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Beyond the Virus: Multidisciplinary and International Perspectives on Inequalities raised by COVID-19

Compiled by Ivanka Karaivanova

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The City Law School

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Abstract

This report summarises the Work-in-Progress Symposium ‘Beyond the Virus: Multidisciplinary and International Perspectives on Inequalities raised by COVID-19’. The event consisted of four panels over two days. It brought together the contributors for the forthcoming edited collection with Bristol University Press (BUP), due to be published in 2022 under the Bristol Studies in Law and Social Justice series, tentatively entitled “Beyond the Virus: Multidisciplinary and International Perspectives on Inequalities raised by COVID-19” edited by Dr Sabrina Germain and Dr Adrienne Yong at The City Law School. The presentations were based on the chapters to the edited collection by each contributor and were followed by discussions. This collection examines social inequalities brought to stark attention by the COVID-19 pandemic under three thematic strands: power and governance, gender and sexuality, and marginalised communities. This project brings together a range of international scholars from multiple disciplines (law, sociology and politics) to showcase a diversity of perspectives on these themes. The unknowns around this novel virus and the scale of the epidemic make COVID-19 and its inequalities a timely subject. Understanding each of these issues from the perspective of multiple disciplines, with law at its centre, is the first step towards tackling them concretely and achieving social justice. The thematic coherence on social inequalities from international and multidisciplinary lenses is the project’s central feature.

Keywords: COVID-19, inequality, governance, gender, marginalised communities.

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PANEL I

1. 'Inequities during the COVID-19 Crisis in Quebec: Governance Law to the Rescue'

Marie-Ève Couture-Ménard, Louise Bernier, Mylaine Breton and Jean-Frédéric Ménard
(Université de Sherbrooke)

1.1 Presentation

Introduction

The presenters started with introducing the objective of their chapter in the forthcoming edited volume, which is to explore the impact of law on the worsening or exacerbation of inequalities during the COVID-19 pandemic, as well as the mitigating role that law can play with regard to these inequities. Is law part of the *problem* or part of the *solution*?

In terms of theory and method, their theoretical framework is governance law theory. Governance law theory is a response to the observation that the last half century has seen the emergence of new forms of regulation which either undermine or displace law as a dominant paradigm or call for reimagining it. Governance theory tends to go with the latter option: it seeks to understand the increase of new forms of norms, e.g. guidelines, recommendation, labels, colour codes, nudges, etc. And it looks at these new forms through a renewed notion of legality which incorporates standards, such as reflexivity, inclusion and consultation of stakeholders.

Among the proliferation of norms that the response to the pandemic has generated and that in itself would be worth investigating, the presenters had narrowed down their inquiry to containment measures or also 'lockdown' measures. Among those, the contribution of Couture-Ménard, Bernier, Breton and Ménard is focussing on two specific case studies:

- School closing: Young children and food insecurity, and
- Curfew: Victims of domestic violence and homeless people and housing precarity.

Overview of the containment measures in Quebec

Each jurisdiction has used a variety or a specific mix of containment measures. In Quebec, particularly, the response to the pandemic could be characterised by two phases. First, there was a very broad containment, where most public spaces were closed, such that people did not have much choice than to stay home. Some populations, such as people over 70 years old, were also strongly encouraged to stay home while people living in institutions, such as nursing homes, were not allowed to receive visitors. Then secondly, at the end of September 2020, a more complex system of alert levels was implemented to track infection levels and modulate measures at regional rather than province-wide level.

Legal framework for the pandemic response

Most of the response in the province of Quebec was coordinated under the Public Health Act¹ which confers broad powers to the Government. A 'public health emergency' was declared by the government and since March 2020 this declaration has been renewed from week to week, hence currently Quebec is under this public health emergency declaration. From the point of view of the government, most of the measures that were adopted in response to the pandemic and are subject of the discussion have been adopted by Executive Decree: either through orders in Councils or Ministerial orders.

¹ Public Health Act, CQLR c S-2.2.

This way of governing in crises, undoubtedly, has advantages. On the one hand, it allows for more agility in responding to an ever-evolving and, in a way, unpredictable situation. But on the other hand, it also excludes traditional democratic checks and balances and concentrates decision-making at the highest level of the government.

Many of the measures that were adopted, predominantly in the first phase, were of broad application and for this reason they led to inequalities. While examining the interaction between the measures adopted and the social inequalities, Couture-Ménard, Bernier, Breton and Ménard formulated the hypothesis that some of the alternative forms of law, forming part of the paradigm of governance law, were likely to be part of the solution adopted to mitigate inequalities, worsened by containment measures.

Case study 1 - School closing: young children and food insecurity

On 13 March 2020 schools, early childhood centres, nurseries and pre-schools were closed by an Order in Council in accordance with Article 123 of the Public Health Act. Very early on it was suspected that one of the unforeseen impacts of this containment measure would be its impact on those children who depend on eating breakfast at school.² In April 2020 a significant number of people in Quebec – a third of adults living with children, reported living with food insecurity, while across Canada the pandemic period has seen 2,5 percent increase in food insecurity. Therefore, at this early stage that was a concern. The analysis of the timeline of the events and the responses with regards to the specific situations shows that community organisations were quicker than the government in identifying the risk associated with food insecurity and that these organisations have been an integral part of the mitigation efforts in the first phase of the pandemic. Later on, it became a government priority to keep schools open for obvious educational and economic purposes, but also such that they could continue to play their role as social safety nets.

After schools in Quebec closed, food insecurity became an overall concern throughout the society - some products were with scarce distribution, networks have been disturbed, hence it was an issue for many people to get access to food. And very rapidly, 'The Breakfast Club', which is a community organisation funded by the government, but not exclusively, which reaches children at risk of food insecurity through schools, realised that school closure were very likely to impact their beneficiaries.

'The Breakfast Club' firstly alerted public opinion and set up an emergency fund to support the population they serve. It took two weeks after that for the Government to come up with structured response. But it demanded to mandate 'The Breakfast Club' to coordinate the logistics of food distributing to those organisations that could reach people at risk of food insecurity at home rather than in school. As a result, this new programme, instead of reaching 30.000 children, as they usually did with breakfast in school, was able to reach 60.000 children and their families through this new method. Further on, the government provided new funding but it had to rely on the logistics of a community organisation to deliver this measure.

Moreover, the school year ended in June 2020 and for the beginning of the next school year in August 2020 there was an already existing measure that was meant to provide food in schools in targeted areas which was based on the socio-economic level of the postcode. This measure was extended to cover the whole school system in Quebec, therefore every school was now targeted, while community organisations were also put to a contribution: they were funded and mobilised to assist in delivering this extraordinary measure.

In order to support the work of community organisations in delivering the measure and

² In Quebec there is a programme which provides breakfast to children in school and therefore attempts to fight food insecurity.

delivering the food aid, these organisations were exempted from the closure orders. Initially, they were all asked to close down as they were treated like ‘non-essential services’, even though they were most likely ‘essential’. It took a little while before this adjustment was made and it was made clear that community organisations were allowed to stay open and to continue with their mission.

And then finally, in December 2020 and January 2021 the burden of containment measures partially shifted from schools to non-essential businesses because the latter were closed down immediately after Christmas, and the first week of classes was held remotely in an attempt to allow children to go back to school. The idea was that schools were such an important part of the social network that they had to be protected, thus businesses were closed with the objective of the salvaging the school year allowing students to continue going to school as the third wave of COVID-19 was coming. In conclusion, there have been several adjustments in relation to the evolution of interaction of food insecurity and school closing, starting from a very broad measure, closing everything, including schools, and then the inclusion of various actors and implementation of new measures aiming at compensating the rising inequity of the vulnerable population.

Case study 2 - Curfew: Victims of domestic violence and homeless people and housing precarity

At the beginning of January 2021 the government ordered that ‘between 8:00 pm and 5:00 am no person may be outside the person’s residence or its equivalent, or its grounds [...]’.³ The fine for violating the curfew was from 1.000 to 6.000 Canadian dollars. The curfew was initially implemented for one month as a ‘shock measure’ to stop the second wave of COVID-19 but was in place for approximately 5 months. Right away, there was a concern that it would be difficult for victims of domestic violence to call for help in the presence of the spouse. In addition, several emergency housing centres had already reported being full before the curfew while others feared they would run out of rooms. Moreover, homeless people were also under stress and some of them had to hide from the police after the curfew, sometimes in dangerous places in the cold temperatures. For instance, a homeless man had died outside of Montreal in an outdoor toilet near a shelter, possibly hiding from the police after the curfew time. And right from the beginning of this containment measure, there was a significant mobilisation of grassroot organisations and academics that denounced the impact of the curfew on these vulnerable populations.

The comparison of the mitigation measures targeting victims of domestic violence to those targeting homeless people shows that the domestic violence victims were automatically a concern for the government which stated that the curfew should not prevent women from leaving violent households. However, it took three weeks for the Superior Court to decide that the homeless people should be exempted from the curfew. Hence, there were two very different stories in dealing with these vulnerable populations regarding the curfew: the first one was relating to statements of the government, while the other mobilised traditional law and courts in getting mitigation measures officially.

Conclusions

The preliminary results of Couture-Ménard, Bernier, Breton and Ménard’s work in progress let to nuancing their initial hypothesis that the alternative forms of regulations are the solution to *mitigate* social inequities, as follows: traditional and alternative forms of regulations are intertwined in both *generating* and *mitigating* inequalities. For example, the response to school closings’ effects on food insecurity combines direct state action and coordination with community actors associated with governance norms, while the response to the curfew’s effects on housing precarity combines community mobilisation and reactive

³ Order in Council 2-2021 of 8 January 2021 – Ordering of measures to protect the health of the population amid the COVID-19 pandemic situation, Government of Quebec.

state action. With the deepening of their research, the presenters will refine their understanding of the role of law in both *generating* and *mitigating* inequalities during COVID-19 pandemic and they hope to be able to identify patterns or disparities between vulnerable populations that were addressed.

1.2 Discussions

The presentation of Marie-Ève Couture-Ménard, Louise Bernier, Mylaine Breton and Jean-Frédéric Ménard was commented by Marie-Andrée Jacob at the University of Leeds.

Jacob suggested that in the forthcoming book chapter, a third player could be included, namely experts and their expertise, e.g. in the presentation there was an indication that some academics were involved in the initiatives led by communities to alleviate the impact of curfews. The literature on governance theories sometimes is very critical of rules by experts but the latter have been very present during the last year and a half and their expertise now is very rarely unquestioned. Moreover, what could the forthcoming paper tell about what do we mean by 'community', by 'grassroots' and who speaks on behalf of local grassroots communities? Another topic is the comparison between the different reactions as to the victims of domestic violence and the homeless people. It took more time for the latter and it was less organised – this comparison gives potentially information about who speaks and who lobbies for those different groups, so it might be that women's groups have better connections with the government. In this comparison, and if 'The Breakfast Club' is added, it seems that the state reacts in different ways to different stakeholders. Is there and if yes, what is the hierarchy of suffering? Who is the state more readily aware of and ready to listen to? Finally, Jacob put forward the suggestion that it would be interesting to see in the book chapter how the presenters imagine the recovery from the damages of the pandemic, for example by anticipating the grassroot-state-expert interactions in the post-COVID times.

In response, Couture-Ménard, Bernier, Breton and Ménard pointed out their observations as to the way experts have been involved in the news. On the one hand, there are official experts reinforcing the message of the government, and on the other hand - dissenting experts presenting another narrative, trying to challenge the official expertise of the official epidemiology. Couture-Ménard, Bernier, Breton and Ménard also consider a fourth player - the media that gives platforms to these experts. The presenters are thinking about reflecting more on the actors, who are behind the mobilisation. This also relates to the other issue of government reactions to the different voices. As to the court decision regarding homeless people, the lawsuit was initiated by a legal clinic which mission is to promote access to justice for the homeless – thus again a community based movement. The presenters agreed that it is a key point to reflect on and find the answers to the question of who the government 'listens' to.

2. 'Business as usual: inequality and health litigation during the COVID-19 pandemic for Brazilian prisoners'

Natalia Pires de Vasconcelos (Insper Instituto de Ensino e Pesquisa)

2.1 Presentation

Introduction

Natalia Pires de Vasconcelos discussed the inequality in access to healthcare and health litigation before and during the COVID-19 pandemic for Brazilian prisoners. Currently, there is well-established literature arguing that health litigation in Brazil has reinforced racial, social

and economic inequalities for many years.⁴ Yet, the COVID-19 pandemic presented an opportunity for courts to be more sensitive towards the effects of their decisions on policy and public health – COVID-19 was an external shock that allowed institutions and normal institutional decision-making to change to address contingencies and possibly set a new standard for how the right to health and health law is dealt with in Brazil. However, this has largely been a missed opportunity for courts – they have addressed health litigation in Brazil as ‘business as usual’.

On the one hand, there is the general *right to everything* which is something that has been a big concern for health litigation literature.⁵ The right to health litigation is ‘concentrated’ in richer neighbourhoods, richer cities, richer states that have less vulnerabilities in terms of health care and socio-economic services and status – these are mostly the people who are bringing claims to the court system and the court system has this general standard for the right to help, meaning a ‘right to everything’.⁶ On the other hand, for those who are incarcerated during the pandemic, but even before it, the right to health was essentially a *right to nothing*. They have a right to health that would allow them to finish their sentence at house arrest or to be released early, but this right has not been taken ‘seriously’ by the courts before and during the pandemic.

Constitutional right to health and a public and universal healthcare system

Brazil has a constitutional right to health – it is a very extensive constitutional article which directly states that the State has a duty to protect the right to health of all and that this should be done through social and economic policies.⁷ This has, in fact, been done by social and economic policies – Brazil has a universal healthcare system that is free and provides universal healthcare coverage and it is one of the largest healthcare systems in the world in terms of numbers of people covered. As noted, it is free and completely accessible, anyone can use it and it provides pharmaceutical assistance and all sorts of services while dealing with the challenges of being a *universal* healthcare system in a middle income and highly unequal country.

Right to health litigation

Over the past 30 years since the Brazilian Constitution and the creation of the universal healthcare system, Brazil has an average and increasing average of 100.000 cases per year filed against the Public Healthcare System (SUS). The lawsuits are brought by individuals, i.e. they are not collective claims or class actions, and they require medicines and services. The evidence shows that most plaintiffs come from less vulnerable neighbourhoods, richer cities and states. Therefore, they are filing these cases from areas where there is a lot of healthcare coverage, which means that the plaintiffs do not come from the bottom of the Brazilian socio-economic division of its population. Pires de Vasconcelos noted that Brazil is one of the most unequal countries in the world. Hence it is the middle class, including upper middle class and lower middle class as there are some variations across the country, that is using the court system and litigation is coming from places where there is less vulnerability in terms of healthcare and other welfare. Half of these claims are asking for drugs treatments that are sometimes completely ‘out-of-policy medicines’ for fair reasons, i.e. it was decided that these treatments should not be provided because they are not ‘cost-effective’ – either they are extremely expensive, or they are unsafe, etc. The average of success of these cases within the court system is very high – between 60 and 70 percent of the cases are decided in favour of the plaintiff. In some court systems this percentage goes up to 80-90 percent, making it very likely if one has a legal claim for a treatment or service to be able to succeed. Cases largely and sometimes almost solely rely on the constitutional right to health

⁴ Octávio Luiz Motta Ferraz, *Health as a Human Right: The Politics and Judicialisation of Health in Brazil* (CUP 2020).

⁵ *ibid.*

⁶ *ibid.*

⁷ Constitution of the Federative Republic of Brazil (1988) art 196.

and the doctor's prescription.

Judicial decisions are followed by the threat of strong sanctions – it is very often a fine, blocking or seizure of public budget (e.g. blocking budgets accounts and transferring resources for treatments directly to plaintiffs), as well as even the detention of policy officials. In this increasing expenditure on compliance with decisions, between 1 and 8 percent of State budget are now destined to address litigation. At Federal level, it is around 1 percent of the budget and it contains 'hidden costs' that are not only connected to the provision of these medicines but also to organisational costs and reallocation of personnel, e.g. hiring new staff, creation of administrative branches to deal with compliance and defence and making litigation run smoothly. As a result, litigation becomes a second institutionalised door to the healthcare system. However, this does not have the effect of making these treatments or drugs collective - in Brazil the idea of a legal precedent is very weak, although this has been improving recently, which means that essentially despite having a successful claim regarding a specific treatment, that treatment is hardly made collective to the entire population. Thus Pires de Vasconcelos concluded that managing the system through litigation is very problematic.

Mass incarceration in Brazil

Pires de Vasconcelos continued with an overview of the incarceration situation in Brazil. Brazil has the third largest prison population in the world (702.069 people are in prison according to the last official numbers available since June 2020). According to Pires de Vasconcelos, Brazilian prison policy is very opaque, much closed system in terms of access to information, as it does not provide information to human rights organisations, the public, the families of the prisoners, and to lawyers and public defenders.

Over 50 percent of the prison population is very young - between the ages of 18 and 35. Moreover, out of the 88 percent of the overall prison population that has declared their race or ethnicity, 67 percent of them self-declare black or *pardo*.⁸ This means that there is an over-representation of very vulnerable communities among the prison population in Brazil.

Furthermore, 30 percent of the prison population is under pre-trial detention, i.e. they have not been sentenced and have been living in over-crowded conditions at an average level of 151.8 percent occupancy rate. In some States, the latter percentage reaches 200 percent which is twice as many people as the prison can hold. Pires de Vasconcelos made the conclusion that the system is very problematic in many ways.

Health in prisons before the pandemic

Close to 42 percent of the prison units do not have medical facilities or even one single space where prisoners can be treated. There is also a lack of specific spaces, such as a vaccination room or a snitching and managing room, X-ray rooms, waiting rooms, areas for decontamination for personnel or material, dressing rooms or bathrooms specifically destined to healthcare workers. Thus, whoever works in the prison facility is also under extremely dangerous and risky conditions, and this also shows that health is not a priority for prison administration as a whole. Furthermore, most units do not have a doctor or a nurse present every day – there are nurse assistants (as they are called in Brazil) who are the main and only access to healthcare for people in prisons.

Moreover, prison cells are often windowless and facilities are so overcrowded that prisoners need to take turns into who sleeps and who 'stands'. In some units there is also a lack of clean water, powers and sanitation. There is also food insecurity – families are sometimes the main source of food for prisoners and one of the things that happened during the

⁸ Pires de Vasconcelos explained that the closest English translation to *pardo* is 'brown' yet this is not completely accurate.

pandemic is that blocking access of families made food insecurity skyrocket. There are no measures from the State in this regard, despite the existing reports from human rights organisations which were listening and talking to families and people in prisons during this period.

In addition, many communicable diseases run free – for example, the levels of tuberculosis and HIV/AIDS are higher inside prisons facilities than outside. And finally, violence is also part of the daily life of prisoners, coming from other inmates, prison staff and the police. There is an absence of any human right provision protection.

COVID-19 pandemic in Brazil

Pires de Vasconcelos moved forward with summarising what had happened during the pandemic in Brazil. There are over 16 million cases confirmed and the number is rising. Brazil recorded close to 480.000 deaths and again this number is growing every day. There is a systematic failure of the government to address the pandemic - to some it has been inertia and efficiency while towards others, like some academics and public intellectuals courageously and openly call, it has been 'genocidal politics'.

The pandemic hit the vulnerable worst. Self-declared black and *pardo* patients were under higher risk of mortality when compared to white individuals. Being *pardo* was found to be the second most important risk factor to mortality of COVID-19 in the country after age.⁹ This was very problematic within the prison system as well - the data is extremely negative. In addition, families were not able to access the prison population, they had no news for months and months, and even defence lawyers were not able to access the prison population to receive information about what is happening. Riots and violence were skyrocketing as well as the reports of torture and inhumane treatment from staff and police.

COVID-19 and health litigation

Pires de Vasconcelos highlighted that health litigation remained the same before and during COVID-19 pandemic. Judges continued 'business as usual' – they decided cases even faster but the levels of granting petitions for the general public in terms of the right to health, statistically, remained the same. This means that the pattern in which they were addressing health law cases also remained the same. Pires de Vasconcelos noted that it seemed that judges were not concerned with the COVID-19 pandemic – it was not present in the judicial decisions at all. One can read a case decided during the pandemic without finding the judge talking about the ongoing healthcare crisis, despite dealing with health law and health cases. At the same time, health litigation for prisoners also remained the same – there had been skyrocketing number of Habeas corpus petitions filed from prisoners trying to get out of the prison system, e.g. to be transferred to other units or to be transferred to house arrest or for an early release. Almost 90 percent of those petitions were denied even for people that were part of the risk groups, while those 9 percent that were granted were going to be granted regardless of COVID-19. Pires de Vasconcelos concluded that judges are entirely *non-sensitive* to COVID-19 within the prison system and the risks of COVID-19 to the prison system.

2.2 Discussions

Following Pires de Vasconcelos' contribution, Octavio Ferraz (King's College London) shared his remarks on it.

Ferraz highlighted again the missed opportunity for the Brazilian courts to show more sensitive side. The sheer number of individuals being held in custody under pre-trial

⁹ Pedro Baqui and others, 'Ethnic and Regional Variations in Hospital Mortality from COVID-19 in Brazil: a Cross-Sectional Observational Study' (2020) 8 Lancet Global Health 1018.

detention is striking: 30 percent of the prisoners. They have been object of reports by the inter-American court of human rights for decades but this does not *sensitise* the Brazilian judges. As per Pires de Vasconcelos findings, during the pandemic, there are c. 10 percent of Habeas corpus petitions which were granted and 90 percent that were denied, thus Ferraz suggested comparing the former with the latter to see whether there is any pattern that explains these rates. The successful petitions are not related to COVID-19 so Ferraz recommended analysing whether this is the normal utilization, are there any interesting correlations between success and failure or characteristics of the claimants or their circumstances, e.g. race, socio-economic status, etc. One granted corpus was of a friend of the Brazilian president, highly reported in the media, and the basis of the decision was related to COVID-19 and the risk of his age and his comorbidities, which according to Ferraz, is an interesting case to explore.

Another issue is the number of doctors for the prisoners. Ferraz suggested converting the findings into a doctor per thousand and comparing it with the World Health Organisation (WHO) recommendations in this regard. This could also be done in general for doctors across Brazil. Do the numbers vary from Sao Paolo to Manaus? And finally, as to the 215 deaths of prisoners due to COVID-19, Ferraz put forward the idea of disaggregating these and examining whether there are any interesting differences between prisons in the South and in the North-East of Brazil, mapping a line with other inequalities, etc.

Pires de Vasconcelos agreed with all of Ferraz' suggestions and that she can expand more on the data provided. However, she pointed out that COVID-19 data in prisons is underreported, there are most likely many more deaths happening within the prison system or being reported as something else. For example, according to the Federal Panel of Brazil that shows information on people in prison that have been infected or died of COVID-19, some States have not updated the numbers since December 2020. On the other sub-topic as to the petitions in question, Pires de Vasconcelos explained that she was not able to look at the persons' profiles as a lot of those cases are under judicial secret. However, she agreed that it is worth exploring further the president's friend case which exemplifies how the Brazilian judicial system chooses to whom is going to grant rights.

3. 'Authority and Governance in Israel during the COVID-19 Pandemic: A Crumbling of Solidarity and the Rise of Social Inequalities'

Roy Gilbar (Netanya Academic College) & Nili Karako-Eyal (Haim Striks School of Law, The College of Management)

3.1 Presentation

Introduction

Gilbar and Karako-Eyal presented their findings about the relationship between law and solidarity. They particularly examined how the legislators view the COVID-19 legal measures policy in terms of protecting public health and preserving human rights, on the one hand, and the issue of solidarity on the other. How did the law contribute to the fight against COVID-19 in Israel before the vaccine? Do we need legal measures to fight the pandemic when people act in a solidaric manner? What is the relationship between law and solidarity in the context of a pandemic? How does solidarity influence the tension between the promotion of public health and the protection of human rights at times of a pandemic? These are the questions that Gilbar and Karako-Eyal are aiming at answering in their forthcoming book chapter.

Coronavirus in Israel – background and government measures

The Israeli population is about 9 million people, divided into the following three segments which are very important from the perspective of managing the pandemic: Ultraorthodox Jews (10%) who are very close-knit community; the biggest minority in Israel - the Arabs, mainly Muslims (20%) and the rest are secular and religious Jews (70%).

The first case of COVID-19 in Israel was confirmed on 21 February 2020 and three lockdowns followed. Vaccination started on 19 December 2020 and Israel now has nearly two-thirds of the population vaccinated. From the beginning of the pandemic the number of confirmed cases is 839,557 and the number of deaths is 6,418 people.

In terms of measures put in place to fight COVID-19, what the Israeli government did was similar to the other countries, namely isolation of patients (confirmed cases), of those with close contact with confirmed patients and of people who returned from abroad. There was also a prohibition on gatherings limited to 20 people outdoors and 10 people indoors and only for family members. The government shut down all educational institutions including primary and secondary schools, universities and currently teaching is still held via Zoom with the exception of schools which went back to normal short time ago.

The government decided that most people would work from home and staff on site was limited to 30 percent of the workforce. Moreover, the private and public providers of goods and services were shut down, including shopping centres, banks, theatres, etc. There was a legal duty to wear a face mask in public places and keep physical distance of at least two meters. The policy was also to impose lockdowns on long-term care homes to protect the elderly and those with severe disabilities.

How did the Israeli Government enforce these measures? According to Gilbar and Karako-Eyal, the measures were quite extreme and in the eyes of the liberals and people who believe in democratic regimes. The government allowed the police to give fines for violation of the regulation, e.g. to people who did not wear their masks, operate businesses at times of lockdowns, etc. The police was also allowed to enter into private properties to enforce the regulations. The government established an organisation, a public body that conducted epidemiological investigations so nurses or other people called patients who are diagnosed with COVID-19 asking about their whereabouts for the last 14 days and checked other people that were in contact with them. And finally, the most severe of extreme, according to Gilbar and Karako-Eyal, was to allow the Israeli Security Authority to trace the patients' whereabouts using their cell phones. This final measure was not accepted positively by the public.

The legal process

How were these measures put in place? In Israel there is an inheritance of the British mandate – before the establishment of Israel, the British gave the Israeli government the opportunity to issue regulations without the approval of the Parliament. These are called 'regulations-for-time-of-emergency' and they are only in force for three months. These regulations must comply with two main acts, which are considered part of the unwritten constitution of Israel: these are the Basic Law: Human Dignity (which secures basic human rights like the right to atonement, autonomy, equality, etc.) and Liberty and Basic Law: Freedom of Occupation. Nevertheless, the Parliament still has discretion and authority to consider the government's measures and monitor the chosen policy.

Discussions in the Israeli Parliament

During the observations of Gilbar and Karako-Eyal of the discussions in the Parliament, they indicated the tension between, on the one hand, the promotion and protection of public health and, on the other hand, the protection and preservation of human rights. The discussions also addressed the influence of solidarity and personal responsibility in fighting

the spread of COVID-19 and in striking a balance between public health and human rights.

Solidarity is a contested principle and refers to a practice that expresses the willingness to support and assist others with whom we recognise *similarity* in a relevant respect.¹⁰ The 'relevant respect' is determined by the specific situation. It is characterised by symmetry between people in the moment of enacting mutual support. Prainsack and Buyx talk about three tiers of solidarity.¹¹ The first one is the 'interpersonal solidarity', enacted at individual level, from person to person. When this solidarity becomes more shared in a group, this is called 'group solidarity' (second tier) – i.e. when personal actions of mutual support become so common that they turn into 'normal', expected behaviour in some groups. It gives a sense of community and this is the heart of the idea of solidarity. The third and highest level of solidarity is the society level when solidarity practices become a legal norm (legal and administrative).

The presenters showed and analysed extracts from the Israeli Parliament, talking through the issues, on the one hand, protecting and promoting public health, and on the other, protecting human rights. Gilbar and Karako-Eyal reviewed all parliament protocols, starting at February 2020 and ending at August 2020. Their idea was to identify reoccurring considerations. The research resulted in identifying four themes out of which Gilbar and Karako-Eyal presented three.

The first one is promoting and protecting public health. That was for example during a discussion that addressed the question of whether the Israeli Security Authority should be authorised to trace cellular phones. One of the participants said after revealing the concrete numbers of patients, deaths, etc., due to the coronavirus, that the world had lost control over the course of the pandemic while it has had control over it. He concluded that considering that they face multiplication of the number of confirmed patients every few days, they need to use all the tools at their disposal.

The second theme that Gilbar and Karako-Eyal identified was protecting and preserving human rights. The review of the discussion suggests that the participants addressed two issues: the first one was whether the suggested measures infringe individual rights and to what extent. That is for example during a discussion that addressed the issue of enforcement and one of the participants said that in the times of coronavirus, everything seemed to be allowed, but this is *unthinkable* in terms of entering into private properties, without an order, without suspicion. It was suggested that the Ministry of Justice of Israel must understand that human rights cannot be ignored every time the situation is a 'bit complex': 'We said we will live with the coronavirus – we must also live with human rights. These rights cannot be revoked, because it is a bit complex.'

The second issue in this theme was the constitutionality of the infringement. That was for example during a discussion addressing the issue of technologically supervised isolation of a person entering Israel. One of the participants asked another one: 'Aren't you afraid that the High Court of Justice will repeal the act?' and the other one said: 'Look, I do not know what will happen in the High Court, but if the High Court uses its common sense and asks – if I do not have [the Act], what is the alternative that currently exists in the hands of the government? The alternative it has is a more severe violation [of human rights]. And the idea in this Act is that the right to choose is given to the individual.'

The third theme concerned the issues of law, solidarity and personal responsibility. There

¹⁰ Barbara Prainsack and Alena Buyx, *Solidarity: Reflections on an emerging concept in bioethics* (Nuffield Council on Bioethics 2011); Barbara Prainsack and Alena Buyx, *Solidarity in Biomedicine and Beyond* (CUP 2016)

¹¹ *ibid.*

were three subcategories. The first one was the importance of the law or why solidarity is not enough. For example, one of the participants in the Parliamentary discussions said: 'Why do we need this tool and I would say - especially when we are getting back to routine? ... First and foremost, citizens' awareness of the existence of a special situation is declining. Awareness of precautionary measures and the willingness to follow them decrease. The willingness to give up comfort in daily life, such as isolation and so on decreases. The willingness to give up one's privacy is also declining.'

The second sub-category refers to the law's limited role or why the law is not enough. One of the participants said: 'We also support the idea that the public should be committed to this mission because at the end of the day the public have the tools to maintain social distance and stop the spreading of the pandemic, which are no less than ours. And I want us to say it every time without fear. The public must be a partner in this challenge of ours... so that we can help people keep the economy up and running as much as possible.'

And finally, the third sub-category is the role of the law in special communities (Ultra-Orthodox Jewish and Arab communities). That is for example: 'It should be borne in mind that in the Ultra-Orthodox Jewish neighbourhoods, the whole situation is more complex. There was less exposure to information, less exposure to communications. There is also a matter of values that you suddenly say to a person "you should close the synagogue"... it is not something that is applied immediately. One has to embark on an in-depth process... In order to defeat the coronavirus, we must bring about the people to be positive about it and if we are unable to do it, it has no meaning.'

The second axis Gilbar and Karako-Eyal had been running since the beginning is the Halakhic Rabbinical axis. The Chief Rabbi, the Police station commanders, district commanders and other officers all the time conduct a dialogue with the Rabbinical leaders out of understanding that without rabbinic ruling and rabbinic statement, they will not be able to convey the messages.

Concluding remarks

Gilbar and Karako-Eyal concluded that it is impossible to fight a pandemic only with solidarity and we do need the law, particularly in Israel. However, using the law leads to compromising human rights. In this sense Gilbar and Karako-Eyal see that solidarity protects human rights, because when people act in solidaric ways, one does not need legal measures to enforce and compromise human rights. But on the other hand, it is impossible to fight a pandemic only with legal measures and you need solidarity. But the problem (at least in Israel) is the Tier 2 solidarity as there are three different communities. Yet, the level of solidarity within each is high. They are not so much committed within the society as a whole. Therefore, in order to convince each group to act in solidaric way you need to grow as nearly presented, you need to go to the 'leaders' and convince them that they need to promote the common good and not just of their people, but on the whole for the promotion of public health and the promotion of personal health and of each one of them.

3.2 Discussions

Gilbar and Karako-Eyal's research was commented by Marie-Andrée Jacob (University of Leeds).

Jacob compared the work of Gilbar and Karako-Eyal with Nancy Fraser's views related to the dilemma between the politics of recognition and the politics of redistribution and suggested their inclusion in the analysis.¹² Jacob added that distributive justice seems

¹² See e.g. Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age' (1995) 1/212 *New Left Review*; Nancy Fraser, 'Social Justice in the Age of Identity Politics: Redistribution,

complicated because of some ethno-racial and religious relations and hierarchies in Israel. As to solidarity, she asked: what would happen if we have a differentiated concept of solidarity or solidarities, what would happen to solidarity if we take the ‘similarity’ element out of it or if we expand it? According to Jacob, the pandemic showed our similarity with viruses, with nature, with animals, so this identity-based notion of solidarity, especially in the Tier 2, is really up for grabs under the current condition. Finally, attention was paid to the fact that there is also another societal group of migrant workers outside the three categories described by Gilbar and Karako-Eyal who ‘stay foreign’ (e.g. West Africans, Filipinos), thus what does Tier 2 solidarity mean to these who are out of the three groups?

Addressing Jacob’s remarks, Gilbar and Karako-Eyal noted that one theme that was not presented during the Symposium indeed was about distributive justice and social inequalities. Throughout the public discussion in the last year and a half, there is an intense public debate about social inequalities – it was reflected in the Israeli Parliament as well and will be examined in the forthcoming paper. As to similarity and looking into immigrants, the latter are considered being one of three communities which the government gave special attention to – each of them was attached to specific officer to take care of this sector. While the immigrants are not homogenic community compared to other groups, they are still living in the same area, sharing the same style of life. They have similarities, and even if they did not have such similarities, other common things could be looked at, such as the value of health. Moreover, all other communities were under discrimination and they experienced negative feelings from the entire public. They were all under attack, each one under its own unique way. Maybe this separates but also *creates solidarity* within the sub-communities.

4. “Lockdowns and Liberty”

Gwilym David Blunt (City, University of London)

4.1. Presentation

Introduction

Every major democracy, such as the United Kingdom, the United States and Canada, has a very small but quite vocal minority dissenting from the regulations brought in by the government in reaction to COVID-19, normally around the ideas of freedom and liberty. This tends to get dismissed with ludicrous conspiracy theories. Blunt expressed that he did not think that this is *prima facie* absurd. The expansion of state power into areas of our lives where it did not exist as directly as it does now seems to be a reasonable concern. Thus the *libertarian objections* might be plausible. One of the things that Blunt plans to do in his forthcoming chapter is to look at this and show that it is an absurd objection, because it is not particularly relevant, but then reconstruct it using an alternative concept of liberty.

The libertarian objection

What is meant by ‘liberty’ and ‘freedom’ in this context? The COVID-19 literature tends to have a very uncritical idea about what freedom or liberty means, according to Blunt. Typically, what we see in both protestors and their sympathisers in the academia and the press, we get a Hobbesian idea of liberty, or that liberty is ‘non-interference’. This is a very simple and very widespread way of understanding liberty – it simply means that when you are not obstructed from doing something that you both want and are able to do – you are free. If you are not prevented by the law from acting in a certain manner, then you are freer

Recognition, and Participation’ (1996) The Tanner Lectures On Human Values Delivered at Stanford University April 30–May 2 1996;

than you otherwise would be. It is a coherent conception of liberty and this can be seen in the case of COVID-19 regulations, where there has been a contraction of liberty.

Mask mandates

Prior to the pandemic, one was able to get on the London underground without wearing a face mask - one could choose to wear a face mask but was not mandated to it. With the pandemic regulations, one now cannot do that, at least without the risk of incurring a fine. The space of freedom has been contracted and as a result one's 'can do' assumptions, e.g. how to conduct their daily life, have been limited.

The problem with this argument is not with its coherence, but its irrelevance – why should we care particularly about increased regulation of my personal choices? We accept this sort of interference regularly in the pre-pandemic times much more stringently. For example, you cannot go to the tube naked – this was not considered to be a particularly egregious violation of liberty, yet we never felt that as a limitation on liberty at all. Blunt found by looking over the objections to the mask mandates that there was a very limited amount of them that got raised.

Objections

Ofentimes there are appeals to individual autonomy and perhaps human rights discourse around freedom of expression. Unfortunately, this does not tend to be developed as well as Blunt would like to see it – for example, freedom of expression is often associated with mask mandates. It is unclear how this limits the ability to express myself because one can express their objections of wearing a mask quite easily – people do it all the time e.g. online, on Twitter, during organised rallies objecting the lockdown measures, via representatives in parliament arguing for easing of restrictions, etc.

The other line of attack raised came from people like Jonathan Sumption, formerly of the Supreme Court of the United Kingdom. He had objected also to the limitations, but his more interesting work was on the processes by which these regulations have come into play. Sumption argued that it was not the means but the *process* that matters. Yet, he was not able to make this case. He is deeply Hobbesian in his thought. Thomas Hobbes generated his conception of liberty with the key idea of reconciling liberty and autocracy –if there is a benevolent dictator who does not interfere with you, Hobbes says you are free. Sumption's procedural objections do not make sense based on the way he conceptualises liberty. It is not clear why the trade off between freedom and public health generates problems for society. This is one way of defusing the objection.

Reconstruction of the objection

Liberty is not the exclusive property of the libertarians and Hobbesians. There is the republican tradition which is a negative conception of liberty in which liberty is understood as absence of arbitrary interference rather than interference *simpliciter*. And this makes a lot of difference.

A paradigmatic case is slavery. A slave can have a benevolent owner or a lazy owner who never interferes with their choices. They are not subjected to interference. It will be very strange to say that this slave would be free. A Hobbesian will be committed to that. A republican would not be, because despite the fact that they are not interfered with, they are always vulnerable to interference and that vulnerability is what contracts liberty.

This conception of liberty is more appealing because it captures and explains many of our (or Blunt's) intuitions about liberty. There is a qualitative difference between laws made in liberal democracy with the rule of law and those made in an absolute despotism. The two things seem intuitively very distinct and this is a way of reconciling law and liberty together in a way that does not recourse to metaphysics or thick conceptions of the good. It simply says

that laws when they are adequately controlled and regulated are not an impediment to liberty because liberty is not just our 'can do' assumptions, but our status within society – that status of citizen or status of a free person. The Hobbesian understanding of liberty loses sight of this important status element. Relating this back to COVID-19, it can be said that we cannot assume that these restrictions limit liberty in a meaningful way, provided that they are not arbitrary, at least not in the context of a liberal democracy characterised by the rule of law with parliamentary oversight with free and fair elections. Using this conception of liberty, Blunt looked at how specific COVID-19 regulations had come into play in the UK with four instances which gave him cause for deep concern about both liberty and equality.

The first is Boris Johnson. According to Blunt, he has a 'tenuous' relationship with truth and constitutional guardrails of the Office which exposes a deeper problem with the concentration of power in the executive. His character is genuinely relevant. He seems to be a political leader most attuned to personalised rules since King Charles I, who was supported by Thomas Hobbes.

The second one is the COVID-19 legislation. The Coronavirus Act contains rather unprecedented spending powers and was only subject to a six-month review due to the Backbenchers. These powers give the executive the ability to spend at will without parliamentary oversight. Looking back to the Civil War and 17th century, we can see a similar situation in which the executive had the ability to spend without representation - this was one of the major causes of the rift between the Crown and the Parliament with the key characteristic of absence of liberty. Returning to COVID-19, we can see amongst the spending scandals, relating to the NHS Test and Trace system, that there is public mismanagement of funds and a deliberate attempt by the government to avoid parliamentary scrutiny.

The third topic is the lockdowns legislation. It was not the Coronavirus Act (CVA) that the government had chosen to implement, neither was the Civil Contingencies Act (which, according to Blunt, would have been the next appropriate form of legislation to draw upon), but the Public Health Act of 1984 (PHA). PHA was designed to constrain individual cases where a transmissible disease could be detected. If someone came back to the UK carrying drug-resistant tuberculosis, for example, they will be appropriately subjected to PHA. If they came in through healthily without coronavirus, PHA seems an odd choice. So why choose it? The simple answer, in Blunt's views, is accountability – with the Civil Contingencies Act and the CVA, there is a wide degree of parliamentary accountability and scrutiny, which is lacking in the PHA. Here one might see a pattern in how the government has dealt with coronavirus.

And finally is enforcement. We have only preliminary evidence on this count but it has given the police a wide degree of discretion in enforcing these laws which may be affecting minority communities far more greatly than the white majority in the UK, along racial lines, and possibly along class lines too. It had also given the police the ability to levy extraordinary fines up to thousands of pounds, fines which would have been outside of the scope of a judge in a Civil Court to give. Hence, CVA and other forms of legislation have granted the power to the police to enforce the laws with a wide degree of discretion and disproportionate fines.

Concluding remarks

In the foregoing a trend can be seen which should be a concern, because unlike the libertarian objection, the republican objection can ring the alarm bells. This is creating a drift towards personalised government, which is not accountable. That could be facilitating corruption in public spending and, more fundamentally, there is eroding of our status as equal citizens by subjecting us to arbitrary power. It will be no surprise that the more vulnerable in society are going to be more subjected to arbitrary interference by the

authorities and Blunt's concern is that there will be a legacy of this beyond the virus and the Britons are going to become more accustomed to the arbitrary interference. It is about accountability and our ability to use our power as citizens who are equal before the law to check excesses of power and the current government is proving remarkably adept at avoiding that sort of accountability.

4.2 Discussions

Octavio Ferraz (King's College London) discussed Blunt's presentation.

Ferraz agreed that the libertarian conception of freedom (also sometimes referred to as factual freedom) is more related to *license* rather to *freedom*. And the question is what the limit of these public health measures is before they started interfering with freedoms. Ferraz suggested that in addition to the arbitrary freedom, Blunt could also use in his analysis the test of proportionality. If a measure is disproportionate, it is arbitrary and that is the kind of lockdown public health measures that impact unjustifiably on freedom. Ferraz also noted that in the forthcoming chapter it will be worthy to establish the framework of how Blunt looks at the issues outside that implausible idea that *any* public health measure is an infringement of our freedom.

From Blunt's point of view, the question of how we assess arbitrariness in relation to freedom is absorbing – yet, the lack of parliamentary scrutiny in the UK *is* or *should* cause a huge amount of alarm. E.g. people can easily dismiss how COVID-19 regulations affect the homeless. But when you take the republican conception of liberty, in which there is a co-dependence between individual freedoms, and if one domino falls, it is a matter of time before the other ones do and Blunt will try to develop this independently in his analysis.

PANEL II

5. '(In)Equality, Expertise and the COVID-19 Crisis: An Intersectional Analysis'

Valentina Cardo (University of Southampton) and Julia Boelle (Cardiff University)

5.1 Presentation

Introduction

Cardo and Boelle presented their preliminary findings on the experts' representation, from health officials to politicians, during the COVID-19 crisis (1 March 2020 – 31 March 2021). They are particularly focusing on Black, Asian and Minority Ethnic (BAME) women*, taking an intersectional approach. The daily press conferences of the UK government and their coverage in the media, e.g. tabloids, national newspapers, etc., were Cardo and Boelle's main interest lies. They looked at the ways in which BAME women were allowed to speak about the pandemic as experts. The overall argument is that the presence (or lack thereof) of diverse voices in the public arena gives us a sense of the type of the democracy we live in.

* Cardo and Boelle used the term Black, Asian and Minority Ethnic (BAME) throughout their presentation. They explicitly warned that the term BAME is controversial and explained that they use it exactly the way that has been used during the COVID-19 crisis - as an umbrella term, highlighting the health disparities during the pandemic.

Background and Methodology

Cardo and Boelle started by acknowledging inequality for women and BAME voices in the public arena: there is underrepresentation and misrepresentation of women, BAME women and BAME people (more generally) in the media worldwide, as well as in expert roles and in politics. Ethnicity complicates this and, according to Cardo and Boelle, COVID-19 crisis exacerbated it.

Cardo and Boelle looked at 156 press conferences/briefings between 1 March 2020 and 31 March 2021. They did a head count of (BAME) women experts, who they are: who they speak for, who they represent and what do they speak about. They also analysed the most read newspapers and tabloids during the pandemic, looking for intersectional bias.

Preliminary findings

In the 156 press conferences examined, Cardo and Boelle found that there were a total of 395 speakers, 81% (or 320 speakers) of whom were men and 12% (or 49) were BAME men, 19% (or 75) were women with 2% (or 8) BAME. The 395 speakers included speakers who came to speak multiple times. The second set of data looks at unique speakers – there were 46 unique speakers in total amongst whom 32 men (69.6%) and 7 BAME men (15.2%) and 14 women (30.4%) and 2 BAME women (4.3%).

Then Cardo and Boelle looked at those leading the press conferences. There was a total of 155 leading speakers of whom nearly 96% were men and 10% were BAME men, nearly 5% were women with 3% of BAME women. Cardo and Boelle found that there seemed to be a reason for women leading these conferences - for instance twice Priti Patel led the conference when the Prime Minister was sick and once she led it 12 days after Boris Johnson message to the nation. Yet, at this stage, there is no evidence for this relation. Furthermore, there were 240 supporting speakers of whom 72% were men, 14% were BAME men, 28% were women and only 1.3% were BAME women. Therefore, there were more women in supporting roles but what Cardo and Boelle discovered is that these women were more likely to be 'experts': they either held a doctorate or a title – this was 64% of the women in supporting roles as opposed to nearly 38% of men. Cardo and Boelle concluded that men did not seem to need to hold titles when they were in supporting roles.

The Sun coverage

Cardo and Boelle looked at The Sun and found a nuanced (rather than outright negative) biased coverage of these (BAME) women. They were only occasionally referred to as 'experts' (despite holding titles) or more specifically 'top government scientists' or 'senior politicians'. They were usually positioned in the articles in supportive, rather than main roles, described as 'standing' or 'appearing next to'. (BAME) women were also often mentioned towards the end of the article. As per the inverted pyramid of journalism, this is problematic, because the main news tend to come at the beginning of the article. (BAME) women were discussed as adding to, rather than providing, key information. Cardo and Boelle also found that (BAME) women were often made to deliver warnings through dramatic language, e.g. 'crooks' selling 'bogus' protective gear. Moreover, (BAME) women were reported to appeal to 'guilt', for instance for not following the rules. The Sun often praised these (BAME) women for taking the stance – e.g. 'a senior politician recognising the human costs of the restraint shown by the vast majority of Britons'. Finally, there was some evidence of emotional language of care. But there was a very rare acknowledgement of the absence of (BAME) women.

The preliminary findings indicate that it might be worth looking at the content of the conferences: there is evidence that (BAME) women were usually asked to deliver information about domestic abuse, child abuse, dating advice, vulnerability around fraud and nurses and NHS difficulties.

(Preliminary) Conclusions

Cardo and Boelle had made a preliminary conclusion that (BAME) women are greatly under-represented in the government and the underrepresentation in these brief conferences is a confirmation of that. They are also underrepresented in position of leadership but the data shows inability (or unwillingness) to include (BAME) women who can speak knowledgeably about the COVID-19 crisis. The (BAME) women who took part (not in leading positions) in the press conferences held titles (e.g. Dr or Prof), whereas men did not need a title to be included. The representation of these groups in the media showed some evidence of gender coverage although at this stage there are no evidence of other types of bias. This, according to Cardo and Boelle, may indicate that gender bias is still acceptable in news coverage, whereas, for instance, race bias is not. The lack of (BAME) women experts during the pandemic (at a time when people relied heavily on the media to garner news of what is happening) and their under- and misrepresentation in the news media were consequences for the way we see ourselves as represented.

5.2 Discussions

Jo Littler (City, University of London) and Maartje De Visser (Singapore Management University) discussed Cardo and Boelle's presentation. Additionally, the rest of the panel also raised questions and shared their views.

Littler brought up the issue of party representation and political alignment of the speakers and suggested it is worth exploring how their affiliations relate to their statements. She also suggested a possible connection of Cardo and Boelle's work with the Expert Women Project which conduct surveys counting the number of women authority figures across flagship media news programmes. For example, Expert Women found that the number of female experts during the pandemic went down, and that in March 2021 the Today Programme had their lowest number of female experts since 2013. How do these issues of lack of media representation and inequality relate to wider gendered expectations and forms of political policy during the pandemic?

Furthermore, De Visser questioned whether Cardo and Boelle's findings show any changes over time in the extent to which women were featured. Is there a correction or is it that we started with a certain approach and since we seem to be able to almost 'get away with it', as it is accepted, there is no sense of urgency to change this? Moreover, De Visser highlighted that at some point, Cardo and Boelle said it is no longer acceptable to engage in overt race bias and we have not seem to have reached that point yet when it comes to gender. Is this only a question of acceptability or a question of awareness? Would women or other individuals be more likely to comply if the public officials in charge of communicating the policy were relatable so they would share the same or similar identity?

Cardo and Boelle view that none of this functions in a vacuum – they think that the policy is directly related to behaviour and that there is a direct relationship between policy behaviour, media representation and actual representation in body in the case of the press conferences. Political affiliation is something they will also consider. However, their focus was on expertise rather than political aligning. For example, Priti Patel was only covered five times out of the 75 times of women's representations and all the other women are experts – e.g. the Head of Test and Trace, the Medical Director of NHS England, the Medical Director for Primary Care, etc. And finally, the thread for Cardo and Boelle is using COVID-19 as yet another case study to show the epistemic injustice about the lack of women in positions of knowledge and the consequences that this has for democracy and public life.

6. 'COVID-19 and Lockdown: An Equalities Analysis'

Joe Tomlinson (University of York & Public Law Project) and
Jed Meers (University of York)

6.1 Presentation

Introduction

Tomlinson and Meers presented their findings about the interplay between gender and law and compliance, as well as the barriers to compliance. Legal compliance can be viewed, as it traditionally is in socio-legal literature, as social psychology thinking about models of why people comply with different rules. For the presenters, it is important to factor equality's dimensions into this, inferring that the experience of complying with lockdown regulations is *different* for people with *different* protected characteristics.

At the start of the pandemic, there was a great amount of ongoing legal change with new rules being introduced, which Tomlinson and Meers suspected will be amended and evolved very quickly. But what was really unusual about that moment was how there was *quick* and *significant* change as well as the way that this significant change impacted on the day-to-day life of everybody in the population. That gave Tomlinson and Meers the opportunity to study everyday behaviours in relation to the law in an unusual way.

The central question at the heart of the presenters' broader project was simply: why do people obey rules, why do people obey legal rules, in particular, and what drives people to behave in relation to rules in certain ways? Tomlinson and Meers hope to get out of these questions various results: the first is to suggest new ways of thinking about the legal/rule-based component of public health responses and the second is to find new ways of thinking about the legal or rule-based components of public policy generally. Tomlinson and Meers concluded that their research tries to develop a sense and understanding of how people perceive their rights in contemporary society.

Method

Tomlinson and Meers had done a series of national quantitative surveys on the public perception of key lockdown rules. The first one was done at the start of lockdown, the second one – during lockdown, and then the final survey they did later with particular focus on face coverings.

The first two surveys, specifically, were large and included 60 questions in relation to all kinds of background assumptions, e.g. perceptions on the rules, understanding of the rules, etc. These questions were built out of concerns that were raised in the theory that we already have on legal compliance. What Tomlinson and Meers are trying to understand is how far that existing theory can go, how far it is relevant to this situation, do they need to refine it, extend it, etc.

Their quantitative data set was supplemented by qualitative work - Tomlinson and Meers did online focus groups, which included 100 participants recruited by Facebook, leading to 100 000+ words of focus group contributions. Within that group, 47 more in-depth qualitative interviews were conducted with members of the focus groups.

Equalities analysis. Gender and compliance

It is really important to factor in demographic and positionality concerns into the analysis of compliance behaviour. When looking at gender and compliance during the pandemic, the default position with significant consensus in the literature is that women are more likely to perceive COVID-19 as a serious health problem, more likely to agree with restraining public

policy measures and are more generally compliant than men.¹³ Within the quantitative work, Tomlinson and Meers had taken a different approach to these pre-existing studies in a couple of ways. Firstly, they differentiated between individual restrictions, thus they did not look at general measures of compliance, but asked about specific behaviours. They had adopted a subjective definition of compliance thus what mattered was what people *thought* was unlawful or against the guidance or was allowed and so on. Their findings via this slightly different approach is something quite different and a bit more complex in the reality of the life experiences of all those who faced COVID-19 restrictions.

The first finding was that women were approximately twice as likely as men to break a rule they thought was illegal after accounting for other factors, such as household size, whether they have a garden or not, etc. And 40 percent of women broke a rule they thought was illegal compared to 32.5 percent of men and that was a statistically significant difference in the currently established models. Moreover, after looking at the individual restrictions and breaking these down, Tomlinson and Meers had found that once controlling for other factors, women were 80 percent more likely than men to meet family and friends inside their home if they thought this was illegal. But at the same time, women were not more likely than men to break the two meter rule or the 'outside rules'. This suggests that COVID-19 regulations are impacting differently on men and women, contradicting some of the other findings as to compliance in this area.

The second wave of analysis Tomlinson and Meers did was in June 2020, hence not straight after the lockdown, but once the regulations were more properly embedded. They tried to find some possible explanations. Jackie Gulland's work¹⁴ had been particularly influential for Tomlinson and Meers research, when thinking about the gendered impact of these restrictions. She argues, *inter alia*, that there are particular concepts within the regulations, specifically households and child care, that exacerbate existing inequalities for women in particular.

Some possible barriers to compliance

During their research so far Tomlinson and Meers identified four possible barriers to compliance.

The first one regarded assumptions about the definition of child care within the COVID-19 regulations and how people are understanding those distinctions, so for instance the exemptions for child care arrangements were broadly parallel to the Childcare Act 2006. In the latter, there was a formalised idea of what child care is, while these arrangements are far more complicated. During their presentation, Tomlinson and Meers exemplified their findings with a quote from a grandparent who was looking after her daughter's four children before the 'bubble policy'. They followed the restrictions for eight-nine weeks, however, at some point the grandmother took over child care as this was affecting the life of her daughter and son-in-law, as the former was a key-worker taking night shifts and the latter was a builder leaving early in the morning. They had made an arrangement of breaching the restrictions on the basis of their understanding of the restrictions but in a way which they felt was *necessary* to avoid the impact on the daughter. This also was part of the consequences of the formalised definition of child care within the regulations.

The second possible identified barrier is related to the closed definition of 'household' and Gulland has written about the interdependency between households and the independence of human life.¹⁵ Under the regulations, households are conceptualised in a narrow way as

¹³ Vincenzo Galasso and others, 'Gender differences in COVID-19 attitudes and behavior: Panel evidence from eight countries' (2020) 117(44) Proceedings of the National Academy of Sciences 27286.

¹⁴ Jackie Gulland, 'Households, bubbles and hugging grandparents: Caring and lockdown rules during COVID-19' (2020) 28 Feminist Legal Studies 329.

¹⁵ *ibid.*

self-sustaining entities while this is not the case when there is a lot of indeterminacy. As an example of that Tomlinson and Meers scrutinised an instance of a reciprocal arrangement of a daughter and her mother that looks after her grandchildren. In return, the daughter does all the organising, paying the bills, fixing everything that breaks for her mother, finding everything that she cannot find in the shop. 'I do the sort of maintenance of running around for her but she does a lot of childcare for me.' the daughter explains. What she goes on to say is that routine of caring for her mother, who's quite elderly person and the daughter looks after her, so this can be labelled as a reciprocal arrangement. The daughter is particularly concerned that going forward her mother is not going to be able to do the same caring role that she has done before because of the impact of the lockdown and not having that caring routine with her.

Moreover, Tomlinson and Meers examined the compounding of caring obligations. What they mean by the latter is the caring responsibilities people have already had becoming more acute or people who are not working as a result of caring responsibilities due to being asked by others to take on further caring responsibilities. That may be in breach of the restrictions. This is the case, for instance, in the situation of a woman, currently off work caring for her own children and being asked by a neighbour effectively to look after her children as well. She explains that she would do this if the grandmother of the child, who is at biggest risk, would approve this arrangement.

The final one is the welfare of dependence and the particular sample are people who are parents of very young children. This is a concern that continued compliance with restrictions would have a disproportionate effect on the welfare of dependence. The concrete example that Tomlinson and Meers gave was of one of their participants who had a very young baby. She was concerned that there was a risk for her baby who was becoming more frightened of other people and attached to her. According to this participant, the risk to a baby of COVID-19 is very small and could be described as a 'theoretical problem', and she had shared: 'I think there would come a point where it tips over and the damage being done by following restrictions would be outweighed by the damage being done to a child of not following them.'

6.2 Discussions

Tomlinson and Meers' presentation was commented on by Jo Littler (City, University of London) and Maartje De Visser (Singapore Management University), supplemented by questions and remarks from the rest of the panellists.

Littler spotlighted how the findings of Tomlinson and Meers also illustrate the government's marginalisation of care and lack of recognise the extent of social reproduction. She suggested thinking about how government policy did not facilitate part-time furlough, which would have enabled more equitable sharing of the childcare for parents and carers. To what extent might that be a driving factor in some of the issues around rule breaking, given that parents/carers had to depend on private informal networks of care which were in place?, Littler asked.

De Visser took over by questioning to what extent there was a matter of identity since women are likely to be compliant when they see something as a serious health problem in a way it almost confirms that assessment of the identity of the woman as the mothering and caring figure, who will be alarmed by anything that could endanger those that she looks after, etc. This might provide almost an additional explanation to compliance issues because what you could get is a sense of conflict between the societal impressions of identity and the woman's *own* sense of identity (e.g. the mother, the carer, the working professional). Moreover, the size of the impact of breaches seemed minor, there was a sense of familiarity and a sense that the society as a whole is not placed in jeopardy. So do women see themselves as complying not with the *letter* but with the *spirit* of the law? And finally, De

Visser gave general suggestions for the research of Tomlinson and Meers: distilling details about the individual's social economic status, relationship status and residency status, as well as exploring whether there is evidence of systemic or more structural biases that we would not be aware of and that might have been amplified by COVID-19 but *pre-existed*.

As to the marginalisation of care and the complexity of networks of care, there are two issues that, in fact, Tomlinson and Meers noticed in their qualitative data, which they will potentially look into with more detail. First was the issue of homeschooling and its implications particularly for those who were not or are on the margins of being key workers. And the second issue was the size of families and particularly large families relating to the idea of households. Moreover, they are currently exploring the correlation between the spirit and the letter of the regulations, drawing particularly on techniques of neutralisation theory. After being asked to clarify the narrative of their research a bit more, Tomlinson and Meers explained that it is simply that when you take that subjective lens to compliance, you get significantly different results looking at different set of characteristics. That could help them explain in a different (and better) way the patterns of compliance that they are seeing compared to the more objective models that we have.

PANEL III

7. 'A new normal, or new abnormal? The South Korean government's handling of the pandemic from the perspective of LGBT rights'

Buhm-Suk Baek (Kyung Hee University)

7.1 Presentation

Introduction and background

Baek talked about South Korea's COVID-19 preventive policies restriction and its impact on human rights, mainly focusing on new technologies used for preventive measures and their impact on the rights of vulnerable groups.

In the first three months of the pandemic South Korea was cited as the one of the most successful countries having best strategy and response tackling the pandemic with relatively low cases per capita and significantly lower mortality rate from COVID-19. Some research showed that the government's new digital technology-based policies have helped Korea to fasten its curve earlier than other countries. Korea extensively implemented the top-down design measures through its centralised system of diseases control referred to as 'K quarantine'. The rapid deployment of these preventive measures was made possible by the country's information communication technologies (ICTs) which had already been extensively developed after the experience of Middle East respiratory syndrome (MARS) outbreak in 2015, recorded as the largest outbreak outside Middle East region. Since then, the Korean disease control and preventive agencies was authorised to collect personal information needed for contact tracing and allows them to disclose such information to the public for preventive purposes. When the first case of COVID-19 emerged in January 2020, the Korean government swiftly activated public health measures by launching only warning system and active tracing and monitoring for potential cases. The strategy is called 'three Ts' – test, trace and treat approach. This approach works through several stages. First, the

potential patient would get tested through a rapid test, for example by inventing a drive-through testing sites across the country. And once they became a confirmed case, the centre and local government conduct a rapid epidemiological investigation and start tracing the source of the infection and potential context of this confirmation. The second step is mainly technological based because the government would trace the come from the patient's credit card details, system analysis, mobile phone locations then disseminate the information to the public through the government website and emergency mobile text. That is all tracing data which is available on district local government website aside from a constant update via text messages. The third step is contact isolation and testing for anyone who happened to have direct or in direct contact with the confirmed patient. As the locations of confirmed patients are announced, whoever happened to be around the patient at the same time can request to get tested.

COVID-19 outbreak and the rights of LGBT community

In February 2020, even one month prior to the World Health Organization's (WHO) declaration of COVID-19 as a pandemic, the Korean National Assembly quickly passed the legislation to allow the Korea Disease Control and Prevention Agency (KDCA) to conduct more extensive data tracing and to implement other online and offline measures. According to the amendment to the Infectious Disease Control and Preventive Acts, articles 34.2 and 76, for the purpose of disease control national and local governments and health authorities can access and disclose individuals' personal information even without their consent. Furthermore, local authorities can force individuals for a suspect of having contracted on infection disease to undergo testing. Anyone who refused to be tested is subject to penalties of up to 10 million Korean won, equivalent to 9 000 USD, and one year of imprisonment. Digital tracing was extensively incorporated into Korea's everyday live during the pandemic. For example, when a person tests positive of COVID-19, a text alert is sent to any- or everyone living nearby and this typically includes a link to a detailed log of infected persons' movements. For example, in a poll led by Seoul National University's Graduate School of Public Health, 70 of respondents replied that they were willing to sacrifice privacy rights for common goods, that the right to know is prioritised over privacy rights in a health crisis. Nevertheless, there have been growing concerns about the legitimacy of surveillance system and the breach of privacy. Such a question also emerged among Korean people when the government released a detailed result of contact tracing on local website. It did not show any real name of the patient but disclosed personal information including neighbourhoods, workplace, locations, details of logs of their loot per minute and also their ages and genders. The Ministry of health and welfare released a quarantine guideline in which they mentioned that the potential patient should download a mandatory tracing application at the mobile to load their daily health check and provide some personal information, including phone numbers. The Prime Minister then even proposed putting an electric bracelet on a potential patient which is usually put on sexual criminals so that they remain traceable without mobile phones, though fortunately this was not implemented in Korea.

One of the most distinct COVID-19 strategies of South Korea is the no lockdown policy. The government left the borders open and did not order shutdown stores, theatres, etc. Instead, the government decided to enforce social distancing policy. Though this strategy draws some criticisms as they rely too much on people's awareness and cooperation, it actually works well with the government's aggressive testing strategy with the new technology. But the extensive digital measures involve the social serving and profiling of the population. KDCA's extensive research tracing revealed its risk on human rights and one example is the stigmatisation of sexual minority groups. In early May 2020 the social discounting policy in Korea had finally relaxed to distancing in daily life measures with no new case of COVID-19 confirmed for several days. But only a week later the entire nation was put back into a state of emergency due to a mass infection centred at Itaewon clubs during a long holiday weekend. It started after a 29-year-old person who visited clubs and bars in Itaewon area tested positive. Then over 5500 people who were at the same location on the same night

were extensively traced. Although Itaewon clubs are not exclusively places for sexual minority groups, unverified information of the infected men's personal information appeared online - like YouTube and other social networks. Then, the information was widely disseminated especially by the news media that highlighted the infected men's sexual orientation.

During the first three days of the outbreak as many as 1174 news articles included the keywords 'homosexuality', 'gay clubs' and 'gay' which had no relevance to tracing efforts at all. Baek concluded that Korean media outlet had unnecessarily and irresponsibly placed a particular emphasis on linking the Itaewon cluster to the lesbian, gay, bisexual and transgender (LGBT) community and framing the Korean LGBT community as a spoiler to the wide efforts in containing the spread of the virus. As a result, it worsened the over-divided spread of homophobia in Korean society. LGBT community became the most stigmatised targets with a growing discrimination and hate speech spread in social media. It led to their reluctance to get tested with the concern about exposure to domestic violence and discrimination in the workplace once their identities are disclosed during self-correcting or after a test result returns positive. In fact, KDCA identified only 246 COVID-19 cases associated with the Itaewon incident. The irresponsible revelation of the personal details about not only the infected individuals but also people visited in the same area by the public on various social media networks caused a huge violation of privacy rights of over 100 people.

Under international law individual states can take public health civilians measures to safeguard the right to life and health as we all know. However, researched civilians can switch in the right to privacy and to limit human rights and states must show that the limitations are strictly necessary and that they must respond to a pressing public or social need. And the collective data should be used only for legitimate public health of civilians purposes to meet the principle of proportionality. But in case of Korea, the initial measures taken by the government in Itaewon incident, for example, Baek believed did not meet these criteria. As to the relationship between new technology and human rights, Korea's extensive top-down research measures, implemented during the pandemic period, had been deeply incorporated into everyday life. Thus, potentially becoming a *new normal* in the future. In other words, what has been justified in the name of public goods during the emergent situation can become normalised even after the crisis has ended.

South Korea's response to COVID-19 crisis relied extensively on digital technology – i.e. the government of digital surveillance and tracing measures instead of implementing a physical lockdown. Korea's case clearly shows how certain technology can be utilised to enhance public health but also potentially risk people's privacy - data security and social equality. Baek thought that it is over simplification to argue that technologies are neutral objects and that the negative consequences are purely the result of humans misusing them. Technologies, not just *users*, also have human rights consequences by limiting users' enjoyment of human rights or influencing a policy, risking individual liberties.

Furthermore, the impact of technological systems on human rights cannot be understood or addressed in isolation. New technology utilised for COVID-19 policies have great potential to support individual rights, especially right to health. However, technologies are initially not designed to serve human rights purposes but for containment of virus. So we need to be conscious of the way in which these new technologies pose significant challenges to human rights.

Concluding remarks

Baek emphasised that the threat to privacy should not be dismissed as an inevitable price for efficient containment of the virus, because the erosion of the right to privacy can weaken the entire human rights framework as the incident above clearly shows. And with the rapid

spread of COVID-19, we have witnessed that some efforts to combat the pandemic have been failing to meet the standards of legality, necessity and proportionality. The problem is that most international human rights instruments were initially drafted for the offline world and may not reflect the reality of digital age, therefore it is critical to understand the human rights implications for each stage of the key health and quality measures. In case of Korea and the testing, tracing and treating stages, it is essential even at the early stage of the development of technology to consider human rights impacts including the rights of vulnerable groups.

7.2 Discussions

Baek's paper was discussed by Chris Ashford (Northumbria University) and Flora Renz (University of Kent). Comments and questions came also from the rest of the panel.

Ashford expressed his concerns triggered by the first theme of the paper, namely around profiling of the population and the idea of stigmatising. He suggested considering the work of David Halperin** in relation to the issues of gay community shaming. In the context of the presented, what do we mean by the idea of 'bad citizens'? When analysing this conception, traditionally it is talked about 'sex', yet in the South Korea incident, there was no mention of 'sex'. Thus when we think of the stigmatisation of the LGBT community we are talking about stigma of people who use a specific 'space', so is there a *spatial* aspect? A suggestion was expanding more on the topic, e.g. on the idea in which the spaces are being 'constructed' and what that might mean for the people that use them, for their identities, etc. Finally, the LGBT community has a different 'collective' memory, so there might be worth looking into the element of HIV/Aids pre-existing issues and their connection with the pandemic.

Furthermore, Renz discussed the possible global trend of 'blaming' different minority groups (who even in non-pandemic times are perceived as 'undesirable') for what often amounts to either unavoidable events or global disasters or events that involve at least some state failure in terms of establishing an effective response. This could be potentially tied to the pre-existing issues of discrimination stigmatisation of sexual minorities in South Korea. And also, is there gender dynamics at play, e.g. are certain genders being stigmatised more than others or seen as more 'responsible'?

According to Baek, the Itaewon incident clearly shows the challenges brought by the new technology-based preventive measures, *inter alia*, as to privacy of personal life and discrimination. He noted that South Korea's Constitution prohibits discrimination on the basis of sex, religion or social status, which according to the Korean Supreme Court, applies to the LGBT people too. However, despite also committing to international law against discrimination of LGBT, Korean laws neither specify punishment for people who discriminate LGBT people, nor provide remedies to the latter.

** University of Michigan.

PANEL IV

9. 'Beyond Hate Crime: COVID-19, Anti-Asian Racial Violence and the Reproduction of Inequality'

Diana Yeh (City, University of London)

9.1 Presentation

Introduction

Yeh's research aims to contribute to the works that interrogate the hate crime framework by specifically exploring its impact in relation to anti-Asian racial violence in the UK in the COVID-19 era. In particular, she will highlight the way that hate crime framework exacerbates inequalities by perpetuating racialised discourses of Eastern and South-Eastern Asians and by extension legitimise racist practices against specific groups both within and also beyond this community, whilst also disavowing the structural dimensions of the impact of COVID-19 and how these intersect with existing inequalities.

Rise of anti-Asian 'hate crime' and discourse

Since the outbreak of COVID-19, there has been a global surge in racial violence against the Chinese, East & South East Asian and bias for communities more widely, due to COVID-19 apparent outbreak in China and the racialisation of the virus. The significance of this problem is demonstrated by appeals by the World Health Organization, the United Nations and human rights watch to governments worldwide to address COVID-19-related hate and xenophobia. In the UK, there had been a significant rise and police figures, in spite of the significant under-reporting, suggest that hate crimes against the Chinese almost tripled in January to March 2020. One source cites 900 percent increase in online hate speech towards China and the Chinese. There has been a usual invisibility of East & South East Asians in the UK media and by comparison now there has been a significant reporting in the media of hate crimes with news agencies keen to seek out victims to showcase their experiences.

Unsurprisingly, in this context there has also been a significant uptake of the discourse of hate crime among a range of community organisations, which have sought to respond by setting up hate crime reporting tools, holding workshops on hate crime and even organising around this specific term, e.g. the organisation 'Stop Asian Hate UK'. As this highlights, these physical and verbal racial attacks are constructed in dominant discourses by international agencies and locally in the UK by the state, the media, law enforcement and community organisations as 'hate crimes'. Yeh noted that there is already a useful body of scholarship that problematises hate crime and this work highlights how it is a government-funded industry that individualises and trivialises racism. It is constructing it as an expression of interpersonal hatreds of individual racists or bigots and thereby separates it from obscure state and institutional racism.

Yeh's paper contextualises anti-Asian racial violence hate crime within a framework that builds on and perpetuates the racialised construction of the Chinese and East & South East community as a model minority. In this discourse, Chinese and sometimes East & South East Asians (with whom they are often confused or conflated) are constructed as a successful and well-integrated minority due to the relative overall success in education and employment. They are perceived to be insulated from racism and sometimes deserving of care and protection by the state. In the context of COVID-19, we can see this in the way in which the racial violence is constructed in the media as something new and unprecedented and this is supported by narratives from victims of attacks. For example, we see headlines reading: 'More shock than anger or fear: Singapore student opens up about the COVID-19

racist attack in London’.

As Yeh argues, the model minority is precisely a form of contemporary racialisation that in itself perpetuates racial inequalities by disavowing racism against East & South East Asians. To challenge this anti-Asian racial violence, it needs to be understood in the context of ongoing historical racial violence against East & South East Asians in the UK. The latter dates back at least to the 19th century when early Chinese seafarers and launderers were subject to racial attacks and violence across different cities in the UK. In terms of the racialisation of disease, specifically, there have been also centuries-long discourses connecting the Chinese to disease contamination. In the contemporary era there have also been direct increases in racist attacks against the Chinese and other East & South East Asians relating to disease. For example, there had been the Severe Acute Respiratory Syndrome (SARS) epidemic in 2003, but also in the UK in 2001 during the foot-and-mouth outbreak, when the Chinese catering trade was scapegoated for spreading the disease. This was a claim made and then later retracted by the Ministry of Agriculture, Fisheries and Food.

More generally, there have always been racial attacks perpetrated against East & South East Asians, in particular to those who work in frontline services.

Second, beyond the burying of these histories of racial violence and the hate crime framework contributes to reproducing contemporary racial and other inequalities. Particularly, Yeh means the way in which the racialisation of East & South East Asians as a model minority works in conjunction with the polarity that is being constructed between deserving and undeserving minorities, i.e. those who should be afforded protection and those not both within and beyond this community.

Notably, in the early onset of the pandemic there was a distinctive narrative in the high-profile cases of racial attacks publicised by the UK media which focused on what Yeh calls *deserving model minorities*, e.g. a Singaporean international student, a Thai city worker, a Vietnamese art curator and a Filipino NHS worker. Within this formulation, those who are constructed as failing to achieve the modern minority status are not only rendered invisible or refused protection. Rather, since responding to hate crimes for deserving minorities expands policing practices, it can further legitimise the increased racist policing of specific groups both within and beyond this community.

As we know, police powers have already increased in response to the COVID-19 pandemic with the UK government introducing new powers under health protection and coronavirus regulations and the Coronavirus Act. These allow police officers, immigration and public health officials to restrict the movement of potentially infectious people and research already demonstrates that these disproportionately affect working class and black people, as well as undocumented migrants. The Metropolitan police, for example, has been running a fortnightly COVID-19 forum for Eastern and South-Eastern Asians communities in response to the rise in anti-Asian hate crime, Yeh quoted, ‘to engage community sentiment, seek feedback and offer reassurance’. Predominantly attended by community leaders, the forums have been spaces in which wider police work around security and terrorism are disseminated. There have also been spaces in which community members construct themselves against undesirable others, both within and beyond the community, calling for increased policing, notably which targets precarious migrants within the East & South East Asians as well as Black communities.

Finally, recent theorisations of racial violence conceptualises it as encompassing intersecting physical, psychological, symbolic and, most importantly, structural dimensions. Thus a focus on racial violence is hate crime in a form of physical, psychological and symbolic attacks, those that have been most visible in the media, renders invisibles are structural dimensions of racism.

The denial of structural racism by the present government has been so blatantly demonstrated by the recent report from the Commission on Ethnic and Racial Disparities. In the case of East & South East Asians, a focus on hate crime diverts attention away from a range of systemic inequalities that impact on the way in which East & South East Asians (and also other groups) experience COVID-19 and how these intersect with other structural inequalities. For example, despite the construction as a model minority of all ethnic groups, the Chinese report the worst experiences of primary care and are at the most risk of housing precarity, both of which have posed heightened problems under COVID-19. For those who fail to achieve model minority status, such as precarious migrants, they become invisible within hate crime statistics due to an inability to report to those very same institutions, which are also policing their movements. Furthermore, the focus on hate crime and attendant disavow of structural racism renders invisible the life-threatening inequalities they face, exacerbated by COVID-19, but which already existed long before the outbreak. This includes difficulties in accessing healthcare and childcare, loss of employment, being forced to choose between working and destitution, overcrowded housing and living in constant fear of isolation. A final glaring structural problem is the way in which, beyond the Chinese, East & South East Asians in the UK are actually rendered and completely invisible in official ethnic and racial categories as they only appear as an aggregated group 'Asian – other', which includes a range of other Asians.

Conclusion

Examining hate crime in relation to anti-Asian racial violence in the UK in the COVID-19 era highlights the way in which this framework that ostensibly seeks to respond to racism, in fact, re-entrenches this racial *status quo*. While seemingly offering protection, it reproduces racialised constructions of East & South East Asians as a model minority that are then used to extend racist policing practices both within and beyond this community. As such, it can further divide communities and forestall interracial solidarities from emerging. And at the same time it reproduces inequalities not only by diverting attention and resources away from the structural dimensions of racial violence, but also in so doing co-opts and neutralises the anti-racist work of community organisations on the ground. It is only by looking beyond the hate crime framework that we are able to uncover the extent and the heterogeneity of experiences of anti-Asian racial violence during COVID-19 and how these differ, according to the way they interact with a range of existing structural inequalities experienced across gender, ethnic group, migration status and a range of other social divisions.

9.2 Discussions

Yeh's presentation was commented by Shan-Jan Sarah Liu (University of Edinburgh) and Patricia Tuitt (independent legal scholar).

As racialisation of diseases is historically rooted, but also has *different* meanings to *different* groups of Asians, Liu suggested to Yeh looking more into that. Furthermore, according to Liu it seems worth exploring further on the racialisation of diseases. With the recent hate crimes against Asians not only in the UK but also in the US and other parts of the world, it really shuts the light on the differential attention that is given to people. That is also another topic that might be of interest within the analysis, especially if it is tied to the myth of the model minority. Liu finally suggested that Yeh could look outside of the community membership or citizenship, and examine what are the structural problems that come with 'anti-Asians-ness', for example in the workplace, or outside the UK, etc.

Tuitt added to Liu's comments the question of how the paper interacts with broader themes, in particular in relation to the core argument about the hate crime and the individualised nature of hate crime, or to other aspects of equality law. There is a mention that migrant activist groups had tried to intervene, at very least to draw attention to hatred violence that

has been experienced by Asian groups and, in Tuitt's opinion, it is interesting to see to what extent that will play out more in the paper. How non-state actors are engaged in terms of providing emergency support and protection to groups suffering racial violence is also worthy of looking into.

The idea of racialisation of the disease will be a contextual part of her research, Yeh agreed. The discussions led to Yeh thinking about the way in which her paper illustrates the particular racial dynamics and the way in which model minority works. Furthermore, Yeh mentioned that she has a broader project, examining the very little *visible* anti-racist organising amongst East & South East Asians, yet there is an unprecedented rise of anti-racist organising for the first time recently. Apart from that, we also see that many organisations are becoming co-opted within this hate crime framework, transforming into the hegemonic way in which community organisations are responding.

10. "Essential but Expendable": Canada's Pandemic Responses Regarding Migrant Workers'

YY Brandon Chen (University of Ottawa)

10.1 Presentation

Introduction

Chen presented on Canada's response to the pandemic with respect to the migrant workers. His opinion is that governments across Canada have collectively failed to ensure migrant workers safety and well-being during the pandemic.

Migrants in Canada

Chen defined migrant workers and described the profile of migrant workers Canada. In the simplest terms, in the forthcoming book chapter the term 'migrant' will refer to individuals that work in Canada but they are neither Canadian citizens, nor permanent residents. Among them, for example, are tens of thousands of migrants who come to Canada each year through what is known as the Temporary Foreign Workers Programme. It is administered by Canada's Federal Government and was meant to be a temporary labour migration programme that helps Canadian employers fill short-term labour and skills shortage. It contains multiple streams, e.g. including one that recruits workers for positions that pay an hourly wage below the median in the relevant province, the so-called 'low-wage stream'. It also has another stream that recruits workers specifically to work in the agricultural sector and another stream that hires migrants to work as caregivers in Canada. There are also others, but the temporary foreign workers migrants coming under the three aforementioned streams tend to occupy the so-called 'three D-s jobs', i.e. dirty, dangerous and difficult or degrading. Because of the nature of their work, these temporary foreign workers are particularly vulnerable to the effects of the pandemic and as a result, for the most part, it is their situations that Chen's chapter will consider.

The top five source countries for the Temporary Foreign Workers Programme are Mexico, Guatemala, India, Jamaica and Philippines, hence we also are talking about racialised people. In addition to migrants and how they are admitted to Canada through this Temporary Foreign Workers Programme and given how Chen define migrant workers, his chapter will also consider non-citizen workers who are asylum seekers and those who are without any legal status. One reason why it is important to consider the circumstances of migrant workers during the pandemic is that in Canada, numerous migrant workers have come to shoulder the responsibility of providing essential goods and services to Canadians, ranging

from maintaining the food supply to the provision of health care during this time. For example, just before the pandemic temporary foreign workers accounted for over 41 percent of agricultural workers in the Province of Ontario and over 30 percent of agricultural workers in Quebec, British Columbia and Nova Scotia. There is no indication that these numbers have significantly changed in the past year since the onset of the pandemic. Similarly and although there is no official statistics that exist for this, it is widely accepted that many of the orderlies or personal support workers that work in Canada's long-term care facilities, particularly in Quebec, are current or refused asylum seekers, many of whom are also racialised.

According to Chen, what all this shows is that the possibility of working from home is impossible for many migrant workers. It stands to reason that this would in turn put migrant workers and their families at greater risk of being exposed to the virus. Available statistics appear to bear this out.

Between the start of the pandemic to June 2020, migrants accounted for 43.5 percent of all COVID-19 cases reported in Ontario whereas they make up just over a quarter of the provinces' population. Public health and social support measures in relation to COVID-19 response, introduced by the Canadian government either leave out some migrant workers altogether or they offer a 'band-aid' solution without addressing the root cause of migrant workers' vulnerability.

The three aspects of Canada's pandemic policies

Chen illustrated his arguments by examples of three aspects of Canada's pandemic policies vis-à-vis migrant workers.

Firstly, he considered workplace safety, specifically in the agri-food industry, namely farms, food processing facilities, etc., in which a large number of migrant workers worked in but also has emerged as hot beds of COVID-19 transmission.

In 2020 about 12 percent of migrant farm workers in Ontario or 1 780 of them contracted COVID-19 and three of them died as a result. All this was despite the fact that since early on in the pandemic, governments across Canada have invested more than 100 million dollars to help farm operators and food processors purchase personal protective equipment for their employees and to reconfigure the workplace so that it better adhere to public health guidelines. Therefore, the government have spent enormous resources trying to help workers mitigate some of this risk and it shows that they were not unaware of the fact that working on the farms and in other food industries increases workers' risk of exposure. And yet they continued to see outbreaks happening.

According to Chen, a large part of the problem is that there has been insufficient effort from governments to ensure that employers in fact spend the funds given to them by the government for the intended public health purposes. For the most part, governments operated with the blind faith that funding provided to employers will trickle down to their workers.

Although the governments have continued to conduct workplace inspections during the pandemic and therefore it is possible that farm operators and food processors may be held accountable this way for failing to follow public health guidelines, significant shortcomings exist concerning these workplace inspections. For one thing, Canada's Federal Government is currently conducting most of its inspections virtually and questions have arisen about the effectiveness of such virtual inspections, especially since the outbreaks continued to occur on farms and inside food processing sites. All these are places that supposedly passed government inspections. Insofar as virtual inspections may include interviews with actual employees, it has long been shown that migrant agricultural workers are extremely reluctant

to say anything negative about their employers out of fear of reprisal. The work permits held by most agricultural migrant workers in Canada are tied to their specific employer, which means that if migrant workers are dismissed by their current employers, their ability to remain in Canada will be in jeopardy. And so for migrant agricultural workers reporting on safe workplace conditions carries with a significant personal and financial risk.

Arguably, migrant workers' elevated risk of exposure to COVID-19 underscored the need to ensure their timely and effective access to COVID-19 related health care, including testing and vaccination. Indeed, governments across Canada have pledged that all residents, irrespective of their immigration and therefore health insurance statuses, would be entitled to receiving COVID-19 tests and vaccines without the need to pay out of pocket. Yet, some uninsured migrants, i.e. those who are undocumented and those who are in the process of renewing their expired work permits, are known to have been turned away by service providers when seeking to access COVID-19 tests or vaccines.

At the same time, some undocumented migrants were reported to have refrained from testing and vaccination because they worried that such encounters with healthcare system would lead to their deportation from Canada. And despite repeated calls from advocates on governments to guarantee that no personal information collected in the course of COVID-19 testing and vaccination will be shared with immigration authorities, so far no such guarantees have been made by the government.

The last aspect of Canada's pandemic response concerns the income protection measures. In the event that a worker contracts COVID-19 or comes in contact with people that are infected, having adequate income protection is critical to safeguarding public health, in Chen's views. It allows the workers to take time off, to get tested and to still isolate without having to worry about how they will pay their bills, etc.

To that end, Canada's Federal Government has introduced a programme, called the Canada Recovery Sickness Benefit (CRSB). However, entitlement to the CRSB is restricted to migrant workers with a valid social insurance number that means again that workers who are undocumented as well as those in the process of renewing their expired work permits are excluded. Moreover, to qualify for the CRSB, a worker must have earned at least 5 000 Canadian dollars in the previous 12 months. This rule renders ineligible many migrant workers who arrived in Canada recently. And even when migrant workers qualify for the CRSB, the application process is entirely web-based which demands a level of digital literacy that not all migrants have.

As many precarious migrant workers work for employers that do not offer paid sick leave, their exclusion from the CRSB, whether in law or in practice, puts pressure on them to continue working even in situations where doing so may lead to their detriment.

Concluding remarks

In his forthcoming book chapter, Chen plans to argue that Canada's COVID-19 response so far has largely failed to ensure migrant workers safety and well-being. He expressed his worries that if the *status quo* is left unchanged, it will seriously impede Canada's ability to achieve the so-called 'COVID-0'. When it comes to public health, a chain is only as strong as its weakest link and without addressing the issues facing migrant workers or migrants generally, Canada's pandemic responses may have a gaping hole.

10.2 Discussions

Shan-Jan Sarah Liu (University of Edinburgh) and Patricia Tuitt (independent legal scholar) discussed YY Brandon Chen's presentation.

Liu highlighted the importance of the forthcoming paper in the globalised world and in worldwide context as the showcased problems occur or are very likely to occur where ever there are migrant workers. What are the implications of the treatment of migrants during the pandemic and how do these reflect on how a country treats migrants outside the pandemic, Liu asked. What about before the pandemic? Furthermore, in Liu's opinion, it is worthy of stressing in Chen's paper what makes Canada a *unique* case. In international relations, Canada has the image of being progressive; however, we saw in the presentation how it treats its migrants. So what does this tell us? And finally, Liu suggested intersectionality as a possible idea to be considered – e.g. how does gender or race play a role in these issues?

Tuitt also stressed that Canada's case as to treatment of migrants is very much the *current situation* of migrant workers everywhere. The wider question that is raised by and where the chapter could be usefully situated within the context of some debates within critical migration studies, is to the extent to which citizenship itself is a problem, but particularly whether citizenship and social protection should be decoupled.

The structural problems that migrant workers were already facing prior to the pandemic are mirrored in the issues that the pandemic brought about, Chen explained. There is a reason why the system of guest workers' programme is structured the way it is, leaving the people extremely vulnerable: it is precisely to make them vulnerable and take advantage of their labour to the greatest extent possible, according to Chen. Apart from what had been presented, in his forthcoming chapter Chen is also planning to examine the extent that the Canadian governments in the last year and a half have opened up some of the pathways for migrants in precarious status to access the more stable status. This is based on our recognition that these people have contributed to our efforts to respond to the pandemic, being essential workers. Chen is determined to problematise this narrative in his future paper.

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