The One vs the Many: When Public Health Conflicts with Individual Rights

Public health is quite different from traditional healthcare. Whereas healthcare involves medical interventions between health professionals and individual patients, the field of public health attempts to maintain the health of a population. Rather than health of a person, the objective in public health interventions is "breaking the chain of transmission of infection in a community."[1] This implicates more stakeholders than conventional healthcare and has wider-ranging effects. The role of law is central to public health interventions in this regard as it is the mechanism that allows for the coordinated action of different authorities necessary to respond to public health issues, especially in an emergency. Law creates a structure within which various public health officials and state authorities can act together to protect the population's health in a crisis.[2]

The concept of public health legal preparedness refers to the specific legal reference points vital to intervention in a public health emergency.[3] However, one of the central issues in these interventions is the way that public health imperatives can come into conflict with individual rights. This can happen in a myriad of ways: the right to privacy can be infringed when surveillance reports containing personal information are required; security of the person can be violated in the case of mandatory vaccination, testing or treatment; and personal autonomy may be restricted through quarantine or isolation. These examples point to some of the underlying tensions between public health interventions and individual rights and freedoms, which can become acute in cases of emergency such as a pandemic.

SARS

During the SARS crisis in 2003, governments in different countries used quarantine to stop the spread of the virus. The responses struck different balances with individual rights. Hong Kong and Shanghai, which do not have strong records of protecting individual rights, used quarantine more sparingly than Canada. Of Toronto's population of 3 million, almost 30,000 were quarantined. In Hong Kong, out of 7 million people, only 1,282 were quarantined. In Shanghai, out of a population of 18 million, 4,090 were quarantined.[4] Contrary to what might be expected, therefore, individual rights were more compromised in Canada, a jurisdiction where these rights are thought to be taken more seriously.[5] In the course of the public health response there was no judicial oversight in the determination of whether the restrictions on individual rights were justified.

Public Health Legal Authority

The tensions between individual rights and public health interventions can also be illuminated by comparing public health authority and the state's power in criminal matters.

In criminal law, preventive detention involves confining a person who has not committed a crime based on the risk they might do so. Incarceration is confinement as punishment for conviction of a crime. In public health interventions, isolation separates a person who has a communicable disease from the healthy population, while quarantine restricts individuals who risk becoming infected. In this sense, public health interventions involve legal authority similar to the criminal law in that both restrict individual rights to achieve their objectives.

Given this parallel, which is relevant in criminal law, a judge decides whether to impose preventive detention or incarceration. However, health authorities followed no such procedure during the SARS crisis in Toronto. Those subject to quarantine were simply informed by telephone of the conditions under which they were required to isolate.[6] This points to a relevant difference between public health and criminal law that demonstrates some of the challenges faced in balancing the issue of individual rights with collective ones. In criminal law, the individual is the legal subject. In contrast, in a public health context the individual is a means to the end of the health of the population.

Public Health and the *Charter of Rights and Freedoms*

Canadian case law says little about the application of the *Charter of Rights and Freedoms* in the context of public health interventions, and essentially nothing about emergency situations.[7] However, the few cases that exist reflect a clear tendency for courts to defer to the government's determination of the need to limit individual rights for the sake of public health. This is evident in case law in non-emergency public health contexts, which reflects judicial deference in the determination of what constitutes a legitimate public health purpose.

For example, in *Canadian AIDS Society v Ontario* (1995),[8] the Court of Ontario ruled the Red Cross was obliged to inform donors who tested HIV-positive and declare them to provincial authorities under the *Health Protection and Promotion Act* (1990).[9] The Canadian AIDS Society argued this obligation was a violation of section 7 of the *Charter*, which guarantees the "right to life, liberty and security of the person."[10] Although the Court found no violation of section 7, it specified that even if there has been one it would have been justified by the state's duty to protect public health. An Ontario Court applied the same logic in *Toronto v Deakin* (2002),[11] a case in which a patient suffering from tuberculosis was detained for treatment. He argued this was a violation of his liberty as protected by section 7 of the *Charter*, and asked a court to release him. The Court declined, finding no effective infringement of section 7. However, it specified even if there has been an infringement, it would have been "in accordance with the principles of fundamental justice" given the state's responsibility to protect public health.

These cases reflect a precedent of courts deferring to public health priorities when they come into conflict with individual rights. However, it is recognised that authorities responsible for adopting public health measures must make an effort to balance individual rights with the public good. The World Health Organization's *International Health Regulations* refer to the importance of respecting basic individual rights.[12] Article 3(1) stipulates that the implementation of the "*egulations* shall be with full respect for dignity,

human rights and fundamental freedoms of persons."[13] Article 42 stipulates that public health measures should be "applied in a transparent and non-discriminatory manner."[14] Free and informed consent and information privacy are also mentioned.

Public Health in an Emergency

In an emergency situation, such as a pandemic, establishing a precedent of deference to individual interests in favour of collective interests is potentially a dangerous one. For example, a recent analysis of emergency triage protocols found people with physical or mental disabilities were systematically excluded or de-prioritised.[15] In some cases, it was because the disability negatively affected the likelihood treatment would succeed. In other cases, it was because they needed more time to recover and had a more limited long-term prognosis. These exclusions are seen as value-neutral in a public health context because they involve an empirical evaluation of an individual's health condition, and not a subjective interpretation of quality of life. However, these types of interventions can involve significant infringement to individual rights and freedoms.

Conclusion

The tensions between the need to protect public health as a collective interest while at the same time protecting individual rights play out differently depending on the seriousness of the public health situation. The tendency to consistently trade off individual rights in the face of collective threats begs the question of what happens in a prolonged public health emergency? How can the law both help protect the life of the population, and at the same time protect the individual against the powers the state takes upon itself to engage that task?

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[1] Amir Attaran & Kumanan Wilson, "Legal and Epidemiological Justification for Federal Authority in Public Health Emergencies" (2007) 52:2 McGill LJ 381 at 392.

[2] Amy Swiffen & Mona Kayal, "Uncharted Territory: Policy Options for a Public Health Emergency in Canada" (2015) 17:3 L & Governance 1.

[3] Anthony D Moulton et al, "What Is Public Health Legal Preparedness?" (2003) 31:4 JL Med & Ethics 672.

[4] Lesley A Jacobs, "Rights and Quarantine During the SARS Global Health Crisis: Differentiated Legal Consciousness in Hong Kong, Shanghai, and Toronto" (2007) 41:3 Law & Soc'y Rev 511.

[5] Lawrence O Gostin, Ronald Bayer & Amy L Fairchild, "Ethical and Legal Challenges Posed by Severe Acute Respiratory Syndrome: Implications for the Control of Severe Infectious Disease Threats" (2003) 290:4 Health L & Ethics 3229.

[6] Jacobs, *supra* note 4.

[7] Nola M Ries & Timothy Caulfield, "Legal Foundations for a National Public Health Agency in Canada" (2005) 96:4 Can J Public Health 281.

[8] *Canadian AIDS Society v Ontario*, [1995] 25 OR (3d) 388, OJ No 2361 (Ct J (Gen Div)).

[9] *Health Protection and Promotion Act*, RSO 1990, c H.7.

[10] *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[11] *Toronto (City, Medical Officer of Health) v Deakin*, [2002] OJ No 2777, 115 ACWS (3d) 338 (Ct J (Gen Div)).

[12] World Health Organization, *International Health Regulations (2005)*, 2nd ed (Geneva: World Health Organization, 2008), online (pdf): *WHO* <apps.who.int/iris/bitstream/handle/10665/43883/9789241580410_eng.pdf;jsessionid=1150167A16189A6FF4ED53EF83B57D9D?sequence=1> [perma.cc/HY6Q-KS62].

[13] *Ibid*, art 3(1) [emphasis added].

[14] *Ibid*, art 42.

[15] Wendy F Hensel & Leslie E Wolf, "Playing God: The Legality of Denying Scarce Resources to People with Disabilities in Public Health Emergencies" (2011) 63:3 Fla L Rev 719.