

The Culture Wars in Quebec?

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By: Pearl Eliadis

On May 13 2021, the government of Quebec tabled Bill 96, *An act respecting French, the official and common language of Québec* [“Bill 96”]. The aim of the Bill is to further promote the French language and respond to a growing concern among Francophones that French is on the decline in Quebec. The Bill freezes access to CEGEPs (Quebec’s junior college system) to persons who are not historic Anglophones (a term not used in the Bill, but which pithily describes the implications of these provisions), limits the right to communicate with government officials in English, and restricts the use of English before the courts. It also significantly strengthens the role of the *Office québécois de la langue française*, which is the agency responsible for compliance with the Charter of the French Language.

Bill 96 has been widely condemned because of its pre-emptive derogations from human rights protections: all fundamental freedoms, legal rights and equality rights under the *Canadian Charter of Rights and Freedoms* [the "Charter"], and the Quebec *Charter of human rights and freedoms* [the "Quebec Charter] are no longer available to anyone in Quebec who experiences a violation of rights under Bill 96.

It also ignores the modern reality of Quebec, in that large numbers of immigrants, whose mother languages are neither French nor English, are learning French and living in several languages. The Bill is also a clear violation of international human rights law, a dimension that is rarely discussed in the media or, to date, in written submissions under the Bill. It also completely ignores the opportunity to strengthen Indigenous languages in a year that marked Canada's first Day for Truth and Reconciliation.

Most Canadians – including Anglophone Quebecers – understand the precariousness the French language in North America and the uniqueness of Quebec culture. Appropriate measures are needed to protect the viability of the French language.

However, Bill 96 goes much further than is necessary. The restrictions on human rights are disproportionate and overbroad, eliminating more rights than would be justified by any rational approach to protecting the French language. This overreach, which engages with principles of fundamental justice that pay attention to the disproportionality and overbreadth of impugned laws, would violate the constitutional principles of fundamental justice under s 7 of the Canadian Charter as described by the Supreme Court of Canada in the *Carter* case - had section 7 not also been overridden in Bill 96 by the use of the notwithstanding clause in section 33 of the Charter. For example, there is no evidence that barring a few thousand Anglophones from English CEGEPs would have any effect on the decline of people whose mother tongue is French in Quebec. This decline is at the heart of the policy objectives underpinning the Bill.

Both Charters draw on and are inspired by international legal obligations that Canada adhered to in 1976, namely the International Covenant on Civil and Political Rights [ICCPR] and the International Covenant on Economic, Social and Cultural Rights [ICESCR].

Putting Bill 96 in Context

Bill 96 is but one in a long string of attempts by several different governments to establish a particular – even monolithic – Quebec, identity, starting with the Bouchard-Taylor Commission's report in 2008. The Bouchard-Taylor report adopted what was then considered a new approach in Canada, namely "interculturalism," an assimilationist doctrine offered as an alternative to multiculturalism. It gives primacy to the rights of the French-Canadian majority and, indeed, in a 2011 article entitled "What is Interculturalism?" in the McGill Law Journal, sociologist Gérard Bouchard described it as a perfectly legitimate attempt to promote the "interests of the majority culture."

In 2009, for example, Bill 391, entitled an *Act to assert the fundamental values of the Quebec* nation, purported to amend the Quebec Charter, establishing a hierarchy of rights with gender equality trumping all other rights. A year later, the Liberal Party of Quebec introduced its own response to the Bouchard Taylor Commission, Bill 94, an *Act to establish guidelines governing and accommodation requests within the Administration at certain institutions* and, of course, in 2013, the infamous, albeit unsuccessful, "Charter of Values", Bill 60, was tabled in the National Assembly by the Parti Québécois government.

More recently, Bill 21, An Act respecting the laicity of the State, was enacted in 2019 and continued the trend of suppressing minority rights in favour of the majority preferences. It too eliminated most rights and freedoms through pre-emptive derogation of both the Charter and the Quebec Charter. In Bill 21, the principle of “laicity”, the Quebec’s government’s infelicitous English term for secularism, was elevated as an uber-principle and used to subjugate most of the substantive rights that are contained in both Charters along with the derogation clauses that were invoked to pass Bill 21 and avoid court challenges. The Bill was challenged in the courts, and while the Quebec Superior Court in *Hak c. Procureur général du Québec* upheld a small number of rights that escaped the derogations (mainly because the English language school board’s jurisdiction over its own system escapes the notwithstanding clause), this should provide cold comfort, considering Mr. Justice Blanchard’s dim view of Bill 21 and the “serious and negative consequences [of Bill 21] for all people who wear religious symbols in public” (para 68) not to mention the evidence of “an upsurge in acts of harassment or denigrating and insulting remarks against … members of the Muslim faith wearing a religious symbol” (para. 71).

Bill 96 should, in this respect, be seen and understood in context, as part of a sustained assault on equality rights, fundamental freedoms, and human rights more generally that has been ongoing in Quebec since at least 2008.

Asserting the Primacy of the Canadian Charter of Rights and Freedoms

Commentators and experts rightly point to the social and cultural significance of the Quebec Charter, as well as the fact that the Quebec Charter preceded the Canadian Charter by seven years following a unanimous vote at the National Assembly. The Quebec Charter came into force a full decade before the Canadian Charter’s equality rights section in 1985.

At the same time, it is important to keep Quebec’s Charter in its historical context: it was preceded by fifteen years by the Canadian Bill of Rights. The Ontario government enacted its human rights code in 1962. A year later Nova Scotia enacted its human rights law. And between 1963 and 1970, Alberta, New Brunswick, Prince Edward Island British Columbia, Newfoundland and Manitoba all enacted their own human rights laws, well before the Quebec Charter which is a human rights law similar to these.

These human rights laws, however important, do not have constitutional status. Unlike the Quebec Charter, the Canadian Charter it cannot be modified by the act of a single legislature (*pace* the

attempts in Bill 96 to do just that).

And yet, even today, advocates and activists in Quebec tend to minimize the use of the Canadian Charter to appease nationalist, majoritarian and populist views in Quebec. There is a tendency to either not refer to the Canadian Charter all, if possible, or to do so as an afterthought, after relying on the Quebec Charter. This, in turn, reinforces a long-standing tendency to focus on the Quebec Charter when it comes to language and identity matters even though both Charters are fundamentally relevant to the protection of the rights of Quebecers and often work hand-in-hand to ensure the protection of critical rights and freedoms.

In this respect, it is worth remembering the historic positioning of section 33 of the Canadian Charter as something that should only be relied on exceptionally in exceptional circumstances: in 2018, a summary analysis of section 33 of the Charter that was prepared for the Library of Parliament said,

“Section 33 was seen as a safety valve to be used only on rare occasions, and it was expected that it would be used in relation to “non-controversial issues.” It was anticipated that resort to section 33 would be to preserve basic social and political institutions and enable legislatures to overcome unacceptable judicial determinations where there was popular support for doing so.”

Repeated attempts to use the notwithstanding clause in Quebec in precisely the controversial cases where it was supposed to have been avoided, risks normalizing the use of the notwithstanding clause in matters of language and identity (noting that language is a specific ground of discrimination in the Quebec Charter), with serious implications for human rights in Canada and, as will be seen below, for our international obligations.

Impact of Derogations from Charter Rights

Bill 96 does not only affect language rights: critically, within the purview of the Bill, it also nullifies freedom of expression, religion, thought belief, opinion, freedom of the press, peaceful assembly and association, the rights to life liberty and security of the person, and the right to be free from unreasonable search or seizure, the right to be free from arbitrary detention, or imprisonment, the right to be free from cruel and unusual treatment. It also eliminates all the legal rights related to a fair trial and the presumption of innocence, the right in legal proceedings to an interpreter for parties or witnesses who do not understand or speak the language in which the proceedings are conducted, and equality rights.

No attempt has been made by the legislator to tailor the restrictions on rights to address any perceived danger to the French language. Instead, every single right that could possibly be derogated from under section 33, the Charter’s notwithstanding clause, has been dispensed with. The disproportionate nature of these derogations should give rise to significant concerns, not only in their own right, but also because of the unwritten principles of the Canadian Constitution that the Supreme Court of Canada affirmed in the 1998 decision of the Supreme Court of Canada in the *Secession Reference* such as constitutionalism and the rule of law, and the protection of minority rights.

A brief example may shed light on the potential impacts. Bill 96 would strengthen the investigation and inspection powers of the *Office québécois de la langue française* to enter premises and access electronic devices and "any related document." Section 111 of Bill 96 would allow an Office inspector to require a person provide access to virtually any data related to any information pertinent to the enforcement of the Office's powers. In addition, any person who has custody, possession or control of documents referred to in this section must communicate them to the person making the inspection and facilitate their examination by that person.

Section 8 of the Canadian Charter of Rights and Freedoms protects against all forms of unreasonable search and seizure. But for the notwithstanding clause, if a person believed that the Office had violated this fundamental democratic right against State intrusion, there would be legal protections. Under Bill 96, however, there would be no such right. Worse, the Bill does not create a requirement of reasonable grounds, or even reasonable suspicion. There is no requirement for prior judicial authorization of any kind, such as a warrant. And so, there would be no grounds whatsoever to contest what would otherwise be an unlawful search and seizure.

The erosion of the Quebec Charter

There is also a long catalogue of rights protected in ss. 1-38 of the Quebec Charter that have also been stripped away by Bill 96. The extent of the erosion of rights in the Quebec Charter under Bill 96 is so extensive that one must ask whether the legislator can possibly be aware of its seriousness and significance or, more likely, considering the trends in Quebec since 2008, whether it has simply chosen to deliberately ignore one of the supposed cornerstones of Quebec's legal system.

Section 9.1 is fundamental to the Quebec Charter and plays a role similar to section 1 of the Canadian Charter. It provides a certain balance and integrity to the overall interpretation of the Quebec Charter by ensuring that the rights to be free from discrimination are exercised in relation to democratic values, public order and the general well-being of Quebec citizens.

Bill 21 had added 'laicity' to the list of priority values that skews the interpretation of the Quebec Charter away from the right to freedom of religion now, Bill 96 would also add the French language as a 'super value' The French language is at the top of the list of 'super values' which take precedence in Quebec society as a result of a majority consensus ushered in by interculturalism. The triumvirate of super-values are: the equality of men and women, secularism and the primacy of the French language. Bill 96 creates a hierarchy of rights, this time placing French language rights above all other rights. By giving the rights of the majority group normative priority over other rights and other groups, the Quebec government is creating hierarchies of rights that have no basis in law and that are inconsistent with both Canadian and international law.

As the example on unreasonable search and seizure demonstrated, the implications are deeply problematic in that they create an untrammelled executive power that allows for no restraints on rights violations and minimize the role of the judiciary.

The Legality of Derogations in International law

Quebec's trend of undermining constitutional rights is also a violation of international human rights law. Canada is legally bound to respect, protect and fulfill the rights in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Quebec is also legally bound by international law, for example in Order-in-council in 1976 (Order-in-Council 1438-76) by which it committed Quebec to respect the rights that Canada had agreed to uphold.

No hierarchies of rights are permissible in international human rights law according to the 1993 UN Vienna Declaration and Programme of Action, which also urged States and the international community to promote and protect the rights of persons belonging to national or ethnic, religious and linguistic minorities in accordance with the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities.

Article 2 of the ICCPR and of the ICESCR require every State to ensure to all individuals within its territory all the rights contained in them without "distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (emphasis added.)

The only possible purpose of Bill 96, and indeed its enunciated and sole objective, is to create distinctions between people based on language, with adverse impacts on historic linguistic communities, especially Anglophones.

Even in cases of an emergency that threatens the life of a nation, Article 4 of the ICCPR states that States may not take measures that discriminate based on language (among other grounds), and Article 4 of the ICESCR provides that the State may subject such rights only to such limitations as are "determined by law, only in so far as this may be compatible with the general nature of these rights and solely for the purpose of promoting the general welfare in a democratic society." But, again, such limitations remain subject to the non-discrimination clause, including for language, which contains no exceptions.

Canada has ratified not only the ICCPR, but also the optional protocol which creates the right for citizens and organizations to make claims that treaty rights are being violated. There is a well-established rule that international human rights law that requires exhausting domestic remedies before being able to file a formal communication (the term used for a complaint). But with regard to those rights that have been subject to the notwithstanding clause, there is by definition no right of action (as we saw in the previously-cited decision in *Hak* case before the Superior Court on Bill 21) and arguably all domestic remedies before the courts have already been removed or have been rendered powerless to address the violation of basic rights with respect to the rights that have been subject to the notwithstanding clause.

Canada has not signed the optional protocol under the ICESCR, which would allow for direct complaints to that treaty system, but that does not preclude representations before the relevant international bodies responsible for reviewing Canada's periodic performance under that treaty, or under the process established by the UN's Universal Periodic Review.

Conclusion

Bill 96 goes far beyond what is necessary or appropriate to protect the French language. English is one of the historic languages of this province, with legal status and a contemporary and critical role both socially and culturally. Not only does Bill 96 minimize the role of English and English-speakers, but it also trivializes their role in Quebec society as among the founding partners of Quebec society.

As a result, if legal challenges to Bill 96 (and, for similar reasons, challenges to Bill 21) fail before Canadian courts, civil society organizations and minority linguistic communities would be well placed to file complaints ("communications") to the treaty bodies that oversee compliance with treaties such as the ICCPR, as well as use mechanisms in other international fora to inform the international community about the impact of Bill 96 on the grounds that it places Canada, and more specifically Quebec, in violation of international human rights law.

In closing, the linguistic rights of Indigenous peoples have been completely ignored in most of this debate and receive barely any mention in Bill 96, despite a national resurgence of interest in Indigenous languages. Canada is currently undergoing a critical examination of the substantive meaning of reconciliation; Bill 96 is focused on status of the two settler nations in Canada, but it would behoove us as a society to think carefully about the linguistic rights of Indigenous peoples in Quebec as part of a meaningful inquiry into social cohesion and reconciliation.

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