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The Formidability of Constitutional Challenges to Quebec's Laicity Law

<https://www.e-ir.info/2025/11/01/the-formidability-of-constitutional-challenges-to-quebecs-laicity-law/>

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The debate over Quebec's Laicity law has recently permeated the Canadian national and constitutional discourse. In his brief filed with the Supreme Court of Canada on the Quebec's Bill 21, the Federal Attorney General, Sean Fraser has urged the Supreme Court justices to set limits on the application of the section 33, known as the Notwithstanding Clause in the Charter of Rights and Freedoms. These remarks have sparked an immediate backlash from Quebec and certain other provinces such as Alberta and Ontario. The federal government's expectation that the Supreme Court should restrict the invocation of section 33 reveals its lack of viable options to challenge Quebec's Bill 21. Relying on the Supreme Court to place restrictions on the application of section 33 is not only an infeasible approach, but it also is conducive to triggering a constitutional crisis and intensifying federal/provincial conflict.

Prior to identifying and analyzing the options available to the federal government to challenge Quebec's impugned law, it is essential to provide a brief background to the case before the Supreme Court of Canada. Enacted in June 2019, Quebec's Bill 21, officially referred to as an Act Respecting the Laicity of the State, prohibits certain public sector workers such as teachers, police officers, judges, and government lawyers from wearing religious symbols while on duty. Quebec's Bill 21 aims at affirming, solidifying secularism, and maintaining religious neutrality in the public sector. The Quebec government adopted Bill 21 based on the findings and recommendations of the 2008 Bouchard-Taylor Commission. One of the main recommendations of the Commission that the Quebec provincial government capitalized on was prohibiting "... provincial judges, Crown prosecutors, police officers and prison guards from wearing religious signs and clothing while on the job."

Quebec's Bill 21 was challenged at the Quebec Superior Court in 2022. The court found the Bill to be in violation of the Charter provisions. However, Quebec government had invoked section 33 of the Charter which allows parliament or legislature of a province to invoke this section to override rights and freedoms mentioned in section 2 and sections 7-15 of the Charter for a duration of five years subject to renewal. In his ruling, Justice Marc-Andre Blanchard of the Quebec Superior Court found that "Bill 21 does not violate Canadian constitutional architecture or the rule of law," However, Justice Blanchard ruled that two parts of the Bill (extending the Bill to English School Boards and the members of the National Assembly were in violation of the Charter protected rights in section 23 and section 3 respectively that could not be taken away by invoking section 33. The Quebec government appealed the ruling by the Quebec Superior Court to the high court in the province. In March 2024, the Quebec Court of Appeal upheld Quebec's Bill 21 in its entirety. The decision by the Quebec Court of Appeal is currently challenged at the Supreme Court.

As an intervenor in the case, the federal government has urged the Supreme Court to set limits on the use of the section 33 because in the federal government's view its repeated usage is tantamount to " indirectly amending the Constitution" which consequently results in the "irreparable impairment" of the Charter protected rights of Canadians.

It should be reminded that the inclusion of section 33 in the Charter was a crucial element of the 1981 federal/provincial agreement that secured the consent of those provinces that had allied themselves with the Quebec to oppose repatriation of the Constitution Act of 1982. To break up the "Gang of Eight" (referred to the alliance between Quebec premier with seven other provincial premiers), the then Prime Minister Pierre Trudeau had to make

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such a painful concession to those provincial premiers who believed the Charter imposes limits on the legislative sovereignty of provinces. It should be mentioned that it is in fact section 52(1) of the Constitution Act of 1982, not necessarily the Charter, which heralds the end of parliamentary sovereignty and the supremacy of the constitution as the highest law of the land. Section 33 in the Charter re-established a limited legislative sovereignty. Therefore, since the inclusion of section 33 in the Charter was an essential condition to secure the repatriation of the Constitution Act of 1982, placing restrictions on the application of section 33 is therefore bound to set off a constitutional crisis.

If setting limits on the application of section 33 is almost impossible, can the federal government challenge Quebec's Bill 21 on the federalism grounds? There is no solid ground for federalism review that could allow the federal government to successfully challenge Quebec's Bill 21. In the 1930s throughout 1950s, the Supreme Court's rulings on provincial laws that had restricted fundamental freedoms (such as freedom of expression, political speech, and freedom of press) established a precedent that only the federal parliament is competent to regulate such fundamental freedoms through either the criminal law power or the Peace, Order and Good Government Power (POGG).

One of the most significant cases that became a point of reference for subsequent cases was Alberta Press case of 1938, formally known as Reference Re Alberta Statutes. In 1937, the Social Credit government in Alberta passed the Accurate News and Information Act which required newspapers to publish government's rebuttals to criticisms directed at provincial policies. The Supreme Court ruled that free political speech, which is central to Canadian parliamentary system of government, was so important to the nation as a whole that could not be relegated to a local or private matter. Thus, the Supreme Court found that regulation of political speech and free press is outside of the jurisdiction of provincial legislature and therefore, falls within the exclusive jurisdiction of the federal parliament which "is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs ...".

This historical precedent is not a viable option for the federal government to rely on to challenge Quebec's Bill 21 on the federalism ground because section 33 in the Charter which is an integral part of the 1982 Constitution Act, has expressly empowered provincial legislature to abrogate the Charter protected fundamental freedoms (freedom of religion, freedom of expression, freedom of assembly and freedom of association), legal rights and equality rights for a specific period.

The only constitutional tool that the federal government has in its arsenal is the Disallowance Power, which is specified in section 55 of the Constitution Act of 1867 and is extended to provincial legislatures in section 90. Constitutionally, the Disallowance Power permits the federal cabinet to request the Governor General to reject any provincial law. During the early decades of the confederation till 1940s, the federal government frequently invoked this constitutionally granted tool to kill provincial laws that were deemed to be contrary to public interests, unjust or discriminatory towards minorities. However, this is a controversial option that if invoked, would set in motion seismic waves of political and legal challenges. First, resorting to the Disallowance Power would be perceived by provinces as a blatant intrusion into provincial jurisdiction and will inevitably inflame anger across provinces particularly, Quebec, Alberta, and Ontario. Second, since it has not been used for more than seven decades, the Disallowance Power is conventionally "fallen into desuetude."

The disuse of the Disallowance Power for a prolonged period has established itself as a constitutional convention. Therefore, invoking the Disallowance Power is an outright violation of constitutional convention. However, legal scholar James Ross Hurley has argued that the formation of a constitutional convention requires the consent of all political players. According to Ross, since no Canadian Prime Minister has declared the Disallowance Power to be obsolete, the latter is still a valid constitutional instrument. But Ross's argument purports to run counter to the Supreme Court's view on the Disallowance Power. In *Queen v. Beauregard* (1986), the Supreme Court asserted that the disuse of Disallowance Power has arisen from the fact that the courts have emerged as "the ultimate umpire of the federal system", and this "role still fundamental today, requires that the umpire be autonomous and completely independent of the parties involved in federal-provincial disputes." Therefore, it is the judiciary, not federal government, which has the constitutional authority to determine the constitutionality of an impugned provincial law.

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Since Quebec's Bill 21 is legally unassailable, there are no viable options to successfully challenge it except removing section 33 from the Charter through a formal constitutional amendment which is a tall order given the formidability of mega constitutional politics in Canada. In this case before the Supreme Court, it is possible that the Supreme Court might identify the breach of certain Charter provisions that are beyond the reach of section 33 or it might exhort Quebec government to minimize Charter infringements as it did in *Ford v. Quebec*, 1988 which is similar to the present case (in response to Quebec's Bill 101 which prohibited the use of commercial signs written in languages other than French, the Supreme Court suggested that commercial signs can be in both languages and Quebec government could still accomplish its legislative objective of protecting French language by requiring greater visibility of French language on commercial signs. Thus, the Supreme Court suggested, not ordered, a compromise between Quebec government's intended objective of protecting the French language and accommodating the English language). However, the Canadian highest court is highly unlikely to set limits on the application of section 33 as the federal government anticipates because such a ruling exacerbates federal/provincial tension and triggers a constitutional turmoil.

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