Chapter 9

Emergencies, Absolute Rights and the Legitimacy of the Notwithstanding Clause

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The primeval question that any grave emergency puts to constitutionalists and civil libertarians is this: Are there any fundamental legal rights that both the federal government and the provinces are bound to respect, despite the severity of the crisis? If so, these must be sought outside of the *Canadian Charter of Rights and Freedoms*,[1] owing to its provisions for limitation and derogation of rights (*i.e.*, sections 1 and 33), and they must also be anterior to sections 91 and 92 of the *Constitution Act, 1867*,[2] as these provisions merely divide the heads of power that authorize emergency powers between Parliament and the provincial legislatures. As I argued in my recently published book *Seven Absolute Rights*,[3] it is in our constitution's grand entrance hall that Canadians should seek the principles that safeguard our most fundamental rights — even during a future war, pandemic or public order emergency.

As I will establish in the first half of this article, should these principles receive explicit recognition by the Canadian judiciary, it would be indisputable that Canada remains in compliance with its most fundamental international obligations, namely to observe at all times the non-derogable rights 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). In the second half of this article, I will argue that despite placing certain rights beyond the scope of legislative override, recognition of a set of non-derogable rights would reinforce, not undermine, the political, legal, and constitutional legitimacy of the use

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ("Charter").

[2] (U.K.), 30 & 31 Vict., c. 3.

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

of section 33, even during a serious public emergency.

I. THE RIGHTS GUARANTEED BY A CONSTITUTION SIMILAR IN PRINCIPLE TO THAT OF THE UNITED KINGDOM

The COVID-19 emergency demonstrates the importance of acknowledging the non-derogable rights protected by the ICCPR (and, I argue, by the principles found in English statutes of constitution significance entrenched by the Preamble's guarantee of a constitution similar in principle to that of the United Kingdom). This is especially true because public health emergencies are largely committed to the provincial authorities by Canada's division of powers. The federal *Emergencies Act*[4] 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."[5] Unfortunately, copious COVID-19 emergency orders powers have been authorized by provincial emergency statutes — none of which recognize the existence of non-derogable rights, or indeed any substantive limitations on the power to protect public health during a crisis.

Additionally, unlike the *Emergencies Act*, provincial emergency 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 deemed necessary to addressing the emergency.[6] 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, let alone the requirement to respect them in every emergency, no matter how severe.

These developments have led to sweeping and unprecedented measures that seem to call into question whether there are any limits within the Canadian constitutional order on what can be done to protect public health, especially if the notwithstanding clause were to be invoked to override Charter *rights*, as was recently contemplated to accomplish comprehensive mandatory vaccination in New Brunswick. As Mancini and Sigalet noted,[7] it was unclear which rights the province intended to derogate; this could have potentially included even the right to life, liberty and security of the person. The question of whether or not legislation of that type would

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[4] R.S.C. 1985, c. 22 (4th Supp.).

[5] *Emergencies Act*, R.S.C. 1985, c. 22 (4th Supp.), preamble.

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

[7] Mark Mancini & Geoff Sigalet, "What constitutes the legitimate use of the notwithstanding clause?" *Policy Options* (January 20, 2020), online: <https://policyoptions.irpp.org/magazines/january-2020/what-constitutes-the-legitimate-use-of-the-notwithstanding-clause/>.

be held constitutional in the event that serious questions were to be raised about the safety of a COVID-19 vaccine with a truncated (but potentially justifiable) human testing process has already been raised before a court.[8] It is lamentable that to date no clear answers about the limits of the use of the notwithstanding clause to derogate section 7 of the Charter have been forthcoming.

Fortunately, on the eve of the 21st century a signpost was erected, one that points the way to the ultimate source of our most fundamental rights. It came in the form of the *Provincial Judges Reference*,[9] 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). In *Seven Absolute Rights*, I demonstrated 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.[10]

These statutes 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.[11] This set of rights, which is broadly congruent with those found in Article 4.2 of the ICCPR, was entrenched precisely because it was these rights that had been abused during wars, insurrections and emergencies. After a series of constitutional crises, English constitutionalists learned that if these rights are routinely infringed — especially in the course of a crisis that purportedly justifies the aggrandizement of the executive — the rule of law will cannot survive.

After the COVID-19 pandemic, one can easier imagine measures being enacted

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[8] Statement of Claim, *Vaccine Choice Canada v. Trudeau*, June 6, 2020, Ontario Superior Court of Justice CV-20-00643451-000, online: <https://vaccinechoicecanada.com/wp-content/uploads/vcc-statement-of-claim-2020-redacted.pdf>.

[9] *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] S.C.J. No. 75, [1997] 3 S.C.R. 3 (S.C.C.).

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

[11] 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*; see Ryan Alford, Seven Absolute Rights: Recovering the Historical Foundations of Canada's Rule of Law (Montreal: McGill-Queen's University Press, 2020), n 1, 73-134.

during public welfare emergencies that would infringe even our most fundamental rights, for example, authorizing mandatory vaccination of those with particular and well founded health-based exceptions to vaccinations, or by mandating widespread and indefinite arbitrary detention in the form of lockdowns and curfews. 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 prevent the infringement of this absolute right (which is recognized in international law as non-derogable).[12] It follows from the construction of the Preamble which I have elucidated that the principles of the *Habeas Corpus Act, 1679* are also constitutionally entrenched and absolute. This principle is the only source of that right which would continue to provide protection should a legislature invoke the notwithstanding clause to override the Charter right not to be subjected to arbitrary detention, as section 9 is explicitly subject to section 33.

Recognition of the Preamble's entrenchment of this unwritten constitutional principle would also fulfil the requirement in international law that "the protection of rights explicitly recognized as non-derogable . . . must be secured by procedural guarantees".[13] The untrammelled ability to petition for the great writ, which compels the government to produce the detainee in open court and to provide a rational basis for continued detention, also serves to preclude involuntary disappearances during major public order emergencies. This protection is essential in those circumstances, as unacknowledged detentions all too frequently enable serious violations of other fundamental and non-derogable rights, such as the right not to be tortured.

II. A FLOOR FOR DEROGATION PROMOTES BETTER DISCUSSIONS ABOUT THE APPROPRIATENESS OF SECTION 33

Recognizing that certain rights are beyond legislative derogation might appear to retrench upon legislative power. However, as I have demonstrated in *Seven Absolute Rights*, this is not an actual reduction in the powers of the legislatures, at least when defined by the original public meaning of the Preamble's guarantee. Furthermore, the recognition of a small number and historically-defined set of non-derogable rights could have the effect of increasing legislative power in practice. This is because reconciling parliamentary sovereignty with Canada's recognition that certain fundamental liberties must be respected at all times would serve to insulate section 33 from inflammatory claims about the eradication of rights. The increased perception of the limits and legitimacy of the notwithstanding clause as an integral element of the Constitution of Canada — as it exists within a well-structured

[12] 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).

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

relationship with other elements, such as the aforementioned seven absolute rights — could encourage legislators to invoke it when appropriate. This would contribute to a renaissance of this moribund but indispensable provision, both generally and in the context of public emergencies — where it is of particular importance.

As Dwight Newman has conclusively demonstrated, the original intent of the framers of the *Constitution Act, 1982* was to grant legislators the authority to substitute their own interpretation of the scope of rights when derogating from particular sections of the Charter.[14] While prominent commentators such as Andrew Coyne and others have posited that any invocation by Parliament of the notwithstanding clause would ignite a tinderbox and create a bonfire of the liberties,[15] this ignores the far more important underlying concern: a dismissive attitude toward rights, which is considerably more serious than the potential misuse of one particular constitutional provision.[16] These commentators have failed to note that this acerbic attitude is catalyzed by the perception of judicial overreaching, particularly when there is no remedy available to the legislature.

Additionally, Coyne's rhetoric shows how the taboo on the use of the notwithstanding clause stems in no small part from arguments that equate any potential invocation of this provision with an attempt to run roughshod over even the most fundamental Charter rights (such as the potential infringement of section 7's right to security of the person by the measures introduced by Bill C-51 in 2015).[17] However, the dialogue that followed Premier Brad Wall's revival two years later of what, in the words of Joanna Baron and Geoffrey Sigalet, had almost become a "zombie law"[18] demonstrated that it is possible to formulate more sophisticated arguments

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[14] Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) at 227.

[15] Andrew Coyne, "Imperious Conservatives and runaway Supreme Court set to Collide" *National Post* (March 9, 2015), online: <http://news.nationalpost.com/2015/03/09/andrew-coyne-imperious-conservatives-and-runaway-supreme-court-set-to-collide/>.

[16] See Geoff Sigalet, "Conservatives might be enabling a healthier dialogue between Parliament and the Court" *National Post* (March 19, 2015), online: <https://nationalpost.com/opinion/geoff-sigalet-conservatives-might-be-enabling-a-healthier-dialogue-between-parliament-and-the-court>.

[17] See Geoff Sigalet, "Conservatives might be enabling a healthier dialogue between Parliament and the Court" *National Post* (March 19, 2015), online: <https://nationalpost.com/opinion/geoff-sigalet-conservatives-might-be-enabling-a-healthier-dialogue-between-parliament-and-the-court>.

[18] Joanna Baron & Geoffrey Sigalet, "Saskatchewan's use of the notwithstanding clause could rehabilitate the democratic reputation of the *Charter* and breathe life into section 33" *Policy Options* (May 19, 2017), online: <https://policyoptions.irpp.org/magazines/may-2017/saskatchewans-brad-wall-rehabilitation-charter/.

about appropriate and inappropriate rationales for derogation. While scholars such as Leonid Sirota were correct to note that Wall did not initially provide a compelling argument for its use,[19] it remained plausible to assert that the notwithstanding clause had been appropriately invoked, owing to legitimate concerns about the over-extension of rights after a court held the Charter mandated taxpayer funding for non-Catholic students in Catholic denominational schools.[20]

In the following year, the Ford government's threat to invoke the notwithstanding clause in legislation that would streamline the Toronto City Council once again provoked considerable alarm.[21] As had been the case in the past, no small part of what prompted that reaction was the perception of a slippery slope with no guard-rail.[22] The recognition of the seven absolute rights roughly comparable with Canada's baseline obligations under Article 4 of the ICCPR would allay precisely that concern. Rather than responding to fear-mongering, more attention could instead be devoted by scholars to the substantive issues related to derogation, particularly whether bills that contain the notwithstanding clause violate rights unjustifiably,[23] or whether the legislative override was invoked on the basis of a compelling and well-articulated rationale. Additionally, those who are uneasy with the concept of legislative derogation of entrenched rights would be better-served by being steered away from an emotive yet unlikely parade of horribles and toward theoretically grounded critiques of the notwithstanding clause, such as Sirota's.[24]

Finally, a definitive judicial enumeration of non-derogable Canadian constitutional rights that are beyond the reach of the notwithstanding clause, if it led to increased legitimacy and acceptance of its well-motivated use, might also mitigate the effects of the Schmittian paradox identified by St-Hilaire.[25] Such a future, in

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[19] Leonid Sirota, "Not Withstanding Scrutiny" *Double Aspect* (May 4, 2017), online: <https://doubleaspect.blog/2017/05/04/not-withstanding-scrutiny/>.

[20] *Good Spirit School Division No. 204 v. Christ the Teacher Roman Catholic Separate School Division No. 212*, [2017] S.J. No. 150, 2017 SKQB 109 (Sask. Q.B.), revd [2020] S.J. No. 92, 2020 SKCA 34 (Sask. C.A.).

[21] Sean Fine, "Experts split over Ford's use of notwithstanding clause" *The Globe and Mail* (September 12, 2018), online: <https://www.theglobeandmail.com/canada/article-experts-split-over-fords-use-of-notwithstanding-clause/>.

[22] Comments of Professor Benjamin Perrin, *id.*

[23] See: Mark Mancini & Geoff Sigalet, "What constitutes the legitimate use of the notwithstanding clause?" *Policy Options* (January 20, 2020), online: <https://policyoptions.irpp.org/magazines/january-2020/what-constitutes-the-legitimate-use-of-the-notwithstanding-clause/>.

[24] See Leonid Sirota, "Things I Dislike about the Constitution" *Double Aspect* (September 4, 2018), online: <https://doubleaspect.blog/2018/09/04/things-i-dislike-about-the-constitution/>.

[25] Maxime St-Hilaire, "Are Quebec and Canada Having a 'Schmittian' (or Iheringian) Moment?'" (May 25, 2020) *Pandemic Powers and the Constitution Blog*, online: <https://

which the notwithstanding clause becomes available as a tool to deal with emergencies (accompanied by duly filed notices of derogation to the Secretary-General, as the ICCPR requires, which also promotes awareness of Article 4.2's guarantee of absolute rights)[26] would balance effective emergency measures with the explicit recognition that the government must continue to respect the rights recognized both domestically and internationally as non-derogable during every crisis, no matter serious. This would transcend the "Schmittian paradox" because governments would be free to derogate from rights during of a serious public emergency, but would also be required to be transparent when doing so. This would encourage effective but more well-tailored and carefully explained suspensions of rights, while preserving protection for the absolute rights at the core of Canada's rule of law.

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ualawccsprod.srv.ualberta.ca/2020/05/are-quebec-and-canada-having-a-schmittian-or-iheringian-moment/>.

[26] Martin Scheinin, "To Derogate or Not to Derogate" (April 6, 2020) *Opinio Juris*, online: <https://opiniojuris.org/2020/04/06/covid-19-symposium-to-derogate-or-not-to-derogate/>.