The Absolute Limits of Canada's Emergency Powers: The Unwritten Constitutional Principles Entrench Rights that Remain Non-Derogable in Extremis

Since the launch of the Centre for Constitutional Studies' *Pandemic Powers and the Constitution* Blog, a number of thought-provoking posts have been penned by leading scholars in the areas of public law, health law, and constitutional law, including the contributions of Professors David Dyzenhaus, Paul Daly, Sujit Choudhry, Amy Swiffen, and Maxime St-Hilaire.

This post builds upon their observations about the constitutional limits of emergency powers implicit to the statutes that authorize them, the division of powers established by the *Constitution Act, 1867,* and the *Canadian Charter of Rights and Freedoms.* It presents the author's position that there is another important source of rights in Canada; it is in our constitution's grand entrance hall that Canadians should seek the principles that safeguard our most fundamental rights --regardless of the nature or scale of any future pandemic or public order emergency. Should these principles receive explicit recognition by the Canadian judiciary, this would also make it indisputable that Canada remains in compliance with its most rudimentary international obligations, namely those enumerated in Section 4.2 of the International Covenant on Civil and Political Rights (as interpreted by the Siracusa Principles on the Limitation and Derogation of Rights in the ICCPR, and General Comment 29 to the ICCPR of the United Nations Human Rights Committee).

As Dyzenhaus observed, the federal *Emergencies Act* contains a number of important safeguards.[1] First, it contains clear preconditions to its invocation. Most notably, this includes the requirement found in Section 8 (3) that any crisis it seeks to address "exceed the capacity or authority of a province to deal with it" before the cabinet can declare a public welfare emergency and issue emergency orders that address it.[2] Additionally, the *Emergencies Act* also recognizes the substantive limits of the federal government's emergency powers: its Preamble notes that while the Act authorizes "special temporary measures that may not be appropriate in normal times . . . . the Governor in Council . . . must have regard to the *International Covenant on Civil and Political Rights,* particularly with respect to those fundamental rights that are not to be limited or abridged even in a national emergency."[3]

Unfortunately, all of the copious emergency orders promulgated during the COVID-19 emergency were authorized by provincial emergency statutes --none of which recognize the

existence of non-derogable rights, or the substantive limitations on these powers. Unlike the *Emergencies Act,* these provincial statutes frequently contain residual clauses that empower the Lieutenant Governor in Council to issue orders of a type not otherwise enumerated, as long as they are necessary to addressing the emergency.[4] Paradoxically, the procedural safeguards of the *Emergencies Act* shifted the locus for the authorization of emergency powers to provincial statutes that do not recognize the existence of non-derogable rights, or the requirement to respect them in every emergency, no matter how severe.

As Daly and Choudhry have both noted in their contributions to this blog, a number of provincial emergency orders promulgated under the authority of these statutes strain the limits of constitutionality, at best. The scope and effects of these powers also exacerbate the familiar problem of executive unaccountability during a crisis. As Swiffen observed in her post, the *Charter* is not well-suited to the task of protecting individual rights during an emergency, as there is a clear judicial tendency to accept the limitation of these rights for the sake of public health.[5] Indeed, in Ontario, courts have noted more than once (albeit in *obiter)* that even section 7 rights might be subject to limitation in this context.[6] Additionally, provincial legislators are for the first time considering foreclosing *Charter* challenges to public health measures entirely, by invoking the notwithstanding clause.[7]

Conversely, lawsuits which allege that provincial emergency measures are *ultra vires* (such as the Canadian Civil Liberties Association's challenge to Newfoundland's infringement of interprovincial mobility rights)[8] preclude their justification as reasonable limitations on rights. That said, these federalism challenges might be a Pyrrhic victory for those seeking to protect fundamental (and non-derogable) rights from infringement in future emergencies, as any judicial determination that a measure is *ultra vires* one level of government suggests that it is *intra vires* the other. Unfortunately, it remains to be seen if the federal government and the courts would treat the Preamble of the *Emergencies Act* reference to the ICCPR's non-derogable rights as anything more than precatory; it is lamentably true that this Covenant is not self-executing, and therefore not a free-standing source of enforceable rights.[9]

The primeval question that any emergency puts to civil libertarians is this: Are there *any* fundamental legal rights that both the federal government and the provinces are bound to respect, despite the seriousness of the crisis? They must be sought outside of the *Charter,* owing to its provisions for limitation and derogation of rights (i.e., ss. 1 & 33), and must also be anterior to sections 91 and 92 of the *Constitution Act, 1867,* as they merely divide the heads of power that authorize emergency powers between Parliament and the provincial legislatures.

The signpost that points the way to the ultimate source of our most fundamental rights is the *Provincial Judges Reference*,[10] in which Chief Justice Lamer recognized that the Preamble to the *Constitution Act, 1867* had embedded the principle of judicial independence of the *Act of Settlement, 1701* into the Constitution, thereby creating a substantive limit to both federal and provincial legislation. This principle undergirds the narrower *Charter* right

to judicial independence (which, unlike the right protected by the unwritten constitutional principle, is also subject to both limitation and derogation).

Elsewhere, I have demonstrated at length how the Preamble's guarantee to Canada of a constitution similar in principle to that of the United Kingdom entrenched not only the principle of the *Act of Settlement* that protects an independent judiciary, but also the principles found in five other statutes, all of which were universally considered at the time of Confederation to be essential elements of the Constitution of the United Kingdom.[11] These statutes[12] memorialize the constitutional principles that protect the rights not to be extrajudicially killed, or subjected to emergency powers not authorized by statute, or tortured, or subjected to indefinite arbitrary detention, or punished for what is said during parliamentary proceedings, or subjected to cruel and unusual punishment or excessive bail.[13] This set of rights, which is broadly congruent with those found in Article 4.2 of the ICCPR, were entrenched precisely because they had been infringed during wars, insurrections, and emergencies.

After the COVID-19 pandemic, it will be easier to imagine measures being enacted during public welfare emergencies that would infringe even our most fundamental rights, particularly by authorizing indefinite arbitrary detention. If provincial legislation mandating an open ended shelter-in-place order were to be challenged in court, only the unwritten constitutional principle entrenched by the Preamble would unequivocally address the infringement of this right (which is recognized by international law to be non-derogable);[14] this principle is also the only source of that right which would continue to provide protection should a legislature invoked the notwithstanding clause to override the *Charter* right not to be subjected to arbitrary detention, as section 9 is explicitly subject to section 33.

It should also be noted that it follows from the construction of the Preamble which I propose that the principles of the *Habeas Corpus Act, 1679* are also constitutionally entrenched and absolute. Accordingly, it would fulfill the requirement in international law that "the protection of rights explicitly recognized as non-derogable . . . must be secured by procedural guarantees".[15] (The untrammelled ability to petition for the great writ, which compels the government to provide a rational basis for continued detention, also serves to preclude involuntary disappearances during major public order emergencies. This protection is essential, as unacknowledged detentions all too frequently enable serious violations of other fundamental and non-derogable rights, such as the right not to be tortured.)

A definitive judicial enumeration of non-derogable Canadian constitutional rights that are beyond the reach of the notwithstanding clause might also mitigate the effects of the Schmittian paradox identified by St-Hilaire in his contribution. If this set of entrenched rights was made clear, governments might no longer fear the perception that the normalization of section 33 might lead to a lawless state of exception. A future in which Canada invoked the notwithstanding clause to deal with emergencies (and filed notices of derogation with the Secretary-General, as the ICCPR requires) might lead to more effective

emergency measures, balanced by the explicit recognition that the government must continue to respect the rights recognized both domestically and internationally as non-derogable during every emergency, no matter serious.

The COVID-19 emergency highlights the urgency of locating a source within the Canadian constitutional order of enforceable and non-derogable rights of the type already universally recognized in international law. Judicial recognition of the unwritten constitutional principles embedded by the Preamble of the *Constitution Act, 1867* is the most straightforward approach to that end.

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[1] David Dyzenhaus, *Canada The Good?* Pandemic Blog of the Centre for Constitutional Studies, University of Alberta (published April 27, 2020), available online at: https://www.constitutionalstudies.ca/2020/04/canada-the-good/

[2] *Emergencies Act*, RSC 1985, c 22 (4th Supp).

[3] *Ibid.*

[4] See, e.g. *Emergency Management and Civil Protection Act (Ontario),* s. 7.0.2(4)(14) RSO 1990 c E.9.

[5] Amy Swiffen, *The One v. the Many: When Public Health Conflicts with Individual Rights,* Pandemic Blog, *Centre for Constitutional Studies* University of Alberta, published 14 May 2020, available online at: https://www.constitutionalstudies.ca/2020/05/the-one-vs-the-many-when-public-health-conflicts-with-individual-rights/

[6] *Canadian AIDS Society v Ontario*, [1995] 25 OR (3d) 388, OJ No 2361 (Ct J (Gen Div)); *Toronto (City, Medical Officer of Health) v Deakin*, [2002] OJ No 2777, 115 ACWS (3d) 338 (Ct J (Gen Div)).

[7] A Bill is currently before the New Brunswick legislature that would invoke s. 33 to protect mandatory vaccinations from a *Charter* challenge. Jacques Poitras,"PC ministers spar over vaccination bill, but debate unexpectedly delayed" CBC News, 27 May 2020, available online at: https://www.cbc.ca/news/canada/new-brunswick/vaccination-bill-11-new-brunswick-cardy-anderson-mason-1.5586973

[8] Sean Fine, "Newfoundland faces court challenge to ban on non-essential travel from outside province", The Globe and Mail, 20 May 2020, available online at: https://www.theglobeandmail.com/canada/article-newfoundland-faces-court-challenge-to-ban-on-non-essential-travel-from/

[9] Peter Rosenthal, “The New Emergencies Act: Four Times the War Measures Act”, (1991) *Manitoba Law Journal* 563, 1991 CanLIIDocs 129.

[10] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)* [[1997] 3 S.C.R. 3.

[11] Ryan Alford, *Seven Absolute Rights*: *Recovering the Historical Foundations of Canada's Rule of Law* (McGill-Queens' University Press, 2020).

[12] Namely, *Confirmatio Cartarum 1297* (the statutory enactment of Magna Carta, as clarified and amplified by the Six Statutes of Due Process); the *Petition of Right, 1628,* the *Act Abolishing the Star Chamber, 1640*, the *Habeas Corpus Act, 1679,* the *Bill of Rights, 1689,* and the *Act of Settlement, 1701*.

[13] Ryan Alford, *Seven Absolute Rights*: *Recovering the Historical Foundations of Canada's Rule of Law* (McGill-Queens' University Press, 2020), 73-134.

[14] Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, s. 70(b), Annex, UN Doc E/CN.4/1984/4 (1984)

[15] Human Rights Committee, General Comment 29, States of Emergency (article 4), s. 14, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001).