Adieu to constitutional elitism?

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Abstract

The negative referendum results in France and the Netherlands have been construed as signs of a deep gap between the European Union's leaders and its people(s). Treaty-making/change in the European Union has historically been conducted through an intergovernmental, executive-style approach, with limited popular input, at least until the referendum stage. The latest instance, the so-called Laeken process (from the Laeken Declaration to the popular referenda, 2001-2005), cast the undertaking in explicit constitutional terms and opened and democratized aspects of the process. The negative referendum results however raise questions as to whether the Union can and should continue down the constitutional route. This article examines political and democratic challenges and opportunities associated with transition from an executive-style to a more open and democratic approach to constitution-making/change. The purpose is to derive theoretical and practical lessons from other comparable polities, which have sought to democratize their executive-style approach to constitution making.

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I.   Introduction[1]

The negative referendum results in France and the Netherlands have been taken as clear signs of a deep gap between the European Union's (EU) leaders and the European people(s): "The [French and Dutch] referendum became a means of reasserting control over political classes that had acquiesced in excessive transfers of authority."(Siedentop 2005). Treaty reform through Intergovernmental Conferences (IGCs) is the single most important instance of elite-run politics. A critical component in the Union's democratization is from this angle to open up and democratize the process of treaty-reform. The latest instance of treaty reform – hereafter labelled the Laeken process (2001-2005?) – was a far more open and deliberative process than had been previous instances (SEA, Maastricht, Amsterdam, Nice). A central feature of the Laeken process was the Convention (2002-2003). Its president hailed it as an explicit departure from IGCs that had "provided an arena for diplomatic negotiations between Member States in which each party sought legitimately to maximise its gains without regard for the overall picture."[2]

Some analysts argue that it was precisely this *departure* from executive-style politics that served to derail the process, as the Union's executive-style politics is seen as an intrinsic part of its success. They hold that the European Council (and the large system of executives and experts that this draws on) has accumulated decades of experience with practical problem-solving and political accommodation. This system has played a crucial role in the gradual development of the Union's *material constitution*. In social practice terms this works as a constitutional arrangement. However, precisely because it does not carry with it

[2] Introductory speech by President V. Giscard d'Estaing to the Convention on the Future of Europe SN 1565/02:14.

the symbolic aura of the *formal* constitution; nor has the normative sanction of the *democratic* constitution it can serve as a more malleable instrument for accommodating diversity and for handling conflicts (cf. Weiler 2002).[3]

In substantive terms, the Treaty establishing a Constitution for Europe (ECT) was not a dramatic break with the past, as it essentially *consolidated* the Union's existing material constitutional arrangement. Laeken was however the most explicit and visible instance wherein the terminology and normative standards of democratic constitutionalism were applied to the EU level (Kokott and Ruth 2003),[4] and had it succeeded in democratic terms it would have reinforced the constitutional dignity of the legal order. Laeken's commitment to a more open and deliberative approach to constitution making was thus in line with the terminology and normative standards of democratic constitutionalism.

Precisely this has also been held up as a major source of the ECT's subsequent rejection. "The objectionable aspect was its form: an idealistic constitution... The new document was an unnecessary public relations exercise based on the seemingly intuitive, but in fact peculiar, notion that democratization and the European ideal could legitimate the EU."(Moravcsik 2005) The negative referendum results have been construed as signs of a popular rejection of further democratization through constitutionalization. It is frequently argued that the Union is too complex; that democracy cannot be disassociated from its nation-state foundation; and that any democratic process of constitution making at the Union level will become unwieldy, over-loaded and eventually unravel.

This argument downplays the popular pressure for further democratization; it also sidesteps the Union's present dilemma. Whether it should continue down the road of democratic constitutionalisation must be seen in light of the Union's commitment to democratic principles and its existing material constitutional arrangement: If it abandons its constitutional vocation, how much of the system

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[3] For a distinction between a formal, material and democratic constitution see Menéndez 2004.
[4]. "The word 'Constitution' ... carries political and symbolic weight. We should stand by our choice of this word, as we Europeans know how significant it is." President of EP, Joseph Borrell Fontelles, cited in Stein 2005, 4.

in place that already works as a material constitution (with basic rights and democratic features included) can be retained now that the association with *democratic constitution* has been made more explicit? Having said that, simply to assert that the Union should continue down the road of further democratization does not resolve the difficult issue of *how* to proceed, as the Union's complex character poses novel and quite distinctive challenges to democratic constitution making.

This article focuses on the challenge of democratizing the process of constitution making. It examines political and democratic challenges and opportunities associated with transition from an executive-style to a more open and deliberative-democratic approach to constitution-making/change. The assumption is that whereas the Union has unique traits, it is not so unique as to defy comparison. There are other polities, with similar challenges and which have sought to democratize their executive-style approach to constitution making. The purpose of this article is to derive theoretical and practical lessons from the most relevant such cases and examine their applicability to the Union.

The selection of cases has followed a *diagnostic comparative approach.*[5] This approach consists in a) identifying the main challenge; b) looking for entities that have dealt with a similar challenge; (c) seeing how they have handled this; d) establishing that the entities share enough in common to warrant comparing them; and e) searching for lessons – including for the EU. With regard to the EU the greater the similarity (along a, b, and c); the more credible will be the lessons.

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[5] This is a *strategic* approach to comparison, inspired by Charles Tilly's understanding of comparison, Tilly 1984.

II.   The challenges

For the diagnostic approach to work, we need to identify an entity with similar democratic challenges and which has democratized its executive-style constitutional politics. No international organization qualifies; hence the analysis must be confined to comparable states. The diagnostic comparative approach has been such devised as to minimize the methodological problems involved in comparing a state with a non-state entity.

Within the field of EU studies, the state that is most frequently drawn on to compare the EU with (consider frequent references in the Laeken Convention to the Philadelphia Convention) is the United States (U.S.). When we apply the diagnostic comparative approach, the U.S. does not qualify: It was a pioneer in instituting democratic constitutionalism in the 18th century, and there is no U.S. parallel to EU's executive-style constitutional politics. In other words, the U.S. does not face the same constitutional- democratic challenges as does the EU; neither does it handle the challenges *it* faces in a manner similar to that of the EU.

From a diagnostic perspective the most relevant case is Canada. Canada is a *contested state*: there is no real shared sense of a Canadian national community; and it is frequently referred to as both multinational and poly-ethnic.[6] 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,* in the sense that both 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.[7]

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[6] For this designation of Canada see Kymlicka 1995, 1998; Gagnon and Tully 2001.
[7] Canada has one of the world's longest lasting constitutions (BNA Act 1867), based on representative democracy, but this was bequeathed upon the country by its colonial mother, the UK.

Canada faced the challenge of entrenching popular sovereignty in a constitutional arrangement that was bequeathed upon it by Britain. In the absence of internal agreement, Canada has historically relied on an elitist and executive-style approach to constitution making. The Canadian parallel to the IGC is the comprehensive system of intergovernmental relations with the First Ministers' Conference (FMC) at its apex. It operates as a collective as well as through a range of bi- and multilateral meetings, in a manner similar to its EU counterpart. A further parallel with the EU is that since there has never been agreement on the constitutional amending procedure, individual state actors – federal and provincial – have insisted on veto and been able to block constitutional agreements.

These parallels blunt the edge of the state – non-state distinction. Further, it should be noted that the Union, whereas it is not a state, does appeal to the same principles as underpin the constitutional democratic state. Vital components of the Union's material constitutional arrangement are also reflections of the common constitutional traditions of the Member States (Stein 2005). Further, whereas the Union holds unique traits, this multi-level configuration does not constitute an *explicit departure* from the state, as the Member States have not been transcended and/or absorbed into a distinctly new and different structure. Intrinsic to the integration process is a comprehensive debate on precisely what form the Union should and does take.

But in some contrast to the EU Canada *has* undergone a profound constitutional transition. This took place in the aftermath of the patriation of the Constitution in 1982, which was the first time that Canadians sought to found themselves as a people (Russell 1993). The main substantive change, the Charter of Rights and Freedoms was cast as a core symbol of democratic constitutionalism and a critical vehicle to undermine the elitist and executive-led approach to constitution making/change. Patriation and the Charter were intended to forge a qualitative change in the approach to constitution making: from closed intergovernmental bargaining to a more open and deliberative mode of constitution making. Habermas (2001), in his analysis of the EU, underlines the

need for a catalytic constitution, and Canada's Charter-infused constitutional transformation was intended to play such a catalytic role.

As we shall see, there was no smooth transition from the intergovernmental to the more open approach; the process sparked deep conflicts (the province of Quebec refused to sign the Constitution Act); and the population was mobilized around different visions of Canada. The decades-long process of constitutional debate that ensued has been labelled a period of "mega constitutional politics", to signify that this was a broad-based discussion on the constitutional essentials of the polity, combined with large-scale efforts at constitutional change. This was the most comprehensive process of constitutional debate ever undertaken, so that "Canada surely had a lock on the entry in the Guinness Book of Records for the sheer volume of constitutional talk."(Russell 1993, 177) Today the Charter has taken hold, even though no constitutional settlement has been reached.[8]

Given the intention to replace or at least modify executive-style elitist politics with a deliberative-democratic approach, the Canadian case can yield relevant insights into the merits and limits of a deliberative approach to constitution-making/change. Further, the Canadian case may yield insights of relevance to the EU on the prospects for democratizing constitution making within complex multinational entities. Since a critical issue in Canada has been how to balance democratic constitutionalism and executive-style accommodation, there may also be lessons of relevance to how this balancing can be handled. That the EU has already forged its own Charter of Fundamental Rights (formally speaking a political declaration but included in the ECT as Part II) only adds to the relevance of comparing the EU with Canada.

In line with my diagnostic approach I proceed in four steps. First, I present and compare the pre-Charter contexts of constitution making and accommodation of difference in Canada and the EU, with emphasis on the democratic character of these arrangements. This assessment helps establish that

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[8] Opinion polls consistently show strong nation-wide support for the Charter cf. Fletcher and Howe 2001, 257-8; Cairns 2003, 105.

the two entities share enough in common in their respective pre-Charter periods to warrant comparing them. Second, I spell out the core features of the Canadian Charter-based constitutional transformation with emphasis on clarifying its catalytic character and the magnitude of transformation in democratic terms. Third, I seek to clarify that the Charters and the larger constitution making settings hold sufficient similarities to warrant the drawing of lessons. In the final part, I outline a set of lessons. Only through such a multi-step comparative procedure can we know whether the lessons from Canada are actually *relevant* to Europe.

Executive-style accommodation, silent publics and tolerance

Whatever label we use to define the community status of Canada and the EU, what is clear is that they *both* rely on a more or less explicit rejection of the One Nation ideal. In both cases we find searches for appropriate labels to designate each entity. Joseph Weiler for instance finds that this entails a Union that:

> 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 2001, 68)

LaSelva, in his reconstruction of one of Canada's founding fathers, Georges Étienne-Cartier, notes that:

> 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)

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In this view, Canadian democracy has emerged within and been shaped by a strong onus on tolerance and accommodation of difference.[9]

Such efforts suggest that each entity has not been seen merely as an aberration from an established norm (that of single-nation-based democracy), but analysts (and decision-makers) have also sought to develop alternative normative justifications that would better suit their complex and multifaceted communal character. According to several analysts, both the EU and Canada have sought to develop a constitutional morality based on *tolerance*.[10]

This type of constitutional morality it is held was sustained by a particular *procedure* for operating the constitution. Both Canada and the EU 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. In both the EU and Canada, where no lasting agreement could be struck on constitutional essentials, the run of time was favored over the pursuit of principle: time was a de-facto problem-handler in that actors could revisit issues over numerous meetings.[11] These systems of accommodation were therefore hardly incidental by-products, but were part of explicit and conscious efforts at ongoing accommodation and learning (mainly at the elite-level).

For their operation these systems of elite accommodation were premised on largely *silent* publics, in the EU evocatively labelled a "permissive consensus", and in Canada often referred to as *deference*.[12] They also entailed significant biases in the selection of issues and in the privileging of actors. Insofar as these undertakings

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[9] Canada "has a reputation for being a very tolerant society…" Williams 2001, 218.

[10] To Joseph Weiler, the Principle of Constitutional Tolerance "is the normative hall mark of European federalism" Weiler 2001, 65.

[11] 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.

were 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.

To sum up, within such complex communal settings, with deep-seated conflicts that could be triggered by all kinds of issues, the EU and Canada (pre-Charter) opted for *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 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 constitutionalization. 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 would take place in accordance with the basic tenets of popular sovereignty.

Thus far I have established that the two entities shared similar challenges and also had adopted similar ways of addressing these in the periods prior to their embarking on explicit programs of democratic constitutionalization. But although the challenges and their handling appear similar, they are dealt with within two different political contexts (with the EU a non-state and Canada a state). It is therefore important to clarify what this difference entails in democratic terms. Such an assessment will also help shed light on the underlying constitutional and structural conditions that may support or stymie a catalytic constitutional process and deliberative constitution-making.

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[12] For more on the permissive consensus see Abromeit 1998. For the Canadian notion of deference, consider Nevitte 1996.

III. Complex accommodation and the question of democracy

Before establishing the democratic quality of these entities it is necessary to spell out the requisite democratic criteria. These have been derived from deliberative-democratic theory. Deliberative democracy liberates democracy from association with the notion of pre-political people; hence enables us to consider also supranational and multinational entities in democratic terms. Both Canada and the EU incorporated elements of deliberative democracy in their efforts to modify their executive-style constitution making.

Given that the EU - and of course also Canada - subscribes to the principles underpinning the democratic constitutional state, there is no need to devise entirely different normative standards. Thus, to further establish comparability, my assessment of the EU and Canada will take this set of standards as the relevant yardstick. The application of the criteria to the two cases helps clarify the extent to which a transition in the direction of deliberative-democratic constitution making can rely on procedural-institutional supports, as opposed to would have to foster such – a great challenge indeed for complex multinational entities.

The first requirement is a democratic constitution, i.e., that the constitution is derived from and devised for the citizens. The presumption is that the more of this that is in place, the easier it will be to forge the transition from executive-style to deliberative-democratic constitution making. A particularly important aspect is for citizens to be equipped with rights that ensure their public and private autonomies in such a manner as to enable them 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

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pertains to a division of powers and responsibilities, along both horizontal and vertical lines.

Second, the constitution must be upheld by the successful operation of *a set of institutions*, notably popularly elected bodies able to translate goals and values into laws, and bodies that reliably implement such into binding actions – subject to popular oversight and scrutiny. They would help 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*. Democratic representation is not only a key to political legitimacy in modern polities; it also has catalytic merit. By providing institutional fora wherein elected members can peacefully and co-operatively seek alternatives, solve problems and resolve conflicts on a broader basis, representation can contribute to refine and enlarge opinions. As such representation can play a central role in ensuring political rationality.(Sunstein 1988) The legitimacy of large, complex, and pluralist, settings is likely affected by representatives' ability to take different interests and perspectives into consideration. Representation is important also for *accountability*: in the sense that those who are potentially affected by decisions will have their say and/or be 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.

These are the three sets of legal-institutional conditions that we associate with democratic constitutionalism. They are also important to ensure a proper *catalytic* constitutional process. The democratic quality of the process hinges on their being present, as well as on *the process of forging the constitution* being in compliance with democratic requirements: it has to be transparent, deliberative

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and widely representative. The same principle applies: all those potentially affected have to be able to consider themselves as participants.

At first glance this may appear tautological: a democratic constitution is required to ensure a democratic constitution. However, the transition from executive-style to some version of deliberative-democratic constitution-making will be greatly aided if it can draw on institutional – and constitutional – supports. The more these are in place, the easier the transition. Further, in the EU and Canada constitution making does/did not take place in a constitutional vacuum. In the EU the constitutional process takes place within a setting of already constitutionalized Member States, with an important constitutional impetus emanating from the common constitutional traditions of the Member States. In Canada there was also a constitutional arrangement in place. The issue is therefore whether these arrangements were conducive to or would instead serve to deter further democratization.

The EU and Canada assessed

Up until Maastricht (at least) the EU's democratic legitimacy was "indirect" or "derivative", i.e., conditioned on the legitimacy of the democratic nation states, of which it was made up.[13] 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 material constitution and not a democratic constitution proper. It equipped citizens with rights (including, citizenship), 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. Since then they embarked on a constitutional conversation but without acknowledging that it was such. As noted, it was only in

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[13] For this notion see Beetham and Lord 1998; Lord 2004.

the aftermath of the Nice Treaty that the elites have acknowledged that they were partaking in a constitutional conversation.[14]

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 the nineteen hundreds. 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 constituted themselves as a sovereign people. 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 1991, 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).

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[14] Cf. debate on the Future of Europe and Laeken Convention.

There was also no agreement on procedures for constitutional change. To obtain such an agreement, unanimous provincial consent proved necessary, which did not materialize.[15] Thus, the problem of where sovereignty was ultimately to be located was left in abeyance. This disagreement enabled the governments, as the stewards of the constitution, to sustain definitional power of what would be constitutionally salient issues.

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

With regard to the second criterion, that of institutional framework, the EU is not based on a parliamentary system of government, neither on a full-fledged system of separation of powers. The EU-level institutions sit on top of a highly asymmetric institutional structure made up of federal and unitary states of great variation in size and institutional composition. The EU system 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 Treaty of the European Union (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).

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[15] For an overview of amendment proposals between 1926 and 1987 see
http://www.solon.org/Constitutions/Canada/English/Committees/Meech_Lake_1987/mlr-

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 poly-centric 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 (but did not formally entrench parliamentary government). Although 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 decentralized federal systems in the world.

Of notable import is that 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,[16] and has greatly weakened the vertical nature of the Canadian federal parliamentary system, as the central role of executive officials at both levels sidelined all parliaments.

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[16] 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 1980, 91.

There were both institutional and substantive factors at work here. The first-past-the-post electoral system privileged majoritarianism, so that federal and provincial governments could generally rely on comfortable parliamentary majorities of loyal partisans, which would give them great leverage in their dealings within the system of intergovernmental relations (note the difference to today's situation where the last two federal elections produced minority governments).

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 had 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 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, and subsume issues under an economic logic.

The Canadian parliamentary system as such was not less representative than other parliamentary systems. But the constitutional arrangement generated and sustained peculiar representative *inadequacies*. Status Indians had been deprived of the right to vote up until the 1960s. Further, the governments' operation of the constitution helped sustain an institutional system with a strong exclusionary bias, i.e., the concerns of large portions of society were effectively *removed* from constitutional operation. This pertained in particular to aboriginals; but women's issues were also marginalized, and the same applies to ethnic and racial minorities. Such *de facto* exclusion of the concerns of large portions of the population was a central component of constitutional elitism. In Canada analysts have referred to this as *constitutional avoidance.*(Cairns 1988, 1995) 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, it reflected these defects. The two entities shared many of these in terms of *how* they conducted constitution making. In the pre-Charter era, "government by negotiation" was a critical common denominator. 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.[17] In the EU, treaty change was undertaken through the 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 EP 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 were not synonymous. The Canadian parallel to the European Council was the FMC, which consisted of the Prime Minister and the 10 Provincial Premiers, or First Ministers. This body played the most important role in the numerous efforts to fashion constitutional change in Canada. Canada's and the EU's systems were based on similar democratic logics: each participating government was to be popularly elected; each First Minister was to be held accountable by the relevant legislative assembly; and each First Minister could de facto veto a proposal.[18] In reality in Canada as in the EU the heads of governments

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[17] EU: Moravcsik 1991, 1993, 1998; Curtin 1993; Canada: Simeon 1972; Cairns 1991.

[18] The Canadian federal parliament still has a more prominent role than its European counterpart, however.

could operate with very limited parliamentary input into the process of intergovernmental negotiations.

In the pre-Charter era Canada relied more on this system than did the EU. The Canadian system was less formalized, which was largely due to failure to reach agreement on a constitutional amendment formula. The European Court of Justice (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. Morton and Knopff argue that prior to the Charter Revolution the Canadian Supreme Court was "the quiet court in the unquiet country".(Morton and Knopff 2000, 9) However, in the EU each Member State has veto on treaty change and many states "contain their compliance".(Conant 2002, 3)

To sum up this brief assessment, in their pre-Charter eras, both the EU and Canada were marked by complex systems of accommodation of difference, which lent key inputs into the definition of the contents of their operational constitutions and were critical to their practical operation. These systems had clear traits of "government by negotiation". The Canadian constitution was aptly termed a "Government's Constitution". The EU lacked a formal and democratic constitution but had a *material* one. Both operational constitutional arrangements were bestowed with significant *institutional bias*: they privileged the concerns propounded by governments, over those of a whole range of excluded or marginalized groups and constituencies. In both cases, government actors could operate as constitutional veto players (in the EU this was formalized, in Canada this was a de facto working arrangement). The issue 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 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?

The patriation of the Constitution and the inclusion of the Charter of Rights and Freedoms in the Constitution Act, 1982 was no doubt the most explicit embrace of democratic constitutionalism in Canada's history. Does this earn the label *catalytic constitution* – did it serve as a critical democratizing vehicle?

The political purpose of the Charter was to entrench individual rights in the Constitution, and to foster national unity. There was a catalytic intent in that it was envisioned as: a means of weakening the executive-style governmental imprint that had marked the Constitution in the pre-Charter era; a vehicle to inject a more participant constitutional ethos into the constitution; and a means to found the constitution on popular sovereignty. The obvious political goal was for these changes to weaken the ability of the government of Quebec to foster a French language-based Quebec nationalism. The catalytic thrust was thus both directed at individual empowerment *and* communal reconfiguration through altered allegiances. What are the democratic effects of this transformation?

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".(Cairns 1991, 1992, 1993, 1995.) But not all governments accepted this. When the Charter 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) and has still not signed it. Quebec was not opposed to fundamental rights, as it already had its own Charter, but was opposed to a competing body with different provisions, in

particular within the field of language protection.[19] In Quebec the Parti Quebecois and nationalist intellectuals characterized the 1982 constitutional package as a "great betrayal" and couched it as a major *denial of recognition*.

The Canadian Charter was based on a complex democratic constitutionalism which sought to balance the forging of a common sense of community with a more complex notion based on the protection of group-based and communal difference and distinctness. It offered both the prospect of special constitutional recognition for a range of groups,[20] as well as included provisions for government actors to *opt out of* certain provisions; hence introducing its own unique blend of rights-based constitutionalism and majoritarian democracy.[21] At the same time, by establishing bilingualism as a nation-wide commitment, and by not permitting governments to opt out of the language provisions, it was set up to curtail the fostering of provincial (including Quebec) nationalisms.

The Constitution Act 1982 also included an amendment formula that would effectively equip governments with a monopoly on formal constitutional change. Hence, "(t)he constitution is seen … as making simultaneously two contradictory statements about sovereignty…". (Cairns 1992, 6) The citizens' constitution thrust embedded in the Charter could thus be greatly modified through the governments' constitution thrust embedded in the amendment formula.

On the first criterion, then, the Charter was intended to found the constitution on the principle of popular sovereignty, but through a complex notion of democratic constitutionalism which induced people to understand

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[19] 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.

[20] Particularly relevant sections were 15: Equality Rights (race, national or ethnic origin, color, religion, sex, age or mental or physical disability); 23: Minority Language Educational Rights; 25 on aboriginals; and 27 on multicultural heritage.

[21] 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. A similar although weaker instrument 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."

themselves in *multicultural* rather than in mono-cultural or classical nationalist, terms. As such we may see the Charter as a critical vehicle to foster cultural reflexivity as it spoke to a more complex conception of "the people", one that was even conducive to a *post-national* sense of identity. However, the government-oriented amendment formula could greatly affect the Charter's democratizing thrust.

Democratization or untrammeled judicialisation?

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. (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. The Canadian debate has focused both on the democratizing effects of the Charter and on its contribution to further judicialisation of politics. Some claim that it has modified parliamentary government and given a much more pronounced role to courts. Their claim is that rather than empowering citizens, the Charter replaces 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: the insertion of the Charter was seen to have weakened the democratic institutions under criterion two, and helped generate a new bias in representation, hence negatively affecting criterion three.

The question is whether the Charter has really weakened parliamentary government, in particular given that representative government had already been partly 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 courts and parliaments, *and* of how the Charter affects the system of intergovernmental relations. Is there here a double-pronged weakening of representative institutions or does the Charter

democratize intergovernmental relations, and hence produce democratic gains? Parliaments (Manitoba) were essential as arenas for the social mobilization that killed off the elite-negotiated Meech Lake Accord. The Charter (underpinned by significant government funding for rights litigation and advocacy)[22] helped to mobilize popular opposition, it empowered parliaments in relation to executives, rather than the reverse, which became even more evident during the process of forging the Charlottetown Accord.[23] Further, Morton and Knopff's acknowledgement to the effect that the Charter empowered groups in civil society is also an acknowledgement of its having democratic effects. Their argument may therefore relate more to what type of representational bias the Charter effected. The importance of such a bias in democratic terms hinges on whether it empowered groups whose role already was prominent, or whether it empowered weak and hitherto marginalized ones.

With regard to the representational bias of the Charter, it helped to politicize in particular the so-called "Charter Canadians" (although all Canadians are by definition Charter Canadians), through amplifying the constitutional salience of individual – *and group-based* – rights. The groups singled out 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.[24]

In the extension of this, many see the Charter as a necessary change, because it helped empower citizens. This occurred through Charter rights and a significant support structure made up of government funding from both provincial and federal sources. The effect was to democratize access to the Supreme Court

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[22] Epp 1996, 1998 notes that much of the support structure was put in place in the 1970s and helped reinforce the Charter's role.

[23] See Russell's 1993 account of the central role of parliaments in this process.

[24] 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.

and in overall terms to strengthen the mutually reinforcing role of democracy and rights.

Further, the Charter contained a mechanism for fostering *dialogue* between the Court and legislatures. Rather than replacing, the system of competitive parliamentary government referred to above, was made to co-exist with – to compete with and to be harmonized with – Court-based litigation. The argument here is that two sections of the Charter (section 33 the notwithstanding clause 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 between the legislative and judicial branches of government. The Charter thus also fosters an element of "institutional reflexivity", in that it spurs an inter-institutional dialogue on the relation between individual rights and collective goals. The question is whether this innovative feature makes for a better balance between individual rights and democracy.

In sum, then, on institutional effects we see that the Charter represented an attempt at striking a difficult balance between several competing principles and

institutional arrangements. It helped mobilize citizens, not only in their quality as individuals but also as groups. As such it gave added weight to the question of how to reconcile individual with group-based rights, as well as the larger issue of how to reconcile individual rights with the protection of groups and collectives. The comprehensive debate on the Charter transformation has brought to light a number of issues. One such is how to strike a viable balance between courts and parliaments within a setting of strong executive prominence. Another relates to the epistemic ability and normative competence of courts in determining issues of great importance to majority rule and minority protection. In Canada this question was given a specific twist through the notwithstanding clause, which opened up for individual governments to determine the reach of the Charter within their constituency. The democratic implications of this would among other things hinge on the quality of the dialogue between courts and legislatures. A further question pertains to the role of governments versus 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 importance both to political theory and to the EU. The Canadian experiences and the Canadian academic debate yield interesting insights and suggestions here.

A catalytic process?

The process of patriating the Constitution had a strong social mobilizing effect.[25] 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

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[25] For different positions on the political mobilizing effect of the Charter insertion, see Brodie and Nevitte 1993a, 1993b; Cairns 1993.

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 organize the process.

The Charter's insertion into the Constitution Act 1982 brought forth two central questions that were to dominate Canadian constitutional politics for decades: Who are legitimate participants in the process of constitution making? How to organize the process so as to include the legitimate participants? This issue is now also at the forefront of the European debate.

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 ensure that the government of Quebec would officially ratify the Constitution Act, and that all Quebecers would be made certain that the Constitution would recognize their particular contribution to Canada and their distinctiveness, through the insertion of the "distinct society" clause.[26] 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 recognizing Quebec difference, became a matter for all the provinces, which *refused* to permit the federal government in Ottawa to negotiate alone with Quebec. The equality of all provinces notion was reflected in the process of forging the Accord (and in the text of the Accord), in the sense that it was negotiated in a closed setting by the eleven heads of governments. The Accord had to be ratified by every one of these eleven (federal and provincial) governments.

The closed, intergovernmental manner of forging the Accord and concerns with rights recently obtained in the Charter sparked a strong popular mobilization against the Accord. Among the most active and vocal critics were aboriginals as

well as women's organizations in the rest-of-Canada, precisely those that had been initially mobilized by the Charter. They saw the closing of the process as a clear sign of denial of recognition. Women's groups were concerned 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. 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 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 1989, 316)

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[26] 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."

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 because of popular rejection of the elite-based and secretive manner in which it had been forged and because it was based on "an inadequate, outdated constitutional theory."(Cairns 1991, 246) The leaders who forged the Accord in secret and defended it in public were motivated by the constitutional thinking of the pre-Charter era, whereas much of the public reaction was informed by the democratic constitutionalism of the Constitution Act 1982.

The dismal fate of this Accord demonstrates clearly that a society politically mobilized by the fundamental norms of democratic constitutionalism will not accept a constitutional theory and a system of constitutional change that privileges governments and excludes citizens from the process.

The next major effort, which led to the Charlottetown Accord, was far more open and consultative. Those in charge recognized that a new and more open process of constitution making was needed but the participants did not realize that they were negotiating a package that had to receive public approval until they were so informed after the package had been completed. The dynamic of the Charlottetown process has traits in common with the present European one, in that it emerged as a result of a perceived failure (Meech Lake viz. Nice); and it was an explicit attempt to exceed beyond the intergovernmental way in which the Meech Lake had been negotiated (Charlottetown viz. Laeken).

The unfolding of the Charlottetown process exhibited a dynamic that is somewhat similar to the present European one, although Charlottetown was far more intense and far more comprehensive: It started with a wide-open constitutional debate which included parliamentary committees and special constitutional mini-conventions but in parallel fashion in the rest-of-Canada (ROC) and in Quebec, and which strongly activated the *general public* within each site. 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 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 each (minority) setting would make it unravel. Such minoritarianism is even more pronounced in Europe where each member state is equipped with veto.

In some contrast to its European counterpart, during the far more open and intensely debated Charlottetown process a very large number of items were thrust in and the resultant Accord, in terms of symbolic, substantive and institutional changes, became extremely comprehensive. This Accord was rejected in both referenda (ROC and Quebec). Here is therefore also now an important parallel with the EU.

The two defunct accords demonstrate how the Charter *within a setting of two-level representative government* (which also activated the citizenry through numerous means) 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 through elite-based negotiations. Rights-conscious citizens and groups objected to the Accord's privileging of the substantive concerns of governments and the elitist and closed manner of its forging, and used their organizations and representative bodies to kill it off. The fate of Meech may serve as a powerful reminder to Europeans *not to revert back* to a closed, intergovernmental process once the population(s) has been mobilized.

The Charlottetown Accord was a far more complex accord - it expanded the principle of the recognition of Quebec's distinct identity (Meech Lake) to now also include aboriginals. This recognition was to be balanced with equality protection and diversity awareness along gendered, ethnic, racial, provincial and linguistic lines. The Accord was a unique effort to try to balance the principles of federalism, nationalism, and multiculturalism – with Chartered popular

sovereignty. Although initially framed as an effort to rectify the alleged historical injustice wrought upon Quebec, the Charlottetown Accord came to revolve around what people had come to see as a deeper and more profound case of historical injustice: the plight of Canada's aboriginal population, the First Nations peoples (Cairns 1995). Its attempt to balance so many different concerns had made it into an extremely complicated package which was rejected in the two referenda partly because many Canadians felt they had more in common than was reflected in 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 but within a setting wherein a government-operated amendment formula still lingers. 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. In constitutional matters, direct plebiscitary democracy has assumed a far more central role.

Catalytic constitution vs. constitutional catharsis?

The Canadian Charter revolution was marked by a democratic catalytic intent. It had a catalytic effect on the public sphere and on the citizens' democratic consciousness, but did not produce constitutional agreement. The democratizing thrust un-bundled and reframed issues, and reconfigured central concerns, all within a very heated political atmosphere. The process unfolded as a struggle for recognition. It was laden with conflict, as it contained several distinct and competing conceptions of political community that the citizens were mobilized along. There was a catalytic thrust but not as envisaged by its architects; it unfolded as an unwieldy, eventually *cathartic*, process.

Three features mark this as *cathartic constitution making*. The first is a reconfigured conception of justice: weak/disenfranchised groups were included/given some form of constitutional recognition. Canada's constitutional transformation has thus helped to shift the standards of justice. In the pre-Charter period these were shaped by the perceived need to accommodate Quebec nationalism. Now this has to compete with and often loses out to the need for rectification of historical injustice wrought on aboriginals, as well as the accommodation of demands from other groups in Canadian society (women's groups, gays and lesbians and disabled people in particular). 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 (rectification of historical and contemporary injustice).

The second pertains to heightened constitutional reflexivity: the Canadian political system appears to have developed a more principled approach to the settlement of issues that have not gone away. In some cases such as Quebec separation we see clearer procedures. The Supreme Court was asked to rule on this and handed down its ruling on unilateral secession in 1998. It declared that unilateral secession was unconstitutional. However, 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 recognized that there was need for a *democratic* framework for secession (hence preceding the EU here).

Third, is for inclusive democratic norms to permeate the political system: Quebec separatists have increasingly justified separation in democratic and inclusive terms, to the extent of labelling Quebec a multicultural society; hence echoing the multicultural character of Canada. Separatists now argue that a future independent Quebec will be a multicultural state.

The constitutional transformation did not put an end to the accommodating style of politics but gave it a more principled foundation. This constitutional transition took place in a setting where there was no disagreement on the fundamental liberal principles of democracy and rule of law.(Taylor 1993) But the Charter and the ensuing comprehensive constitutional debate and contestation elevated the issue of accommodation of difference/uniqueness to a prime constitutional concern; as well as altered the character and opportunity structure of the constitution. This led to 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)

A central feature of this transition has been the search for procedures to ensure a proper mixture of deliberation, consultation, and direct representation. It was *not* a smooth transition: when constitutional voice replaced silence, a cacophony of voices entered the fray.

Cathartic constitution making has normative value but the heightened democratization that accompanies this translates into reflexivity and voice and not directly into loyalty.

V.   European Parallels?

To assess what possible lessons Europeans might derive from Canada, I have demonstrated that there are relevant parallels in their pre-Charter eras. Are the Charters and the larger settings of constitution making sufficiently similar as to warrant the drawing of lessons for Europe?

If we try to locate the European experience in relation to the Canadian sequence, on balance, the present situation in Europe bears most resemblance to the time around patriation in Canada (early 1980s). The Laeken process ushered in an important change, as it was the most significant instance wherein the EU's ongoing process of treaty-making/change was framed *in constitutional terms*. Part of this was the Charter which underpinned and reinforced the popular democratic character of the constitution, in other words, helped cast it in terms similar to a "Citizen's Constitution", with rights reminiscent of those of full-fledged constitutional-democratic states. Symbolically speaking, the European Charter can thus be construed as an (however incomplete in practice) attempt to found the EU polity on a footing of popular sovereignty. The powerful symbolism of democratic constitutionalism received short shrift from some of the leaders, who subscribed to a notion of the EU not as a self-standing democratic-constitutional system, but as a derivative of the Member States. We saw from the Canadian case that there was a clash of constitutional theories; such a discrepancy and conflict was far more pronounced in the European case.

A critical component in the Canadian constitutional transformation was the comprehensive popular mobilization that took place during and after the Charter was inserted into the Constitution Act, 1982. Might the European Charter fill a similar role - spark a similar mobilization as occurred in Canada?[27] Even if fully adopted, the European Charter will likely enjoy a weaker status than the Canadian due to its stronger built-in limitations.

Nevertheless, the European Charter *has already* affected the process of constitution making. The Charter Convention was 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 parallel IGC during Nice) was taken as evidence of the superiority of the Convention mode over that of the IGC. The open and deliberative manner of forging the Charter was deemed a success, and the Convention mode was adopted for the preparation of the next round of Treaty change, the Laeken process. In the Laeken process the Convention was inserted into the IGC system; hence as in post-1982 Canada it incorporated both executive-run interstate diplomacy and democratic constitutionalism in a difficult tension.[28]

The Charter helped generate a broader and deeper citizen involvement in constitution making. In this context, popular referenda, admittedly unevenly (Spain saw low turnout), have further served to mobilize the populace. The high turnout in the French and Dutch referenda and the comprehensive debate that preceded the French referendum suggest that the Laeken process *has* mobilized the populace of two of the EU's core member states to a greater extent than ever before in the EU's history.

Since the IGC accepted the Convention's draft, the EU has struggled with reconciling a similar tension between a Citizens' and a Governments' Constitution as has been the case in Canada. This takes two forms. One can be termed the tension between the Citizens' Charter and the Governments' amendment formula. Laeken (unanimity through 10 national referenda and 15 national parliamentary ratifications) here appears as a mix of the two Canadian instances, Meech Lake (unanimity) and Charlottetown (two referenda: ROC and Quebec). This tension has made the process highly lopsided and democratically

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[27] For different explanations of the political mobilization associated with the Charter consider Brodie and Nevitte 1993a, b; Cairns 1992, 1993, 1995, 2003; Epp 1996, 1998; and Morton and Knopff 2000.
[28] In Canada during patriation, the federal parliament held hearings on the Charter and activated civil society, whereas the governments argued over the amendment formula.

deficient in that citizens in most constituencies are being asked to defer to the decisions of their others and of their governing bodies. The second and related form is the structuring of the overall process. When should closed executive-operated bodies, when should parliamentary bodies, and when should the people, be directly included? If for instance the EU now reverts back to the closed and secretive Council mode in its further handling of the process, what is to prevent a logic similar to that which unfolded in Canada at Meech Lake to take place? What are the main lessons from Canada's experience and how applicable are they to the EU?

V. Conclusion: Possible Lessons

In the following I seek to outline lessons from the Canadian case pertaining to deliberative-democratic constitution making, including reflections on their relevance for Europe.

The first lesson is that even a complex and contested multinational and poly-ethnic entity can undergo a transition from executive-style to a more open and democratic approach to constitution making. What is notable is the cathartic character of the Canadian process, how a more open process of constitutional contestation helped reconfigure the social conception of justice and the way in which political conflicts are framed. With reference to Europe we need more knowledge of the key mechanisms that gave the transformation its *democratic* nature and whether such mechanisms are applicable in Europe. An important issue is how much of the Canadian transformation can be attributed to political culture and the – admittedly fragmented – character of a Canadian public sphere.

To Europe, it is important to establish how strongly the relative absence of a European public sphere weighs in here. An equally important issue, is to establish how much of the Canadian transformation, comes down to institutional conditions. To address this latter issue we need to clarify what role the Charter of Rights and other aspects of public policy played as enabling devices for the political mobilization and transformation. For instance, to what extent can constitutional rights serve as mobilizing and democratizing devices? There are different positions on this in the literature: Madison asserts that constitutional rights guarantees are mere "parchment barriers",(Madison 1977, 211-2 cited in Epp 1996, 766) in the sense that they do not provide rights-holders with explicit control over institutional resources. Others note that rights are important in recognition terms: they speak to basic self-confidence and respect and have deep implications for self-esteem;(Honneth 1995) hence can propel action. Others again underline that the normative salience of rights has implications for action. Rights speak to the core principles of freedom, democracy, autonomy, and

equality, which have obtained a deontological standing in modern societies. This evokes a sense of *duty* to comply with them. In this view constitutional rights can be considered as "trumps" in collective decision-making.(Dworkin 1977: xi; Eriksen 2004)

The second lesson from the Canadian case is that when democratic constitutionalism is inserted into a highly complex multinational and poly-ethnic entity it does not replace executive-led politics but *modifies* it. Canadian governments (as their European equivalents) 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 has clung on to veto on constitutional amendment. In Canada provisions and arrangements were inserted into the Charter to guarantee governments 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 which can also retain an executive imprint. What the case of Canada shows is that within a highly complex multinational and poly-ethnic setting, executive-style constitutional politics can be modified through democratization but is very hard to abolish. The implication is that there is a strong continued pressure towards a constitutional arrangement more akin to constitutional treaty than democratic constitution proper.

However, this is only part of the story. Although governments remained important actors in the constitutional process, what government signifies is changed: government can no longer present itself as the executive that speaks *on behalf of* the people; it has to be seen as *the embodiment of the people*. Provincial (and Member State) demands for referenda for instance testify to widespread public perceptions to the effect that the people cannot entrust government with this vital democratic function.

The third lesson picks up on this change and speaks to how the norms of democratic constitutionalism shape relations between leaders and led, and the character of the gap between them. As the case of the Meech Lake Accord

showed, when the norms of democratic constitutionalism have come to inhabit the political scene, leaders face an altered set of public expectations in the sense that their own arguments and actions are evaluated in light of democratic constitutional norms. Failure to recognize such changes in expectations can have serious legitimacy implications. In other words, executives can retain a significant role within the altered constitutional setting, but legitimately so only insofar as they are seen to embrace the norms of democratic constitutionalism.

A fourth lesson from the Canadian case speaks to the central legitimacy implications of the constitution making *process*. Charter-infused democratic constitutionalism is not only about signalling to citizens that they have rights of explicit constitutional stature; it also signals that citizens are constitutional stakeholders who have to be properly consulted *throughout the process*. The design of the process is therefore not only a political consideration or a matter for political bargaining, but a major intellectual challenge. To devise a constitutional process that meets with modern democratic requirements represents a serious intellectual challenge and merits more thorough theoretical attention. This might also require an alternative conception of constitution making, that of constitution making as an ongoing process, rather than as a process which ends up in a contractual arrangement that is established or given *at a particular point in time.*(Chambers 1998) This has implications for the very conception of constitution. It is neither merely a contractual arrangement nor a founding pact between the citizens, but *in addition and in particular* a set of procedures and rights that can accommodate an ongoing process of discursive validation of the structure in place.

Such a notion of constitution making may also be more compatible with a fifth lesson from Canada: for the constitutional people of a "community of communities" to constitute itself can take considerable time and take place through an unpredictable cathartic rather than a stream-lined catalytic process. Looking at the Canadian experience it would be easy to conclude that there is *no one people* that constitutes itself, as the constitution does not give licence to one

people but is the battleground for cultural diversity protection and the preservation of *several* culturally distinct peoples. Nevertheless, it is *also* important to underline that the growing acceptance of the Charter across Canada underlines 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, which unfolds irregardless of high formal barriers to further constitutional change. The Canadian case demonstrates that once the constitutional machinery of rights and democratic institutions is in place, the character of the constitutional conversation changes, in that it is lent a much more consistent focus on individual autonomy. What may seem ironic is that precisely because democratic norms come to occupy such a central role in the constitutional conversation, they may offer less assurance of the sustenance of any one particular community. Applied to the EU this suggests that whereas further democratization of the Union may offer less assurance of support for integration than many Euro-federalists assume, a continued thrust may help retain focus on democracy and democratization in the Member (and applicant) States (through a competitive quest for democratic legitimacy).

Here it might also be useful to note that in Canada Charter-based juridification arguably did have democratizing effects, in particular in the relation between citizens/social movements and government executives. To clarify democratic potentials, it is necessary to understand the nature of the *triangular* relation among executives, legislatures and courts. Of relevance to Europe is to clarify under what circumstances rights-driven juridification will strengthen representative democracy, and under what circumstances it will weaken it. The Canadian experience suggests that further democratization of the EU requires both a Charter to re-politicize and de-juridify conflicts (the EU's catalogue of fundamental rights is judge-made) and further EU-parliamentarisation.

The upshot is that the magnitude of constitutional conflict and contestation, and even possibly deadlock that we have seen in Canada should not

detract us from the heightened reflexivity that Chartered constitutional transformation can bring about. The powerful symbolism of popular sovereignty that Charter-insertion draws on forces governments to find acceptable justifications for their influence and for the principle of equality of governments. In Canada they have often resorted to sub-unit majoritarianism (provincial referenda). The justifications they resorted to were those of democracy, not rule by government.

The Canadian case shows that political systems with deep-seated disagreements over first principles can undergo a constitutional transformation because this transformation 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. The issue is whether the heightened inclusiveness and cultural sensitivity that these modes also presuppose can 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.

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