



Forty years after the Charter: How routine use of the notwithstanding clause is transforming minority rights in Québec

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Just over 40 years ago, in the spring of 1982, Queen Elizabeth II signed the *Canada Act*, patriating Canada's Constitution and entrenching the *Canadian Charter of Rights and Freedoms* into law. Spurred by accelerated calls for a bill of rights domestically, and by growing international concern for human rights since the Second World War, the Charter established a pan-Canadian standard of rights and freedoms, transforming the relationship of citizens to governments across the country. At the time of its adoption, and to this day, the Charter has been widely supported, even celebrated, by the Canadian public (Parkin, 2022; Weinrib, 2003). Yet its establishment was also subject to highly divisive political debates, the consequences of which continue to reverberate. This is especially evident in Québec, which—for reasons tied to the pursuit of national autonomy—never signed on to the new Constitution.

Forty years after the Charter's passing, the conflicts at its centre are playing out in the actions of Québec's current Coalition avenir Québec (CAQ) government. Since being elected in 2018, this government has made a regular habit of bypassing the Charter, granting legislators more purchase over the determination of rights in the name of upholding "collective values." Understanding the means permitting—and the ends produced by—this legislative agenda is essential to grasping contemporary Québec nationalism and politics.

POLITICAL MOTIVATIONS

Historians agree that the architects of the Charter in Pierre Elliott Trudeau's Liberal government, in addition to being concerned about enshrining fundamental rights, were politically motivated. They believed that a constitutional Charter would help counter provinces' decentralizing demands, and they hoped it would dampen Québec's escalating independence movement by strengthening national unity (Russell, 1983). Opponents of the Charter, led by a "gang of eight" Canadian premiers (minus those of Ontario and New Brunswick), countered this narrative by portraying the Charter as violating the fundamentals of Canadian federalism by limiting the power of provincial legislatures. Chief among these opponents was Québec premier René Lévesque. He argued that the Charter constituted an act of "trickery" by the federal Liberals, designed to thwart Québec's efforts to secure constitu-

tional recognition as a distinct society (Binette, 2022). On the day that the *Canada Act* was signed by the Queen on Parliament Hill, Lévesque conveyed his discontent by ordering Québec's flags to be flown at half-mast (CBC, 2001).

Although unable to prevent the Charter's adoption, its opponents did secure a major victory through the inclusion of section 33, known as "the notwithstanding clause," which allows federal and provincial parliaments to override sections 2 and 7 through 15 of the Charter for a period of up to five years. Dismayed that the Charter held force in Québec despite his government's objections, Lévesque wielded the clause as a symbolic device throughout the early 1980s, citing it in every one of his government's hundreds of legislative initiatives (Weinrib, 1990). But, beginning in 1988, after it was used by Québec's Liberal premier, Robert Bourassa, to secure language restrictions on commercial signs, the notwithstanding clause fell into disuse in Québec.

Fast-forward to today, and the notwithstanding clause has once again become a routine instrument in the Québec government's political tool kit. In 2019, the CAQ wielded the clause to pass Bill 21, which prohibits public employees in positions of "authority"—including police officers, judges, and teachers—from donning visible religious signs on the job (Assemblée nationale du Québec, 2019). The CAQ government deployed the clause again in 2021 to alter provisions in the *Charter of the French Language* through Bill 96. Among other things, the bill enforces French-language requirements in businesses with 25 or more employees, stipulates that most government services will be offered only in French to immigrants and refugees in the country for six months, and adds clauses to the Canadian Constitution stating that Québec is a nation whose official language is French (Assemblée nationale du Québec, 2021).

MAJORITY VALUES

In both instances, use of the notwithstanding clause enabled the CAQ to divert power from the judiciary to the legislature in order to establish a framework of rights that—it alleges—embody the "values" of Québec's majority population.

In justifying its use of the notwithstanding clause on both occasions, the CAQ government has adopted a discursive strategy that is common to modern populisms: that of dismissing the courts as illegitimate, "elite" institutions whose actions lack the endorsement of everyday "people." When asked why his government felt legitimate in deploying the clause to pass Bill 21, for instance, CAQ Minister Simon Jolin-Barrette (2019) replied, "Québec society's decision to have a secular state belongs to the National Assembly, it belongs to the people of Québec through their elected representatives. . . . It is not up to the courts to determine how relations between the state and religions should be organized." This framing of the courts is especially resonant when tied to memories of Québec's betrayal by the "chartistes" of the 1980s. Recalling those memories in the subsequent debate over Bill 96, Jolin-Barrette (2022) decried those "who followed Pierre Elliott Trudeau in creating a constitution without even the approval of the National Assembly [and] imposed a *Charter of Rights and Freedoms* without the endorsement even of the people of Québec."

MINORITY RIGHTS

Yet, the CAQ's claims to represent the will of the "people" are rendered problematic by mounting evidence that, for many in Québec, Bill 21 undermines fundamental rights, particularly among religious minorities (Cour d'Appel du Québec, 2021). A recent online survey of 1,828 Quebecers, including 632 Muslim respondents, further found that 73 percent of Muslims in Québec feel less safe in public since Bill 21 was implemented. Two-thirds of Muslim respondents also reported being the victim of or a witness to a hate crime in that time (Taylor, 2022).

Forty years after its passing, the *Canadian Charter of Rights and Freedoms* continues to be the subject of political debate, even conflict. The long-term implications for minority rights have yet to be

seen. What seems more certain, however, is that the current CAQ government has made circumventing the Charter a core aspect of its political brand. ■

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