international human rights issues. The organizers assembled a diverse set of speakers and panelists over Zoom, including a highly anticipated keynote address by the Honourable Irwin Cotler.

The COVID-19 pandemic has challenged students and educators, activists and advocates across the globe not only in the public health domain, but also on human rights issues, as governments undertake emergency measures that may limit individual freedoms in the interest of public health and the collective well-being. Ms. Eliadis’ opening remarks set the stage for the conference by taking a human-rights based approach to both the pandemic and the economic and public health measures taken by governments to counter it. Examining the human rights-based approach in the context of the *Mobile Legal Aid Clinic v. Attorney General of Quebec* case concluded Ms. Eliadis’ opening remarks.

The Human Rights-Based Approach

A human rights-based approach to the pandemic requires that emergency measures enacted to suppress the spread of COVID-19 and save lives are non-discriminatory, proportionate (no broader than required by the exigencies of the situation), and justifiable in a free and democratic society. Additionally, this approach to examining how governments enact emergency measures requires that the use of emergency power is not normalized, is temporary, and subject to scrutiny. It is necessarily “people-centred” in that it prioritizes saving lives and suppressing the disease, even if economic sacrifices are made in the short-run. Overall, human rights-based approaches are understood as the conscious, systematic integration of human rights standards and principles into all aspects of development and programming work.

The human rights-based approach is necessary because report after report shows that the greatest concern is blanket emergency measures disproportionately impacting society’s most marginalized and vulnerable. These people are particularly impacted by COVID-19, and the emergency measures, due to pre-existing inequalities that are exacerbated by the pandemic. For example, individuals in precarious work environments may face loss of housing or income, or women and children experience domestic violence facing additional risks under “stay-at-home” orders. An added challenge, globally and in the Canadian context, is that many of these measures are brought into force without legislative scrutiny. While the aim of emergency measures is to protect public health and the collective well-being, the human rights-based approach demands that discrete groups do not face discrimination or adverse impacts, and that governments account for the exceptional measures to justify any limit on individual freedoms.

Managing the problems posed by the COVID-19 pandemic requires governments to consider how public health, economic security, individual rights and health should intersect. Early in the pandemic it was not clear which problems should take priority because no event in recent history has had such an impact on the global economy. However, emerging data presented by Ms. Eliadis shows that a human-rights approach to countering COVID-19 has worked better in terms of economic recovery and saving lives than approaches that aim to foster or sustain the economy. Generally, a "people-first" approach has had better outcomes for society through focusing on proportional responses and non-discrimination, especially with respect to emergency measures that may exacerbate pre-existing vulnerabilities.

Ms. Eliadis presented the recent *Mobile Legal Clinic v. Attorney General of Quebec* decision from Quebec's Superior Court as an example of how legal advocates can successfully petition the justice system to protect discrete vulnerable groups from blanket measures. In this case, the measure discriminatorily impacted Quebec's homeless population. The court considered that individuals were unable to comply with the order while experiencing homelessness, and unable to access shelters due to pre-existing vulnerabilities such as substance dependency. As well, members of the group were put in harm's way by being forced to choose between entering congregate-setting shelters where there is a heightened risk of COVID-19 exposure, and avoiding curfew enforcement through risky means by hiding in areas that are remote and hidden, which are unheated and dangerous.

Ms. Eliadis concluded by encouraging the legal and advocacy community to interrogate government responses to the pandemic using a human rights-based approach that focuses on proportionality, non-discrimination and pressing governments for justification for measures that limit freedoms. For example, the court in *Mobile Legal Clinic* considered the context in which Quebec's homeless individuals are especially vulnerable in the pandemic and noted that the Attorney General lacked sufficient justification for the blanket curfew measure.

Human Rights in Pandemic Times: Emergency Measures

Almost one year ago, the United Nations Human Rights' Committee issued policy guidance for States parties to the International Convention on Civil and Political Rights (ICCPR) temporarily derogating from the Covenant for the use of emergency powers to confront "the threat of widespread contagion". However, as States began implementing emergency measures, evidence emerged that certain governments were disproportionately infringing on citizens' rights under the guise of combatting the COVID-19 pandemic – a trend dubbed by the media as "coronavirus coups".

Emergency measures taken by governments range from "blanket measures", which apply to the whole of society, to "tiered systems" that adopt tailored approaches at the regional or municipal level. In the Canadian context, the Executive has not invoked the *Emergencies Act*, but has instituted federal orders under the *Quarantine Act*, for example, prohibiting entry from certain countries into Canada. Provinces have used both emergency management laws and health legislation to respond to the COVID-19 pandemic.

A major concern about the Canadian COVID-19 response framework is that the provincial decrees, executive orders and orders-in-council were enacted, and are renewed, in a context where there is reduced legislative scrutiny. This shift of power from the legislature to the Executive significantly reduces government accountability. In Quebec alone there have been more than 150 orders-in-council and directives issued by the Executive – none of which have undergone legislative scrutiny and, therefore, lack public consultation processes.

The enactment of emergency measures also has the effect of turning Canada's rights regime upside down. Where individual rights had held a position of primacy in Canada, and in constitutional and legislative rights regimes, the emergency measures suddenly subjugated individual rights in favour of the collective well-being and public health, with no legislative amendments and little by way of large-scale public challenges. The government now operates in a justificatory framework by focusing on section 1 of the Charter to justify the limits on individual rights that some emergency measures impose. For example, measures that limit gatherings or impose blanket orders on movement to protect public health also limit freedom of movement and assembly. Therefore, governments are in a mode of justifying the limits on freedoms that the emergency pandemic measures impose.

The justificatory mode seen in Canada under operation of section 1 of the *Charter* is also seen on an international scale. Article 4 of the International Covenant on Civil and Political Rights allows a "public emergency" to work to suspend certain rights. However, rights derogations are permissible only in certain circumstances: a public emergency must be specifically proclaimed, and the measures must be temporary, proportionate, legitimate and no broader than strictly needed. States can derogate from individual rights, such as security of the person, if those measures are tailored to the exigencies of the situation. The presence of justificatory modes at both the domestic and international levels bolster Ms. Eliadis' point that while emergency measures begin to feel like "the new normal", we must continue to ask governments to justify emergency actions that limit freedoms in accordance with commitments to the Charter, as required by section 1, and to international human rights treaties.

Human Rights Approaches

Where human-rights based approaches focus on the protection of individuals by ensuring that measures are proportionate and non-discriminate, an economic approach is one that prioritizes keeping the cost of the pandemic down with potentially larger sacrifices to human life.

The COVID-19 pandemic is certainly unprecedented in terms of the impact on the global economy, but not in terms of scale. The Spanish Flu killed far more people, but what is different today is the exceptional capacity of economies to provide health and social assistance to populations. National and international agencies have also mobilized on an unprecedented scale to develop effective immunizations and to roll out vaccination programs.

A recent paper by David Cutler and Lawrence Summers estimates that the COVID-19 pandemic has cost the United States $16 trillion, while the global cost, estimated by extension from the US economy,

is in the range of $96 trillion. While daily death tolls continue to fall, the global death toll currently sits at approximately 2.8 million people.

Proponents of the economic approach suggest that blanket measures such as lockdowns, closures and curfews are responsible for the high economic costs. These critics question the effectiveness of such measures in the modern economies described above and propose that businesses and economic activity should carry on – allowing people to maintain their livelihoods and keep working. This policy approach acknowledges that in the short term the disease would be permitted to spread with few restrictions and additional deaths would result. The early pandemic responses in Sweden and the United Kingdom, for instance, accepted this model.

The data now shows that suppressing the disease through restricting the economy is the better strategy, both in terms of a human-rights based approach that is "people-first" by saving lives and in terms of the economic impact. For example, the data from the Institute for New Economic Thinking, in the report To save the Economy, Save the People First shows, on the whole, that many countries that sacrificed lives to protect the economy experienced more deaths and higher economic losses than countries that sacrificed the economy to save lives.

The key issue that remains, which the human rights approach seeks to address, is the normalization of the "emergency", such that measures impinging upon rights and liberties become part of routine life. Of additional concern is the creation of new layers of vulnerability for the marginalized who may not have the means to contest the discriminatory measures.

The *Mobile Legal Aid v. Attorney General (Quebec)* case study described below reveals how certain emergency measures, with the stated purpose of collective well-being, can instead harm certain marginalized individuals. Applying a human rights-based approach to Quebec's emergency blanket curfew measure reveals how governments must be mindful of the disproportionate, harmful and discriminatory impact that ill-fitted emergency responses may have on society's marginalized and vulnerable. In this case example, the vulnerable are individuals who are experiencing homelessness in extreme climates and are exposed to additional risks because of blanket measures.

Case Study: Mobile Legal Aid v. Attorney General (Quebec)

On January 11, 2021, the Quebec government issued a new decree ordering a blanket curfew on the population between the hours of 8pm and 5am. There wereas no exceptions permitted under Decree 2-2021. Quebec's homeless population was disproportionately impacted by the order: by definition, homeless people have no residence to go to during curfew and shelter beds are limited. Given the enhanced risk of infection in shelters, many homeless individuals are willing to take risks to hide themselves and evade enforcement of the order by police officers, for example, by moving away from heat sources such as vents.

A week later, Raphaël André, an Innu man originally from the Matimekush-Lac John community in northern Quebec, was found frozen to death in Montreal – steps from a shelter where he had spent

part of the previous day.

Advocates called on the provincial government to provide additional resources, and to suspend the application of the blanket emergency measure for homeless individuals to account for the unique situation faced by this discrete population, but to no avail. The government refused to change the blanket rules, claiming that police would exercise appropriate “discretion” in application of the order.

On January 22, the Mobile Legal Clinic, represented pro bono by Montreal firm Trudel Johnston & Lespérance, filed an application before the Superior Court of Quebec asking that the curfew not apply to homeless individuals. The application sought judicial review of the decree as it applied to Quebec’s homeless population and an interim order to safeguard this population.

The Superior Court granted the application, applying the test for judicial review to suspend legislation as set out by the Supreme Court of Canada in *RJR MacDonald v. Canada*.

First, the court asked if there was a serious issue to be tried and found that the decree demonstrably impacted the life, liberty and security of Quebec’s homeless population. The court also found the issue was serious because of the discriminatory impact on the equality rights of homeless individuals.

The Court then asked whether Quebec’s homeless individuals would suffer irreparable harm if the order were not granted. The court considered the vulnerability of the homeless population, particularly for those who may avoid police and sleep in hidden areas that expose them to greater risk of freezing. Shelters may not be an appropriate alternative because, as the court noted, these congregate settings are more likely to expose persons to a higher risk of COVID-19 infection. The court also noted that most shelters are dry, meaning that no alcohol or other narcotic substances are permitted, meaning that few shelters can accommodate individuals with substance dependency.

Finally, the court asked whether the balance of convenience favoured granting the injunction. While the court assumed the overall public good of the blanket curfew in the province to curb the spread of COVID-19, the balance of convenience still favoured granting the relief sought, as police had been fining homeless individuals despite assurances that police would exercise discretion in enforcement.

The Court granted an interim stay on January 26, 2021, suspending until February 5, 2021 the application of the decree to individuals experiencing homelessness. The provincial government announced shortly thereafter that it would not appeal the decision and would amend the decrees to exempt Quebec’s homeless population.

The success of the case was closely tied to the discrete nature of Quebec’s homeless population, allowing the court to easily delineate the group and assess the harm in a concrete manner. Demographic data mentioned in the decision pointed to estimates that approximately 3,000 people were affected by the curfew order in the province, a relatively small portion of the Quebec population. A human rights-based approach to designing and implementing the emergency blanket measure, which limited freedoms in the interest of the collective well-being of Quebec’s population, required the

government to craft measures that are effective, but as well, proportionate, non-discriminatory and tailored to the unique situations of vulnerable individuals. In this case, the objective of proportionality could be achieved without altering the effect of the blanket measures to protect the general population.

Conclusion

The remaining three days of the conference continued the focus on human-rights based approaches to the pandemic. This approach ensures that emergency measures are proportionate and non-discriminatory, and that the government enactment and renewal of the measures is justified and not normalized in society. This touchstone guided discussions on a range of topics including the overdose epidemic and COVID-19, ecological crises, disability discrimination, the pandemic's impact on refugee populations, political prisoners, policing, and businesses at home and abroad. The scope of discussions demonstrates that the issue in *Mobile Legal Aid Clinic v Attorney General (Quebec)* is not the only concern over how emergency measures impact human rights in the pandemic. Ms. Eliadis' opening remarks framed how a human rights-based approach to the pandemic must guide governments in the design and renewal of emergency orders. The opportunity for the advocacy community to maintain a vigilant watch over government action was apparent throughout the rich dialogues on human rights in pandemic times.

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About the author

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