

# **Constitution Making and the Quest for Popular Sovereignty – the EU and Canada Compared**

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## I. Introduction

The last days' scrambles after a clear majority of French voters (55 vs. 45 percent) on May 29, 2005 rejected the Treaty establishing a Constitution for Europe serve to underline that the Union is at a critical crossroads. Euro-sceptics see the French result as clear evidence to the effect that the notion of a European constitution is a dream, a fiction that can never be realised in practice.<sup>1</sup> Euro-federalists see the result as the vindication of their argument to the effect that the Constitutional Treaty did not go far enough.<sup>2</sup>

These events and their different interpretations only underline the importance of the following critical issues: Is it possible to forge a sense of belonging – in a manner consistent with democratic principles - in entities that are both multinational and poly-ethnic? Can democracy be disassociated from its putative nation-state foundation so that supranational and highly complex multinational entities can also be considered democratic?

A clear no to these questions would have profound immediate consequences. For one, it would be clear that the EU's treaty-based commitment to democracy (cf. Article 6 TEU) would not extend far and could simply amount to mere window-dressing. Further, there would be no sense in seeking to revitalise the process of constitution making, as the 'game would not be worth the candle'. If we look to political theory for answers, we find that it is deeply torn over these issues. Many political theorists have therefore turned to the EU for answers. Present uncertainties have complicated this search for answers. It is therefore important to establish whether there are any other possible examples that we can draw upon – to illuminate debates in political theory and to offer lessons for the EU. By many counts the most interesting such case is Canada, also a multinational and poly-ethnic entity (cf. Kymlicka 1995, 1998).

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<sup>1</sup> Consider the Times Editorial of May 30 which stated that "The view of the French electorate should be deemed to be the last nail in the coffin of this unloved treaty. If, as expected, the citizens of the Netherlands again condemn it on Wednesday, then it will be more than six feet under. Rather than casting around for excuses and scapegoats, politicians, at home and abroad, should acknowledge the obvious. This text and the enterprise that produced it has long lacked the public enthusiasm that is required of democracies. The EU constitution is the dead parrot of the forestry of European politics."

<sup>2</sup> Consider the Independent Editorial of May 30 which stated that "A good proportion of the French who voted 'no' did so because they believed the treaty did too little to guarantee the EU's 'European' character."

Canada shares with the EU a long-drawn and deeply contested search for an institutional-constitutional framework that all relevant parties can agree to. Both Canada and the EU are *essentially contested entities*, which have, throughout their existence, faced the challenge of forging a sense of unity in the absence of agreement on the fundamental nature of the polity. Both have also existed for a long time under constitutional systems *not* explicitly founded on the principle of popular sovereignty.<sup>3</sup> It was only with the patriation of the Constitution in 1982, that Canadians for the first time sought to found themselves as a people (Russell 1993). The core vehicle here was the Charter of Rights and Freedoms, whose purpose was to foster a rights-based pan-Canadian constitutional patriotism. This was not a consensual process or a constitutional moment in Ackerman's sense (1991, 1997); it sparked deep conflicts that were sought settled through two major subsequent efforts, *both of which* failed. In other words, Canada shares with the EU the experience of failure to ratify major constitutional initiatives.

Given that the Charter was an effort to found the constitution on the principle of popular sovereignty, and has taken hold, Canada's experience can offer important insights as to whether the EU should proceed further in a democratizing direction. The purpose of this essay is precisely to examine the relevance of the Canadian Charter-infused constitutional transformation to the EU. It should be noted that this comparison is likely made more relevant by the fact that the European Union has already forged its own Charter of Fundamental Rights (formally speaking a political declaration but included in the Constitutional Treaty as Part II). What are the relevant lessons Europeans may draw from the Canadian experience of Charter-infused constitutional change?

To examine this, I will proceed in four steps. First, in light of the "widespread agreement that Canadians have experienced a Charter revolution" (Morton and Knopff 2000; Cairns 2003:105), I will present and compare the pre-Charter contexts of constitution making and accommodation of difference in Canada and the EU. Second, I will assess their democratic character. The assessment criteria have been derived from

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<sup>3</sup> Although Canada has one of the world's longest lasting constitutions (BNA Act 1867), based on representative democracy, this was bequeathed upon the country by its colonial mother, the UK. Note also the peculiar nature of the EU's constitutional arrangement. Cf. Weiler 1995, 1999, Grimm 1995. Rather than based on one constitutional demos, the EU, many analysts argue, is better thought of as based on an underdeveloped, yet unique – constitution of *multiple demoi* (cf. Weiler 2001a,b; 2002)..

deliberative democratic theory. This theory is based on a procedural notion of legitimacy and is highly sensitive to cultural and other difference. The point is to establish that the two entities share enough in common in the pre-Charter period as to warrant comparison. Third, since I find important and relevant similarities, I proceed to spell out the core features of the Canadian Charter-based constitutional transformation, with specific emphasis on the question of popular sovereignty and allegiance. This transformation will also be assessed in relation to the criteria for democratic legitimacy, to clarify the magnitude of transformation in democratic terms. Finally, I will discuss what lessons Europeans might draw from the Canadian experience. To substantiate this, we need to clarify that the Charters are sufficiently similar as to warrant the drawing of lessons from the Canadian experience for Europe. Only through such a multi-step comparative procedure can we know whether there are relevant lessons.

## **II. Complex allegiance and accommodation of difference in the pre-Charter eras**

Both the EU and Canada are highly diverse, complex and contested as political entities, and both have long faced deep disagreements over first principles. A critical challenge for both has been to ensure stability through managing to stay together. Both have developed complex systems for the forging of trust and agreement, and for the accommodation of difference and diversity.

In Canada, the need for accommodation initially arose from the co-existence of the anglophone majority and the francophone minority. Over time, this onus on accommodation of self- or other - conceived national difference has expanded territorially and socially: it has come to include other forms of difference and has permeated much larger parts of society (cf. Aboriginal self-government, the 1971 Multiculturalism Policy and the 1988 Multiculturalism Act). The European Union's founding rationale was to prevent further devastating continental wars and to ensure a lasting reconciliation between Germany and France. The initial six-member Community has since then greatly expanded in size. With increased integration the need for accommodation of national and regional difference has been expanded to include

numerous other forms of difference and diversity. As a result, in both Canada and the EU, more complex systems of accommodation of difference and diversity have arisen.

This onus on accommodation of difference is readily apparent in the way the systems depict themselves. For instance, the EU's Treaty-based commitment to 'an ever closer Union' is not an attempt at eradicating difference, but a way to establish a sense of co-existence and commonality, amidst recognised difference. This is also reflected in the Preamble of the Draft Treaty establishing a Constitution of Europe, which depicts the EU as "united in its diversity". This trait the EU shares with Canada. As Charles Taylor has observed, '[i]n a way, accommodating difference is what Canada is all about' (Taylor 1993).

Two important shared pre-Charter traits stand out. First, the system for accommodating difference was an elite-operated undertaking, largely removed from the populace. Insofar as this undertaking was framed in constitutional terms (which was not the case in the EU until after Nice 2000), what was amplified as constitutional was what governments and courts defined it to be. Second, both entities had developed comprehensive *practical* arrangements for the ongoing and peaceful accommodation of difference and diversity. In both cases such ongoing accommodation was operated within the framework of executive-run intergovernmental relations,<sup>4</sup> which operated within a setting of largely *silent* publics, in the EU evocatively labelled as a 'permissive consensus'.<sup>5</sup> These elite-operated arrangements were seen as necessary in the absence of lasting agreements on constitutional essentials.<sup>6</sup>

These systems of accommodation were hardly mere incidental by-products, but were part of explicit and conscious efforts at ongoing accommodation and learning (mainly at the elite-level). Analysts have expended considerable intellectual energies in reconstructing their moral foundations. The most prominent reading would be that both Canada and the EU have sought to develop a constitutional morality based on *tolerance*. To Joseph Weiler, the Principle of Constitutional Tolerance "is the normative hall mark

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<sup>4</sup> In Canada this has been given several designations, most prominent among which is executive federalism. In the EU the system is foremost embedded in the European Council and the Council of the Union.

<sup>5</sup> For more on the permissive consensus see Abromeit (1998). The Canadian near-equivalent is the notion of deference.

<sup>6</sup> The instances have been numerous in both cases. In the EU since 1985: SEA, Maastricht, Amsterdam, Nice, Laeken. In Canada since 1982: patriation through the Constitution Act, Meech Lake and Charlottetown.

of European federalism”(Weiler 2001b:65). In a similar manner, “Canada is graced by diversity, tolerance, compassion and an equality of opportunity that is without rival in the world.”<sup>7</sup> Canada “has a reputation for being a very tolerant society...” (Williams 2001:218). Throughout its history, Canada has been marked by an onus on accommodation of difference, and this very trait deeply marks the Canadian identity: “If Canada is a country with an identity, it is because the historic unwillingness to choose either “the one” or “the many” has produced a complex sense of community and has facilitated the realization of values that require the multiplication (rather than the unification) of community. It is the existence of a complex sense of community that provides Canada with its moral foundations.”(LaSelva 1996:9) This is said to have helped give rise to a particular Canadian-style version of toleration.

### ***Reconciling Federalism and Nationalism***

In a more overarching sense both systems of accommodation were efforts to reconcile the spirit of nationalism and federalism, rather than subsume federalism under nationalism, as is the case in most federal states.<sup>8</sup> In the absence of an agreed-upon overarching national sense of community, both entities have sought to develop more complex, essentially federal conceptions of community such set up as to reconcile competing nationalisms.<sup>9</sup> In their respective pre-Charter eras (at least) this was done mainly through practice and largely without an agreed-upon blueprint or doctrine. As Sam LaSelva has noted, in Canada: “Canadian practice [with federalism] is far better than Canadian theory” LaSelva 1996:193). That practice has predominated is also evident in that it is academic analysts that have fleshed out the normative foundations and not the polity or constitution-makers.

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<sup>7</sup>The Calgary Declaration, 1997, available at <http://www.uni.ca/calgary.html>

<sup>8</sup> In the U.S. the role of the nation is critically different, from that of both the EU and Canada. . U.S. federalism presupposed a nation. The issue was “how to create a large country without destroying individual liberty and local initiative”(LaSelva 1996:xii). The federal system, to James Madison, was a vital safeguard against the tyranny of faction. In Canada, the challenge was to create a sense of nationhood, without eradicating multiple (national) identities. In this sense, the Canadian federal version is much more relevant to the EU than is the U.S.

<sup>9</sup> Federal proposals have been considered from the on start of the integration process (Scharpf 1988) and are still hotly debated The most explicit such example is the German Foreign Minister Joschka Fischer’s Humboldt University speech, which helped fuel a renewed debate on federalism (cf. Joerges, Meny and Weiler 2000).

With regard to the existing EU, Joseph Weiler argues that it has developed a unique federal arrangement, the normative hallmark of which is the *principle of constitutional tolerance*. He sees this as being based on two core components. The first is the consolidation of democracy within and among Member States. Such consolidation was important given the undemocratic past of some of the Member States and also because many would-be members were undemocratic. The EU has since 1962 applied democratic requirements for entry.<sup>10</sup> The second component is the explicit rejection of the One Nation ideal and the recognition that “the Union ... is to remain a union among distinct peoples, distinct political identities, distinct political communities... The call to bond with those very others in an ever closer union demands an internalisation – individual and societal – of a very high degree of tolerance” (Weiler 2001b: 68). As Weiler notes in a more recent article, “in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to be bound by precepts articulated, not by ‘my people’, but by a community composed of distinct political communities: a people, if you wish, of ‘others’”(Weiler 2002: 568). Such an entity would be accepting of different conceptions and visions of what the polity is, and ought to be. One way to depict this is to see it as a “community of communities”.<sup>11</sup>

The national community is seen as the locus of primary and deeper attachments. The constitutional treaty cannot be based on a Schmittian notion of ultimate authority, neither on a Kelsenian *Grundnorm*. The overarching entity is equipped with a constitutional authority, but the acceptance of its authority “is an autonomous voluntary act, endlessly renewed on each occasion, of subordination, in the discrete areas governed by Europe to a norm which is the aggregate expression of other wills, other political identities, other political communities”(Weiler 2001a:53). The supranational level was to fulfil a specified set of tasks that the lower-level entities would confer on it, and there would be provisions to ensure that the authority conferred, and the resources granted, were properly put to those tasks.

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<sup>10</sup> See Sjursen 2002, Sjursen and Smith 2001, Eriksen, Fossum and Sjursen 2003.

<sup>11</sup> This term was initially coined by the Canadian leader Joe Clark to depict his vision of Canada. <http://www.lieutenantgovernor.ab.ca/aoe/bio/clark.htm>

This analysis underlines the transformation of the EU from a system that initially was largely based on the Member States, and a legal system derived from international law, to a supranational legal system and a political system, which exhibits a complex mixture of supranational, transnational and intergovernmental elements. The legal system is supranational, but its federalism is, as Weiler has noted, not based on the state template: “European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and power”(Weiler 2001a:44).

In a similar vein, Samuel LaSelva has sought to reconstruct the principal foundations of Canadian federalism, through looking at today’s system through the lens of one of its founders, George-Étienne Cartier. Federalism, to Cartier, “accommodated distinct identities within the political framework of a great nation. The very divisions of federalism, when correctly drawn and coupled with a suitable scheme of minority rights, were for him what sustained the Canadian nation”(LaSelva 1996:189). Canadian nationhood “presupposes Canadian federalism, which in turn rests on a complex form of fraternity that can promote a just society characterized by a humanistic liberalism and a democratic dialogue”(LaSelva 1996:xiii). Although the term nationalism was used this could not be seen as a conventional form of nationalism because the idea of fraternity is based on a sense of community that incorporates within itself an element of other-regard and reflexivity that serves to break down the distinction between us and them intrinsic to nationalism.

The tension between federalism and nationalism was intrinsic to the very conception of Canada<sup>12</sup>:

In French Canada, the traditional interpretation of the Confederation was as a pact between ‘two nations’. In this understanding, Canada was a bi-national state and allegiance to the whole was via allegiance to the part - one adhered to the larger entity because this was the political home which the nation had chosen for itself. The rest of Canada is seen in this view as making up another ‘nation’, which would similarly be the primary focus of allegiance for its members and the channel through which they belonged to the larger whole. But that has never been

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<sup>12</sup> This tension could be aptly captioned in the following metaphors: Rene Levesque’s “Two Scorpions in a Bottle” which depicts the tension between two alleged nations: French and English and Alan Cairns’ “Eleven elephants in a maze”, which depicts the tension between governments in the federal system.



the way the rest of Canada sees the country... [T]he sense of national identity in non-French Canada is complex and in some ways not ultimately defined.  
(Taylor 1985:217)

The rest-of-Canada is federal, not national. It was pre-Charter made up of 10 provinces (and territories), and was “headless”, with the federal government as the government of the entire federation.

To sum up, both entities have relied critically on contested federal-type arrangements to foster allegiance and to accommodate and settle conflicts.<sup>13</sup> This accommodation has taken place within a political framework wherein the association between federalism and the nation state is essentially broken (EU) or far weaker than in other federations (Canada). The EU is a non-state entity, whereas Canada is a contested state, which has long faced the challenge of break-up and complex territorial-political reconfiguration in particular through aboriginal self-government.

This means that insofar as they have resorted to federalism, each entity has been compelled to develop a model of federalism that could generate commonality, whilst simultaneously accommodate nationally based – and other forms of – difference and a set of organisational arrangements able to carry or sustain such. The EU has thus had to grapple with the same problem as Canada, namely how to develop a suitable theory of federalism, where the federal spirit is not subservient to nationalism, and where federalism is able to accommodate multiple, competing nationalisms.

Given the difficulties in finding solutions, a core concern has been peaceful co-existence, through accommodating difference. Peaceful accommodation of conflict is a central component of stability, in particular in multinational entities. Multinational entities raise particularly vexing questions pertaining to how to reconcile justice and stability, or “the connection between, on the one hand, the justice of relations between individuals and between political and cultural communities, and on the other, the ability of these communities to continue cooperating within the bosom of the same multinational state”(Norman 2001:97). Justice and stability presuppose each other, but in complex

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<sup>13</sup> The EU has gone through a profound transformation, but although many of the terms used to describe it are borrowed from the vocabulary of federalism, there is still no consensus among the actors involved that it is a federal entity. In the Convention, the effort to describe the EU as ‘federal’ was defeated.

entities, there is also a “‘meta-tension’ between justice and stability; namely, the fact that the existence of many divergent conceptions of justice – especially when they are held by different cultural, religious or regional communities, or by different social classes – can exacerbate political instability or disunity by perpetuating arrangements that are perceived by many to be unjust” (Norman 2001:100).

The European and Canadian pre-Charter stances were to establish *elite-based* systems of accommodation of conflict that were focused on tolerance but where the elites spoke on behalf of largely silent publics. Such elite-based systems privileged an ongoing elite-based deliberation and accommodation over a limited (and largely fixed) set of contentious issues. These systems of accommodation were thought of as superior in terms of preserving peace over systems wherein the public was activated through an explicit process of democratic constitutionalisation. An implicit assumption was that retention of peace and stability presupposed public silence and acquiescence. It was thought that explicit efforts to found the systems on popular sovereignty would activate people in a manner that would upset the fragile systems of accommodation. The result was either to inadequately set up (as was the case in the EU) or to essentially bypass (as was the case in Canada) procedures that would ensure that accommodation took place in accordance with the basic tenets of popular sovereignty. In the next section we shall look closer at the democratic quality of these systems.

### **III Complex Accommodation and the Question of Democracy**

What were the democratic foundations of these complex systems of accommodation? A deliberative perspective sees democracy in procedural terms; not foremost as a specific organisational arrangement; but rather as a legitimation principle. The deliberative perspective liberates democracy from any association with a pre-political people; hence enables us to consider also supranational and multinational entities in democratic terms. Seeing democracy foremost as a legitimation principle does not relieve us of the task of spelling out which legal-institutional and procedural prerequisites that best embed this principle. But it underlines that democracy can be entrenched in several organisational forms and any amplification of a specific set of institutional arrangements is an approximation to the democratic principle. Both the EU and Canada subscribe to the core

principles of the democratic constitutional state; therefore to further establish comparability, my assessment of these systems will take this set of standards as the relevant yardstick.

The first such requirement is a democratic constitution, i.e., that the constitution is derived from and devised for the citizens. The citizens are equipped with rights that ensure their public and private autonomies in such a manner as to be able to consider themselves as the ultimate authors of the laws they are subject to. This is generally ensured through *a bill of inalienable rights*, and provisions that delimit the powers and competences of the various branches of government. The former includes rights to participation, where the set of rights make up communicative fora for common opinion formation and for wielding influence through voting rights. The latter pertains to a division of powers and responsibilities, along both horizontal and vertical lines. The division spells out a set of distinct functions, which are ultimately co-dependent. A delineation of powers and responsibilities is needed to protect their integrity, to prevent accumulation of power, and to ensure co-operation.

Second, the constitution is upheld by the successful operation of *a set of institutions*. Such are popularly elected bodies that can translate goals and values into laws, and bodies that reliably implement such into binding actions – subject to popular oversight and scrutiny. They are to ensure public deliberation and efficient collective decision-making through bargaining and voting procedures. The legislative process also needs a legally based overseer, a set of courts, to protect the democratic process. The rights and the institutions create the conditions for viable public spheres, i.e. state-free rooms where citizens can deliberate unencumbered by prevailing ideologies or state-based loyalties.

Third, is the requirement of *representativeness*. Representation contributes to refine and enlarge opinions, by passing them through the reflective concerns of chosen members of the demos. In larger, more complex, and pluralist, settings the representatives have to take different interests and perspectives into consideration in order to justify particular claims and may consequently be able to reach more reasonable and legitimate decisions. Representation may be seen as a precondition for political rationality, as it secures institutional fora in which elected members of constituencies can peacefully and

co-operatively seek alternatives, and solve problems and resolve conflicts on a broader basis (Sunstein 1988). The representatives do not only have to justify their decisions to their own electorate, but also to the representatives of other electorates. Representation is important also for *accountability*: those who are potentially affected by decisions will have their say and/or are able to dismiss incompetent leaders. Taken together, these procedures ground the presumption that the outcomes will be of such a quality that they can be defended in an open, free and rational debate.

Fourth, and finally, the process of forging the constitution must be in compliance with democratic requirements: it would have to be transparent, deliberative and widely representative. The same principle applies: all those potentially affected have to be able to consider themselves as participants.

#### *The EU and Canada assessed*

The EU suffers from a democratic deficit. Up until Maastricht its democratic legitimacy was 'indirect' or 'derivative', i.e., conditioned on the legitimacy of the democratic nation states, of which it was made up (for this notion see Beetham and Lord 1998, 2004; Eriksen and Fossum 2000). Its own legitimacy was based on its outcomes. The Treaty of Maastricht was a turning point, as it helped set the EU up as a polity with a constitution-type arrangement. This was a unique arrangement, a *constitutional treaty* and not a democratic constitution proper. It equipped citizens with rights, but the citizens had not given the rights to themselves through a democratic process. This constitutional structure was derivative also in a more subtle way. Under the shadow of the permissive consensus, the European elites who forged the treaties refused to discuss or clarify their constitutional status. Up until Maastricht they largely performed constitution making through stealth.<sup>14</sup> Since then they embarked on a constitutional conversation but without acknowledging that it was such (Fossum 2000). It was only in the aftermath of the Nice Treaty that the elites have acknowledged that they are partaking in a constitutional conversation (cf. debate on the Future of Europe and Laeken Convention).

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<sup>14</sup> Up until Maastricht, Lamy has noted, Europe "was built in a St Simonian way from the beginning, this was Monnet's approach. The people weren't ready to agree to integration, so you had to get on without telling them too much about what was happening. Now St Simonianism is finished. It can't work when you have to face democratic opinion."(Lamy, in Ross, 1995:194)

Historically speaking, the Canadian constitution shared with the EU some of this derivative character. The British North America Act 1867 was derived from the UK and depended on UK sanction until well into this century. In formal terms, it was only the patriation of the constitution and the inclusion of the Charter in the Constitution Act in 1982 that severed this link. Before that Canadians had never really constituted themselves as a sovereign people (cf. Russell 1993). And even at that moment there was no agreement on this. “It is now evident that, for most of post-Confederation history, parliamentary supremacy and the British approach to the protection of rights without a Charter were, to a considerable extent, sustained by the imperial connection. Much of the support for parliamentary supremacy was derivative...” (Cairns 1991a:116).

The constitutional text was *not* one that spoke to Canadians as self-legislating citizens. It has been described as:

a document of monumental dullness which enshrines no eternal principles and is devoid of inspirational content. It was not born in a revolutionary, populist context, and it acquired little symbolic aura in its subsequent history... The absence of an overt ideological content in its terms, and the circumstances surrounding its creation, have prevented the BNA Act from being perceived as a repository of values by which Canadianism was to be measured.(Cairns 1988:27)

There was also no agreement on procedures for constitutional change, so that the problem of where sovereignty was ultimately to be located was not resolved. This disagreement among the governments, the stewards of the constitution, served to install a deep exclusionary bias into the constitution, in terms of what were deemed as constitutionally salient issues.

On the first requirement, then, both entities’ constitutional arrangements suffered from democratic deficiencies. How grave these were in practice would also depend on the institutional system, which can deviate considerably from the formal constitution.

With regard to the second criterion, the EU is not based on a parliamentary system of government, neither on a full-fledged system of separation of powers. It is still based on *two* distinct yet overlapping decision-making systems, the *Community method* and the *Intergovernmental method*. The Community method (which basically operates

within pillar I TEU) assumes that only the Commission (an appointed body) can initiate legislative and policy proposals. The main legislative body, and in power terms, the most important, is still the Council, which consists of Member State representatives. Each such representative is accountable to his/her legislative assembly but not to the whole population of the EU. The European Parliament (EP), from 1979 directly elected by the peoples of the Member States, was initially a consultative body only but has over time obtained the power of co-decision with the Council in the EU lawmaking process in a wide range of policy fields. Over time, the EU has moved in the direction of the parliamentary model of governance, but far from fully, mainly because of the strength of the *intergovernmental method* (which marks pillars II and III of the TEU). This method is based on national representation, with each Member-State having the power of veto. Here the Council is the central body and the EP, the Commission and the Court of Justice are on the sideline. European cooperation is here indirectly legitimated through nation-state democracy. Both methods suffer from the secrecy of the Council's deliberations which offers national government representatives considerable leverage to *circumvent* the mandates given to them by their respective national parliaments, and national parliaments have no adequate ways of knowing *how* their representatives behaved in the Council because of its in-transparent procedures.

Within the EU, as we have seen, the EP and the national parliaments were inadequate as means of ensuring popular input, and as means of holding the executive accountable. The system also had strong transparency and accountability defects. The EU was therefore, pre-Charter, a system that privileged executive officials.

Canada was based on the British-derived model of parliamentary federalism, i.e., parliamentary government at both levels, coexisting with a federal constitution that spelled out in considerable detail the powers and prerogatives of each level. Albeit the constitutional text privileged the federal level, the reality has become markedly different, so much so that today's Canada is one of the most decentralised federal systems in the world.

The system of two-level parliamentary majoritarianism was greatly modified by the gradual emergence of an extensive system of intergovernmental relations, where each governmental actor had de facto veto. This system is often referred to as executive

federalism.<sup>15</sup> This system of close interaction has greatly weakened the vertical nature of the Canadian federal parliamentary system, as parliaments at both levels were sidelined and the role of executive officials strengthened. Initially spurred by the fiscal and tax requirements of an expanding welfare state, at both levels, this system grew to include all types of concerns (including constitutional change). A comprehensive bureaucratic apparatus was established to deal with a wide range of functional issues that needed to be coordinated among governments. This intergovernmental affairs apparatus emerged as an important vehicle to provide assistance to the elected officials in their dealings with each other. Through this system, executive officials were able to bypass their respective legislatures, hence greatly weakening the relevance of representative parliamentary government.

The conduct of this system was complicated by Quebec's insistence (since the 1960s in particular) on its being more than a province - a de facto nation, with special status in the federation. Thus, albeit the Canadian federal system had strong traits of *institutional congruence*, in the sense that the basic institutional arrangements and principles of government were the same at both levels of government, Quebec obtained a range of special arrangements which made the working system somewhat asymmetrical. On the second criterion, then, the two entities differ in that Canada had a full-fledged system of representative government, whereas the EU did not. In practice, however, the democratic quality of the Canadian system was greatly weakened by a set of working arrangements that gave executive officials a dominant role. On this latter aspect of *practice* the two entities shared important similarities.

On the third criterion, that of representativeness, the EU suffered from significant defects. These stemmed from the weakness of the representative bodies, long and uncertain chains of representation both with regard to the EP and the Council, the absence of truly European parties, the relative absence of a European public sphere, and inadequate rights of EU citizens. There were also significant inequalities in the number of seats allocated to each country, so that German citizens were greatly underrepresented in the EP. The pillar structure of the TEU also de facto served to exclude a number of

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<sup>15</sup> Executive federalism is defined as "the relations between elected and appointed officials of the two orders of government in federal-provincial interactions and among the executives of the provinces in inter-provincial interactions" Smiley 1(980:91).

concerns from the democratic agenda of the EU. The EU's largely *economic* constitution also generated a significant economic bias and served to translate issues into economic ones, as well as could subsume issues under an economic logic.

The Canadian constitution was also marked by *inadequacies* in representativeness. A central feature of the BNA Act was that it helped sustain an institutional system that contained a strong exclusionary bias, i.e., the concerns of large proportions of society were effectively *removed* from constitutional operation. This pertained in particular to aboriginals, where Status Indians were deprived of the right to vote up until the 1960s. Women were also marginalized, and the same applies to ethnic and racial minorities, at least up until the 1960s. This *de facto* exclusion of large portions of the population was amplified by the constitutional elitism referred to above and this contributed to uphold the notion of the constitution as foremost a concern for the governmental elites. Analysts have referred to this as *constitutional avoidance*. Prior to the late 1970s, the governments' operation of the constitution was marked by a "conscious and habitual strategy of avoidance by which many of the 'big' questions were put aside or the response interminably delayed until some acceptable state of ripeness had blossomed. Although all constitutions are living, and hence always in transition, the Canadian constitution, and therefore the Canadian people, were in transition in a more fundamental sense. Basic constitutional issues were repeatedly shelved" (Cairns 1995:103).

Again on the third criterion, both entities had representative defects but given the different institutions, the EU's were much more pronounced than those of Canada. Having said that, in their practical operations both entities operated with constitutional systems that contained strong exclusionary biases.

On the fourth and final criterion, that of process, the two entities were quite similar with regard to *how* they conducted constitution making. In the pre-Charter era, 'government by negotiation' was a critical hallmark of this system in both entities. Government leaders and their supportive staffs played a critical role in this elite-based system, which has often been discussed in terms similar to Lijphart's consociationalism. Executive officials (heads of governments and their supportive staffs), came together and fashioned agreements in a manner more akin to international diplomacy than to



constitution making (EU: Moravcsik, 1991, 1993, 1998, Curtin 1993, Fossum 1998, 2000; Canada: Simeon 1972, Cairns 1991). In the EU, treaty change was undertaken through the intergovernmental conference (IGC), by executive heads of government and their respective staffs, in a formal system of summitry, with the European Council at its apex, rather than in specifically designated constitutional conferences, and where every Member State had the right of veto. In formal terms, the European Parliament had a very limited role in the process.

The system of treaty change that emerged in the EU, finds an obvious parallel in the Canadian – also intergovernmental - approach to constitutional change, although the two are not synonymous. The heads of government - from the federal and each provincial government –came together in a system termed the First Ministers' Conference (FMC). This body played the most important role in the numerous efforts to fashion constitutional change in Canada. This system was less formalised in Canada than in the EU, partly because there has never been agreement on how constitutional changes should be organised. Despite this, the mainstay of the system, in particular up until 1980 was the FMC. The Canadian parallel to the European Council was the First Ministers' Conference, which consisted of the Prime Minister and the 10 Provincial Premiers, or First Ministers. This system was based on a similar logic as that which marks constitution-making in the EU, insofar as each participating government was popularly elected; each First Minister was held accountable by the relevant legislative assembly; and each First Minister had the de facto power to veto a proposal.<sup>16</sup>

In overall terms, in the pre-Charter era Canada has relied more on this kind of system than has the EU. The ECJ as numerous analysts have underlined has played a critical role in the construction of Europe's *Sonderweg*. This was not the case with the Canadian Supreme Court. Prior to the Charter Revolution in Canada, the Canadian Supreme Court has been described as “the quiet court in the unquiet country” (Morton and Knopf 2000:9). But the difference should not be overstated. In the EU each Member State has had numerous occasions to upset Court actions, during numerous IGCs, or through national Supreme Court rulings, but no such upsets have occurred.

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<sup>16</sup> The Canadian federal parliament still has a more prominent role than its European counterpart, however.

To sum up this brief assessment, in their pre-Charter eras, both entities were marked by complex systems of accommodation of difference, which lent key inputs into the definition of the contents of the operational constitution and were critical to its practical operation. These systems had clear traits of “government by negotiation”. The Canadian constitution was aptly termed a ‘Government’s Constitution’. The EU only had a *material* constitution<sup>17</sup> and this was generally referred to as a ‘Constitutional Treaty’. Both were bestowed with significant *institutional bias*, in that they privileged the concerns of governments, over those of a whole range of excluded or marginalized groups and constituencies. The system of accommodation was framed within political entities *not* explicitly focused on popular sovereignty and with clear representative defects. In the above I outlined their normative justifications and have underlined that the question of the *popular legitimacy* of these arrangements had never been properly addressed.

This assessment has revealed that the two entities shared critical challenges, sought to handle these in similar ways and faced somewhat similar democratic deficits. Although the similarities should not be overstated, they are sufficient as to warrant a closer look at the Canadian Charter revolution, perhaps precisely because Canada’s democratic defects are less significant than those of the EU. How relevant this experience is to the question of possible lessons will become more apparent after this brief presentation of the Charter transformation.

#### **IV The Canadian Charter and the Constitution Act-inducing popular sovereignty and constitutional patriotism?**

In Canada, the inclusion of the Charter of Rights and Freedoms in the Constitution Act, 1982 dramatically altered the constitutional scene. The Charter basically holds the range of individual civil and political rights that we associate with the constitutional state and democracy. Unlike its European counterpart, it applies to both federal and provincial areas of jurisdiction.

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<sup>17</sup> For a distinction between a formal, material and democratic constitution see Menendez 2004.

The most important political purpose of the Charter was twofold: to entrench individual rights in the Constitution, and to foster national unity. The Charter was presented as a pan-Canadian symbol. It was also seen as a means of weakening the strong governmental imprint that had marked the Constitution in the pre-Charter era; as a vehicle to inject a more participant constitutional ethos into the constitution; and hence, to help found the constitution on popular sovereignty. In allegiance terms, Charters are critical vehicles for a rights-based *constitutional patriotism*. What are the core effects of the Charter-based constitutional transformation, when assessed in relation to the criteria of democracy set out above?

There is general agreement that Canada has undergone a deep constitutional transformation, but there is not agreement on what caused it and what its effects are. The following assessment will include reference to the different positions in the relevant debates.

In terms of the first criterion, that of a democratic constitution, the insertion of the Charter into the Constitution Act 1982 was critical to its altered designation, from being labelled as a ‘Governments’ Constitution’ to a ‘Citizens’ Constitution’ (cf. Cairns 1991, 1992, 1993, 1995). “The ‘Citizens’ Constitution’, with its Charter, gives the citizenry constitutional interests of a highly visible nature. They are given constitutional connections, constitutional niches, constitutional identities, constitutional clauses they can identify with, and the powerful language of rights to remind them that Trudeau’s purpose was to vest sovereignty with the people.”(Cairns 1993:266)

The Canadian Charter was injected into a political entity with different legal traditions: the common law tradition in English Canada and the civil law tradition in Quebec. The Charter was also born amidst controversy and helped spark such. When it was first introduced as part of the Constitution Act 1982, the national assembly of Quebec refused to sign the Constitution Act (although a great majority of the Quebec delegation in the federal parliament did). The national assembly of Quebec still has not signed it.<sup>18</sup> Quebec was not opposed to fundamental rights, as it already had its own Charter, but it was opposed to a competing body with different provisions, in particular

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<sup>18</sup> The then Quebec leader Rene Levesque referred to it as that “bloody Charter”(cited in Cairns 1992:121)

within the field of language protection.<sup>19</sup> Quebecers were thus faced with two sets of Charters, each of which sought to instil its version of constitutional patriotism unto Quebec.

Three features of the Canadian Charter experience stand out and are relevant to the complex European case of ‘multiple demoi’. First, the Canadian Charter (more extensively than the European) contains a number of rights that are best labelled as “group-based” rights (in particular 15, 23, 25, and 27). Second, section 33 of the Charter, the so-called notwithstanding clause, permits governments (federal and provincial) to opt out of sections 2 or 7-15 of the Charter, for renewable periods of 5 years each. This applies for instance to section 15, which is labelled *Equality Rights*, and which states that “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” The notwithstanding clause does *not* apply to language rights. In language terms, the Charter is set up to foster bilingualism across all of Canada rather than foster language-based regional or provincial nationalisms.

A similar albeit weaker instrument that permits a legislature to pass a law that infringes on a right in the Charter is section 1, the reasonable limits clause, which provides that the rights guaranteed in the Charter are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The Supreme Court’s rules for its operation can be summarized as “(1) The law must pursue an objective that is sufficiently important to justify limiting a Charter right, and (2) it must limit the right no more than is necessary to accomplish the objective”(Hogg and Thornton 2001:108). Third, the Canadian Charter, in opposition to its European counterpart, does *not* have an explicit right to private property,<sup>20</sup> nor does it contain any explicit *social* rights. The Canadian Charter, thus, offered both the prospect of special

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<sup>19</sup> In 1975 Québec passed its *Charte des droits et libertés de la personne*. The Québec Charter offers far stronger protections of French language rights and is more conducive to the pursuit of collective goals than is the Canadian Charter.

<sup>20</sup> Hogg notes that “Section 7 of the Charter ... protects “life, liberty and security of the person”, but makes no reference to a deprivation of property. Section 8 of the Charter, which protects against “unreasonable search or seizure”, is probably confined to seizures of property for evidentiary or investigatory purposes, and, if so, has no application to an expropriation.”(Hogg 1992:708)

constitutional recognition for a range of groups, as well as included provisions for government actors to opt out of certain provisions.

On the first criterion, then, the Charter was intended to found the constitution on the principle of popular sovereignty, but not as reflected in a single nationality. The government of Quebec's refusal to sign the Constitution Act signalled that the province would not succumb to the particular legal regime set out by the Charter, although Quebec with its own Charter would continue to abide by fundamental rights. The Charter itself permitted a more complex conception of 'the people': through the provisions in the Charter they could understand themselves in *multicultural* rather than mono-cultural terms. As such the Charter was a critical vehicle to foster cultural reflexivity. As we shall see, it was also set up to foster 'institutional reflexivity': Analysts have noted that Section 33, which permits governments to opt out of the Charter should be seen as part of a larger system of inter-institutional dialogue on the relation between individual rights and collective goals.

#### *From parliamentary politics to struggles over rights?*

The second criterion pertains to a set of institutions that ensure not only that citizens have rights and can exercise these through democratic institutions, but also that their operation ensure the necessary *mutual* reinforcement of citizens' private and public autonomies that is the key characteristic of the constitutional democratic state (cf. Habermas 1996, Tully 2002).

Twenty years after its inception it is evident that the constitutional changes helped alter inter-institutional relations, along both horizontal and vertical lines, and with deep implications for Canadian democracy. Two sets of institutional effects will be discussed here, both of which are relevant to the EU. The first is the judicialisation of politics, which modified parliamentary government and gave a much more pronounced role to courts.<sup>21</sup> In the EU this problem is particularly acute given the weak role of representative institutions (cf. the role of the EP cited above). The second is its effect on "nationalising" politics, in that individuals and groups looked to *national* courts for rulings and dispute settlements. It was thus seen to confirm Martin Shapiro's conclusion

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<sup>21</sup> Many refer to this as the judicialisation of politics See for instance Mandel 1994.

to the effect that in federal states high courts are “devices of centralized policy-making” (cited in Kelly 2001:338). This point is also highly relevant to the EU: if correct one should expect a centralising thrust, which was a highly contentious issue during the forging of the European Charter.

On the first possible effect, from a democratic perspective, a critical question is whether judicialisation of politics, rather than empowering citizens, represents the replacing of representative institutions with courts: “A long tradition of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy. On rights issues, judges have abandoned the deference and self-restraint that characterized their pre-Charter jurisprudence and become more active players in the political process...” (Morton and Knopff 2000:25). This was not seen as a change at the elite level only. Morton and Knopff present the Charter revolution as the emergence of a ‘Court Party’, which links rights-advocacy organizations up with courts. This interaction is facilitated by government and foundation funding, and a host of lawyers:

Encouraged by the judiciary’s more active policymaking role, interest groups – many funded by the very governments whose laws they challenge – have increasingly turned to the courts to advance their policy objectives. As a result, policymakers are ever watchful for what a justice department lawyer describes as judicial ‘bombshells’ which ‘shock... the system.’ In addition to making the courtroom a new arena for the pursuit of interest-group politics, in other words, Charter litigation – or its threat – also casts its shadow over the more traditional areas of electoral, legislative, and administrative politics. Not only are judges now influencing public policy to a previously unheard-of degree, but lawyers and legal arguments are increasingly shaping political discourse and policy formation.(Morton and Knopff 2000:13).

The claim, then, is that the institutional changes effected by the Charter have inserted another strong institutional bias into the system, a bias in favour of *certain* groups. This again is seen to have detrimental effects on representative bodies, notably parliaments. Their claim, then, is that the insertion of the Charter has both weakened the democratic institutions under criterion two, and helped generate a new bias in representation, hence negatively affecting criterion three.

There are several questions here. One is whether the Charter really has weakened parliamentary government, in particular given that representative government was already partially sidelined by the system of intergovernmental relations or executive federalism. In other words, an assessment of the democratic effects of the Charter requires examination both of the relation between the Charter and courts, as well as of how the Charter affects the system of intergovernmental relations. Is there a double-pronged weakening of representative institutions or does the Charter democratize intergovernmental relations and hence produces democratic gains? A closely related issue is what type of representational bias the Charter had. Note that the acknowledgement that it empowered groups in civil society is also an acknowledgement of it having democratic effects. The strength of such hinges on whether it empowered groups whose role already was prominent, or whether it empowered weak and hitherto marginalised ones. On the first issue, we shall see, when discussing changes to the process of constitution making, that the insertion of the Charter did much to weaken the governments' privileged role in the operation of the constitution. It thus had positive democratizing effects.

On the representational bias generated by the Charter, it served to politicise in particular the so-called 'Charter Canadians' (although all Canadians are by definition Charter Canadians), and these were mostly groups whose role and status in the pre-Charter BNA Act 1867 had been either marginal or had not been part of the initial compact - the latter applies in particular to aboriginals or First Nations.<sup>22</sup>

In the extension of this, the Charter was also seen as a necessary change, because it helped empower citizens. It strengthened the mutually reinforcing role of democracy and rights. But the reinforcing role was made more difficult because the Charter both amplified the constitutional salience of individual – *and group-based* – rights. Rather than replacing, the system of competitive parliamentary government referred to above, was made to co-exist with – to compete with and to be harmonised with – Court-based litigation. This effect was somewhat ameliorated by the Charter's fostering of *dialogue* between the Court and legislatures.

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<sup>22</sup> Section 25 of the Charter noted that "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada..." Part II of the Constitution Act also explicitly dealt with Aboriginals.

The federal structure with the division of powers ensured that the effort at harmonization would not have a uniform effect across the polity. Some of this would be arrested through the Charter's centralising role. The centralisation thesis asserts that the Charter reduces federal diversity. "The Charter enshrines equality of citizens as a fundamental constitutional principle, and derivatively the equality of provinces. The Charter invests the qualities it recognizes with a powerful "social symbolism". Its "great symbolic force tends to crowd out (...) respect for political autonomy" for sub-national governments." (Cairns 2003:109). There is little doubt that the centralisation thesis is correct from the perspective of social norms and social valuation. It is less clear that it is a wholly adequate representation of the actions of the Court.

Empirical research on Charter review by the Supreme Court reveals a more complex picture, which includes Court sensitivity to provincial policy variation (Kelly 2001: 324). Further, the Charter itself has provisions that can weaken centralisation. The most important such is Section 33, the notwithstanding clause, which permits a federal or provincial majority to enact legislation that overrides a Charter provision.<sup>23</sup> Some see the notwithstanding clause as an unfortunate last-minute compromise required for the provinces to accept the Charter, and as such an affront to both individual autonomy and equality (cf. its application to section 15, the equality clause). Others see it as a federal safeguard which can *reduce* the nationalising and unifying thrust of the Charter (Kelly 2001, Williams 2001). Their argument is that it and section 1, the reasonable limits provision, both inject an element of deliberation between courts and legislatures (Hogg and Thornton 2001, Kelly 2001). On section 1 Hogg and Thornton note that "(w)hen a law is struck down because it impairs a Charter right more than is necessary to accomplish the legislative objective, then it is obviously open to the legislature to fashion a new law that accomplishes the same objective with provisions that are more respectful of the Charter right. Moreover, since the reviewing court that struck down the original law will have explained why the law did not satisfy the s.1 justification tests, the court's explanation will often suggest to the legislative body exactly how a new law can be drafted that will pursue the desired ends by Charter-justified means."(Hogg and Thornton 2001:108-9). The Charter spurs legislative sequels, in which Charter dialogue takes place

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<sup>23</sup> Leeson notes that it has fallen into disuse. Cf Leeson 2001.



between the legislative and judicial branches of government. The question is whether this makes for a better balance between individual rights and democracy.

In sum, then, we see that the Charter represented an attempt at striking a difficult compromise among several principles. One dimension was the question of individual vs. group-based rights. How far would the rights of groups extend? How damaging might this be to individual rights? Second, were the institutional ramifications of the Charter: how to establish a viable balance between courts and parliaments? This had general application to the Charter as a legal instrument. It raises questions about the epistemic ability and the normative competence of courts in determining issues of great importance to majority rule and minority protection. In Canada this question was also amplified through the notwithstanding clause which opened up for individual governments to determine the reach of the Charter within their constituency. This would also hinge on the quality of the dialogue between courts and legislatures. Third, what would be the role of the governments viz. the citizens in operating the constitution? Given the symbolic and substantive appeal in the Charter to each citizen as a person under the constitution, what were the effects of the Charter on the governments' operation of the constitution? These are questions and challenges that are of obvious relevance to the EU and where the Canadian debate can yield interesting insights and suggestions.

*From an intergovernmental process to an open process or to a constitutional deadlock?*  
The Charter's insertion into the Constitution Act brought forth two central questions that were to dominate Canadian constitutional politics for several decades: Who are legitimate participants in the process of constitution making? How to organise the process so as to include the legitimate participants?

This issue is now entering the forefront of the European debate. Consider the Financial Times editorial of May 30:

What the debates in France and the Netherlands have demonstrated is a great desire among ordinary voters to have a real say on the future of the EU. They have not been properly consulted for far too long. The wrong reaction would be for EU leaders to retreat once more behind closed doors, call off the political

process and try to save the parts of the treaty they like best in a constitutional fudge.

When we consider the Canadian case we see that the process of patriating the Constitution had a strong mobilising effect.<sup>24</sup> The Charter's presence reminded citizens that they as rights bearers could not be content with a system of constitution making in which the heads of government negotiated among themselves. Since the 1970s, opposition to what had come to be seen as an elitist process of constitutional change included a broad cast of actors, with quite different visions and motivations. The inclusion of the Charter was important in that it both helped spark a much wider cast of actors and also a much wider range of possible solutions for how to organise the process:

- (a) demands from various interest-groups and so-called constitutional stakeholders for access to the process so that their interests be protected in the different stages of the process (for instance women's groups, Aboriginals, and disabled people);
- (b) demands for a more prominent role for deliberative bodies in the process of change;
- (c) demands for direct participation in the process of constitutional deliberation by hitherto excluded groups, in particular Aboriginals or First Nations groups;
- (d) demands for a truly consultative and open process, i.e., one that is based on debates and deliberations at all stages of the process, and
- (e) demands for a popular referendum to sanction the proposed changes.

The failure to obtain Quebec's signature to the Constitution Act sparked a new round of reforms, the Meech Lake Accord, 1987. The rationale for the Meech Lake Accord was to "include Quebec in the constitutional family". The purpose of the Accord was to ensure that the government of Quebec would officially ratify the Constitution Act, and that all Quebecers would be made certain that the Constitution would recognise their particular contribution to Canada and their distinctiveness, through the insertion of the 'distinct

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<sup>24</sup> For different positions on the political mobilizing effect of the Charter insertion, see Brodie and Nevitte (1993a, 1993b), Cairns (1993).

society' clause.<sup>25</sup> The distinct society clause was intended to be “a powerful constitutional interpretative clause that instructs Supreme Court justices to interpret the entire Charter, except sections 25 and 27, [dealing with aboriginal rights and guarantees and multicultural rights, respectively] in the light of this sociological reality.”(Behiels 1989:142). The Meech Lake Accord, whilst initially a matter of recognising Quebec difference, became a matter for all the provinces, which refused to permit the federal government in Ottawa to negotiate alone with Quebec. They succeeded: The section on equality of all provinces was even italicised in the accord.<sup>26</sup>

The equality of all provinces notion was reflected in the process of forging the Accord, in the sense that it was negotiated in a closed setting by the eleven heads of governments. The Accord would have to be ratified by every government.

The closed, intergovernmental manner of forging the Accord and concerns with rights recently obtained in the Charter sparked a strong popular mobilisation against the Accord. Among the most active and vocal critics were the women's organisations in the rest-of-Canada. Their concern was with the impact of the Meech Lake Accord on the rights in the Charter. Both of the two equality guarantees in the Charter, in sections 15 and 28, would be subject to the Quebec distinct society clause introduced in the Meech Lake Accord. The women's groups were concerned that courts, in their interpretation of these equality clauses, would be less inclined to pursue equality when they were bound to take additional concerns into consideration. An important point was that by the time the Meech Lake Accord was fashioned, there had been very few court cases on these issues, which meant that there was still considerable uncertainty as to how far the rights would apply. The issue of the distinct society and its application could not be seen as an issue merely applying to Quebec, for several reasons. First, the strong onus on provincial equality in the Meech Lake Accord suggested that other provinces might also propose that they were distinct societies, and seek exemptions from the Charter. Second, “(t)he

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<sup>25</sup> Proposed Section 2(1)(b) of amended Constitution Act) which states that “The Constitution of Canada shall be interpreted in a manner consistent with ... (b) the recognition that Quebec constitutes within Canada a distinct society.”

<sup>26</sup> “WHEREAS first ministers, assembled in Ottawa, have arrived at a unanimous accord on constitutional amendments that would bring about the full and active participation of Quebec in Canada's constitutional evolution, *would recognize the principle of equality of all the provinces...*” cited in Behiels 1989:Appendix:539.

Supreme Court of Canada is the final court of appeal for all of Canada, including Quebec. Cases from Quebec dealing with conflicts between sex equality and the distinct society will, once decided by our highest court, be in our jurisprudence for citation in other sex equality cases, arising in other parts of Canada. It is thus not at all true to say that the relation between sex equality and the distinct society is a domestic matter, for Quebec only.”(Eberts in Behiels 1989:316). Women’s groups also wondered why it was that the two clauses dealing with Aboriginal and multicultural protections could be exempted from the distinct society requirement but not the equality clauses.

The Meech Lake Accord failed partly as a result of the substantive clauses, and partly as a result of the popular rejection of the elite-based and secretive manner in which it had been forged.

The next major effort, the Charlottetown Accord, generated a massive search for a new and more open process of constitution making. The dynamic of the process is quite reminiscent of its present European counterpart, (a) in that it emerged as a result of a previous failure: Meech Lake (cf. Nice); and (b) in the parallels between the way the Meech Lake was negotiated and how IGCs forge treaties in the EU. The specific rationale for its forging was different: in response to an ultimatum by Quebec and its demands for cultural protection. But the dynamics of the process soon expanded, so that during the process a very large number of items were thrust in and the resultant Accord, in terms of symbolic, substantive and institutional changes, became extremely great.

The unfolding of the process exhibited a dynamic very similar to the present European one: It started with a wide-open and nation-wide constitutional debate which included parliamentary committees and special constitutional mini-conventions but in parallel fashion in the rest-of-Canada and in Quebec. Canada lacked a polity-wide Convention but it was otherwise quite similar to Europe in that there were numerous provincial debates. After this phase, the documents and proposals were handed over to the heads of government (with aboriginal representation present), who negotiated among themselves. The obvious European parallel is the IGC 2004. The final stage was a set of referenda, which were held simultaneously in ROC and in Quebec. Failure to ratify the Accord in a minority setting would make it unravel, as is also the rule in Europe. The

Accord was rejected in both referenda (ROC and Quebec), and here there is also now an important parallel.

The two defunct accords demonstrate how the Charter helped insert a different and more democratic logic into constitution making. The Meech Lake Accord could be seen as an attempt to go back to the pre-Charter era of constitution making. The spirit of Meech Lake was that of deep diversity, but privileging a bi-national notion of such. The process was that of elite-based negotiations. Rights-conscious citizens and groups objected to both and contributed to its failing. The Charlottetown Accord was a far more complex accord - it expanded the principle of deep diversity and made it apply to very many different sets of actors and relationships. The Accord was a unique effort to try to balance the principles of federalism, nationalism, and multiculturalism – within the larger ambit of Chartered popular sovereignty. It was also the product of a much more open process. In overall terms, the Accord placed much more emphasis on the needs of Canada's aboriginal population, the First Nations peoples, than on accommodating Quebec. Part of the reason for its failure was that many Canadians felt they had more in common than was clear from the accord.

Since then, decision-makers have sought to leave the constitutional question in abeyance. Stronger barriers to constitutional change have also emerged as a consequence of the federal government 'loaning' its veto to the provinces, many of which have introduced referendum requirements for constitutional amendment. "The public, infused with a rights consciousness based on its stake in the constitution, is unwilling to defer to the leadership of governments which the amendment formula presupposes."(Cairns 2003:109)

On the final criterion, then, pertaining to process we see how the Governments' Constitution has given way to the Citizens' Constitution, in that citizens will no longer leave constitutional matters to governments to handle without their explicit consent. This is no repudiation of federalism, or of the notion of Canada as a community of *communities*: the population of a given province, and not a nation-wide majority, will decide whether to pass a constitutional amendment. The code is democracy but within a subunit, federal context.

*Constitutional allegiance and accommodation of difference/diversity*

To sum up, no country has debated its constitutional essentials more deeply and extensively than has Canada (Russell 1993). The Charter-based constitution has taken hold. There is no disagreement on the fundamental liberal principles of democracy and rule of law (Taylor 1993), and opinion polls consistently show strong nation-wide support for the Charter (cf. Fletcher and Howe 2001:257-8; Cairns 2003:105). Further, it is also notable that this Canadian constitutional process has helped shift the standards of justice. In the pre-Charter period these were clearly focused on the accommodation of Quebec nationalism. Now this has to compete with and as was indicated above in the Meech Lake case often loses out to the need for rectification of historical injustice wrought on aboriginals, as well as the accommodation of demands from other marginalized groups in Canadian society. As such, it can be claimed that the opening up of the process has helped rank-order conflicts and concerns more in line with people's intuitive conceptions of justice and need for rectification of injustice.

The Charter had profound implications for constitutional morality in that it helped generate a new way of accommodating principles "particularly since the Charter, Canadian liberalism has very constructively combined the historic impulse to accommodate with conscientious attention to the claims of autonomy and equality"(Williams 2001:227). In other words, the Charter did take Canadians much closer to a hierarchy of values, albeit both the steepness of the hierarchy and its particular content differed from that of the US.

The Charter helped alter the system of elite-based accommodation. It elevated the issue of accommodation of difference/uniqueness to a prime constitutional concern; it altered the character and opportunity structure of the constitution – both with regard to the provisions and with regard to the process of changing/amending the constitution; and it weakened the legitimacy of governments and parliaments as the core speakers for popular views.

The Charter did not put an end to the accommodating style of politics but gave it a more principled foundation. It could be argued that the Canadian political system has developed a more principled approach to the settlement of issues, through establishing clearer procedures for how deliberation is conducted. Consider the case of Quebec

separation. The Supreme Court was asked to rule on this and handed down its ruling on unilateral secession in 1998. The Court declared that unilateral secession was unconstitutional. On the other hand, it said that secession was possible, provided a set of procedural requirements were met. These pertained to standards of justice, as well as to the need for deliberation and consultation. In this question, after three decades of attempts at accommodation, it was recognised that they had failed and that it was instead necessary to establish a framework for secession. In a similar manner, perhaps, what changed with the inclusion of the Charter into the Constitution Act 1982 was the specification and amplification of a particular set of normative guidelines to shape and direct the process of deliberation. New actors and new reasons entered the fray. The process became more cumbersome and more contested but was also far more democratic. It was *not* a smooth transition: when constitutional voice replaced silence, a cacophony of voices entered the fray.

A hallmark of this transition has been the search for proper procedures to ensure a proper mixture of deliberation, consultation, and direct representation.

## **V. European Parallels?**

To assess what possible lessons Europeans might learn from Canada, I have demonstrated that there are relevant parallels in their pre-Charter eras. Now it is necessary to briefly examine how relevant the similarities are in the Charters and in the larger settings of constitution making – are they sufficiently similar as to warrant the drawing of lessons for Europe?

Both Charters were inserted into contested constitutional arrangements; the process of inserting each Charter was marred with conflict; and core actors in both settings have refused to acknowledge the Charters as binding constitutional vehicles. The Quebec government refused to sign the Constitution Act 1982 mainly because of its opposition to the Canadian Charter and has still not signed the Constitution Act. In the EU, the UK and several other governments were successful in having the Charter presented as a mere declaration. In both cases again, such opposition has not prevented

the further adoption of each Charter. The Canadian Charter has taken hold also in Quebec. In the EU, the EP and the Commission declared that they would consider it as binding on them. It has become a source of legal interpretation (cf. Menendez 2002), and after much to and fro in the Convention it was inserted in Part II of the Constitutional Treaty. The French ‘non’ in the referendum was *not* a rejection of the Charter –it is better seen as a plea to strengthen the Charter’s social dimension.

A further parallel is that *both* Charters are forged in the twilight of “domestic” or internecine and external or international law. Both Charters are closely linked up to and affected by the emerging international system of rights. This system is actively undermining the notion of sovereignty embedded in the Westphalian conception of the state system. The most explicit such link is to the EU Charter, as the European Convention on Human Rights is very strongly and explicitly reflected in many of the provisions of the Charter. The drafting Charter Convention was also very concerned with avoiding conflicts between the two, as the ECJ in interpreting the European Charter, would draw on the case-law of the ECHR. In a less direct manner the Canadian Charter was greatly influenced by the international system of rights (Cairns 1992, 2003).

In legitimacy terms, both Charters are attempts at founding each respective polity on a symbolic and substantive footing of popular sovereignty. As noted above, the legitimacy of each entity in the pre-Charter era had a strong derivative component. The key question facing Canadians, at the time of incorporation of the Charter, was whether Canadians had enough in common to form a single people in the sense of consenting to a common constitution. The EU is today wrestling with that same question, albeit coming at it from a somewhat different angle (as a post-Westphalian entity born out of a system of states). Therefore, albeit the settings are different and the entities as well, the fundamental question is quite similar and so are some of the vehicles to resolve it.

In both cases, the underlying philosophy of each Charter is that of constitutional patriotism. At the same time, both Charters are devised so as to reflect the tensions and divisions of the entities into which they are embedded, and each was equipped with a lot of mechanisms to ensure accommodation of difference and diversity. Here there is an interesting difference between the two: the Canadian Charter focussed much more on cultural difference, whereas the European Charter focuses more on solidarity and social



rights. How far this reaches depends on the actual restraining role among other factors of the emerging division of competences between levels of government in the EU, and on the horizontal clauses that define and delimit its reach. These factors are probably more important than specific provisions that establish specific group rights, albeit the European Charter also holds such.

These comments suggest that the two Charters and the settings in which they are located share enough in common as to warrant a deeper examination and the drawing of lessons. Chartered popular sovereignty was in Canada obtained through popular mobilisation. An important question is whether the European Charter might fill a similar role - spark a similar revolution as occurred in Canada. This also prompts attention to precisely what sparked the Canadian changes – the rights in the Charter, the support structure and group-based mobilisation, the responsive legal community, societal value changes, or deep internal conflicts?<sup>27</sup>

Even if fully adopted, the European Charter will likely enjoy a weaker status than the Canadian (Fossum 2004b). This suggests that we should expect *less* mobilisation and debate in Europe than was the case in Canada. On the other hand, the high turnout in the French referendum and the comprehensive debate that preceded it suggest that there may be fertile grounds for Charter-based popular mobilisation, in particular along social lines.

A further relevant question is whether the European Charter could help spark a ‘European Court Party’? Enger notes, in his analysis of the possible future effects of the European Charter, that “justifiable fundamental rights open new fields of activity to national and European political actors that do not hold office” (Enger ... ). The Charter equips citizens and other political actors with the right of complaint; hence “Political actors could use this circumstance to form an alliance with the Court of Justice against the majority in the Council, the Parliament, the Commission or Single Member States. Thus the possibility of fundamental rights litigation transforms the Court of Justice to a political arena, in which power is distributed differently.” The Charter also holds some of the mechanisms that helped trigger such a strong mobilisation as took place in the Canadian case, such as for instance group-based rights (Fossum 2003).

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<sup>27</sup> For different explanations, consider Epp 1996, Brodie and Nevitte 1993, Cairns 1992, 1993, 1995, 2003; Morton and Knopff 2000.

There are also signs to the effect that the European Charter already has affected the *process* of constitution making. The Charter Convention can be conceived of as the first important breach with the EU's executive-driven approach to constitution making. Its success in forging the Charter (as opposed to the dismal failure of the IGC at the parallel process during Nice) was taken as evidence of the superiority of the Convention mode over that of the IGC. The Charter has thus indirectly at least helped to generate a broader and deeper citizen involvement in constitution making. The EU expressed a commitment to this at the Nice Summit when the Charter was proclaimed (cf. Declaration 23 of the Nice Treaty). The open and deliberative manner of forging the Charter was deemed a success and this mode was then adopted for the preparation of the next round of Treaty change, initiated at the Laeken European Council Meeting in December 2001 and concluded in October 2004. The social and integrationist thrust of the Convention, many will keep reminding us, was curtailed by governments.

Since the IGC accepted the Convention's draft, the EU has struggled with reconciling a similar tension as has plagued Canada since the Charter's inception, labelled as the Citizens' Charter vs. the governments' amendment formula (highlighted in the writings of Alan Cairns), with a concomitant similar tension between a Citizens' and a Governments' Constitution. The tension is reflected in different ways of addressing the citizens. Laeken here appears as a mix (10 national referenda and 15 national parliamentary ratifications) between the de facto unanimous governmental consent required at Meech Lake and the 'subunit' referenda option adopted in the Charlottetown Accord. This makes the process highly lopsided, with citizens in most constituencies being asked to defer to the decisions of their others and of their governing bodies.

## **VI Conclusion: Possible Lessons for Europe**

The EU and Canada are multinational and poly-ethnic entities, which have committed themselves to the founding of their respective constitutional orders on popular sovereignty. Canada embarked on this process two and a half decades ago, and has undergone what is frequently referred to as a Charter revolution. The EU during the Laeken process has taken numerous measures to forge such a transition. In the above I

have demonstrated that there are sufficient similarities between the two processes as to warrant the drawing of lessons, provided that the EU after the referenda does not decide to drop the constitutional project altogether, a result that really amounts to abandoning its democratic vocation altogether. In the below I will seek to demonstrate that there are constructive lessons from the Canadian experience, which could help the EU when it proceeds to grapple with recent days' events.

The first lesson from the Canadian experience is that Charter-insertion *can* contribute to democratise the constitutional order also of a highly complex multinational and poly-ethnic entity, with several partly competing Charters. How well this lesson will travel especially to the far more complex European context hinges on additional factors: what are the key mechanisms that gave the transformation its *democratic* nature? How much of the transformation can be attributed to the insertion of the Charter of Rights into the country's constitutional order? What about other aspects of public policy that served as enabling devices for the political mobilisation? Of relevance here is Madison's assertion to the effect that constitutional rights guarantees are mere "parchment barriers" (Madison 1977, 10:211-2, cited in Epp 1996:766), in the sense that they do not provide rights-holders with explicit control over institutional resources. The deeper question is therefore how and to what extent constitutional rights can serve as mobilising devices. Rights are clearly important in emotive terms: they speak to basic self-confidence and respect and have deep implications for self-esteem (Honneth 1995). In normative terms, rights speak to the core principles of freedom, democracy, autonomy, equality - in short, due process and equal respect for all – all of which have obtained a deontological standing in modern democratic societies. In this sense they can be conceived of as *principles or moral norms*, which it is a *duty* to comply with even though they could interfere with the values of the majority, particular conceptions of the good, roles, identities or utility calculations. That is why constitutional rights can function like trumps in collective decision-making (Dworkin 1977:xi). Rights can draw on these factors to empower individuals and groups but as noted we need to consider the importance of this aspect in relation to other factors.

The second lesson from the Canadian experience is that there is *no easy transition* from a Governments' Constitution to a Citizens' Constitution. Governments have proven

highly reluctant to give up their stewardship of the constitution, as for instance reflected in the control of the process of constitutional/treaty change/amendment, where each government clings on to veto on constitutional amendment. Governments have also injected provisions and arrangements into their respective Charters that guarantee them with a continued privileged constitutional position, through inserting mechanisms bent on ensuring (sub-unit) majoritarian considerations into rights exercise (cf. article 33 of Constitution Act). But note that the transformation has altered what government signifies here: government can no longer present itself as the executive that speaks *on behalf of* the people, but has to be seen as *the embodiment of the people*. Provincial demands for referenda testify to widespread public perceptions to the effect that the people cannot entrust government with this vital democratic function.

Third, the Canadian case amply demonstrates the legitimacy dimension of the constitution making *process*: Charter-infusion is not only about signalling to citizens that they have rights of explicit constitutional stature, but also that this means that citizens are constitutional stakeholders that have to be properly consulted throughout the process. The design of the process is therefore not only a political consideration or matter for political bargaining. It also has a vital epistemic and a normative dimension – which may not add up or work in the same direction. The perhaps most destructive component here has been to structure the process in such a manner as to permit subunits to conduct their debates in relative isolation to each other. The European Convention was here a major step forward as it was the only public forum that spoke to all EU citizens. The Canadian process was marred by debates conducted within the ‘two solitudes’ of federal-English and French Quebec.

Fourth, the complex character of the Canadian case nevertheless reveals that Charter insertion can generate a large-scale popular mobilisation, with massive efforts at constitutional renewal as the immediate outcome. The strong opposition, Quebec’s refusal to officially endorse the Charter, and the many other devices of minoritarian (communal) protective devices that are built into it – raise doubts as to whether this can be said to qualify as a *constitutional moment* in Ackerman’s (1991, 1997) sense. In Canada the insertion of the Charter into the constitutional order did not herald in a consensual process wherein the people came to identify itself as one people, but rather

ushered in a cacophony of distinct voices.<sup>28</sup> Passions ran high and the enormous range of issues that entered the agenda made it very hard to reach agreements on comprehensive packages of reform. In retrospect, the transition from constitutional silence to voice is best seen not as a constitutional moment but as a *constitutional catharsis*: the peoples came to see themselves not as constitutional actors within a fixed constitutional setting but as actors on a stage whereby several constitutional plays were unfolding simultaneously.

Fifth, in cultural terms, it is easy to conclude from this that there is *no one people* that constitutes itself, as the constitution contains measures to ensure the protection of *several* culturally distinct peoples. Nevertheless, it is *also* important to underline that the growing acceptance of the Charter across Canada reveals that there over time *is* a ‘constitutional demos’ emerging. This is a thin demos, with its common denominator and point of connection the basic rights and procedures in the constitution. This also serves as the foundation for a further ongoing constitutional conversation (cf. Chambers 1998) which unfolds irregardless of high formal barriers against further constitutional change. Once this constitutional machinery is put in place, the character of the constitutional conversation changes, in that it is lent a much more consistent focus on individual autonomy.

Sixth, the magnitude of conflict and contestation and even possibly deadlock should therefore not detract us from the heightened reflexivity that Chartered constitutional transformation brings about. Charter-insertion forces governments to find acceptable justifications for their influence and for the principle of equality of governments. In Canada they have often resorted to majoritarianism (provincial referenda). Hence, the justifications they resorted to were those of democracy, not rule by government. Good leadership might then turn these into mechanisms whereby the entire people, is addressed as one.

Seventh, the Canadian experience has brought forth one - complex - solution to the dilemma now also shaping the EU with regard to constitutional morality: Should the existing constitutional morality that highlights peace-based toleration yield for a system that establishes a clearer hierarchy among the three principles of individual autonomy,

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<sup>28</sup> Cf. Tully’s (2001) notion of *multilogues*, discussions “among many members of various kinds...”.

group-based (collective) equality and peace? Through what kind of process can and should a constitutional agreement be forged? These are some of the core questions that the EU currently seeks to resolve in its constitutional debate. The Canadian experience shows that in such systems, even with an explicit effort to insert Chartered popular sovereignty, we have to live with a more complex and normatively demanding tension between justice and stability that was referred to at the outset.

The Canadian case shows that political systems can survive despite deep-seated disagreements over first principles. They can undergo a constitutional catharsis *precisely* because the catharsis is premised on and reinforces those components that ensure reflexivity: democracy and basic rights. Therefore, even though the Charter favours some groups and interests over others, its greatest merit is in further entrenching the institutional conditions for reflexivity. Multinational and poly-ethnic entities probably require complex and composite modes of accommodation but the heightened inclusiveness and cultural sensitivity that these modes also presuppose *cannot* be ensured unless there are systems of rights-framing in place that ensure that the codes of democracy and basic rights consistently inhabit the constitutional agenda.

This reading of the Canadian case emphasises this as a particularly interesting case of high or reflexive modernity and as such an interesting case for Europeans to study in further depth.

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