On Democratizing European Constitution Making: Possible Lessons from Canada's Experience

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I. INTRODUCTION[1]

This article focuses on the challenge of democratizing the process of constitution making in the European Union (also "EU" or "Union"), and in that connection, seeks to discern relevant lessons for Europe from Canada's constitutional experience. The focus is on political and democratic challenges and opportunities associated with the attempt to replace a closed and executive-style approach with a more open and inclusive (and, on balance) deliberative democratic mode of constitution making.

Despite the EU's unique traits as a polity, being neither a state nor a nation, there are other polities, with similar challenges, that have sought to democratize their executive-style approach to constitution making. Canadians will recognize a certain parallel in terms of process dynamics: in Canada there was an opening up of the process during the patriation (which produced the *Canadian Charter of Rights and Freedoms*[2] and the *Constitution Act, 1982*),[3] before a subsequent reversal to classical intergovernmental diplomacy during the Meech Lake Accord (1987)

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[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

process.[4] If the Canadian example is anything to go by, the Europeans are in for another failure, driven by popular resistance to perceived undemocratic elites. How the new round of treaty reform will unfold is a matter of conjecture and cannot be dealt with here.

The purpose of this article is to derive theoretical and practical lessons from Canada and examine the applicability of these lessons to the EU. Canada has been selected as the most relevant entity to compare with the EU in terms of constitutional process, through a specially devised "diagnostic comparative approach".[5] This approach consists of (a) identifying the main challenge facing a given entity; (b) looking for entities that have dealt with that or a similar challenge; (c) examining how they have handled this challenge; (d) establishing that the entities share enough in common to warrant comparing them in the first place; and (e) searching for lessons. Particular emphasis is placed on such lessons being applicable to the EU. With regard to relevance for the EU, the greater the similarity between (a), (b), (c) and (d), the more credible will be the lessons.

1. Background: Constitutional Experience in the European Union in the 21st Century

Before I embark on the comparative venture, some background information on the complex European experience is in order. After the Treaty of Nice[6] had been negotiated in 2000, the European Union opened up and democratized aspects of its approach to constitution making. The reasons for this were that the Nice Treaty was considered inadequate to handle the challenges facing an enlarged Union of more than 25 member states; the process of negotiating the Treaty had sparked great conflict and acrimony; and there were numerous calls for opening up and democratizing the Union's closed, diplomacy-style process of constitution making. In the next round of constitution making,

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[4] Canada, *Strengthening the Canadian Federation: The Constitution Amendment, 1987* (Government of Canada: 1987), online at: Government of Canada, Privy Council Office <http://www.pco-bcp.gc.ca/aia/printer.asp?Language=E&page=consfile&sub=thehistoryofconstitution&Doc=meech_e.htm> [hereinafter "Meech Lake"].

[5] This is a strategic approach to comparison, inspired by Charles Tilly's understanding of comparison, although Tilly's proposed comparative strategies bear no resemblance to the diagnostic comparative approach as set out here. Charles Tilly, *Big Structures, Large Processes, Huge Comparisons* (New York: Russell Sage Foundation, 1984).

[6] February 26, 2001, OJ C 80 (entered into force February 1, 2003), online at: Europa, see Treaties <http://eur-lex-europa.eu/en/index.htm> [hereinafter "Nice Treaty"].

the Laeken process from 2001 to 2005 (labelled after the Laeken Declaration of December 2001[7] which officially launched the process), the Union set up the Convention on the Future of Europe[8] to discuss future options, including the prospect of a constitution for Europe. The Convention was made up of a majority of parliamentarians (from the European Parliament and the member — and applicant — states), and successfully drafted one constitutional proposal. This led to the Treaty establishing a Constitution for Europe[9] ("TEC"), because the Intergovernmental Conference ("IGC"),[10] as the Union's formal constitution-making body, accepted this proposal with only minor changes. The Laeken process was the most explicit and visible instance wherein the terminology and normative standards of democratic constitutionalism were applied to the EU.[11] Had it succeeded in democratic terms, it would have reinforced the constitutional dignity of the Union's legal order. Laeken's commitment to a more open and deliberative approach to constitution making was in line with the terminology and the normative standards of democratic constitutionalism.

However, the TEC was rejected in popular referenda in France and the Netherlands in May and June of 2005. Faced with two negative referendum results (18 member states had ratified the TEC[12]), the EU, after a lengthy period of "reflection", declared that the TEC had failed.

At the time of writing (August 2007), the Union has embarked on a new round of treaty reform. Much of the substance of the TEC is

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7 *See Declaration of the European Council, Laeken Declaration on the Future of the European Union*, online at: Europa <http://ec.europa.eu/justice-home/unit/charte/en/declarations-laeken.html> [hereinafter "Laeken"].

8 For more information on the Convention on the Future of Europe, see generally, online at: The European Convention <http://european-convention.europa.eu/bienvenue.asp?lang=EN>.

9 See *Treaty establishing a Constitution for Europe*, Official Journal of the European Union, 2004/C310, Vol. 47 (December 16, 2004), online at: Europa, see Treaties <http://eur-lex.europa.eu/en/index.htm> [hereinafter "Europe Constitution"].

10 The ICG is a specially convened set of sessions of the European Council where the heads of states and governments come together to reform treaties in a system of summitry, which has a clear resemblance to the Canadian First Ministers' Conference ("FMC").

11 Julianne Kokott & Alexandra Ruth, "The European Convention and its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Question" (2003) 40 C.M.L. Rev. 1315. According to the President of the European Parliament, Joseph Borrell Fontelles, "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" (cited in Eric Stein, "The Magic of the C-Word" (2005) 18:3 EUSA Review 1, at 4 [hereinafter "Stein"]).

12 For a general overview of the ratification process of the European Union Constitution, see *The Constitution Ratification*, online at: Universidad de Zaragoza <http://www.unizar.es/euroconstitucion/Treaties/Treaty_Const_Rat.htm>.

retained in the detailed mandate set out for this process, but the term "constitution" and other vocabulary and symbols (Union laws, flag and anthem) that connote a state-type entity have been dropped. The hope is that this "reform treaty" will pass without having to call popular referenda. In an effort to facilitate agreement among the Union's 27 member states, the Union has reverted back to a closed, executive-style, European Council-driven process.

The perceived need to close the process to get a viable result is consistent with the view that it was the democratic departure from executive-style politics that derailed the TEC process, as the Union's executive-style politics is seen as an intrinsic part of its success. The proponents of this view hold that the European Council (and the large system of executives and experts that it draws on) has accumulated decades of experience with practical problem-solving and political accommodation.

This argument, however, downplays the popular pressure for further democratization; it also sidesteps the Union's present dilemma. Whether or not the Union should continue down the road of democratic constitutionalization must be seen in light of its commitment to democratic principles and its existing constitutional arrangement (with basic rights and democratic features). If the EU abandons its constitutional vocation, how much of the system in place can be retained now that these components are associated with a European democratic constitution?

The Union is not an international organization. It possesses a "material" constitution, a legal arrangement that speaks to those social practices that are actually regarded as the basic norms of a given society.[13] Furthermore, the European Court of Justice acts as a trustee of the treaties (and not as an agent of the member states), and Union law is equipped with supremacy and direct effect (within the realm of Union competence). This constitutional arrangement has emerged over time through two main vehicles: formal treaty changes made through Intergovernmental Conferences ("IGCs") and the European Court's legal interpretive work, which in many instances has been sanctioned and developed further through IGCs. The EU has been involved in constitution

[13] A modern democratic constitution can be said to include a material, a formal and a democratic component. A political entity can have a material constitution without this qualifying as a formal and/or democratic constitution. For an apt distinction between these three forms, see Agustín J. Menéndez, "Three Conceptions of the European Constitution" in Erik Oddvar Eriksen, John Erik Fossum & Agustín J. Menéndez, eds., *Developing a Constitution for Europe* (London: Routledge, 2004), at 109.

making almost without interruption since the early 1980s. This has resulted in the Single European Act,[14] the Maastricht Treaty,[15] the Treaty of Amsterdam,[16] the Nice Treaty,[17] and the now defunct Treaty establishing a Constitution for the European Union.[18]

The upshot of this is that whereas the Union's complex character poses novel and distinct challenges to democratic constitution making, it is not so distinct as to defy comparison with states. Canada's challenges and constitutional experiences appear particularly relevant.

II. THE CHALLENGES

For the diagnostic approach to work, we need to identify an entity with democratic challenges similar to the EU, which has also sought to democratize its executive-style constitutional politics. No international organization qualifies; hence, the analysis must be confined to comparable states. The diagnostic comparative approach has been devised 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 for comparison with the EU is the United States (U.S.) (consider frequent references in the Laeken Convention to the Philadelphia Convention).[19] Yet, when we apply the diagnostic comparative approach, the U.S. does not qualify. On the one hand, it was a pioneer in instituting democratic constitutionalism in the 18th century, and there is no U.S. parallel to the EU's executive-style constitutional politics. On the other hand, the U.S. does not handle the challenges it faces in a manner similar to that of the EU.

From a diagnostic perspective the most relevant comparative case is Canada. Canada is a contested state: there is no real shared sense of a

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[14] February 28, 1986, OJ L 169 (entered into force July 1, 1987), online at: Europa, see Treaties <http://eur-lex/europa.eu/en/index.htm>.

[15] February 7, 1992, OJ C 191 (entered into force November 1, 1993), online at: Europa <http://europa.eu/scadplus/treaties/maastricht_en.htm> (also known as *Treaty on European Union*).

[16] October 2, 1997, OJ C 340 (entered into force May 1, 1999), online at: Europa <http://europa.eu/scadplus/leg/en/s50000.htm>.

[17] Nice Treaty, *supra*, note 8.

[18] Europe Constitution, *supra*, note 9.

[19] On the Constitutional Convention of 1787 (also known as the Philadelphia Convention), see The Library of Congress: American Memory, *Documents from the Continental Congress and the Constitutional Convention, 1774-1789*, online at: Library of Congress <http://memory.loc.gov/ammem/collections/continental/constit.html>.

Canadian national community, and it is frequently referred to as both multinational and poly-ethnic.[20] Canada and the EU share 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.[21]

Canada faced the challenge of entrenching popular sovereignty in a constitutional arrangement that was conferred upon it by a parliament not its own. In the absence of internal agreement, Canada has historically relied on an elitist and executive-style approach to constitution making. The Canadian near-equivalent to the IGC is the comprehensive system of intergovernmental relations with the First Ministers' Conference ("FMC") at its apex. This system operates as a collective as well as through a range of bi- and multilateral meetings, in a manner similar to its EU counterpart. In addition, since there has never been agreement on the constitutional amending procedure, individual state actors — federal and provincial — have insisted on a veto power and have been able to block constitutional agreements.

These parallels blunt the edge of the distinction between state and non-state. Further, although it is not a state, the EU appeals to the same principles that underpin the constitutional democratic state. Vital components of the Union's material constitutional arrangement also reflect the common constitutional traditions of the member states.[22] Furthermore, although the Union has unique traits, this multi-level configuration does not constitute an *explicit departure* from the state, as the member states have neither been transcended nor 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.

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[20] For this designation of Canada, see Will Kymlicka, *Multicultural Citizenship, A Liberal Theory of Minority Rights* (Oxford: Clarendon, 1995); Will Kymlicka, *Finding Our Way* (Oxford: Oxford University Press, 1998); Alain-G. Gagnon & James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001).

[21] Canada has one of the world's longest lasting constitutions based on representative democracy, but that constitution was bequeathed by the imperial Parliament of Westminster. See *British North America Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[22] Stein, *supra*, note 11.

In contrast to the EU, Canada has undergone a profound constitutional transition, which took place in the aftermath of the patriation of the Constitution in 1982, when for the first time Canadians sought to found themselves as a people.[23] The main substantive change, the *Canadian 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. 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, in his analysis of the EU,[24] underlines the need for a catalytic constitution.[25] Canada's Charter-infused constitutional transformation might be understood as having 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, 1982*), and the population mobilized around different visions of Canada. The long process of constitutional debate that ensued has been labelled a period of "mega constitutional politics",[26] to signify that this was a broad-based discussion of 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."[27] Today the Charter has taken hold, even though a constitutional settlement has never been reached.[28]

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[23] Peter. H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2d ed. (Toronto: University of Toronto Press, 1993) [hereinafter "Russell"].

[24] Jürgen Habermas, "Why Europe Needs a Constitution" in Erik Oddvar Eriksen, John Erik Fossum & Agustín J. Menéndez, eds., *Developing a Constitution for Europe* (London: Routledge, 2004), at 19.

[25] *Id*., at 28. Habermas notes that a catalytic constitution "would have to begin with a referendum, arousing a Europe-wide debate — the making of such a constitution representing in itself a unique opportunity of transnational communication, with the potential for a self-fulfilling prophecy". More specifically, and citing Claus Offe, he says that "Europe has to apply to itself, as a whole, 'the logic of the circular creation of state and society that shaped the modern history of European countries'". For text by Claus Offe, see "Is there, or can there be, a European Society?" (2000) [unpublished paper], online at: University of Trento <www4.soc.unitn.it:8080/poloeuropeo/content/e64/e385/e395/offe-Europeansociety_ita.pdf>, at 13.

[26] Russell, *supra*, note 23, at 74.

[27] *Id*., at 177.

[28] Opinion polls consistently show strong nation-wide support for the Charter. *Cf.* Joseph F. Fletcher & Paul Howe, "Public Opinion and Canada's Courts" in Paul Howe & Peter H. Russell,

Given the effort to modify executive-style elitist politics and the ensuing — haphazard — adoption of a deliberative democratic approach, the Canadian case can yield relevant insights into the merits and limits of a deliberative approach to constitution making. Further, the Canadian case may yield insights relevant 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 relevant lessons on how this balance can be handled. That the EU has already forged its own *Charter of Fundamental Rights of the European Union*[29] (formally speaking this is a political declaration but it is included in the TEC and in the mandate for the new reform treaty)[30] only adds to the relevance of comparing the EU with Canada.

In keeping with my diagnostic approach, I have divided the following discussion and analysis into 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 the two entities share enough in common in their respective pre-Charter periods to warrant comparing them. Second, I outline 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 drawing lessons. In the final part, I outline a set of lessons. Only through a multi-step comparative procedure can we know whether the lessons from Canada are actually relevant to Europe.

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eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 255, at 257-59; Alan C. Cairns, "The Canadian experience of a Charter of Rights" in Erik Oddvar Eriksen, John Erik Fossum & Agustín J. Menéndez, eds., *The Chartering of Europe: The Charter of Fundamental Rights and its Constitutional Implications* (Baden-Baden: Nomos Verlagsgesellschaft, 2003) 93, at 105 [hereinafter "Cairns Canadian Experience"].

[29] Official Journal of the European Communities 2000/C 364, Vol. 43 (December 18, 2000) online at: European Parliament <http://www.europarl.europa.eu/charter/default_en.htm>.

[30] For the mandate of the IGC in 2007, see Memo from General Secretariat of the Council [of the European Union] to Delegations (June 26, 2007) online at: Universidad de Zaragoza <http://www.unizar.es/euroconstitucion/Treaties/Library%20(Since%20June%202007/G.%20Presidency%20IGC%20Mandate.pdf>.

1. Executive-style Accommodation, Silent Publics and Tolerance

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

> [with] 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.[31]

LaSelva, in his reconstruction of one of Canada's founding fathers, George-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.[32]

According to this view, Canadian democracy has emerged within and been shaped by a strong climate of tolerance and accommodation of difference.[33]

Such efforts suggest that each entity has been seen not merely as an aberration from an established norm (that of single-nation-based democracy), but as an affirmation of an alternative normative value 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.[34]

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[31] Joseph H.H. Weiler, "Federalism without Constitutionalism: Europe's Sonderweg" in Kalypso Nicolaidis & Robert Howse, eds., *The Federal Vision* (Oxford: Oxford University Press, 2001) 54, at 68 [hereinafter "Weiler"].

[32] Samuel V. LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies in Nationhood* (Montreal and Kingston: McGill-Queen's University Press, 1996), at 9.

[33] Canada "has a reputation for being a very tolerant society" (Melissa S. Williams, "Toleration, Canadian Style: Reflections of a Yankee-Canadian" in Ronald Beiner & Wayne Norman, eds., *Canadian Political Philosophy — Contemporary Reflections* (Oxford: Oxford University Press, 2001) 216, at 218 [hereinafter "Williams"].

[34] According to Joseph Weiler, the principle of constitutional tolerance "is the normative hall mark of European federalism" (Weiler, *supra*, note 31, at 65).

This type of constitutional morality, it is held, was sustained by a particular procedure for operating the Constitution. Canada and the EU developed comprehensive practical arrangements for the ongoing and peaceful accommodation of difference and diversity. In each, ongoing accommodation operated within the framework of executive-run intergovernmental relations. Where a lasting agreement could not be struck on constitutional essentials, the passing of time was favoured over the pursuit of principle: time was a de facto problem-handler in that actors could revisit issues over numerous meetings.[35] 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 (evocatively labelled a "permissive consensus" in the EU and as "deference" in Canada).[36] They also entailed significant biases in the selection of issues and in the privileging of actors. Insofar as these undertakings were framed in constitutional terms (which was not the case in the EU until after Nice in 2000), governments and courts defined what was constitutional.

In summary, 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, 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 participated in an explicit process of democratic constitutionalization. An implicit assumption was that the retention of peace and stability presupposed public silence and acquiescence. Explicit efforts to found the systems on popular sovereignty were thought to activate people in a manner that would upset the fragile systems of accommodation. The result was either to set up, inadequately (as was the case in the EU), or

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[35] The instances have been numerous in both cases. In the EU since 1985 constitutional debates include the Single European Act, Maastricht, Amsterdam, and Nice Treaties, and the Laeken Declaration. In Canada, constitutional debates include patriation of the *Constitution Act, 1982* and continue through the Meech Lake and Charlottetown Accords.

[36] For more on the "permissive consensus", see Heidrun Abromeit, *Democracy in Europe* (Oxford: Berghahn Books, 1998). For the Canadian notion of "deference", consider Neil Nevitte, *The Decline of Deference: Canadian Value Change in a Cross-national Perspective* (Peterborough: Broadview Press, 1996).

to bypass, essentially (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 adopted similar ways of addressing these in the periods prior to their embarking on explicit programs of democratic constitutionalization. Although the challenges and their handling appear similar, they are dealt with in two different political contexts (a non-state in the case of the EU and a state in the case of Canada). It is therefore important to clarify what this difference entails in democratic terms. Such an assessment will also help to illuminate the underlying constitutional and structural conditions that may support or stymie a catalytic constitutional process and deliberative constitution making.

III. Complex Accommodation and the Question of Democracy

Before establishing the democratic quality of the EU and Canada, it is necessary to outline the requisite criteria for a democracy, which have been derived from deliberative democratic theory. Deliberative democracy liberates democracy from association with the notion of prepolitical people,[37] and hence, it enables us to consider also supranational and multinational entities in democratic terms. Both Canada and the EU have incorporated elements of deliberative democracy in their ongoing efforts to modify their executive-style constitution making.

Given that the EU — and, of course, Canada — subscribe 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 use 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. Not being able to draw on any such supports and having to set them up in the process of constitution making would represent an enormous challenge for complex multinational entities.

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[37] This is the notion of a "prepolitical fact of a quasi-natural people, that is, to something independent of and prior to the political opinion — and will-formation of the citizens themselves" (Jürgen Habermas, *The Inclusion of the Other* (Cambridge: Polity Press, 2001), at 115).

The first requirement is a democratic constitution, that is, a constitution derived from and devised for the citizens. Presumably, the more democratic a constitution is, the easier it will be to transition from an executive-style approach to deliberative democratic constitution making. Importantly, citizens must 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 under which they live. 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 these 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.

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 them into binding actions — subject to popular oversight and scrutiny. These institutions 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. These rights and the institutions create the conditions required 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 where elected members can peacefully and cooperatively seek alternatives, solve problems and resolve conflicts on a broader basis, representation can contribute to refining and enlarging opinions. As such, representation can play a central role in ensuring political rationality.[38] Complex and pluralist settings are likely to enjoy higher legitimacy insofar as their elected representatives are able 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 a voice or be

[38] Cass Sunstein, "Constitutions and Democracies: An Epilogue" in Jon Elster & Rune Slagstad, eds., *Constitutionalism and Democracy* (Cambridge: Cambridge University Press, 1988), at 327.

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. At first glance this may appear tautological: a democratic constitution is required to ensure a democratic constitution. However, the transition from executive-style to a version of deliberative democratic constitution making will be greatly aided if it can draw on institutional — and constitutional — supports. The more supports are in place, the easier the transition. Furthermore, in the EU and Canada, constitution making did not and still does not take place in a constitutional vacuum. In the EU, the constitutional process occurs 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.

1. The EU and Canada Assessed

Until the Maastricht Treaty in 1992 (at least), the EU's democratic legitimacy was "indirect" or "derivative", *i.e.*, conditioned on the legitimacy of the democratic member states.[39] The Union's own legitimacy was mainly based on its outcomes. The Treaty of Maastricht was a turning point, as it redefined the EU as a polity with a constitution-type foundation. 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. Until Maastricht, the elites largely performed constitution making through stealth. Since then they have embarked on a constitutional conversation but without acknowl-

[39] For this notion, see David Beetham & Christopher Lord, *Legitimacy and the EU* (London: Longman, 1998); Christopher Lord, *A Democratic Audit of the European Union* (Houndmills: Palgrave, 2004).

edging that it is such. As noted, it was only in the aftermath of the Nice Treaty that the elites acknowledged that they were partaking in a constitutional conversation.[40]

Historically speaking, the Canadian Constitution shared with the EU some of this derivative character. The *British North America Act, 1867* was derived from the United Kingdom (U.K.) and depended on U.K. sanction well into the 20th century. In formal terms, it was only the patriation of the Constitution and the inclusion of the Charter in the *Constitution Act, 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.[41]

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.[42]

There was also no agreement on procedures for constitutional change. To obtain such an agreement, unanimous provincial consent proved necessary, and this did not materialize.[43] Thus, the problem of where sovereignty ultimately was to be located was left in abeyance. This disagreement enabled the governments, as the stewards of the Constitution, to sustain the power to define what would be constitutionally salient issues.

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[40] *Cf*. Nice Treaty, Declaration 23, *supra*, note 6. See also Laeken, *supra*, note 7.

[41] Alan C. Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto: McClelland & Stewart, 1991), at 116 [hereinafter "Cairns Disruptions"].

[42] Alan C. Cairns, *Constitution, Government, and Society in Canada* (Toronto: McClelland & Stewart, 1988), at 27 [hereinafter "Cairns Constitution"].

[43] For an overview of amendment proposals between 1926 and 1987, see online at: The Solon Law Archive <http://www.solon.org/Constitutions/Canada/English/Committees/Meech_Lake_1987/mlr-ch1.html>.

On the first requirement, then, the constitutional arrangements of both entities suffered from democratic deficiencies. How grave these were in practice also depends 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 based neither on a parliamentary system of government nor on a full-fledged system of separation of powers. In the institutional structure, the EU sits at the top level under which is the member state level, which is made of federal and unitary states of great variation in size and institutional composition. Further, the institutional structure at the EU level is based on two distinct yet overlapping decision-making systems, which are generally labelled the "community method" and the "intergovernmental method". The community method (which basically operates within Pillar I)[44] assumes that only the Commission (an appointed body) can initiate legislative and policy proposals. The main legislative body, the most important in power terms, is still the Council, which consists of member state representatives. Each representative is accountable to his or her legislative assembly but not to the entire EU. The European Parliament ("EP") was initially a consultative body only and was composed of representatives from the member state parliaments. In 1979, however, direct elections to the EP were introduced. MEPs (Members of the European Parliament) were, from then on, directly elected by the peoples of the member states. Over time the EP has obtained the power of co-decision[45] with the Council in the EU lawmaking process in a wide range of policy fields. The EU has moved gradually toward a parliamentary model of governance, but this has not been achieved fully, mainly because of the strength of the intergovernmental method (which operates within 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; the EP, the Commission and the Court of Justice are on the sideline. European cooperation is indirectly legitimated through nation-state democracy. Both methods suffered from the

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[44] The pillar structure was introduced in the Treaty of Maastricht (1992). In principle, Pillar I is the European Community, Pillar II is the Common Foreign and Security Policy, and Pillar III is Justice and Home Affairs Co-operation. Together they make up the European Union. Note that since 1992, a range of activities have been shifted from Pillar III to Pillar I, hence strengthening the Union's supranational character.

[45] The co-decision procedure makes the EP a co-equal legislator to the Council. See George Tsebelis & Geoffrey Garrett, "Legislative Politics in the European Union" (2000) 1:1 European Union Politics 9, at 15; Berthold Rittberger, *Building Europe's Parliament* (Oxford: Oxford University Press, 2005), at 19.

intransparency of the Council's deliberations,[46] which offers national government representatives considerable leverage to circumvent the mandates given to them by their respective national parliaments. Therefore, national parliaments have no adequate ways of knowing how their representatives behaved in the Council.

Within the EU, as we have seen, the EP and the national parliaments were inadequate as a means of ensuring popular input, and as a 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.

Canadian government was based on the British-derived model of parliamentary federalism: a parliamentary government at both levels, coexisting with a federal constitution that outlined in considerable detail the powers and prerogatives of each level. Although the constitutional text privileged the federal level, the reality has become markedly different, so much so that Canada is now one of the most decentralized federal systems in the world.

Of notable importance, the system of two-level parliamentary majoritarianism was significantly 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[47] 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. There were both institutional and substantive factors at work. The first-past-the-post electoral system privileged majoritarianism, so that federal and provincial governments could rely generally on comfortable parliamentary majorities of loyal partisans, which would give them substantial leverage in their negotiations and activities within intergovernmental relations (note the difference to the current 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

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[46] Note that the Council, when acting in its legislative role, has become far more transparent in recent years: General Secretariat of the Council of the EU, "Openness and Transparency of Council Proceedings" (2005) online at: Council of the European Union <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/87866.pdf>.

[47] 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" (Donald Smiley, *Canada in Question: Federalism in the Eighties*, 3d ed. (Toronto: McGraw-Hill Ryerson, 1980), at 91.

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 significantly weakening the relevance of representative parliamentary government.

The conduct of this system was complicated by Quebec's insistence (since the 1960s in particular) on being recognized as a nation, with special status in the federation. Thus, while 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.[48]

On the second criterion — regarding the successful operation of a set of institutions — the two entities differ: 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 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 — representativeness — the EU suffered from significant defects. These stemmed from the weakness of the representative bodies, long and uncertain chains of representation in the EP and 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, for instance, German citizens were significantly underrepresented in the EP. The pillar structure of the TEU also served to exclude de facto a number of concerns from the democratic agenda of the EU. The EU's largely economic constitution also generated a sig-

[48] Consider Quebec's distinct tradition of private law; official bilingualism, coupled with Quebec's special language provisions; immigration; and a range of other issues. For an extensive treatment of these issues, see Jeremy Webber, *Reimagining Canada* (Montreal and Kingston: McGill-Queen's University Press, 1994). Note also Stephen Harper's recent remark to the effect that Quebeckers constitute a nation "within a united Canada" ("Quebecers form a nation within Canada: PM" *CBC News* (November 22, 2006), online at: cbc.ca <http://www.cbc.ca/canada/story/2006/11/22/harper-quebec.html>).

nificant economic bias and served to translate issues into economic terms, and subsumed them 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.[49] This pertained in particular to Aboriginals, but women's issues and ethnic and racial minorities were also marginalized. 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".[50] 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.[51]

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.

The fourth and final criterion, that of process, reflected these defects. In the pre-Charter era, "government by negotiation" was a critical common denominator. Government leaders and their support staff played a critical role in this elite-based system, which has often been

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[49] This minority exclusion is facilitated by a first-past-the-post electoral system.

[50] Alan C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change: Selected Essays*, in Douglas C. Williams, ed. (Toronto: McClelland & Stewart, 1995), at 103 [hereinafter "Cairns Reconfigurations"]. For further relevant background, see Cairns Constitution, *supra*, note 42.

[51] Cairns Reconfigurations, *id*., at 103.

discussed in terms similar to Lijphart's consociationalism.[52] Executive officials (heads of governments and their support staff) fashioned agreements in a manner more akin to international diplomacy than to constitution making.[53] In the EU, treaty change[54] was undertaken through the IGC, by executive heads of government and their respective staff, in a formal system of summitry, with the European Council at its apex, rather than in specifically designated constitutional conferences, 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 near-equivalent to the European Council was the First Ministers' Conference, which consisted of the Prime Minister and the 10 premiers. This body played the most important role in the numerous efforts to fashion constitutional change in Canada. Canada and the EU's systems were based on similar democratic logics: each participating government was to be popularly elected; the PM and each premier was to be held accountable by the relevant legislative assembly; and the PM and each premier could de facto veto a proposal.[55] In reality, in Canada as in the EU the heads of governments 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 formal, largely due to the failure to reach agreement on a constitutional amendment formula. The European

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[52] Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, CT: Yale University Press, 1977). Lijphart spells out four characteristic features of consociational democracy. These are grand coalition, segmental autonomy, proportionality and minority veto.

[53] On the EU, see Andrew Moravcsik, "Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community" (1991) 45:1 International Organisation 19; Andrew Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmental Approach to the EC" (1993) 31:4 Journal of Common Market Studies 473; Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power From Messina to Maastricht* (Ithaca: Cornell University Press, 1998); Deirdre Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces" (1993) 30:1 C.M.L. Rev. 17. On Canada, see Richard Simeon, *Federal-Provincial Diplomacy: The Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972); Cairns Disruptions, *supra*, note 41.

[54] Note that the EU, notably pre-Laeken, referred to treaty not constitutional change. In an interview with a Commission Official (conducted by John Erik Fossum (1998) (unpublished)), the official noted that there was a virtual ban on talking about constitution in Brussels.

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

Court of Justice ("ECJ"), as numerous analysts have underlined, has played a critical role in the construction of Europe's "Sonderweg".[56] 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".[57] However, in the EU each member state has veto on treaty change and many states "contain their compliance".[58]

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 helped define the contents of their operational constitutions and proved critical to their practical operation. These systems had clear traits of "government by negotiation". The Canadian Constitution was aptly termed a "Governments' Constitution".[59] The EU lacked a formal, democratic constitution but had a material one. Both operational constitutional arrangements had significant institutional bias: they privileged the concerns propounded by governments over those of a range of excluded or marginalized groups and constituencies. In both cases, government actors could operate as constitutional veto players (formalized in the case of the EU, a de facto working arrangement in the case of Canada). 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 Canada after the Charter revolution, perhaps precisely because Canada's democratic defects now 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.

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[56] Joseph H.H. Weiler, "A Quiet Revolution: The European Court of Justice and Its Interlocutors" (1994) 26 Comparative Political Studies 510; Joseph H.H. Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999); and Weiler, *supra*, note 31.

[57] F.L. Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press, 2000), at 9 [hereinafter "Morton"].

[58] Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Ithaca: Cornell University Press, 2002), at 3.

[59] Cairns Reconfigurations, *supra*, note 50, at 115.

IV. THE CANADIAN CHARTER AND THE *CONSTITUTION ACT, 1982* — INDUCING POPULAR SOVEREIGNTY?

The patriation of the Constitution and the inclusion of the *Canadian 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. This may be construed as a catalytic intent in that it was envisioned from several perspectives 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 as 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 by creating a common Canadian national identity. The catalytic thrust was thus directed at both 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 altering its designation from being a "Governments' Constitution" to a "Citizens' Constitution",[60] but not all governments accepted this. When the Charter was first introduced as part of the *Constitution Act, 1982*, the Government of Quebec refused to sign the *Constitution Act* (although 70 out of the 75 elected members of the Quebec delegation in the federal Parliament supported it) 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 area of language protection.[61] In Quebec, the Parti Québécois

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[60] Cairns Disruptions, *supra*, note 41; Alan C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen's University Press, 1992) [hereinafter "Cairns Charter"]; Alan Cairns, "A Defence of the Citizens' Constitution Theory: A Response to I. Brodie and N. Nevitte" (1993) 26:2 Canadian Journal of Political Science 261 [hereinafter "Cairns Defence"]; and Cairns Reconfigurations, *supra*, note 50.

[61] In 1975, Quebec passed its *Charte des droits et libertés de la personne*, R.S.Q., c. C-12, see also online at: <http://www.cdpdj.qc.ca./fr/commun/docs/charte.pdf>). The Quebec Charter offers far stronger protections of French language rights and is more conducive to the pursuit of collective goals than is the Canadian Charter.

and nationalist intellectuals characterized the 1982 constitutional package as a "great betrayal"[62] and couched it as a major denial of recognition.

The Canadian Charter was based on a complex democratic constitutionalism that 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 special constitutional recognition for a range of groups,[63] as well as provisions for government actors to opt out of certain provisions, hence introducing its own unique blend of rights-based constitutionalism and majoritarian democracy.[64] At the same time, by establishing bilingualism as a nation-wide commitment, and by not permitting governments to opt out of the language provisions, the Charter 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."[65] 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 created a sense of popular sovereignty, but through a complex notion of democratic constitutionalism which induced people to understand themselves in multicultural rather than 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 significantly affect the Charter's democratizing thrust.

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[62] Cairns Disruptions, *supra*, note 41, at 23.

[63] Particularly relevant sections were s. 15 on equality rights (race, national or ethnic origin, colour, religion, sex, age or mental or physical disability); s. 23 on minority language educational rights; s. 25 on Aboriginal rights; and s. 27 on multicultural heritage.

[64] Section 33 of the Charter, the so-called notwithstanding clause, permits governments (federal and provincial) to opt out of s. 2 or 7-15 of the Charter, for renewable periods of five years each. A similar although weaker instrument is s. 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".

[65] Cairns Charter, *supra*, note 60, at 6.

1. Democratization or Untrammelled Judicialization?

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 ensures the necessary mutual reinforcement of citizens' private and public autonomies, which is the key characteristic of the constitutional democratic state.[66]

Twenty years after the Charter's inception it is evident that the constitutional changes have 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 judicialization of politics. Some claim that it has modified parliamentary government and given a 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.[67]

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 to the 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

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[66] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press, 1996); James Tully, "The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy" (2002) 65:2 Mod. L. Rev. 204.

[67] Morton, *supra*, note 57, at 25.

> unheard-of degree, but lawyers and legal arguments are increasingly shaping political discourse and policy formation.[68]

The claim, then, is that the institutional changes effected by the Charter have inserted another strong institutional bias into the system in favour of certain groups. This again is seen to have detrimental effects on representative bodies, notably parliaments: from this perspective the insertion of the Charter is 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 actually weakened parliamentary government, in particular given that representative government has 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 a double-pronged weakening of representative institutions, or does the Charter democratize intergovernmental relations, and hence produce democratic gains? Legislatures, Manitoba's in particular, were essential as arenas for the social mobilization that terminated the elite-negotiated Meech Lake Accord. The Charter (underpinned by significant government funding for rights litigation and advocacy)[69] helped to mobilize popular opposition and empower parliaments in relation to executives, rather than the reverse, which became more evident during the process of forging the Charlottetown Accord (1992).[70] Further, Morton and Knopff's acknowledgment of the effect that the Charter has had by empowering groups in civil society is also an acknowledgment of its 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

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[68] *Id*., at 13.

[69] Charles Epp notes that much of the support structure was put in place in the 1970s and helped reinforce the Charter's role. See Charles Epp, "Do Bills of Rights Matter? The Canadian Charter of Rights and Freedoms" (1996) 90:4 American Political Science Review 765 [hereinafter "Epp Bills"]; Charles Epp, *The Rights Revolution* (Chicago: University of Chicago Press, 1998) [hereinafter "Epp Revolution"].

[70] The Charlottetown Accord of August 18, 1992 is available online. See Canada, *Consensus Report on the Constitution* (Charlottetown: Government of Canada, 1992) online at: Government of Canada, Privy Council Office <http://www.pco-bcp.gc.ca/aia/default.asp?Language=E&Page=consfile&doc=charlottetwn_e.htm>. See Russell's account of the central role of parliaments in this process (*supra*, note 23).

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), by 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 *British North America Act, 1867* had been marginal or who had not been part of the initial compact — the latter applies in particular to Aboriginals or First Nations.[71]

As a result, many see the Charter as a necessary change, because it helped empower citizens by giving them Charter rights and a significant support structure made up of government funding from provincial and federal sources. The effect was to democratize access to the Supreme Court and to strengthen overall the mutually reinforcing role of democracy and rights.

Further, the Charter contained a mechanism for fostering dialogue between the Court and legislatures. 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.[72] 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

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[71] 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, 1982* also explicitly dealt with Aboriginals.

[72] Peter W. Hogg & Allison A. Thornton, "The Charter Dialogue between Courts and Legislatures" in Paul Howe & Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001), at 106 [hereinafter "Hogg"]; James B. Kelly, "Reconciling Rights and Federalism during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis 1982-1999" (2001) 34:2 Canadian Journal of Political Science 321.

> suggest to the legislative body exactly how a new law can be drafted that will pursue the desired ends by Charter-justified means.[73]

The Charter spurs legislative sequels in which Charter dialogue takes place between the legislative and judicial branches of government. Thus, the Charter also fosters an element of "institutional reflexivity", in that it encourages an inter-institutional dialogue on the relationship between individual rights and collective goals. The question is whether this innovative feature makes for a stronger balance between individual rights and democracy.

In summary, then, on institutional effects the Charter represents an attempt at striking a difficult balance between several competing principles and institutional arrangements. It helped mobilize citizens, not only 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, such as how to strike a viable balance between courts and parliaments within a setting of strong executive prominence. Another issue 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 permitted individual governments to determine the reach of portions 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. Canadian experience and Canadian academic debate yield interesting insights and suggestions here.

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[73] Hogg, *id*., at 108-109.

2. A Catalytic Process?

The process of patriating the Constitution had a strong social mobilizing effect.[74] 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 because it promoted both a wider cast of actors and a 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 subsequently to dominate Canadian constitutional politics: Who are legitimate participants in the process of constitution making? How can the process be organized 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, 1982* sparked a new round of reforms in the form of the Meech Lake Accord, 1987.[75] The rationale for the Meech Lake Accord was to ensure that the Government of Quebec would assent to the *Constitution Act, 1982*, and that Quebeckers would acknowledge that the Constitution recognized their particular contribution to Canada and their distinctiveness, through the insertion of the "distinct society" clause.[76] 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".[77] The Meech Lake Accord, while initially a matter

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[74] For different positions on the political mobilizing effect of the Charter insertion, see Ian Brodie & Neil Nevitte, "Evaluating the Citizens' Constitution Theory" (1993) 26:2 Canadian Journal of Political Science 235 [hereinafter "Brodie Constitution Theory"]; Ian Brodie & Neil Nevitte, "Clarifying Differences: A Rejoinder to Alan Cairns's Defence of the Citizens' Constitution Theory" (1993) 26:2 Canadian Journal of Political Science 269 [hereinafter "Brodie Clarifying Differences"]; Cairns Defence, *supra*, note 60.

[75] Meech Lake, *supra*, note 4.

[76] Proposed s. 2(1)(*b*) of the amended *Constitution Act* states: "The Constitution of Canada shall be interpreted in a manner consistent with ... (*b*) the recognition that Quebec constitutes within Canada a distinct society."

[77] Michael D. Behiels, "Deciphering the Distinct Society Clause: Introduction" in Michael D. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989) 139, at 141-42.

of recognizing Quebec's difference, became a matter for all the provinces, since they refused to permit the federal government in Ottawa to negotiate alone with Quebec. The notion that all provinces were equal 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 11 heads of federal and provincial governments. The Accord had to be ratified by every one of these 11 (federal and provincial) governments (with approval by legislature).

The closed, intergovernmental manner of forging the Accord and concerns about its effect on 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, especially outside of Quebec, precisely those that had been initially mobilized by the Charter. They saw the process as a clear sign of denial of recognition. Women's groups were concerned that sections 15 and 28 of the Charter would be subject to the distinct society clause introduced in the Meech Lake Accord. Would courts be less inclined to pursue equality when they were bound to take additional concerns into consideration? Nor should the issue of the distinct society and its application be seen as an issue applying merely to Quebec. The emphasis upon 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. More than that however:

> [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.[78]

Women's groups also queried why the two clauses dealing with Aboriginal and multicultural protections were exempted from the distinct society requirement but not the equality clauses.

The Meech Lake Accord failed because of popular opposition to the elite-based and secretive manner by which it had been forged and

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[78] Mary Eberts, "Why Are Women Being Ignored?" in Michael D. Behiels, ed., *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989) 302, at 316.

because it was based on "an inadequate, outdated constitutional theory".[79] 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 the public reaction was strongly informed by the democratic constitutionalism of the *Constitution Act, 1982*. The fate of this Accord illustrates that a society mobilized by the norms of democratic constitutionalism will not accept a theory and a system of constitutional change that privileges governments and excludes citizens. The interesting point is whether there will be a similar popular reaction to the process and substance of the reform treaty in Europe today. The European reaction will tell us a lot about how Europeans relate to their constitutional arrangements (national versus European).

The next major effort, which led to the Charlottetown Accord, was more open and consultative. Those in charge recognized that a more open process than in the Meech Lake Round was needed, but they did not realize that meant placing the package before the public for approval. That step became evident only after the package had been negotiated. The dynamic of the Charlottetown process emerged as a result of a perceived failure, and it was an explicit attempt to go beyond negotiation between governments only.

The Charlottetown process was both more intense and far more comprehensive than Meech Lake. For instance, it started with a constitutional debate involving parliamentary committees and regional constitutional mini-conventions and, most importantly, involving the general public at each site. Following consultation, the documents and proposals were handed over to the heads of government (with Aboriginal representation present), who negotiated among themselves. The final stage was a pair of referenda held simultaneously in the Rest of Canada ("ROC") and in Quebec. Failure to approve 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 a veto.

During the more open and intensely debated Charlottetown process a very large number of items were thrust into the resultant Accord. In terms of symbolic, substantive and institutional changes, the Charlottetown Accord was more comprehensive than either its Meech Lake predecessor or any European counterparts. Nonetheless, the Accord was rejected in both referenda.

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[79] Cairns Disruptions, *supra*, note 41, at 246.

Meech Lake and Charlottetown demonstrate how the Charter — within a setting of two-level representative government — helped insert a new, 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 manner of privileging the substantive concerns of governments and the elitist and closed manner of its forging, and used their organizations and representative bodies to terminate the Accord. The fate of Meech Lake could have served as a powerful reminder to European leaders not to revert to a closed, intergovernmental process once their populations have been mobilized.

A far more complex agreement, the Charlottetown Accord expanded the Meech Lake principle of recognition of Quebec's distinct identity to include Aboriginals. This recognition was to be balanced with equality protection and diversity awareness along gender, ethnic, racial, provincial and linguistic lines. The Accord represented a unique effort to balance the principles of federalism, nationalism and multiculturalism against the popular sovereignty of the Charter. Although initially framed as an effort to rectify the alleged historical injustice wrought upon Quebec, the Charlottetown Accord came to revolve around what people saw as a deeper and more profound case of historical injustice: the plight of Canada's Aboriginal peoples.[80] Such an attempt made the Charlottetown Accord an extremely complicated package, one ultimately rejected by the people because many Canadians believed they had more in common than was reflected in the Accord.

Since then, decision-makers have sought to leave the constitutional question in abeyance. Higher barriers to constitutional change have also emerged as a consequence of the federal government's "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."[81]

On the final criterion pertaining to process, we see how the Constitution has shifted from being perceived as the property of the governments to being seen to belong to the people. Citizens no longer allow

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80 Cairns Reconfigurations, *supra*, note 50.

81 Cairns Canadian Experience, *supra*, note 28, at 109.

governments to handle constitutional matters without their explicit consent even though the formal amendment remains the prerogative of government and legislatures. This is neither a repudiation of federalism, nor of the notion of Canada as a "community of communities". Rather, it emphasizes that the population of a given province, and not a nationwide majority, will decide whether to pass a constitutional amendment. In constitutional questions, plebiscitary democratic sentiment has emerged as a matter of some moment.

3. Catalytic Constitution versus Constitutional Catharsis?

I have thus far sought to describe the Charter revolution as a democratic catalytic event. Its effect was seen in the public sphere and on the democratic consciousness of citizens, but not in the form of a 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 distinct and competing conceptions of political community according to which citizens might be mobilized. 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 and disenfranchised groups received 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 the need to rectify historical injustice wrought on Aboriginals, as well as the accommodation of demands from other groups in Canadian society (*i.e.*, women's groups, gays and lesbians, and disabled people). 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 feature 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. In 1998, the Supreme Court was asked to advise on unilateral secession. Unilateral secession, it said, was unconstitutional but still possible, provided a set of procedural requirements was 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 a need for a democratic framework for secession. (In this matter, Canada precedes the EU.)

Finally, it is clear that inclusive democratic norms permeate the political system: Quebec separatists have increasingly justified separation in such terms, to the extent of labelling Quebec a multicultural society and 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.[82] But the Charter and the ensuing comprehensive constitutional debate and contestation elevated the issue of accommodation of difference or uniqueness to a constitutional concern of the first order. As well, it 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."[83]

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

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[82] Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal and Kingston: McGill-Queen's University Press, 1993).

[83] Williams, *supra*, note 33, at 227.

making sufficiently similar 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 of 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 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, it helped cast the debate in terms similar to a "Citizens' Constitution", with rights reminiscent of those of full-fledged constitutional, democratic states. Symbolically speaking, the European Charter can thus be construed as an attempt (however incomplete in practice) 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. This view has gained in prominence since the demise of the TEC. At the same time, the proposed reform treaty, if adopted, will further strengthen the self-standing character of the EU as polity. We saw from the Canadian case that there was a clash of constitutional theories; such a discrepancy and conflict was and continues to be 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?[84] Even if fully adopted, the European Charter will likely enjoy a weaker status than the Canadian one due to its stronger built-in limitations.[85]

Nevertheless, the European Charter has already affected the process of constitution making. The Charter Convention[86] (on which the Laeken

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[84] For different explanations of the political mobilization associated with the Charter, consider Brodie Constitution Theory, *supra*, note 74; Brodie Clarifying Differences, *supra*, note 74; Cairns Charter, *supra*, note 60; Cairns Defence, *supra*, note 60; Cairns Reconfigurations, *supra*, note 50; Cairns Canadian Experience, *supra*, note 28; Epp Bills, *supra*, note 69; Epp Revolution, *supra*, note 69; Morton, *supra*, note 57.

[85] In the proposed reform treaty the U.K. has obtained exemptions from some of its provisions.

[86] For the Convention drafting the Charter of Fundamental Rights, see *Annex: The Convention Responsible for Drafting the Charter of Fundamental Rights*, online at: European Parliament <http://www.europarl.europa.eu/charter/composition_en.htm>.

Constitutional Convention was modelled) 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 more 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.[87]

The Charter helped generate a broader and deeper citizen involvement in constitution making. In this context, popular referenda (admittedly with uneven voter turnout in different countries) 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 struggle 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) appears as a combination of the two Canadian instances, Meech Lake (unanimity) and Charlottetown (two referenda). This tension has made the process highly lopsided and democratically deficient in that citizens in most constituencies are being asked to defer to the decisions of 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? As the EU now reverts back to the closed and secretive Council mode in its further handling of the process, one is left to wonder what is to prevent a logic similar to that which unfolded in Canada over the Meech Lake Accord to take place.

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[87] In Canada during patriation, the federal Parliament held hearings on the Charter and activated civil society, whereas the governments argued over the amendment formula.

VI. CONCLUSION: POSSIBLE LESSONS

In conclusion, 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. We need more knowledge of the key mechanisms that gave the Canadian transformation its democratic nature in order to determine 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. For Europe, it is important to establish how strongly the relative absence of a European public sphere weighs in. 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 *Canadian Charter of Rights and Freedoms* and other aspects of public policy played as enabling devices for 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",[88] in the sense that they do not provide rights-holders with explicit control over institutional resources. Others note that rights are important in terms of recognition: they speak to basic self-confidence and respect and have deep implications for self-esteem,[89] which can propel action. Others, again, emphasize 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

[88] James Madison, *The Papers of James Madison*, vol. 10 (Chicago: University of Chicago Press, 1977), at 211-12, cited in Epp Bills, *supra*, note 69, at 766.

[89] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Polity Press, 1995).

sense of duty to comply with them. In this view constitutional rights can be considered as "trumps" in collective decision-making.[90]

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 (similar to their European equivalents) have proven highly reluctant to give up their stewardship of the Constitution. This is reflected, for instance, in the control of the process of constitutional and treaty amendment, where each government has retained a veto on constitutional amendment. In Canada, provisions and arrangements (for instance section 33 of the *Constitution Act, 1982*) were inserted into the Charter to guarantee governments a continued, privileged constitutional position, through inserting mechanisms to ensure (subunit) majoritarian considerations, but these can also retain an executive imprint. The Canadian case shows that within a highly complex multinational and poly-ethnic setting, executive-style constitutional politics can be modified through democratization, but it 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 have remained important actors in the constitutional process, what government signifies has 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 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 peoples, and the nature of the gap between them. As the Meech Lake Accord showed, when the norms of democratic constitutionalism inhabit the political scene, leaders face an altered set of public expectations — their own arguments and actions are evaluated in light of democratic constitutional norms. Failure to recognize such changes in

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[90] Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), at xi; Erik Oddvar Eriksen, "Democratic or Jurist-Made Law: On the Claim to Correctness" in Agustín J. Menéndez & Erik Oddvar Eriksen, eds., *Fundamental Rights through Discourse: On Robert Alexy's Legal Theory — European and Theoretical Perspectives*, ARENA Report 9 (Oslo: ARENA, 2004), at 95.

expectations can have serious legitimacy implications. In other words, executives can retain a significant role within the altered constitutional setting, but are 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 core 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.[91] 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, it is a set of procedures and rights that can accommodate an ongoing process of discursive validation of the existing structure.

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 can occur through an unpredictable cathartic, rather than a streamlined 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 the protection of cultural diversity and the preservation of several culturally distinct peoples. Nevertheless, it is also important to emphasize that the growing acceptance of the Charter across Canada underlines that over time there 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 regardless of high formal barriers to further constitutional

[91] Simone Chambers, "Contract or Conversation: Theoretical Lessons from the Canadian Constitutional Crisis" (1998) 26:1 Politics and Society 143.

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 to a more consistent focus on individual autonomy. Ironically, precisely because democratic norms occupy a central role in the constitutional conversation, they may offer less assurance of the sustenance of any 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[92] arguably did have democratizing effects, in particular in the relationship between citizens, social movements and government executives. To clarify democratic potentials, it is necessary to understand the nature of the triangular relationship between executives, legislatures and courts. Relevant to Europe, it is important 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-parliamentarization.

The magnitude of constitutional conflict and contestation, and even the deadlock that we have seen in Canada, should not deter the EU from pursuing 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.

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.

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[92] For an excellent overview of the different dimensions of juridification, see Lars Chr. Blichner & Anders Molander, "What is Juridification?" Working Paper 14 (Oslo: ARENA, 2005).

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.