



 AdChoices
ROBERT LECKEY

There's no room for delay when Charter rights are being violated

ROBERT LECKEY

Contributed to The Globe and Mail

Published Monday, Jan. 11, 2016 4:28PM EST

Last updated Monday, Jan. 11, 2016 4:31PM EST

Robert Leckey is director of the Paul-André Crépeau Centre for Private and Comparative Law at McGill University and author of Bills of Rights in the Common Law (Cambridge University Press, 2015).

Most of us have asked a teacher or boss to extend a deadline. On Monday, the federal government asked the Supreme Court of Canada for six months more to regulate assisted suicide, and the court said it would take time to decide. Unlike yours or mine, the government's extension would authorize it to keep violating people's fundamental rights. We should rethink judges' practice of delaying orders in Charter cases.

Last February, the Supreme Court of Canada ruled that the blanket ban on help ending one's life violated the Canadian Charter of Rights and Freedoms. To give our elected lawmakers time to act, the court suspended its ruling for 12 months. The unconstitutional law remained in effect in the meantime.

It's worth examining why the court delayed its order and how this practice has evolved. In the early years of the Charter, the court struck down laws with immediate effect. It did so even for criminal laws intersecting with social policy, like assisted suicide. In 1988, it struck down the abortion regime effective the same day.

When the court first recognized for itself the power to keep an unconstitutional law on life support, it cited as the principal reason avoiding harm to the public or threats to the rule of law. Now, it suspends declarations to facilitate Parliament's task in crafting a replacement.

Some favour the practice of suspended orders as deferential and dialogic. Those more skeptical see the court as making efforts to appear more deferential and less confrontational, perhaps in response to criticisms of judicial activism.

Monday's bid for an extension calls us to consider the stakes carefully. A suspension prolongs a state of affairs that the judges have concluded limits individual rights in a way that cannot be justified in a free and democratic society. For example, the ban on assisted suicide drives some people to end their life while they still can. It protracts the excruciating suffering of others. As the government's lawyers told the court, 12 months may prove short for policy-makers and legislative drafters. But it's a long time for those vulnerable individuals whose rights the Charter purportedly protects – and who thought they had

won their case.

Crucially, a suspended order in cases such as this one fails to secure the certainty required by the rule of law. December saw litigation in two levels of court in Quebec to work out whether a federal law ruled invalid but kept in effect could forestall the application of the province's law on end-of-life care. After the court suspended its order relating to sex work, in 2013, some prosecution units still laid charges under the challenged provisions. Others decided not to do so. A suspended declaration that a criminal law is invalid creates a grey zone rife with potential for abuse.

Last, the practice of suspending orders to give time to the legislature involves the court in profoundly political decisions. Some will say that all Charter litigation is political. In my view, though, deciding how long Parliament needs to make legislation or whether it deserves an extension are political in a different way. Judges have no special expertise at making such calls.

Lay people and even lawyers do not generally pay much attention to the remedies in Charter cases. It's time that we did.

More Related to this Story

- [law Supreme Court seeks compromise to allow doctor-assisted death](#)
- [schipper and lemmens Why we must move cautiously on doctor-assisted dying](#)
- [Carissima Mathen Assisted-death ruling: Federal law isn't always paramount](#)

Topics:

- [Supreme Court of Canada](#)

Share this selection

- [Tweet](#)
-