FLATTEN INEQUALITY:

Human rights in the age of COVID-19

At a Glance:

Terminology Matters:

SARS-CoV-2 is the virus responsible for the disease we now commonly refer to as COVID-19 (coronavirus disease).

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Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

HIV and SARs-CoV-2: What history can teach us

In the face of the global COVID-19 pandemic, law- and policymakers around the world are already taking or seriously contemplating drastic measures in an attempt to minimize the spread of SARS-CoV-2. Some of these measures are eerily familiar to those adopted in response to HIV, such as imposing penalties on people for not abiding by public health recommendations or engaging in exceptional surveillance of individuals. Certain limitations on some human rights may be justified as necessary in the context of a pandemic of a casually communicable infection, but it is essential that any measures be appropriately narrow and comply with human rights standards. **Furthermore, those making and enforcing any laws or policies limiting rights must reflect carefully on the reality that hasty and broad resort to such punitive measures may perversely undermine public health objectives while also violating human rights — doing more harm than good on both fronts.**

At the same time, the history of both the HIV pandemic and the ongoing opioid overdose crisis has taught us that public health responses all too often neglect the most marginalized. Like HIV, COVID-19 exacerbates inequalities and exposes the many structural factors that lead to health inequities and other economic and social disparities, as well as vulnerability to the virus. For example, people who are homeless or inadequately housed, and dependent on various services for basic needs, will face greater vulnerability to the virus and will find it difficult or impossible to maintain the recommended physical distance or self-isolate. When Canada fails to provide Indigenous communities with access to clean water, proper sanitation, decent housing, and adequate health care, Indigenous Peoples are at greater risk of viral infection. When there is a dearth of shelter spaces for women or young people fleeing violence — particularly those who use drugs, are Indigenous, migrant, LGBTQ2+, or who live with a disability — they are more likely to experience domestic violence and other abuse especially if they are to stay at home.

But this need not be the case. **The right laws, policies, and programs can make a positive difference by creating an "enabling environment" that supports individuals and communities in protecting and promoting their health and respecting human rights.** This, in turn, supports public health more broadly.

Lessons learned from the HIV pandemic confirm that successful public health responses must place human rights front and centre to reduce suffering, save lives, and protect public health. Similarly, a successful response to COVID-19 must protect the health and human rights of all people. International human rights law guarantees everyone the right to the highest attainable standard of health and obligates governments to take steps to prevent threats to public health and to provide health care to those who need it, in ways that respond to the particular needs of certain vulnerable populations.

Any limitations on rights, including those imposed in the name of public health, must be necessary, proportionate, and in pursuit of a legitimate aim. They must always include safeguards against their abusive or illegal application, and be subject to review and challenge. When taken in response to an emergency, such as a public health emergency, they must be limited in time.

Now, more than ever, Canada must stand vigilant against laws and policies that are not grounded in sound evidence, public health principles, and human rights.

At Issue: Criminalization and public health surveillance

We are concerned by recent reports suggesting some instances of people being criminally charged in Canada for allegedly exposing others to COVID-19. We have also seen police being deployed to enforce public health measures. While public health measures are necessary to limit the spread of the virus, repressive measures can have a discriminatory and devastating impact on the most vulnerable in society as well as those who are already disproportionately surveilled, policed, and criminalized. These include people who are homeless, insecurely housed and/or living in poverty; Indigenous, Black, and other racialized people; people who use drugs, people who sell sex, and other individuals from marginalized, stigmatized, or criminalized communities — especially where no economic and social support is provided to allow people to protect themselves and others, including through physical distancing and self-isolation.

As highlighted in a recent statement by HIV JUSTICE WORLWIDE regarding the COVID-19 pandemic, experience with HIV criminalization demonstrates the harmful consequences of the criminalization of infections and diseases on both human rights and public health. **Criminalization is not an evidence-based response to public health issues.** In fact, the use of the criminal law and other punitive approaches most often undermines public health by creating barriers to prevention, testing, care, and treatment. For example, people may not disclose their symptoms or status, or seek testing or treatment, for fear of being criminalized, otherwise penalized, or put under extreme surveillance. It can also lead to ill-informed "trial" by social and news media, and to myriad human rights violations, from arbitrary arrests and detentions to unfair trials (or no trials at all under new emergency measures) and harsh prison sentences.

The federal government, prosecutors, and courts must resist the overly broad use of criminal laws to address perceived exposure or risk of exposure to COVID-19, and police and other law enforcement interventions in the context of COVID-19 must be strictly limited. Heavy-handed fines and arrests to enforce public health measures could lead to abuse, with a disproportionate impact on the most marginalized, particularly those who may be less able or equipped to comply with public health recommendations. **Voluntary measures are more likely to encourage cooperation, facilitate access to care, and protect public trust than coercive measures.**

The drastic use of surveillance, such as the use of telecommunications data to track compliance with pandemic measures, also intrudes on the right to privacy and should be rejected. Privacy laws continue to apply during a public health crisis, and there must be a clear legal framework as to how and why information is collected, how it may legally be used, and how long it will be retained. **Certainly, each and every limitation of rights must comply with the *Canadian Charter of Rights and Freedoms ("Charter"),* no matter the situation.**

Human Rights Standards in International and Canadian Law

The *Siracusa Principles* were set out in 1984 by international law experts and are a widely accepted international framework for criteria that must be met for any measures limiting human rights. In Canada, the *Canadian Charter of Rights and Freedoms ("Charter")* largely reflects these principles, and delineates binding legal rules for assessing whether a government law or other action that limits Charter rights is constitutionally permitted.

When scrutinizing limitations on rights imposed in response to the COVID-19 pandemic, the key considerations reflected in the *Siracusa Principles* and the *Charter* can be summarized as follows:

- The limitation on rights must be provided for and carried out in accordance with a law of general application.
- The government always has the burden of showing that the limitation is "demonstrably justified in a free and democratic society."
- This means that any limitation on rights must:
  - be in pursuit of a legitimate objective, i.e. addressing a pressing and substantial public or social need;
  - be rationally connected to achieving that objective, meaning that it must be based on sound evidence and not be arbitrary, unfair, or based on irrational considerations;
  - impair rights as minimally as possible, meaning there are no less intrusive and restrictive means of achieving the objective; and finally,
  - there must be proportionality between the harmful effect of the measure limiting rights and the greater public good in achieving the objective.

At Issue: Prisons and other places of detention

As law- and policymakers implement unprecedented measures to protect the health of people in Canada, they must continue to fulfill their responsibility to provide health care for people in prisons and other places of detention (e.g. immigration detention) and immediately and consistently implement measures to protect the physical and mental health of people in custody.

It is a well-established legal principle that prisoners do not surrender their rights upon incarceration. Instead, prisoners retain all rights, subject to those restrictions that are unavoidable in a prison environment, including the right to the highest attainable standard of health, as set out by the UN Standard Minimum Rules for the Treatment of Prisoners (also known as the Nelson Mandela Rules) and the federal *Corrections and Conditional Release Act*. As a matter not only of ethical obligations, but also of legal obligation under the *Charter* and international human rights standards on health care in prison settings, prison health care should be equivalent to that available in the community.

States also have an obligation to take steps to prevent foreseeable threats to public health and law- and policymakers must take evidence-based steps that respect human rights to prevent COVID-19 from entering and spreading in prisons. People in prisons and other places of detention are likely to be more vulnerable to infection with COVID-19 because of close confinement, overcrowding, poor hygiene, poor ventilation, poor nutrition, and sub-standard health care. But they are unable to take the same precautions that other people in Canada are encouraged to adopt to protect themselves and reduce the rate and speed of transmission. Indeed, there are already a growing number of reports of infection among prison staff and prisoners in Canada.

Moreover, many prisoners — a disproportionate number of whom are Indigenous — live with underlying health conditions that compromise their immunity and increase their risk of contracting COVID-19. Both HIV and hepatitis C virus (HCV) are far more prevalent among prisoners than among the population as a whole; a significant number also report hypertension, diabetes, or respiratory illness.

Concrete measures should be considered to reduce the prison population and the number of those in immigration detention. Having fewer people in detention will decrease the risk of COVID-19 transmission for both prisoners and correctional staff, including by reducing overcrowding, and allow prison authorities to prioritize resources for the institutions that need them most. For example, **in the short term, Attorneys General should issue directives for prosecutors to dismiss pending criminal charges against all people arrested for simple drug possession or sex work–specific criminal offences, and police forces should adopt guidelines that instruct law enforcement not to arrest and/or charge people with those offences.** Decriminalizing drug possession for personal use and repealing sex work–specific criminal laws have been recommended by numerous health and human rights bodies, including the World Health Organization, UNAIDS, and the UN Special Rapporteur on the right to health, as measures that both protect health and uphold human rights.

At the same time, non-custodial measures at the pre-trial, trial, sentencing as well as post-sentencing stages must be considered. In particular, alternatives to custody including release must be sought for those who are at high risk of infection and of experiencing serious complications in the event that they are infected, including persons aged 60+; people with compromised immunity, respiratory conditions, and other chronic health conditions; people who are pregnant (who are also likely to be immune-compromised); and primary support parents (in light of the psychological stress of separation during a pandemic and to ensure safe supervision of dependent children who may otherwise be in precarious living situations). Alternatives to custody for the majority of prisoners incarcerated for non-violent offences and for those nearing the end of their sentence should also be explored. If certain prisoners cannot be evacuated due to some risk to the general public, they should, at minimum, have their own cell to be able to practice physical distancing. **Immigration detainees, the vast majority of whom pose no safety risk, should be released from custody.**

It is equally urgent to reduce the risk of transmission among people in prison and other people in detention. People in prison and other people in detention should be provided with adequate supplies of soap, sanitizer, and cleaning supplies without cost or further delay and prison authorities must fulfill their legal responsibility to uphold maintenance and sanitation in prisons, including enhanced cleaning by staff who are properly trained, equipped, and protected. Measures must also be adopted to enable people in custody and staff to maintain a minimum physical distance between them, as per public health recommendations.

For those known to have been directly exposed to SARS-CoV-2 or who are exhibiting symptoms of COVID-19, testing and protocols to prevent further transmission should be established in line with the expert guidance provided by public health officials. It is essential that these measures be evidence-based and not unduly restrictive of prisoners' residual liberty. In particular, the use of prolonged or indefinite lockdowns and/or individual segregation must be avoided. Appellate courts in Canada have held that segregation can violate prisoners' *Charter* rights, given its demonstrated and often permanent effects on prisoners' health. Any use of restrictive measures must be a last resort — after community placements and other measures have been implemented — and must be as minimal as possible. **The psychological and emotional well-being of prisoners and other detainees, who are disproportionately likely to be living with mental health conditions, should not be jeopardized unnecessarily.**

Prison authorities must also ensure that sufficient medical staff and resources are available within institutions both to care for those who may contract COVID-19 but not require hospitalization, and to also provide uninterrupted treatment for those prisoners living with HIV, HCV, and/or other underlying health conditions. They must also guarantee uninterrupted access to other essential health care including harm reduction services. **The suspension of essential health services such as the Correctional Service of Canada's Prison Needle Exchange Program in response to COVID-19 is unacceptable, as this creates additional risk to prisoners of harms such as HIV and HCV infection.** There is no public health justification for such a suspension.

At a time of a great uncertainty, continued contact with family and friends is more vital than ever to prisoners' and other detainees' mental health and emotional well-being. With in-person visits suspended in prisons, it is especially important that prisoners have meaningful access to other means of communicating with their loved ones. **At a minimum, phone calls for prisoners should be free.** The number of phones available must also be increased and access to videoconferencing facilities for prisoners' personal communications must be expanded, particularly while all non-essential court proceedings are adjourned.

At Issue: Universal access to shelter and housing, income and other supports, and health care

Shelter and housing

As with HIV, numerous factors affect one's vulnerability to and experience of COVID-19, including access to shelter and housing, income and other supports, and health care. People who are homeless or living in precarious housing will have extremely limited ways to seek safety or isolation during the pandemic and are particularly vulnerable to its effects. A dangerous shortage of housing and shelter means actual shelters will continue to be overcrowded and people will not be able to practice physical distancing — thereby dramatically increasing the risk of COVID-19 transmission. People who are homeless must also travel (generally using public transit) to access services and meal programs, further increasing their risk of exposure. Simply being in public spaces also increases their risk of being policed.

Federal, provincial, and municipal governments must work together to ensure there are sufficient shelter spaces to allow for physical distancing, drop-in programs that offer bathrooms, showers, meals, and daytime shelter, and quarantine spaces. All governments must also ensure the safety of all workers serving homeless people by supporting access to necessary personal protective equipment and implementing measures to prevent the transmission of COVID-19 within the shelter system. More broadly, provincial governments should implement a moratorium on eviction orders for the duration of the pandemic.

Income and other supports

Governments' response to COVID-19 has also prevented many people labouring in low-wage, precarious, or informal labour from working because of movement restrictions and other disruptions to the economy and public life. Precarious workers, including migrants, are already excluded from labour rights and protections; many are now also experiencing loss of income with little or no safety net when they are unable to work, making it impossible to meet their basic needs or those of their family. Sex workers, for example, who have experienced drastic reductions in income as a result of the COVID-19 pandemic, are unable to access government relief efforts given the criminalized nature of their industry, and migrant sex workers face the additional threat of imprisonment and deportation when making contact with any government agency or authority. **Provincial and federal governments must work together to increase income supports and ensure that these are accessible to all.**

Restrictions cannot and should not prevent people from accessing the necessities of life, including food and other critical amenities. For those whose employment is deemed essential, including those working in low-wage jobs, childcare must be available or alternative arrangements proffered. Support must also be put in place to prevent and respond to violence against women and children, for whom isolating at home during the COVID-19 pandemic could prove deadly as abuse is likely to escalate.

Health care

If individuals do not feel safe accessing health care or do not have access to health care that meets their needs, public health efforts will be hampered. **Governments have a responsibility to provide health care without stigma and discrimination of any kind, including on the grounds of immigration status.** To that end, federal, provincial, and municipal governments should ensure that the COVID-19 response is not linked to immigration enforcement in any way, and take steps to communicate to migrant communities that they do not risk reprisal or deportation if they access care, especially in the context of seeking testing or treatment for COVID-19.

Other criminalized and stigmatized communities must also be offered care without fear of reprisals. The impact of the COVID-19 pandemic is likely to be further intensified by an ongoing overdose crisis. People who use drugs and/or are homeless are more likely to have chronic health issues that will increase their risk of experiencing severe complications related to the virus. Additional barriers to accessing drugs and requiring people to use drugs in isolation also increases their risk of fatal overdose. If specific mitigation measures are not implemented, people who use drugs will be negatively affected by efforts meant to prevent viral exposure, such as the shuttering or limiting of services and supports. This will, in turn, increase social isolation and the risk of forced withdrawal, non-potable alcohol use, HIV and HCV infection, and fatal overdose.

For people who use drugs, access to vital harm reduction services, including supervised consumption services, must be maintained. Calls for a safer drug supply are also all the more urgent in the midst of the COVID-19 pandemic, as border restrictions limit the available supply of illicit opioids and other substances, increasing prices and forcing people with little to no income to take measures to access opioids that may expose them to greater risk of infection and overdose. Lack of access could also force people into involuntary withdrawal, thereby exposing them to the risk of harm at a time when the health system is ill equipped to accommodate them. **For people who have access to opioid agonist therapy, governments should continue to encourage prescribers to consider ways they could allow patients to take more doses home, reducing the risk involved in multiple daily trips to their clinic or pharmacy.**

At Issue: Travel and border restrictions

Travel bans have been used to address the risk of COVID-19 in Canada and abroad. Such measures can be effective only if they are guided by science, with appropriate protection of the rights of those affected. As outlined above, infringements on human rights, including the right to freedom of movement, need to be proportionate to the risk presented by those affected, scientifically sound, transparent to the public, the least restrictive means to protect public health, and regularly revisited to ensure that they are still needed as the pandemic evolves. The effectiveness of travel bans depends on many variables, and also decreases in the later stages of an outbreak, particularly if more local, community transmission is happening. **The federal government should continually review its current policies restricting travel, including entry to Canada, to ensure it meets these criteria.**

For citizens and permanent citizens who may have COVID-19

The federal government is currently denying entry to Canada (by air) of any citizen or permanent resident who "has symptoms consistent with COVID-19." While Canada allows such people entry by land, rail, or marine transportation, in practice, for many citizens and permanent residents abroad, entry by air (arriving at one of four designated airports permitted to receive international flights) is the only practical means of entering Canada. A blanket prohibition on boarding a flight to Canada if presenting any symptoms effectively denies entry to Canada to citizens and residents who may have some other condition accounting for certain symptoms; recall that the symptoms of COVID-19 are similar to and largely indistinguishable from various other conditions. It also denies entry to people who may have COVID-19 and urgently need to return home for appropriate medical care, family reunification, or other reasons. **Rather than a blanket prohibition on entry by air that leaves sick people without support, Canada must facilitate their return — and treatment if necessary — in ways that minimize the potential for transmission to others.**

For asylum-seekers crossing US/Canada border irregularly

In addition, Canada must immediately reverse its decision to shut the Canada–US border to people seeking asylum between official land ports of entry. Turning back people seeking refuge is not in accordance with Canada's international legal obligations and runs contrary to public health guidance. Simply put, it is ineffective, illegal, and ethically indefensible. Refugee claimants' right to be protected from forced return is the cornerstone of international refugee protection, and migrants and asylum-seekers are no more of a threat for COVID-19 transmission than the rest of the population. Legal guidance issued by the UN High Commissioner for Refugees (UNHCR) on asylum protections in the COVID-19 pandemic makes clear that states may not implement measures that categorically deny people an effective opportunity to seek protection.

A ban on asylum-seekers entering Canada from a Canada–US land border, even implemented temporarily as part of the response to the COVID-19 pandemic, will not only endanger the lives of people seeking refuge, but will further jeopardize public health. By closing the border in this fashion, Canada will force migrants to take clandestine routes into Canada (or be stuck in the US in situations of even greater risk). Either way, on whichever side of the border, they will be less likely to be properly screened, referred for testing or to health care if necessary, or quarantined to reduce risk of onward transmission; if they are sick, they will be too afraid to seek medical attention, which not only undermines their own health but further exacerbates the risk of transmission.

COVID-19 should not be used as a justification to evade international obligations towards refugees. **Canada must uphold domestic and international refugee laws and treaties and implement measures — with the guidance and involvement of public health, refugee assistance, and health professionals — to protect public health and the health of people seeking safety.** Outbreak response measures for all individuals should be based on data and known best practices in public health.

Summing Up: Human rights are more important now than ever

While the COVID-19 pandemic is forcing legal and policy decisions to be made quickly and within previously unimaginable timelines, now is not the time for Canada to abandon its human rights obligations, including to those most marginalized. **By engaging affected communities and removing barriers to people protecting their own health and that of their communities, policymakers can avoid indirect or unintended harms. Canada must decisively centre human rights in the fight against COVID-19.**

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