Are Quebec and Canada having a "Schmittian" (or Iheringian) moment?

On June 16, 2019, the Quebec legislature invoked Section 33 of the *Canadian Charter of Rights and Freedoms* in order to suspend, with regard to the *Act respecting the laicity [secularism] of the State* (*ALS)* that it was passing, all constitutional rights and freedoms which this section permits. The *ALS* prohibits certain categories of persons, such as public officials and managers, civil servants, administrative justices and statutory arbitrators, from wearing religious symbols in the exercise of their duties. It also states that certain public services must both be provided and received with one's face uncovered. Insofar as the reception of these services is concerned, however, this obligation applies only where face uncovering is "necessary to allow identity to be verified or for security reasons". The face-uncovering obligation that is incumbent upon the beneficiaries of public services "does not apply to persons whose face is covered for health reasons or because of a handicap or of requirements tied to their functions or to the performance of certain tasks".

On March 13, 2020, the Quebec government declared a state of public health emergency under the province's *Public Health Act (PHA)* –a statute that does far more than provide for such a declaration– but this declaration was not accompanied by a similar invocation of Section 33 of the *Charter*. The government has since renewed the state of emergency four times, without Quebec's legislative assembly being able to consider suspending constitutional rights.

Suspending rights would have done nothing to reassure the public. But there is something paradoxical in the comparison I have just made; at least if it is conceded that the current global pandemic is more serious than the wearing of religious symbols. *Quebec is prepared to derogate from constitutional rights in normal times but not when faced with an emergency.* This paradox is an opportunity for defenders of the rule of law to take a step back, to try to take a global view of the situation and to think carefully before taking comfort in the present non-derogation from fundamental constitutional rights on the grounds of a public health emergency. Rather than being purely contingent, contextual or particular, the paradox of the current situation could be rooted in what has been a fundamental legal issue for centuries.

Can the law actually provide for its own suspension? Can it really do so? This is what legal and political theory calls "Schmitt's paradox" (*Politische Theologie*). Perhaps it would be better called "Ihering's paradox" (*Kampf ums Recht*, see my post, in French, here), for Carl Schmitt posed this question about a situation of extreme or otherwise absolute exception, which he distinguished from "any emergency decree or state of siege" –an "absolute" situation whose manufacture he actually wanted to justify, in order to then justify the

dictatorship. Nonetheless, the question had always arisen, and has continued to do so, with regard to proclaimed emergencies, even if these were almost exclusively thought of as disturbances of order and peace, and rarely as public health crises. While, for Schmitt, the law simply cannot provide for its own suspension in the case of an "extreme" exception, for Ihering the law "can" provide for emergency powers, but only redundantly, uselessly, and unnecessarily.

Whether the law can really provide for its own bracketing thus opens the eyes to the possibility of something worse than the temporary suspension of rights by legally provided means, namely their effective but purely political suspension –one might say an a-legal one, albeit genuinely illegal. The orders by which the province is currently ruled, and which are issued by the Minister of Health under both the declaration of a state of public health emergency, and the *PHA* which provides for it, contain numerous restrictions on fundamental rights. They prohibit both outdoor and indoor gatherings (including religious ones), totally confine the elderly, impose restrictions on mobility for all, provide for behind-closed-doors municipal assemblies, suspend court orders regarding child custody or parental visiting, postpone local elections *sine die*, ban prison visits, close businesses and suspend collective labour agreements, among other things.

Most of these restrictions on rights would probably pass the justification/proportionality "*Oakes* test" under Section 1 of the *Charter*, but perhaps not all. The courts have agreed to operate exceptionally in a manner limited to essential judicial services. The Chief Justice of the Quebec Superior Court indicated that the Court "loses 1000 sitting days per judge each month because of COVID-19, which will soon make 3000 lost, "and "225 to 240 cases are postponed each month, both civil [including administrative and constitutional] and criminal". The question could therefore arise whether, in the present public health emergency in Quebec, constitutional rights are not actually suspended on a purely political, as opposed to a legal, basis. One would really have to have lost her touch with reality to think that, not having been formally suspended, constitutional rights are at present likely to apply normally to the review of executive and administrative actions.

In light of the above, let us return to the –ideal-typical rather than perfectly faithful– figure of Schmitt, in order to contrast it with that of an emblematic author of the British Rule of Law in the classical sense, Albert Dicey. Except insofar as Dicey spoke only of British law, it is possible, for the purposes of reflection, to attribute to both authors the position that: No, the law cannot in fact provide for its own suspension. In Dicey's case, this position leads to a claim of the irreducibility of British law, while in Schmitt's it serves to defend a position of the irreducibility of politics. As David Dyzenhaus demonstrated in an article published in 2009, Dicey was "naïvely wrong" about the state of British law of his time on these issues, but his views were not without jurisprudential support, merit, and prospective insight.

The wager of modern constitutional states –against Schmitt or Ihering on an empirical ground, and *contra* Hamilton (*Federalist No. 23*) on a political one– is that the law can and must provide for its own *limited* suspension in emergency situations. This modernity is but relative, since modern emergency legal powers all remain more or less modelled on the

Roman dictatorship, as we are reminded by the typology that John Ferejohn and Pasquale Pasquino published in 2004. On a more normative level, the most recent compilation by the Venice Commission –of which Canada recently became a member– of its opinions and reports on states of emergency can be taken into account.

In short, not only is it accepted, but a standard desideratum that modern, democratic, and liberal law should provide for its relative withdrawal in favour of the executive in emergency situations, in the (urgent) search for a proper balance between security and equal dignity for all. According to some authors, such as Ryan Alford, as well as national and international legal instruments, certain rights would be "absolute". What is more commonly accepted is the principle that this relative and balanced withdrawal of the law must, paradoxically, remain within the framework of the law. It is not clear that this is what is occurring in Quebec, a Canadian province that is currently ruled by “orders” of its Health Minister.

While I wrote this post with Quebec in mind, other provinces either invoked Section 33 of the *Charter* or seriously considered doing so for various non-urgent reasons before the pandemic, and yet they did not so when they took emergency measures in order to tackle the pandemic. As for the federal Parliament, it has never used Section 33 of the *Charter*, so that the paradox discussed above appears to be less vivid where central government is concerned. Still, the federal government refused to apply the *Emergencies Act (EA)*, favouring extraordinary measures under other statutes such as the *Quarantine Act (QA)* and the *Aeronautics Act (AA)* –alongside spending and amending the *Patent Act* and the *Food and Drug Act*. This again is paradoxical, since invoking the *EA* would have provided for tight parliamentary scrutiny.

One wonders whether it would be better news for the rule of law, a least in the long run, if states faced with an emergency used the means at their disposal in order to render fully legal the extraordinary measures they are about to take in any event.

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