Law, Preventive State, and Dissent

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> In conformity with a continuing tendency in all of the Western democracies, the declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government.
> — Giorgio Agamben, *The State of Exception*[2]

The 2012 student strike disrupted the state of many affairs in Québec. There was the solidarity and the creation of new spaces for experimentation. There was a sudden entry of subversive and unsettling discourses into mass media. There was the advent of possible commons that had been previously unthinkable. Because of all this, and against it, one of the most repressive episodes in contemporary Québec's history was set in motion. Tasked with an assignment, the juridico-legal machine applied itself with rigor and serenity to completing its hard work. The official discourse tirelessly repeated the same formulas: stability, public order, and the monopoly certain institutions held on political legitimacy. However, the criminalization of dissent and the careful destruction of the first stammerings of counter-power would have been more appropriate ways of discussing the processes set in motion.

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[1] Translated by Kevin Paul.

[2] Agamben, Giorgio. État d'exception, 2003, Paris, Seuil, 2003, p. 29. Translator's Note: Translation pulled from exceptionsandnormality.files.wordpress.com/2007/11/agamben-state-of-exception.pdf.

By virtue of their stunningly cohesive common action, the executive, legislative, judicial, and police branches of State power revealed their unity. As always in a period of crisis, the State took off its mask and confirmed through its actions that the separation of powers is the foundational *myth* of liberalism, rather than its precondition. What if the state of exception did not need to be incarnated through a suspension of the Constitution? And what if modern democracies, parliamentary or republican, working through the juridico-police complex, already possessed all the tools to impose the rules of the game, and in the same move bypass them? The 2012 strike provides an example of the State's capacity for repression — innovative and infinite — in periods of crisis.

Political power and the birth of repression

May 18, 2012, some 3 days after talks definitively broke down between the Minister of Education and the student federations, Québec's National Assembly adopted Law 12, the *Act to enable students to receive instruction from the postsecondary institutions they attend*.[3] The term special law was used as well, but let us not kid ourselves: this was not a law of exception but indeed an ordinary law, simply one that was hastily adopted by Parliament. The law contained three parts: first, a section suspending the current school semester and laying out plans for resumption in mid-August with a condensed calendar, in order to both avoid the cancellation of the semester and halt the momentum

[3] *Loi permettant aux étudiants de recevoir l'enseignement dispensé par les établissements de niveau postsecondaire qu'ils fréquentent* («Act to enable students to receive instruction from the postsecondary institutions they attend»; L.Q. 2012, chapitre 12)

of mobilization; second, a section containing provisions aimed at preserving peace, order, and public security; last, civil, administrative, and penal sanctions for breaches of the above provisions.

With the adoption of this law, the legislative power—which in the Canadian and Québécois parliamentary system merges with the executive, since the party in power and the cabinet of ministers (i.e. the executive organ) controls the legislative organ, Parliament—enacted a change of paradigm. Beginning in the month of March, a bit more than a month after the start of the strike, Québec Premier Jean Charest started to substitute the word "boycott" for the word "strike."[4] Using a particularly rigid, legalistic argument, Charest declared that the strike is a concept that exists only in the Labour Code, specifically when there is an impasse in negotiating a new collective agreement in a unionized setting. Of course, the Labour Code may be the only codification of the concept of a strike in Québec law, but the right to strike is recognized as custom or practice[5] in other contexts, not least for student associations, and has been for over 50 years in Québec. But for the Charest government, that which lacked a purely legal existence was inadmissible. Students became users having paid for a service, and not going to one's classes was no longer a manner of carrying out a strike, but rather a simple boycott, like a consumer exercising (or not exercising) their buying power. It's their right, but they must not fetter the service; the free market and the free choice of the other consumer-

[4] *cf*. Comment la grève est devenue boycott («How the strike became a boycott»; in French): docs.google.com/document/d/1lzorbxztxgihf2q0qnh80brozbkjr_ecaha5y21owdw/

[5] Translator's note: i.e., extra-legally.

units would not permit it, the fluidity of capitalism takes precedence. This new paradigm of the strike was crystallized by the special law.

Under the new paradigm, those who intend to make the mechanics of the strike work just like before have to face the consequences:

> 13. No one may, **by an act or omission**, deny students their right to receive instruction from the institution they attend…

This means the end of picketing organized to carry out the strike mandate duly voted by student general assemblies. Note that fault by omission (not doing) is explicitly named in the law, which, in the newly codified domain of the student strike-as-boycott, leads us to worry about the extent that it can be interpreted very widely.

> 16. A person, a body or a group that is the organizer of a demonstration involving **50 people** or more to take place in a venue accessible to the public must, **not less than eight hours** before the beginning of the demonstration, provide the following information in writing to the police … :
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> (1) the date, time, duration and venue of the demonstration as well as its route, if applicable; and (2) the means of transportation to be used for those purposes.
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> **When it considers** that the planned venue or route poses serious risks for public security, the police force serving the territory where the demonstration is to take place may, before the demonstration, **require a change of venue or route** …

In other words, no more spontaneous demonstrations. Instead, we have the codification of police ability to interfere, to change the route of a demonstration at its discretion. This is a striking example of the delegation of powers that occurred from political power to police power. "We have faith in the work of the police," replied the Premier and the Ministers of Education, of Justice, and of Public Security in unison when questioned on the concrete application of Law 12.[6] Here, the political wing expressed a general will more than specific measures, and in leaving it to police power to make this will concrete created a political police.

But let's return to the notion of the state of exception. Law 12 states at article 9 that *the government may prescribe any other necessary change to the provisions of this Act*. No more amendments to the law, no more sanctions and no more obligation to operate in accordance with parliamentary procedure. Short-circuiting the usual process, the minister herself can make changes to her law. In our parliamentary system, legislative power is in the hands of the executive, which in the case of a majority government controls the Parliament. No one makes a big deal out of this blurring of lines. However here, they no longer even trouble themselves with the trappings of an official opposition and the process of amending laws in Parliament. The executive controls the political, without any restrictions.

[6] *cf.* Chouinsard, Tommy. «Loi 78: Jean Charest s'en remet au jugement de la police» («Bill 78: Charest to let police decide»), *La Presse*, August 8th 2012

Add to these considerations the fact that Law 12 violates the Canadian Charter of Rights and Freedoms, a constitutional document, and the Québec Charter of Human Rights and Freedoms, even according to the Québec Bar Association. But between the submission of a motion to a tribunal and the eventual trial many months may pass, years if we count the appeals process. Months or years of potential unconstitutionality are thus tolerated and, in a way, are rendered legal. The executive branch assumes then that it incarnates the State and is above the law. Such is a major characteristic of a state of exception. As is the presence of a political police, which we now turn to.

Police power and reinterpretation of the law

The student strike and the social movement that followed upon its heels generated more than 3300 arrests from February 16 to September 3, 2012, the biggest wave of political repression in the history of Québec.[7] These numbers are explained by the high number of direct actions and demonstrations that took place, but also by the quite particular room for legislative interpretation that the political branch of government placed in the hands of the police forces and that the police appropriated for itself.

Upon reading Law 12, we asked ourselves how the police would apply many provisions, above all those relative to the right to protest, since when the semester was suspended (as of May 18) there would no longer be any action on the campuses. The response never came. During

[7] *cf.* Collectif Opposé à la Brutalité Policière. *Plus de 3000 arrestations contre le mouvement étudiant (3e bilan final – 3 septembre 2012)* («Over 3000 arrests against the student movement, 3rd and final update, September 3, 2012») at cobp.resist.ca/

the 4 months when this law was in effect (it was repealed by the new government elected on September 4, 2012), the provisions relating to demonstrations were never applied. But they were nevertheless "in effect." And it was in this manner that police proceeded, by enforcing a change in the atmosphere. Time and again during the nightly demonstrations in the streets of downtown Montreal, the SPVM declared a march illegal (more than 50 people and route not stated in advance), but tolerated it. When you demonstrate under such conditions, you are de facto illegal. The supposed constitutionally guaranteed right to protest (made up of the right to express oneself and to freely assemble) no longer exists in this situation.

The most ironic part of the story is that the police never in fact needed Law 12. While Law 12 placed the crowd in a state of constant illegality, preexisting laws and bylaws, amply sufficient to "restore order," were used for arrests. For example:

- The City of Montreal's *Bylaw concerning the prevention of breaches of the peace, public order, and safety, and the use of public property*, in which article 3 prohibits **"obstructing the movement, pace, or presence"** of another citizen during a gathering.
- The Québec *Highway Safety Code*, which states at article 500 that **"no person may, without legal authorization, occupy the roadway"**.
- The *Criminal Code* of Canada, which allows the police, per article 63, to declare an **illegal assembly** and to order dispersal. Article 31 of the same code allows a peace officer to arrest an individual who they have **reasonable motive to believe** is about to take part in a **breach of the peace**.

The first two tools were used frequently, with 308 persons having been arrested in a single day (May 20), at the end of a nightly demonstration, for violation of a municipal bylaw.

Many charges were also brought under provisions of the Criminal Code. From June 7 to 10, 2012, the Formula 1 Grand Prix was held in Montreal. Following in the immediate footsteps of the height of the strike, several groups called for demonstrations against—or disruptions of—this event, rightly calling it a "paroxysm of the decadent chauvinism of the ultra-rich." The State and the elite became extremely concerned about these threats: To paraphrase Mayor Tremblay, who repeated the formula tirelessly throughout the conflict, Montreal's international reputation was at stake![8] Thirty-four people were thus arrested over the long weekend in conjunction with the event and countless more stops and searches were conducted in public transit and around the Grand Prix site. This was justified by claiming reasonable motive to believe there would be a breach of the peace, as per article 31 of the Criminal Code. What was the reasonable motive here? Accounts suggest that those who were apprehended were wearing the red square or had the misfortune of being under 30 years old. An arbitrary policing exercise, political profiling; in sum, a preventive State, which arrests the population to ensure that peace reigns rather than arresting the population following the commission of a crime. You are guilty before committing any crime and will be arrested on this basis; it's simpler that way.

[8] *cf.* Benssaieh, Karim. «Conflit étudiant: Gérald Tremblay se dit 'très, très, très déçu'» («Student unrest: [Montreal mayor] Gerald Tremblay 'very, very, very disappointed'»), *La Presse*, June 1st 2012

Such an interpretation of article 31 has been judged illegal by the courts, notably the Provincial Court of Ontario, which in the *Puddy* decision indicated that carrying out preventive arrests in the context of demonstrations is equivalent to penalizing dissent. The Court added that this interpretation can be a way of "metaphorically hijacking the message conveyed by those participating in demonstrations through the discrediting and de-legitimation that accompanies mass arrests."[9]

"SSPVM: political police!" chanted a group of anti-Grand Prix demonstrators, while surrounded and contained without any crime having been committed or any dispersal notice having been issued, all under the cover of a breach of an obscure municipal bylaw. Here, no War Measures Act or suspension of civil liberties is in sight. Police power responds to the demands of political power by criminalizing the "enemy within" by virtue of laws created for that explicit purpose, or laws already existing and imaginatively interpreted.

The judiciary: terrorism, paternalism, and rule by example

As we have seen, the criminalization of dissent was first instituted by political power and the creation of a discourse.[10] Police power extended this work further using

[9] Sylvestre, Marie-Ève. «Les arrestations préventives sont illégales et illégitimes» («Preventive arrests are illegal and illegitimate»), *Le Devoir*, June 12 2012. Translator's note: direct quote was pulled from *R. v. Puddy, 2011 ONCJ 399* ruling.

[10] Not least of which was the Minister of Finances at the time, Raymond Bachand, who told the Canadian Press that the movement was only made up of «a few radical groups who are bent on systematical-

political profiling and politically-motivated arrests. The role of judicial power remains to be seen: at the time of writing, no one has been convicted criminally for acts committed during the strike. We are still at the stage of challenging charges, among them some stemming from the *Anti-terrorism Act*.[11]

On May 11, 2012, after a police investigation that benefitted from media and informants for help identifying suspects, four people turned themselves in to the police, suspected of having thrown smoke bombs in the Montreal metro. The devices thrown on the tracks produced smoke, which led to a service interruption throughout the metro network lasting several hours. Charges of mischief and conspiracy to commit mischief have been brought, unsurprisingly, but also those of inciting fear of terrorist acts.

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ly destabilizing Montreal's economy. They are anticapitalist groups, marxists, they have nothing to do with tuition fees». «Bachand en a assez des groupes radicaux» («Bachand is tired of radical groups»), *Le Devoir*, May 15 2012.

[11] Anti-terrorism Act (SC 2001 c 41). This law has added anti-terrorism provisions in many previously existing laws, including the Criminal Code, the Security of Information Act, as well as the Canada Evidence Act.

Terrorist activity proper is defined in section 83.01 of the Criminal Code as:

- an act or ommission that occurs in Canada or abroad;
- is carried out in accordance with political, religious or ideological motives;
- with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act, whether the public or the person, government or organization is inside or outside Canada;
- and endangers a person's life, causes death or serious injury, substantial property damage, or causes serious interference with or serious disruption of an essential service

> *Criminal Code, 83.231*: (1) Every one commits an offence who, without lawful excuse and with intent to cause any person to fear **death, bodily harm, substantial damage to property** or serious interference with the **legitimate** use or operation of property:
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> (…) commits an act that, in all the circumstances, is likely to cause a **reasonable apprehension** that **terrorist activity** is occurring or will occur, without believing that such activity is occurring or will occur.

Let's look at the general interpretation of what is an incitation to fear terrorist activity. Per article 83.231, it is not a question of murder or homicide, but indeed of the fear of death, not of assault, but of fear of injuries, and not of mischief, but of fear of considerable material damage to property or serious interference with its legitimate use or operation. *Reasonably fearing terrorist activity; considerably; reasonably;* the law is full of fictions, of these magical adverbs that solve everything.

With the arrival of antiterrorist measures, we can observe a displacement of the notion of guilt in the theory of law. The charge rests here on an incitation to fear that the safety of the population might be in grave danger. A political notion (terrorism) and a crime of intent (incitation to fear, tending to scare) that no longer have anything to do with criminal law are grafted onto the traditional offence of mischief (having damaged property combined with the intention of doing so). When we compare the text of the antiterrorist provisions with the traditional mechanics of determining guilt, we are struck by the extent

to which these provisions clash, since they codify within the legal text *itself* the political and arbitrary character of the mechanics of determining guilt. That the first use of this article in Québec, 10 years after its creation, arises in the context of the student strike illustrates the political task shamelessly undertaken by the judicial branch. It remains to be seen how the magistrate presiding over the trial will rule. The trend set already in motion by Superior Court justices—which consists of imposing particularly restrictive release conditions for the accused in light of the allegations—does not bode well.

Lessons to be drawn

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
> – Montesquieu[12]

> One of the essential characteristics of the state of exception—the provisional abolition of the distinction among legislative, executive, and judicial powers—here shows its tendency to become a lasting practice of government.
> – Giorgio Agamben, *The State of Exception*[13]

During the 2012 student strike, we saw a high level of coherence between the legislative, executive, judicial, and police powers, as much in their reading of events as in the

[12] Montesquieu, *The Spirit of Laws*, vol. XI, chap. VI

[13] Agamben, Giorgio. *État d'exception*, 2003, Paris, Seuil, 2003, p. 19. Translation pulled from exceptionsandnormality.files.wordpress.com/2007/11/agamben-state-of-exception.pdf

violent repression that they deployed. The close relations linking these levels of powers and their capacity for concerted action become apparent when the State, of which they are only the iterations, is faced with dissent in an instance of crisis. Formally, however, these powers remain separate, in keeping with the liberal myth of a self-regulating state. Nevertheless, while the security paradigm establishes itself more and more as a normal technique of government, this same security paradigm is brought in in a time of crisis, to repress the enemy with a single voice. The student strike serves as an example of this process.

Can the state of exception then quietly settle in during periods of crisis, in the midst of the ordinary business of democracy? Many people asked themselves this question during the events of spring 2012. It also applies to the political militants, activists, and dissidents of other western democracies that also confront the security paradigm. Admitting that the state of exception exists implies rethinking one's activism, one's role when faced with the state. In the end, it calls upon us to disentangle ourselves from legal illusions, in order to confront political powers better and more directly.