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Canadian Charter of Rights and Freedoms at 30

Those 30 years have shown that the Charter and democracy are not opposing ideals.

It has now been 30 years since Canada's Charter of Rights and Freedoms was signed.

By **JOHN D. WHYTE**

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Thirty years ago, on April 17, 1982, Queen Elizabeth, sitting under a wet and gloomy sky in front of Canada's Parliament Buildings, proclaimed in force the Canadian Charter of Rights and Freedoms — a key element of the new Constitution Act.

This event did not bring about a transformation of Canada's political life — it has not significantly added sensitivity to human rights to our politics. But what it did do was bring a missing legal instrument to Canadian liberal democracy: constitutional entrenchment of such basic rights as freedom of association, speech and religion, due process and equality.

At the time, some Canadian politicians opposed the Charter of Rights because it gave courts new power to review the decisions of Parliament, legislatures and governmental officials and to declare them invalid when they abridged rights. They objected to having the will of the people (as determined by elected representatives) be frustrated by the decisions of judges.

Opponents of the Charter forced the federal government to amend its constitutional plan and give legislatures the power to override the Charter, in some cases. This would seem to have defeated the claim that Canada had entrenched rights, except for the fact that governments fairly quickly abandoned use of the override clause — and it is not likely to come back.

Notwithstanding opposition to entrenched rights, a majority of Canadians seemed to agree to the creation of constitutional rights. And it is not at all clear what is anti-democratic in the people of a nation assenting to constitutional reforms that restrain exercises of political power. The people's will to approve constitutional policies is certainly as valid as majority approved legislation.

How disruptive of governmental policies and public will has the Charter actually been? The list of court rulings over the past 30 years that have struck down laws is not insignificant. These include Canada's abortion regulation, legislative barriers to same-sex marriage, legislated stripping of collective bargaining rights, restrictions on wearing religious symbols, excluding protection for homosexuals in provincial human rights legislation, excluding non-citizens from becoming lawyers, and restricting individuals wishing to campaign against Quebec separation. Reactions to these outcomes will vary from individual to individual but these decisions reflect a constitutional commitment to fair and just treatment.

Other decisions overturning government regulation have been more controversial — striking down limits on tobacco advertising and disallowing restrictions on private health insurance, for instance. While these decisions interfered with what seemed valuable governmental regulation, they have not actually led to the frustration of governmental plans for restricting smoking or maintaining a predominantly public health-care system.

What is more unsettling for some are instances of court failure to grant Charter protection — for example, to Hutterites who do not want their photos on driving licences, to young welfare recipients whose welfare payments were reduced to \$170 per month, to Newfoundland's women civil servants who sought to overturn the government's refusal to implement a pay equity award, and to parents of autistic children for whom treatment was curtailed. These cases represent an undoubted tendency of the courts not to let the Charter add to governments' burdens.

Questions remain. Has the Charter enhanced moral sensibility in Canadian political practice? Sadly, not perceptibly. Has the Charter weakened democratic practices? Something certainly has, but it is likely not the Charter. Have Charter decisions frustrated the achievement of public interests as declared by legislatures? Not to the extent that political outrage has often been induced. Have Charter decisions favoured the well-off who bask in liberty and left behind those who need government help in meeting basic needs? To some extent, this is true. For one thing, in our society the rule of law is realized imperfectly and the benefits of law, including Charter law, are distributed unevenly.

There is a question, though, to which the answer is clearer. Do Canadians now believe that the Charter was a mistaken constitutional initiative? This seems not to be the case; the Charter and democracy are still not opposing ideals.

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