
1-19-2021

Law in the Time of COVID

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Introduction

Citation Information

Haigh, Richard and Priel, Dan. "Law in the Time of COVID." *Osgoode Hall Law Journal* 57.3 (2021) : 533-536.

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss3/1>

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Law in the Time of COVID

Abstract

In early January of this year, newspapers started reporting on a mysterious new respiratory disease that was spreading in Wuhan, China. At the time, few paid much attention to that nameless disease. A month later, China was effectively in lockdown; most of the rest of the world was cautious but life continued largely as before. In another month, the virus spread across the globe, and with it the eerie images of deserted streets. Our university shut its doors on March 13, 2020, after a week of increasing pandemic anxiety in Toronto. As we write this in December, it is still largely shuttered. The prognosis for the upcoming winter semester remains bleak: Another term where Osgoode remains closed, and the normally bustling and life-affirming hallways, library, cafeteria, offices, classrooms and atrium, stay silent and still.

Law in the Time of COVID

RICHARD HAIGH AND DAN PRIEL*

IN EARLY JANUARY OF THIS YEAR, newspapers started reporting on a mysterious new respiratory disease that was spreading in Wuhan, China.¹ At the time, few paid much attention to that nameless disease. A month later, China was effectively in lockdown; most of the rest of the world was cautious but life continued largely as before. In another month, the virus spread across the globe, and with it the eerie images of deserted streets. Our university shut its doors on March 13, 2020, after a week of increasing pandemic anxiety in Toronto. As we write this in December, it is still largely shuttered. The prognosis for the upcoming winter semester remains bleak: Another term where Osgoode remains closed, and the normally bustling and life-affirming hallways, library, cafeteria, offices, classrooms and atrium, stay silent and still.

The March shutdown meant that we had to “pivot,” as they say. As teachers, we had to rapidly switch over to online delivery for the final six weeks of classes and some unknown duration into the future. As scholars, we had to put on hold many projects, conferences, and collaborations. All this was a tiny—and by all measures insignificant—aspect of the effects of the pandemic on virtually every aspect of human life. For a while, the whole world seems to have shut down. Ever

* Osgoode Hall Law School, York University. This footnote provides an opportunity to thank Stephanie Cho, Lidia Hencic, Tomislav Miloš, Cameron Teschuk, and Carly Valentine, for their excellent work on reviewing and editing all the articles in this issue. Thanks also for Osgoode Research Fund, for financial support that made the publication of this special issue possible.

1. Sui-Lee Wee & Vivian Wang, “China Grapples with Mystery Pneumonia-Like Illness,” *The New York Times* (6 January 2020), online: <[nytimes.com/2020/01/06/world/asia/china-SARS-pneumonialike.html](https://www.nytimes.com/2020/01/06/world/asia/china-SARS-pneumonialike.html)>.

since, countries have been experimenting with constantly shifting rules that try to balance safety while maintaining a measure of normalcy.

At the time of writing, more than seventy-five million people around the world have been infected and just over 1.6 million have died, but the effects of the disease have been felt by billions of others. It affected people who had to switch to working from home; and it affected their children whose schools switched to remote teaching and who had to adjust to few face-to-face interactions with their peers. Businesses had to significantly reduce or alter their services; others had to shut down completely. Many millions lost their jobs.

As law has been entangled with every aspect of human life for some time now—from before conception until death and beyond—this disruption of life has brought with it a disruption to law. The articles in this issue of the *Osgoode Hall Law Journal*, though by no means covering all the effects of the pandemic on the law, tackle a broad range of examples of this disruption, from civil and criminal procedure to copyright and bankruptcy law.

Despite the diversity of issues and perspectives, a few general themes emerge. The first is the need for a quick adjustment to the disruption that lockdown policies have forced upon lawyers. Though this is something that all articles in the issue touch on, it is a prominent theme in the articles by Suzanne Chiodo focusing on civil justice, by Palma Paciocco focusing on criminal justice, and by Richard Haigh and Bruce Preston on court administration.²

As mentioned, millions in Canada and around the world have seen their work conditions change dramatically. For many of who could not switch to work from home—often workers who enjoy relatively few protections—going to work now has become even riskier. Sara Slinn's contribution uses workers' protesting the lack of safety procedures in the workplace for a comparison between American and Canadian labour law on this issue, as well as more basic questions pertaining to collective action.³ For many other people, the pandemic did not mean a riskier job, but the end of it. Despite some government assistance, many are now

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2. Suzanne E Chiodo, "Ontario Civil Justice Reform in the Wake of COVID-19: Inspired or Institutionalized?" (2020) 57 *Osgoode Hall LJ* 801; Palma Paciocco, "Trial Delay Caused by Discrete Systemwide Events: The Post-*Jordan* Era Meets the Age of COVID-19" (2020) 57 *Osgoode Hall LJ* 835; Richard Haigh & Bruce Preston, "The Court System in a Time of Crisis: COVID-19, and Issues in Court Administration" (2020) 57 *Osgoode Hall LJ* 869.
 3. See Sara J Slinn, "Protected Concreted Activity and Non-Unionized Employee Strikes: Worker Rights in Canada in the Time of COVID-19" (2020) 57 *Osgoode Hall LJ* 605.

facing the prospect of bankruptcy. Stephanie Ben-Ishai considers the impact the pandemic has had on lives upturned by this catastrophic loss of income.⁴

All these articles consider the way the COVID-19 pandemic has disrupted life and law. Some of them also suggest that the pandemic may also “disrupt” law in a manner akin to the way MBAs and techies use the word. In different ways, they examine the possibility that the pandemic has not just forced quick, temporary patches to existing law, but may lead to needed changes that before the pandemic were always put off for another time. In their contribution, Carys Craig and Bob Tarantino consider how copyright law can be re-imagined to mesh with the digital revolution, balancing more appropriately user and creator rights.⁵ Eric Tucker, Leah Vosko, and Sarah Marsden similarly argue that the pandemic should be an opportunity to bring Canada’s welfare legislation to the standard owed to others as a matter of common humanity.⁶

In these articles there is the view, or at least the hope, that the pandemic could be, in the words of Arundhati Roy, “a portal, a gateway between one world and the next.”⁷ Against this aspiration, reality has so far proven harsher. Even before the pandemic, a significant body of research noted the correlation between rising levels of inequality and various social ills, including greater political polarization and higher rates of “death of despair.”⁸ So far, however, rather than leading to a change in course, the pandemic has exacerbated these trends. At a time that most people struggled, the world’s wealthiest have generally done well. Several of the articles in this issue explore some of the distributive effects of the pandemic. Jeniffer Koshan, Janet Mosher, and Wanda Wieggers review court proceedings dealing with cases of domestic abuse and show that they have paid little attention

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4. Stephanie Ben-Ishai, “Consumer Bankruptcy in the Wake of COVID-19: The Calm Before the Storm” (2020) 57 *Osgoode Hall LJ* 637.
 5. See Carys J Craig & Bob Tarantino, “An Hundred Stories in Ten Days’: COVID-19 Lessons for Culture, Learning, and Copyright Law” (2020) 57 *Osgoode Hall LJ* 567.
 6. Eric Tucker, Leah F Vosko & Sarah Marsden, “Flawed by Design? A Case Study of Federal Enforcement of Migrant Workers’ Labour Rights in Canada” (2020) 57 *Osgoode Hall LJ* 665.
 7. Arundhati Roy, “The Pandemic Is a Portal,” *The Financial Times* (3 April 2020), online: <ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca>.
 8. See e.g. Jonas Pontusson & David Rueda, “Inequality as a Source of Political Polarization: A Comparative Analysis of Twelve OECD Countries” in *Democracy, Inequality, and Representation in Comparative Perspective* (Russel Sage, 2008) 312; Anne Case & Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton University Press, 2020). To be clear, we are not arguing here for a causal connection between inequality and social problems, a question that remains contested.

to the particularly acute effects of the pandemic on victims of such violence.⁹ Elise Mercier and Sean Rahaag examine how asylum seekers from the United States, under pandemic laws passed via executive orders, are unable to seek entry to Canada, in contravention of international laws.¹⁰

Looking at the bigger picture, Dan Priel considers the question of tradeoffs that many countries have been struggling with and their implications for the law. He asks there, “What will be the long-term effects of the pandemic?”¹¹ By some accounts, COVID-19 has already permanently altered the way science is done.¹² Law is a profession notorious for its institutional conservatism, but it is safe to assume that some of the changes brought about by the pandemic are here to stay. Just how much remains to be seen, but one thing is sure: This issue is by no means the end of the discussion of the impact of COVID-19 on the law.

And beyond? Horrible as its death toll and devastating as its broader effects have been, the current pandemic has been mild compared to that of the flu pandemic that ravaged the world from 1918 to 1920. By the most conservative estimate, that pandemic killed seventeen million people (and by some measures several times that) at a time when the world’s population was less than a third of what it is today. That outbreak began spreading in the final months of World War I, itself the cause of death and injury of many millions. Despite all that, the decade that followed was marked by prosperity, optimism, and liberal change. Our world is in many ways very different, so it would be facile to predict that we are about to have our own Roaring Twenties. But one lesson to take from this century-old pandemic is humanity’s capacity for quick recovery through collective amnesia. Right now, this may be a source of hope.

9. Jennifer Koshan, Janet Mosher & Wanda Wiegers, “COVID-19, the Shadow Pandemic, and Access to Justice for Survivors of Domestic Violence” (2020) 57 Osgoode Hall LJ 739.

10. See Elise Mercier & Sean Rehaag, “The Right to Seek Asylum in Canada (During a Global Pandemic)” (2020) 57 Osgoode Hall LJ 705.

11. See Dan Priel, “COVID-19: Cost-Benefit Analysis and Politics” (2020) 57 Osgoode Hall LJ 537.

12. See Ed Yong, “How Science Beat the Virus,” *The Atlantic* (14 December 2020), online: <theatlantic.com/magazine/archive/2021/01/science-covid-19-manhattan-project/617262/>