

# *The Charter at Forty: Commemorating Patriation and Reflecting Upon the Promises and Perils of Human Rights*

**Special Issue Editors:**

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## **I. Introduction**

Between November 8 and 10, 2021, a national online conference, *The Charter at Forty: From Isolation to Inclusion: Navigating the Post-COVID World*, gathered an impressive array of scholars, human rights advocates, community leaders, artists, and policymakers to commemorate and critically assess the four decades since the important occasion of April 17, 1982, when Canada patriated its Constitution and elevated the country's human rights agenda to constitutional status. With 40 years of hindsight, it is a truism that the *Charter of Rights and Freedoms* has fundamentally changed the Canadian social, political, legal, and cultural landscape. Given the influence of the *Charter*, its 40th anniversary presents an opportunity to reflect on Canada as a settler colonial state with imperfect features of bilingualism and multiculturalism.

Brought into existence in a spirit of community-university partnership, the *Charter at Forty* conference boasted a wealth of conveners and partners, including: Canadians for a Civil Society, The University of Alberta's Department of Political Science (Faculty of Arts), the Canadian Research Chair in the Politics of Citizenship and Human Rights, the Centre for Constitutional Studies, the Social Science and Humanities Research Council of Canada, and the Kule Institute for Advanced Study. The conference was developed with a wide audience in

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mind and was open for all to attend. Accordingly, the conference not only framed the *Charter* as a constitutional landmark that was the product of fractious political processes, but also offered an example of how a human rights agenda can and should include the voices of civil society groups and ordinary citizens.

Acknowledging that Canada is a treaty territory and being guided by a recognition that human rights advocacy, practice, and scholarship necessarily entail a grassroots, bottom-up approach, the conference asked, in the words of Conference Co-Chair Dr Yasmeen Abu-Laban,<sup>1</sup> “How can a critical exploration of the *Charter*, nearly 40 years after its creation, assist us in responding to the exigencies of the post-COVID world?” Importantly, the conference recognized that our society is currently faced with numerous problems, many of which were exacerbated or brought to light by the pandemic. These included Canada’s ongoing colonial relationship with Indigenous Peoples, the rise of extremist movements and preponderance of misinformation, the discrimination and structural inequalities faced by minorities, and a variety of ecological crises. The conference organizers sought to create a space where these challenges could be discussed openly, and the conference was especially attentive to the building of good relationships with Indigenous communities in a general spirit of reconciliation.

This special issue of the *Constitutional Forum* presents papers written by several conference presenters, providing a glimpse into the diversity of perspectives and ideas that were represented. In this introductory essay, we aim to provide a snapshot of some of the main conference events and offer some very brief remarks about the importance and legacy of the *Charter* as we see it. We conclude by providing readers with introductions to each of the articles that comprise this special edition of the journal.

## II. The Conference

Informed by an eclectic and transdisciplinary approach, the conference invited and featured contributions from scholars, policy practitioners, artists, and civil society groups. Academic papers and panels analyzed key human rights issues and themes in the context of the *Charter* including: Indigenous peoples and decolonizing human rights; official languages and Quebec; immigration, diversity, and multiculturalism; federalism; the environment and environmental rights; disability rights; LGBTQ2S rights; gender and women’s rights; free expression; criminal law and human rights; and the notwithstanding clause.

The Human Rights Action Lab exemplified the bottom-up and grassroots approach of the conference by organizing workshops that aimed for the creation of change by means of legislation, policy, and the adoption of new practices. The Action Lab was convened by Conference Co-Chair Vasant Chotai, the President of Canadians for a Civil Society, and Dr Jared Wesley, Associate Professor in the Department of Political Science. It was conceptualized and delivered with the support of Dr Pieter de Vos, Peter Faid, Dr Richard Mailey, and Patricia Paradis. Using human-centered and systemic design methods, participants designed prototype solutions and recommendations focusing on socioeconomic barriers to rights protections, the disproportionate impacts of climate change on already marginalized groups, and mitigating

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harms arising from intolerance and racism driven by misinformation spread via social networks. Guided by the same commitment to a policy and practice-focused approach, and with the support of former Canadian citizenship judge Gurcharan Singh Batia, the John Humphrey Centre for Peace and Human Rights conducted a project that critically assessed the federal human rights complaint mechanism and provided recommendations so that it better meets the needs of the most vulnerable.

Community circles — spearheaded by Satya Das (acclaimed journalist and human rights activist), the Edmonton Heritage Council, the Jewish Seniors Centre, and Francophonie Plurielle Albertaine (FRAP) — brought together Canadians from different generations and life paths. Inspired by Indigenous tradition, the initiative aimed for change through storytelling, inviting each participant to reflect on the broader question of being and belonging as well as their role in the advancement of human rights and reconciliation efforts.

Highlighting important connections between cultures of human rights and the arts, the conference also featured arts-based workshops in collaboration with Teesri Duniya Theatre and the John Humphrey Centre for Peace and Human Rights. These workshops asked how human rights dialogue can be centered in theatrical productions and what role the arts can play in building community resilience in challenging times.

### III. The *Charter*

The consequences and legacies of the *Charter* are multiple. Some worry about the waning influence of Parliament as Canada's elected legislative branch and that judicial decision-making may seem "activist." Others worry that majoritarian approaches to democratic governance sometimes fail to fully respect minority rights, and thus see greater interaction between the judicial and legislative branches of government as a positive step. Along these lines, the *Charter* is often said to have contributed to a broad "legalization" of politics whereby Canadian courts have developed a much more significant role in the development of public policy and the settlement of political and policy disputes. Outside of the realm of law, the *Charter* has also had a major impact on Canadian national identity, underscoring a broadly shared public commitment to civic nationalism and multiculturalism.

Despite some contested impressions of the *Charter's* consequences and legacies, even a cursory look at *Charter* jurisprudence reveals that it has measurably advanced the cause of human rights in Canada.<sup>2</sup> Seminal cases have advanced the rights of refugees, women, the LGBTQ2S community, Francophones, incarcerated individuals, sex workers, and racial and ethnic minorities (to offer a non-exhaustive list). Others have bolstered procedural rights and a substantive version of equality, established wide latitude for expression (including dissent, protest, and a free press), and improved both access to justice and the state's commitment to core principles of fundamental justice.

Nonetheless, many of the sober reflections of the conference highlighted the fact that the key ambitions of the human rights project — even with 40 years of important Canadian

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2 For some examples of such cases in Canadian constitutional jurisprudence, see here: <<https://www.justice.gc.ca/eng/cs-jc/rfc-dlc/ccrf-ccdl/cases.html>>.

and international advances — still remain unfulfilled. The opening keynote of the conference, delivered by former Chief Justice of the Supreme Court, the Right Honourable Beverley McLachlin, captured this tension. According to McLachlin, Canada is “much admired for having adopted a *Charter*” and is generally recognized internationally as “having handled pluralism very well.” Nonetheless, McLachlin continued, Canada is also grappling with its “great shame,” its (cultural) genocide of Indigenous Peoples, including through the Residential School System. As Chief and Dr Wilton Littlechild emphasized in his opening remarks at the conference, the inclusion of Indigenous rights — as unsatisfactory as the “empty box” of section 35 of the *Constitution Act* came to be — was the culmination of decades of activism and advocacy seeking recognition from the Canadian government.

Recent invocations of the notwithstanding clause likewise show that human rights in Canada can be contingent, particularly in the case of Quebec’s Bill 21. Looking internationally, the present moment is also characterized by acute democratic backsliding, where constitutional rights and the rule of law are under immense strain as a result of a broad wave of authoritarian governance taking root. In addition, the global pandemic has both highlighted and intensified some tensions in contemporary democracies, human rights, and the rule of law. In debates about health policy and public health mandates, for example, the *Charter* has been lurking not too far beneath the surface. Most obviously, a global public health emergency necessitated a renegotiation of the scope and limits of coercive state power and individual rights. Similarly, tensions between individual rights and the collective good were suddenly less an abstract debate than a present reality of pandemic policymaking.

As became clear throughout the conference, while there are some causes for celebration, there are many challenges that confront us as a society. In the closing panel, Conference Co-Chair Dr Catherine Kellogg, Professor and Chair in the Department of Political Science, acknowledged the limitations and shortcomings of the *Charter* and suggested that it should be understood as only one of the tools in our toolkit as we seek to tackle the enormous problems before us. Therefore, in the wake of the pandemic, a robust human rights agenda with a renewed focus on disproportionately impacted communities is vital for Canada and the international community alike.

## IV. The Special Issue

In this special issue, François Laroque and Linda Cardinal’s paper analyzes what they call “the unfinished business of patriation,” the fact that the majority of Canada’s constitutional documents have no legal force in the French language. The fulcrum of their analysis is section 55 of the *Constitution Act, 1982*, which stipulates that an official French version of the Constitution must be prepared and enacted via proclamation by the Governor General. In this respect, Laroque and Cardinal’s paper highlights an historical inconsistency that has aroused less scrutiny than it deserves. They begin by tracing the historical origins of section 55, including the negligence that led to Canada’s unilingual Constitution and some of the legal, political, and scholarly efforts to address its failure to fully materialize since. Here, they argue that “constitutional fatigue” has been a major barrier, a result of high-profile constitutional and political dialogues that took place in the 1980s and 1990s. Despite a modest effort and some provincial interest in formalizing a French version in the 1990s, the status quo of non-recognition is durable. Admittedly, fully realizing section 55 would require challenging prerequisites: significant

provincial and federal collaboration and the invocation of the formal amending formula to provide a French version of the Constitution with the force of law. However, Laroque and Cardinal conclude with a range of persuasive normative arguments, making the case that the unfulfilled promise of section 55 has national implications that directly bear upon Canada's constitutional commitments. Like other contributions to this issue and the conference as a whole, they bring our attention to an important gap in Canada's fundamental law, suggesting that an officially bilingual Constitution is neither symbolism nor formality. Rather, by denying equal recognition of the French language, Canada's "persistent unilingualism" jeopardizes its commitment to bridging national cleavages through a shared commitment to a pan-national human rights agenda.

Entertaining the idea of being and belonging, the historically focused, narrative-driven analysis of Satya Das explores the deeply problematic history of the formation of the Canadian state and dismantles the notion of "two founding nations." Centering a critical settler colonial perspective, the author assesses the role of the *Constitution Act* "both as an evolutionary and revolutionary founding law" in the formation of Canadian identity. Drawing on personal reflections of Canadians with very diverse backgrounds, Das reveals that despite the *Charter's* key role in the birth of pluralistic identity, there was and remains a gap between the ideas of the bilingual and multicultural country this document evokes and the realities encountered on the ground. As a way of addressing this gap, Das illuminates the importance of approaching one's being and belonging through collective responsibility to one another as "treaty" people valuing "Mother Earth."

Catherine Kellogg and Adam Thurschwell's papers work in tandem with one another to explore the tension between the universal and the particular when it comes to human rights. Though we often think of human rights as universal, it is through our belonging in nation-states that rights are exercised and protected in practice, and this can have terrible consequences for those who — for one reason or another — are excluded from spheres of national belonging. Catherine Kellogg's paper lays out this tension by engaging with the work of Hannah Arendt, whose writing was seminal in articulating this tension at the heart of the modern human rights project. Arendt's focus was on the refugee, but as Kellogg argues, the experience of social isolation that Arendt describes can also be relevant for thinking about others who are isolated and disconnected from social life and institutions through dispossession, incarceration, or detention — those who are subject *to* but not *of* the law. Kellogg concludes by asking readers to take seriously the questions raised by Arendt about whether we can have non-nationalist modes of belonging where human rights would be protected in ways that transcend the exclusionary logic of the modern nation-state.

Adam Thurschwell's paper picks up this question, but rather than taking a theoretical approach, he grounds his argument in the empirical case of Omar Khadr, the former Guantanamo Bay detainee. In many ways, the individuals detained indefinitely at Guantanamo Bay exemplify Arendt's "uprooted, superfluous and rightless subject." And yet, as Thurschwell demonstrates, the political and legal struggles of these detainees have forced sovereign states to evolve in the direction of transnational human rights. To unpack this apparent contradiction, Thurschwell's essay compares relevant cases within Canada and the United States to demonstrate that although they have taken different approaches, both states have been pushed, through the legal and political struggles of the Guantanamo detainees, to recognize

the rights of these individuals as encoded in national and international human rights law. So, while modes of political belonging outside of the nation-state may not yet (if ever) be a reality, there is evidence that states can be moved toward recognizing human rights even of those they might try to exclude.

The three of us invite readers to visit the *Charter at Forty* conference website, where you can find a trove of valuable resources related to human rights in Canada, including some of the proceedings from the three sections of the conference: academic, policy, and arts and community. The website also features graphic recordings of conference proceedings by the artist and illustrator, Sam Hester.

You can find the website here: <<https://www.charteratforty.ca/>>