GLOBAL ROUNDTABLE

e-book

DECEMBER 2020

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# DEMOCRACY 2020

## Assessing Constitutional Decay, Breakdown, and Renewal Worldwide

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## ASSESSING CONSTITUTIONAL DECAY, BREAKDOWN & RENEWAL WORLDWIDE

This e-book is a collection of short essays produced for the Global Roundtable webinar series organised by the International Association of Constitutional Law on 18-26 November 2020: 'Democracy 2020: Assessing Constitutional Decay, Breakdown, and Renewal Worldwide'. The event was co-sponsored by the Laureate Program in Comparative Constitutional Law, funded by the Australian Research Council (ARC), and the Melbourne School of Government. These essays were initially published as a collection of blog posts on the event blog.

International Association of Constitutional Law
Association Internationale de Droit Constitutionnel

Laureate Program in Comparative Constitutional Law

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Australian Government
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# The Resurgence of the Notwithstanding Clause

Han-Ru ZHOU

1982 marks a watershed in the modern history of Canada. More than a century after Confederation (1867), the country formally severed its remaining legal ties with the United Kingdom by "patriating" its constitution and, on the same occasion, adopted its first constitutional bill of rights, the Canadian Charter of Rights and Freedoms. The negotiations between the federal government of Prime Minister Pierre Elliott Trudeau and the provincial governments leading to the 1982 constitutional reform had been mired in strife. The year before, the Supreme Court of Canada, in a landmark reference case, opined that the attempt to pass the reform package without a "substantial measure of provincial consent" would be contrary to convention, thus forcing the federal government to return to the bargaining table. Among some of the provinces' main objections to the federal plan was the entrenchment of a charter that would constrain their legislative authority. Finally, it was during the ultimate federal-provincial negotiation round in November 1981 that all the parties, excluding Québec, agreed to the draft charter, provided that an override power – which would come to be known as the notwithstanding or non-obstante clause – was added.

**The Use and Effects of the Override Power**

The idea of an override power was not something new in 1982 as there was already such a power in the Canadian Bill of Rights 1960, which is a federal statute, and in some provincial rights instruments. In a constitutional charter, the presence of a notwithstanding clause is a contradictory element in that it is the antithesis of the constitutionalization of rights. Whereas the purpose of an entrenched charter of rights is to protect fundamental rights against potential abuses of power by the state, the notwithstanding clause authorizes the legislative body to override them. We do not know exactly how the Framers wanted the provision to be used, but some envisaged it as a safety valve, which would rarely be invoked, and only when the government would have the broad support of the population.

Section 33(1) of the Charter states as follows:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

This override power seems to be unique to Canada and does not have any real equivalent in other democracies. Although certain international human rights instruments contain a notwithstanding clause, they restrict its scope to emergency situations whereby the life of the nation is threatened (see Art. 4 of the International Covenant on Civil and Political Rights, Art. 15 of the European Convention on Human Rights). In the Canadian Charter, s. 33 does not entail such a restriction. Only s. 4 of the Charter, which fixes the maximum duration of the House of Commons and of the legislative assemblies, limits the possibility of infringing this guarantee and continuing the life of a legislative body beyond the five years provided for "[i]n time of real or apprehended war, invasion or insurrection."

Section 33 only allows for the override of certain guaranteed rights and freedoms, namely fundamental freedoms (religion, expression, assembly, association), the right to life, liberty and security, equality rights and certain rights in the criminal process. The rights that are immune to any possible override are those that are deemed of particular political importance, either because they are essential for protecting the parliamentary system, such as democratic rights (ss. 3-5), or because they represent minimal or necessary conditions for the maintenance of national unity, such as mobility rights (s. 6) and language rights (ss. 16-23). Contrary to what the Supreme Court suggested, the decision to exempt certain rights from the application of s. 33 should not be seen as part of an effort to prioritize rights and freedoms that would be considered more sacred or inviolable. If this were so, inalienable rights, such as the right to life and the right to not be subjected to cruel or unusual treatment or punishment would have been exempted from the scope of the override power. The determination of the rights to which the Framers gave inviolable status is based on reasons that are specific to the Canadian federal context. In this regard, the Charter differs from the international instruments cited above that protect a "core group" of universal rights that are exempt from any override, even when the existence of the nation is endangered.

Section 33 requires a formal declaration in the overriding legislation that asserts paramountcy over the Charter right or freedom in question. The aim of this mechanism is believed to alert public opinion and to inform those who have, or may have, an input in the legislative process. In the landmark case of *Ford v Québec (AG)* (1988), the Supreme Court held that the purely formal nature of the clause makes it impossible to consider the merits of an act that invokes it. Once an act with an override provision has been duly passed, there is no more room for judicial review of the suitability or the justification of the statutory policy that gave rise to the use of the override.

Section 33(3) provides that an override declaration "shall cease to have effect five years after it comes into force". This automatic loss of effect can be avoided by enacting a new declaration that will also be valid for another period of five years, thus mandating a periodic review of the override and, hopefully, sparking a public debate. The five-year period coincides with the maximum duration of a federal or provincial government's term, and so gives citizens the opportunity to take the overriding of some of their constitutional rights into account in the voting booth.

**Recent Developments**

By and large, use of the notwithstanding clause has been rare. To date, only three provinces (Québec, Saskatchewan and Alberta) have enacted overrides. The federal government has never used it. Many explanations for this under-utilization have been offered, ranging from fear of political repercussions to the expression of deference to the courts. Several scholars have opined that the less the notwithstanding clause is used, the more difficult it will be for a government to justify its use. Some have even suggested the creation of a convention against its use. The notwithstanding clause seems more politically acceptable in Québec than in the rest of Canada. In the wake of the 1982 patriation without Québec's consent, the province passed an omnibus-style law that incorporated into every Québec act a declaration according to which the act "shall operate notwithstanding the provisions of sections 2 and 7 to 15" of the Charter, an initiative that was ultimately upheld by the Supreme Court.

Resort to s. 33 has picked up again in recent years with four actual or contemplated uses of the notwithstanding clause. Two provinces saw their governments present an override bill for the first time. In 2018, in the middle of the municipal election campaign, the newly elected Conservative government of Ontario passed a law reducing the number of Toronto City wards and councillors by half. When the trial court invalidated the law on the grounds that it violated freedom of expression, the government countered by introducing a bill containing an override to be inserted into the invalidated statute. The government only withdrew the bill after the Court of Appeal decided to stay the trial court's decision. The Court later rendered a 3-2 decision on the merits in favour of the government, which is now under appeal to the Supreme Court. In 2019, the New Brunswick government introduced a bill that would require all school-age children to provide proof of immunization for listed diseases. This initiative had been prompted by an outbreak of measles in a high school earlier that year. Faced with mounting pressure from anti-vaccination groups and parents threatening to challenge the bill if enacted, the minority government decided to insert an override, which it subsequently withdrew in an attempt to win over the support of the opposition parties. The last-minute concession proved insufficient as the bill was still narrowly defeated on third reading.

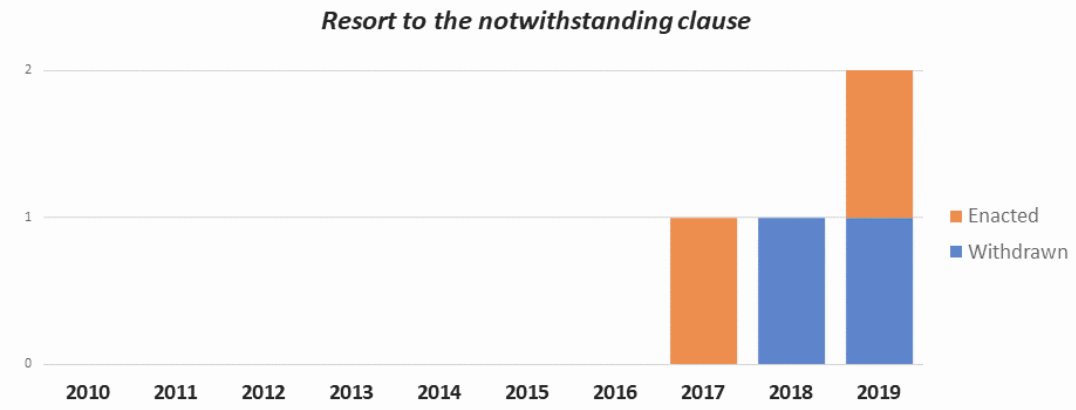
While Ontario and New Brunswick introduced override bills that were later withdrawn, two other recent uses of s. 33 – by provinces that had already enacted overrides – actually reached the stage of a law (although in one case, it has not come into force). The first override in over a decade was passed by the Legislature of Saskatchewan. In 2017, the Saskatchewan Court of Queen's Bench ruled in *Good Spirit School Division No. 204* that funding of non-Catholic students in Catholic public schools violated freedom of religion and equality rights, as no other religion received the same preferential treatment. As the ruling threatened the province's school funding scheme and would impact thousands of students attending denominational schools, the government passed a law that inserted an override into the Education Act 1995. In the end, the override did not come into force as the Court of Appeal subsequently held that the 1995 Act was valid.

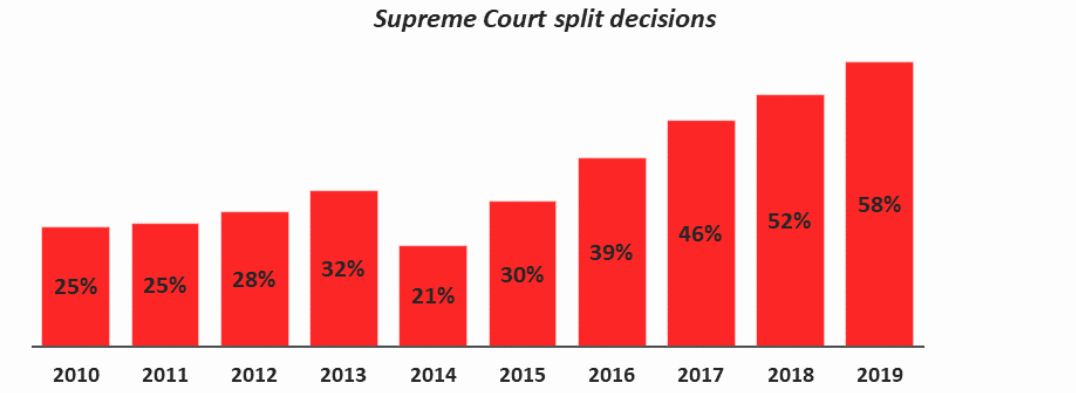
By far the most controversial recent use of s. 33 is Québec's 2019 *Act respecting the laicity of the State* (also known as Bill 21), which prohibits public sector employees in a position of authority from wearing religious symbols while in the exercise of their functions. Of the four provincial override initiatives, the Québec bill is the only one that has come into force. The prohibition is not without reminding us of similar laws enacted in several European countries such as Belgium, France and Switzerland. Shortly after its enactment, the Laicity Act became the subject of a lawsuit. In *Hak v Québec* (2019), the Court of Appeal, in a 2-1 majority decision, dismissed the appellants' application for a provisional stay of the ban on religious symbols (and the requirement that public sector employees exercise their functions with their face uncovered).

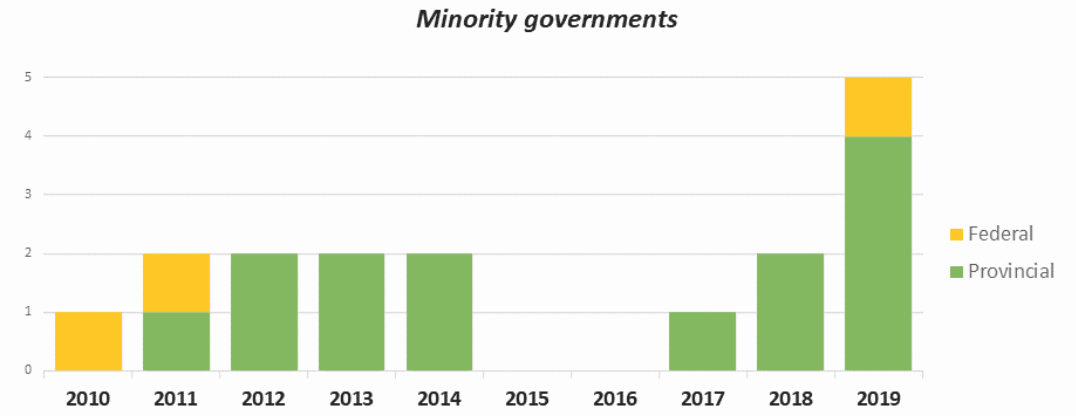
The recent resurgence of the notwithstanding clause may be interpreted as a symptom of deeper disagreements, or even polarization, over major social and political issues across the three branches of the government. 10 of the 36 provincial minority governments since Confederation were elected in the past 20 years. During that period, Québec had two of its three minority governments (2007, 2012), the third one dating back to 1878. At the federal level, the country is under its fourth minority government since 2004; before then, the previous one was in 1979-80. The increased divisiveness in the electorate parallels an increased divisiveness at the Supreme Court. From a 18% low in 2001, the proportion of split decisions has gone to a high of 58% in 2019. In fact, 2018 and 2019 have seen the highest number of split decisions since at least the turn of the century.

Canada is not immune from global social and political currents. It shares in many of the same major controversies and sources of social tension that exist in other democracies. These trends are visible in the four recent instances of actual or intended uses of the notwithstanding clause, which deal with the role of the State vis-à-vis religion, electoral reforms, and popular distrust in science. At the more theoretical level, the notwithstanding clause also exemplifies a perennial debate in democratic societies about the proper balance between the judicial and political branches of government. As the Québec Bill 21 case finally proceeds to be heard on the merits, it is the first Charter challenge involving the notwithstanding clause in more than 30 years. The end result in this latest round of the power struggle between the government and the judiciary has the potential to recast the longstanding role of Canadian courts as the self-appointed guardians of the Constitution and determine their real ability to act as a counter-majoritarian force in a constitutional democracy.

*This blog post is partly based on a note from F. Chevrette and H. Marx,* Canadian Constitutional Law: Fundamental Principles – Notes and Cases *(by H.-R. Zhou, Thémis) (in print). With thanks to Audrey Labrecque for excellent research assistance.*




*Sources: Supreme Court of Canada, 2019 Year in Review (2020), p. 35, https://www.scc-csc.ca/review-revue/2019/yr-ra2019-eng.pdf; Pier-Luc MIGNEAULT, Les gouvernements minoritaires au Canada et au Québec : historique, contexte électoral et efficacité législative (Presses de l'Université du Québec) (2010) p. 11-12*