RECONSTITUTING DEMOCRACY IN EUROPE

WP 2 – The Constitutionalisation of the EU, the Europeanisation of National Constitutions and Constitutionalism Compared

Research Report

Lessons from Europe's and Canada's Constitutional Experiences

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Chapter One
Introduction

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The general issue that informs this report is the challenge of fashioning democratic constitutions for complex multinational entities. The two entities that this report focuses on are the EU and Canada. In Chapter Two John Erik Fossum provides an overview of some of the constitutional challenges that these two entities both face, as a prelude to a more structured methodological approach for comparing the two. This theme of comparison and comparability resonates through most of the chapters in the report.

Both the EU and Canada are frequently labelled multinational and poly-ethnic entities. As regards Canada, it has never succeeded in forging constitutional agreement among its provinces and notably one of its would-be-nations, as Quebec has still not signed the patriated 1982 Constitution Act and the subsequent attempts to 'include Quebec in the constitutional family' have failed (the Meech Lake and Charlottetown Accords). In a similar manner, the explicit effort to forge a European Constitution through the so-called Laeken process (2001-2005), was rejected by significant majorities of Dutch and French citizens; the subsequent effort, the Lisbon Treaty, was initially turned down by a majority of Irish citizens but passed in a subsequent second referendum. However, the Lisbon Treaty is a decaffeinated version of the Constitutional Treaty: it was explicitly stated in the mandate that it should be a treaty rather than a constitution; every mention of 'constitution' was replaced by 'treaty'; and all vestiges of state-based language were removed from the text of the Lisbon Treaty.

In both the EU and Canada, at first glance, it would seem that the efforts to carry out reforms of explicitly stated constitutional nature have *failed*. I will get back to this question of failure in the below because reality on the ground is more complex.

Democratizing Constitution-Making

At this stage, it is important to underline that one of the main reasons that has been held up to account for the alleged failure of the constitutional reform efforts in the EU *and* Canada is the notion that efforts to open up and to democratize constitution-making in such complex and contested entities are almost bound to fail. The most explicit spokesman for this in the EU has been Andrew Moravcsik (2006).

This theme of democratizing constitution-making is thoroughly addressed throughout this report, and is the explicit focus of chapters Three through Five. In Chapter Three, Peter Russell who not only coined the term 'mega-constitutional politics',[1] but also provided the most extensive analysis of this phenomenon (cf. Russell 1993, 2004) which depicts the large-scale efforts to patriate and democratize the Canadian constitution during the period from the late 1970s and until the early 1990s, effectively argues that there are important similarities between the EU and Canada which point to the inability of mega

[1] Russell (1993: 75) notes that "mega constitutional politics goes beyond disputing the merits of specific constitutional proposals and addresses the very nature of the political community on which the constitution is based. Mega constitutional politics, whether directed towards comprehensive constitutional change or not, is concerned with reaching agreement on the identity and fundamental principles of the body politic. The second feature of mega constitutional politics flows from the first. Precisely because of the fundamental nature of the issues in dispute - their tendency to touch citizens' sense of identity and self-worth - mega constitutional politics is exceptionally emotional and intense. When a country's constitutional politics reaches this level, the constitutional question tends to dwarf all other public concerns."

constitutional politics to produce popular constitutional agreement. To Russell, then, an important similarity between the EU and Canada is that whereas both entities have sought to democratize the process of constitution making, neither has been able to obtain popular agreement on a renewed or reformed constitution. He argues that the reason for this inability to react positively as a sovereign people stems from "differences of civic allegiance and identity and of constitutional justice [that] are just too deep to yield a popular consensus on constitutional restructuring" (p. 25). This fact, he argues, adopting a Burkean position, is no cause for alarm as the two entities have recourse to more normal processes of constitutional change to deal with pressing issues and to ensure democratic improvement.

In Chapter Four, Chris Lord focuses on the EU's procedures for treaty change. He sees them as cases of institutional design that can be evaluated from a democratic perspective, with specific focus on three sets of standards, namely public control, political equality, and the right to justification. He then proceeds to document how deficient the pre-Laeken (2001) procedures were in relation to all three sets of standards, then evaluates the Conventions and the ratifications against these standards. It is worth noting that these democratic standards figured in the decisions to establish the Charter Convention and the Constitutional Convention. Lord then seeks to establish how significant an improvement the Conventions represented and finds that they indeed were a "significant, but by no means unqualified improvement" (p. 34). Both were able to fashion agreement on thorny issues that had previously divided member states; both were far more open and transparent than had been the case with previous IGCs; and both were also coloured by the strong executive imprint of the broader process within which they were situated. This applied in particular to the Constitutional Convention which deliberated "under the shadow of the (governmental) veto"; thus reflecting important limits to deliberation. In the final section Lord evaluates the ratifications, with the two relevant procedures being parliamentary votes and popular referenda. His nuanced assessment points to strengths and shortcomings in both procedures. In the final section he addresses the important question pertaining to how best to respond to treaty rejections (in single or multiple countries). An important proposal here is a 'post-rejection Convention' whose agenda he outlines in the chapter.

In Chapter Five, Patrick Fafard discusses the relationship between constitutional change and public participation with specific reference to the case of Canada. Focus is on the period (from the late 1980s) when the system of elite accommodation was challenged and constitution making was made more open to public debate and contestation. Fafard focuses on four sets of claims that he finds to mark accounts of this process: (a) that constitution making can no longer be a matter of or be confined to a limited system of elite accommodation; (b) that Canada has experienced a democratization of the process of constitution making which entails that popular participation is required for further constitutional change; (c) that this popular participation requirement has rendered the constitution virtually unamendable; and (d) that the way out of the impasse is to sustain a more broadly based constitutional 'conversation'. In the chapter, Fafard first provides a brief overview of the distinct manner in which the Canadian constitutional process was democratized (the distinctness of which is further developed in Chapter Ten, including the theoretical implications that we can discern from this). He rightly points out that it was never a matter of departing from elite accommodation; every effort at opening up the process had to be reconciled with the system of elite accommodation. As he notes, "[t]his executive dominance is, to some extent, 'hardwired' into Canadian constitutional practice by the various amending formulas which almost invariably provide for some form of negotiation between the federal and provincial and territorial governments" (p. 54). Recent years have however seen some important innovations in terms of public consultation and deliberation. The penchant for informal change can effectively sideline the more open procedures now instituted at the ratification stage (referendum requirement installed in several provinces). Fafard argues that, in effect, then, popular participation is not a necessary component of actual constitutional change. He also takes

issue with the notion that the present constitution is virtually unamendable by pointing to the many changes that have taken place since Charlottetown and points to factors that have and may limit a constitutional conversation. These comments are meant to modify the four points in the main account; they do not refute the important point that there is disagreement over constitutional fundamentals, referendum requirements and thus high barriers against major or large-scale constitutional changes.

Constitutional Refashioning of Community in a Gender-Sensitive Direction?

An important instigator of public constitutional participation in Canada is the inclusion of the Charter of Rights and Freedoms in the patriation of the constitution that resulted in the Constitution Act 1982. This set the stage for what analysts have come to label as the Canadian 'Charter revolution'. This process of constitutional transformation is marked by a radical increase in gendered participation and political contestation, as groups found the courts and the legal system as a vital additional channel for the promotion and protection of their concerns and grievances. One of the questions this has brought up pertains to how this came about. Should it be attributed to rights empowerment, various forms of government-generated organizational resources, other public policy measures etc.? Or is it more to do with civil society organizing and political mobilization? Another set of questions pertain to the relative participatory merits of representative systems in relation to Court-based litigation in terms of social empowerment and gendered restructuring of society. The European case provides a useful comparative reference to that of Canada on the gender participation issue. How should we interpret the European situation? What are the general lessons we can draw from the constitutional reform efforts?

In Chapter Six Marilou McPhedran addresses these questions from the perspective of an academic-cum-activist who has first-hand experience with the transitions Canada has gone through. McPhedran focuses on the nature and background for women's social mobilization in Canada and the post-Charter ensuing patterns of *trialogues* between women's groups, courts and parliaments. The term was introduced "to acknowledge the ongoing engagement and influence of social movements in the drafting of constitutional text and in securing quality rights in sections 15 and 28 of the Charter. These articles suggested that constitution-working requires sustainable citizen participation for realizing systemic changes and benefits in the "living" of the rights and freedoms articulated in the *Charter*" (p. 65). The first part of the chapter provides a historical background on the legal status of women in Canada, starting with the Persons Case, 1929 when the Supreme Court of Canada unanimously ruled that the notion of 'person' in the BNA Act 1867 did not include female 'persons'. A major turning-point in women's political activism came with the Royal Commission on the Status of Women which delivered its reports during 1967-70. In the aftermath of the Report, there was a great surge in women's political organising (notably the National Action Committee on the Status of Women) coupled with the development of equality promoting mechanisms (Status of Women Canada and Canadian Advisory Council on the Status of Women). Legal efforts to improve women's legal standing were however hampered by the narrow interpretation of rights under the Canadian Bill of Rights, which in turn made aboriginal activists take their cases to the UN Human Rights Comittee. When the federal government started the patriation process and introduced the first drafts of the Charter, the women's groups pushed for the equality rights provisions and secured participation in the process. The chapter chronicles the successes but also some of the limits of this the most prominent dimension of the Canadian constitutional trialogue (that of course included other social movements as well). The present situation has brought more uncertainty as the trialogue is difficult and costly to sustain and also ultimately hinges on the willingness of courts to take equality seriously, which appears to be less so at present than was the case in the 1980s and 1990s.

In Chapter Seven, Yvonne Galligan and Sara Clavero discuss the gendered effects of the EU's constitutional development. The authors trace this back to the equal pay provisions in the Rome Treaty (Article 119), but underline that its operation was confined to the member states. This was changed with the ECJ's Defrenne cases from 1966, which equipped individuals with the right to seek redress against Article 141 (initially 119); thus eqipping this article with EU law's tenets of direct effect and supremacy. The authors trace the gradual widening of provisions for gender equality beyond the realm of employment and to cover a wider ambit of social relations. An important change came with the Amsterdam Treaty which provided that then Article 141 should be made subject to the co-decision procedure which gave the European Parliament a more prominent role. Through the analysis of two directives the authors show the distinct features of the emerging gendered trialogues in Europe, processes that in comparison to Canada are complicated by the interplay among the Commission, the EP and the Council. The two case studies show mixed results. Nevertheless, on balance the authors conclude that "the legal architecture of EU treaties, ECJ interpretations, and emanating laws provide individual citizens with opportunities for seeking redress of discrimination or enforcing of rights in a supra-national arena, with these findings binding on lower levels of governance" (p. 96). In this connection it is important to underline that the activities at the EU level fill gaps in national legislation as member states' gender equality provisions vary considerably. The authors conclude by noting an important limitation in the EU's constitutional experience from a gendered perspective, namely that it is confined to an equal opportunities platform.

These two chapters show that efforts to open up the constitutional processes to social groups and movements have had positive effects in terms of effecting greater gender equality. The strongest effects were found in Canada but even the EU has seen important improvements, notably in those member states that had the weakest systems in place. From a theoretical perspective it might be useful to explore the notion of trialogue which depicts relations among civil society actors, Courts and legislatures from the perspective of democratic theory because it invites more structured examination of the relationships among claims-making, participation, representation and juridification. The comparison between the EU and Canada also sheds light on how these processes unfold in state-based versus supranational settings.

Constitutional Failures or…?

The previous chapters show that in both the EU and Canada there is a legal-constitutional order in place which is not only complied with but which also (notably in Canada but also in the EU) is understood as *higher law* or constitutional law. Given this fact can they then really be labeled as *constitutional* failures? Other possibilities that require attention are: constitutional *reform* failure as opposed to constitutional failure as such; *ratification* failure but not constitutional failure as such; or some form of constitutional *consolidation* or change.

Establishing that something is a failure presupposes that we have a certain standard that we can measure failure, as well as success, against. What is then the appropriate standard? To establish this we need to revisit core constitutional concepts and clarify what is meant by 'constitution'. This is in particular the case with the EU, since it raises the question of a constitution without a state or a nation. Given that the EU is neither a state nor a standard form of international organization, we face the question as to whether we may be able to apply standard state-based constitutional language and the normative standards embedded in this when assessing whether the Lisbon Treaty constitutes a *constitutional* failure. The question of proper terminology naturally brings up the question as to whether (EU) or the extent to which (Canada) these entities fit with the two standard conceptions of constitution making, namely the revolutionary and evolutionary traditions. Or is it necessary to consider whether either or both may be giving rise to a distinctly new constitutional theory?

Ben Crum in his chapter (Chapter Eight) argues on the one hand that we can "salvage the ideal of democratic constitutionalism also for multi-national communities by revising it rather than to reject or deconstruct it…" (p. 99). Starting from Rawls and a 'dialogical' approach to his notion of the original position (developed in two trappings, the domestic and the international contexts, respectively), Crum develops a two-level theory of the multinational democratic constitutionalisation of the EU. The theory yields two central sets of nested actors and concerns: national collectives and individuals. National representatives mediate between them through engaging in international negotiations. A distinct mode of representation here has to unfold for this to be considered legitimate: it is what Mansbridge (2003) has termed the anticipatory and not the promissory conception of representation. Crum finds that this model is useful to capture the Laeken European constitutional process but also that it is not very apt for analyzing Canada.

There is some overlap between Crum's two-level theory and the theory of constitutional synthesis that John Erik Fossum and Agustín José Menéndez outline and discuss in relation to both the EU and Canada in their two chapters (Chapters Nine and Ten). The basic idea emerged from the attempt to make sense of the European Union and its legal order. It posits that the best way of reconstructing this is to see it as the result of a process of constitutional synthesis, of an "ever closer" putting in common of national constitutional norms (normative synthesis) and of the "development" of a supranational institutional structure (institutional development). This has three core features. First is that constitutional synthesis is characterised by the constitutions of the participating states taking on a new *seconded* role as a part of the collective constitutional law of the new polity. Constitutional synthesis is grounded on national constitutional provisions which do not only authorise, but also mandate the active participation of national institutions in the creation of a supranational legal order as the only way to fully realise the principles which underlie the national constitution. Constitutional synthesis claims that there is a substantive identity between national constitutional norms and Community constitutional norms. Second, constitutional synthesis can be described as the combination of normative synthesis and institutional development and consolidation, two processes that have very different inner logics. Third, the regulatory ideal of a single constitutional law comes hand in hand with the respect of national constitutional and institutional structures. This entails that while supranational law is one, there are several institutions that apply the supranational law in an authoritative manner. The peculiar combination of a single law and a pluralist institutional structure results from the fact that there is no ultimate hierarchical structuring of supranational and national institutions, and is compounded by the pluralistic proclivities of institutional consolidation at the supranational level.[2]

In Chapter Ten Fossum and Menéndez also show how the theory of constitutional synthesis can be adapted to make sense of the Canadian case. The authors underline a number of important parallels between the cases, notably that both the EU and Canada obtained their constitutional norms through processes of *transfer* of constitutional norms and dignity. In the EU this transfer took place from the Member States to the EU-level as part of the development of the European Constitution, in Canada the transfer was from the imperial UK parliament to Canada (as well as more limitedly from France and aboriginal communities). Both the EU and Canada are marked by contestation over constitutional essentials and multiple constitutional traditions which require reconciliation. The two processes of course unfolded differently but in both cases we see that the constitutional arrangements crucially rely on an ongoing search for constitutional synthesis. An important difference between the EU and Canada is that Canada with the patriation underweant an important constitutional transition. The chapter underlines that this does not entail a departure from constitutional synthesis but rather that the

[2] The precise manner in which the theory can be discerned in the European integration process has been documented in Fossum and Menéndez (2011).

patriation gave the Canadian constitution a more principled character and increased the democratic quality of the institutions that support it.

Broader Lessons

One important lesson that can be discerned from both of the two constitutional theoretical frameworks that this report encompasses (as presented in Chapters Eight and Nine-Ten, respectively) underline the need to rescue and remain faithful to democratic constitutionalism in both the EU and Canadian cases. This is hardly a surprise with regard to Canada but it is important to underline that both perspective point to the need to adapt the standard approach to democratic constitutionalism to the special circumstances of the EU, and to a considerable extent also Canada. Fossum and Menéndez go the furthest here. They argue that constitutional synthesis can be said to constitute a distinct constitutional tradition that stands apart from both the revolutionary and the evolutionary traditions.

The second lesson is that whereas democratizing constitution making may make the process more unwieldy, doing so also has positive democratic effects, as we saw on gender equality or gender justice.

The third lesson is that part of the problem with regard to discerning whether such processes are successes or failures has been the lack of proper theories to capture these processes; theories that are faithful to the basic tenets of democratic constitutonalism. In the extention of this it should also be noted that the question of how to design constitutional processes in such complex political entities is a major intellectual challenge that has not been properly addressed yet. Here practice is clearly still ahead of theory.

The fourth lesson is that the constitutional arrangements of both Canada and the EU may be based on what we may label as 'permanent synthesis'. There are factors in both entities that underline this, not the least in the case of the EU the many rounds of enlargement that raise questions of its constitutional digestive ability. In the case of Canada, a similar issue pertains to the question of aboriginal self-government, which brings the question of permanent synthesis to the head.

The final lesson is that constitutional synthesis is a very frail process with a strong built-in self-subversive component which underlines the need to pay particular attention to the circumstances in which such processes unfold.

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Chapter Two

Initial Reflections on the Comparability of the EU and Canada

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Introduction

Many of Europe's post-war constitutional architects were eager to hold up the U.S. as the example for the then fledgling EU to emulate. Many researchers have also drawn on the U.S. as the 'natural' case to compare the EU with.[1] Well before the EU was formed there were calls for a *United States of Europe*; to establish a European federal constitutional democracy that would be similar to the U.S. version. These abated when the political constraints on integration became clear. But the idea of a U.S.-style democratic constitution for Europe has never really died. The attractiveness of the American constitutional experience reappeared with Laeken. The European Convention (2001-3) for instance had many draw parallels to the Philadelphia Convention of 1787.[2] Those that stressed the parallels with the contemporary European experience did so in an effort to convince Europeans that they were on the right path. The Philadelphia Convention well over two centuries ago set the stage for America's remarkable development, first into a continent-wide federation and thereafter into a global super-power. It is difficult to argue with success, notably of global proportions. Such an argument also clearly resonates well in a Europe that for centuries has understood itself to be at the centre of the world. Many Europeans accordingly see in the U.S. a number of attractive features that invite comparison and lesson-drawing, not the least pertaining to the U.S. Constitution. It has proven remarkably robust; central features have been successfully transplanted to Germany (which again as we have seen directly influences the EU's constitutional construct); and it holds great normative attraction, as a central instigator of the revolutionary tradition of constitutional thought.

From a scientific perspective, the question remains as to how suitable the U.S. constitutional experience is to compare the EU with. This matter of comparability brings up the question of whether the EU and the U.S. are apples and oranges, or simply, different types of fruit. The most obvious way to get at this would be to spell out the most important similarities and differences between the two cases.[3] But even if we put up a detailed list of factors, we would still be left with the question of how best to weight the similarities against the differences, in order to determine overall comparability. To establish this we need to go beyond thinking of comparison simply as a method for juxtaposing cases and instead consider it as an intrinsic part of the research strategy. Doing so requires a clear idea of *why* we compare, and also *what precisely* we use the comparison for (Tilly 1984). Understanding comparison as a strategy that connects observation and theory, and not simply as a mere technique for assessing similarities and differences between cases, implies that the question of what to compare the EU with forms an intrinsic part of the broader research strategy, and must be theoretically justified.

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[1] For a brief selection of contemporary sources, consider Nicolaidis and Howse (2001); Majone 2005; see also contributions to 'Altneuland: The Constitution of Europe in an American Perspective', 28 – 30 April 2004. Available at: <http://www.jeanmonnetprogram.org/conference_JMC_Princeton/index.html>.

[2] This included the Convention chair, Valery Giscard d'Estaing who noted that "the European Union now stands at a crossroads, not wholly unlike that of Philadelphia 1787."

[3] There are several standard comparative designs here, with the most important being most similar systems design and most different systems design.

One issue that this has to contend with is the relevance of the U.S. experience; another is the oft-cited notion that the EU experience is so unique as to *defy* comparison. This view draws credence from the many apparent ambiguities and paradoxes surrounding the EU's constitutional dimension and status. We therefore obviously need an approach to comparison that is able to factor these in.

Sui Generis and Comparability

An entity *sui generis* is a unique type of entity; it is one-of-its-kind. Those that label the EU an entity sui generis underline that it is more and different from an international organization, and clearly also less than a state. Insofar as they acknowledge that it has a constitutional dimension they underline that this is a different-from-the-statist constitutional arrangement. It is a constitutionally unique construct with unique constitutional challenges. Obviously then, to understand this entity we would not gain much from comparing it to states. Its uniqueness also implies that there would not be many constitutionally relevant lessons from other types of organisation. The EU's uniqueness, in other words, entails that broader lessons for constitutional undertakings *beyond* the nation-state, need not apply to the EU. Lessons would have to be derived from the specifics of the EU experience. In sum, there would be little sense in comparing the EU with other instances of constitutionalism whether within or beyond the nation-state in the search for broader underlying patterns.

This argument is generally justified with reference to several distinct puzzles or paradoxes that beset the EU's constitutional order and that are also held up as distinct traits of this highly pluralistic constitutional order. These might be identified as: (a) the constitutional puzzle (the EU's constitutional status is both highly contested and ambiguous); (b) the integration paradox (disagreement on the type of polity the EU is and thus also on its suitability for a constitution in the first place); and (c) the authorization paradox (who has authorized the structure in place?).

But when we approach these puzzles and paradoxes with the appropriate conceptual tools, the paradoxes and puzzles not only become comprehensible but more importantly, they also put the issue of EU distinctness in a different light. At a minimum, as Chapters Eight and Nine underline, there is no need to abandon basic state-based constitutional vocabulary and standards. These are relevant for the EU despite the fact that the EU is neither a state nor a nation. But whereas a better – synthetic - understanding of the constitutional character, origins and development of this pluralistic legal order, opens up conceptual space for comparison with state-type entities; there are nevertheless also clear limits to comparability because of the distinct character of many of the EU's constitutional challenges. These are challenges that the U.S. does not face; thus clearly limiting the scope for comparison with the U.S.

But comparison will nevertheless help to increase our understanding of the European constitutional experience. The best way of doing so is to render clear in what sense there are parallels between the European and other constitutional experiences and in what sense we may discern broader lessons from these cases. To ensure this particular attention has to be paid to the design of the comparative approach: it must take proper heed of the specific constitutional challenges facing the EU. Probably the best way of ensuring this is through the *diagnostic comparative approach* (Fossum 2007). The diagnostic approach contains several stages, which are: (a) to identify the main constitutional challenge(s) facing a given entity; (b) to search for entities that have dealt with or are dealing with the same or a very similar challenge; (c) to examine how they have handled the challenge(s); (d) to establish that the entities share enough in common to warrant lesson-drawing; and (e) to derive the main empirical, theoretical, and normative lessons.

The diagnostic approach, then, starts by identifying the basic constitutional challenges entities face, and discusses how similar they are. Given that sufficient similarity can be established the next step is to clarify how similarly and differently the cases have addressed the relevant challenge(s). Insofar as we can establish that the similar challenges have been similarly handled, can we start to discern lessons. Provided it is properly carried out, this approach to comparison lends itself to the drawing of lessons even across cases that are otherwise quite different. The diagnostic approach is particularly useful to study constitution making. The process of constitution making always takes place within a particular setting which shapes and conditions it. Constitution making is always a matter of addressing certain key issues and challenges, many of which are universal but which also always take on a specific character from the context in which they originate. The diagnostic approach starts by identifying the key challenges facing constitution makers, and considers how these are dealt with through the process of constitution making.

The diagnostic comparative approach induces us to look for state-type entities that share one or several of the particular challenges facing the EU. It is therefore natural to start by focusing on common challenges rather than common institutional features, also because the EU is a dynamic entity. This means that we need to look for entities with democratic vocations that are simultaneously deeply – constitutionally speaking - contested entities, where constitutional status, character of polity and democratic authorization of the constitutional construct figure as central concerns; these are some of the traits that have given rise to the challenges facing the EU. Such entities would then naturally also be multinational and poly-ethnic. Further, we should expect the entities to grapple with the challenges in a manner similar to that of the EU; the critical marker here is constitutional synthesis. Lessons of particular interest then pertain to the democratic-constitutional effects of such processes.

Canada is the most relevant case to consider here. It faces several constitutional challenges that are similar to those of the EU. It is both multinational and polyethnic (Kymlicka 1995, 1998) Both Canada's and the EU's constitutional arrangements have derivative origins. In the EU it is the Member States' constitutional arrangements that gave room for the EU; in Canada it was the country's colonial master, the UK, that bequeathed the original constitution, tellingly named the British North America Act (BNA Act), on Canada in 1867. Both constitutional arrangements have pluralistic traits, the EU's distinctly so, but Canada's also. Both the EU's and Canada's constitutional arrangements hold important ambiguities through profound conflict and contestation over constitutional essentials and lack of agreement on the type of community and the type of polity that they are and should be (the integration challenge). In both cases key executives (heads of states and governments) play a central role in the process of constitution making/amendment; and in both cases the constitutional structure in place has failed to obtain explicit democratic authorization.

These commonalities suggest that the EU and Canada share several important challenges; there are also important parallels in how these challenges have been dealt with, including a synthetic orientation. These facts warrant comparison. Thus we should pay particular attention to what the cases can tell us of broader relevance for constitutional and democratic theory and practice.

In this chapter the focus is on spelling out the main challenges the two entities face and consider to what extent they are common. In chapters Nine and notably Ten how the challenges have been dealt with and the lessons we can discern from them will be provided.

Common Challenges?

In Europe, there is deep disagreement on the constitutional issue, and over how to interpret the European constitutional experience. This also means that there is no agreement that the main challenge facing the EU is that of fashioning a democratic constitution for a complex multinational entity. It is therefore necessary to start by clarifying what the disagreement resides in, and what this might entail for comparison. In the European setting there is deep political and academic disagreement over the following core issues:

- whether it is possible to forge a European constitution;
- whether the EU is a type of entity that can and should be constitutionalised; and
- whether writing a European Constitution requires a European pouvoir constituent, and whether this again entails a 'European we the people'

If it is impossible to forge a European constitution, then it makes no sense to compare the EU with a multinational constitutional state. The same point applies to the second issue. The third issue is less determinate and is a question that all multinational entities grapple with. In the next pages, I first clarify where the EU stands on these three issues, thereafter I sum up the main challenges facing the EU in the constitutional realm, and in the final part of this section I consider whether Canada shares similar challenges with obvious bearings on comparability.

The 'Constitutional Paradox'

At the heart of the first issue, that of whether it is possible to forge a European constitution, lies an apparent paradox. Lawyers have for several decades – that is long before the Laeken constitution making process was initiated - insisted that the Treaties should be considered a constitution of sorts. The alleged paradox runs as follows: *Why* launch a process of constitution making when the Union is widely held to possess a constitution already?

However, this is an alleged paradox only. It rests on a misleading question, as it presumes that there is only one way of understanding constitution. Once we acknowledge that in ordinary language, 'constitution' can mean different things to different people, then the question is not simply whether it is possible to forge a European Constitution, but to open up for the possibility that the Union already possesses a constitution. Then the issue would instead be to establish *what kind of constitution* the Union has, and further, what kind of constitution those that demand an EU-constitution opt for.

We may here distinguish between a formal, a material, and a democratic conception of constitution. When we apply these distinctions to the European Union, it becomes apparent that the Union neither has a written constitution nor a set of constitutional norms that have been approved through an inclusive and participatory process. But we can nevertheless identify a set of basic legal norms that define the rights of citizens, and structure European institutions. This is what lawyers refer to as a material constitution (Menéndez 2004; Fossum and Menéndez 2011). Note also that it is precisely the *mismatch* between the existence of a material constitution and the lack of a formal and a normative-democratic European constitution that has underpinned most pleas for constitutional reform in the European Union since the late 1970s.[4]

[4] The election of the Members of the European Parliament by universal suffrage led within few months to the debate and drafting of a Constitutional Treaty (the so-called Spinelli project), the first major attempt at writing a Constitution for the European polity since the demise of the Defence and Political Communities Treaties in 1954. The European Parliament saw the project as a means of increasing the democratic legitimacy of the Union at the same time that the efficiency of

The issue then is really about whether it is possible to *transform* this material constitution into a *democratic constitution* proper. This is not only a matter of the Union's constitutional character, but is also a matter of the Union's character *qua polity*. The problem is that within the Union setting we cannot adequately handle this first issue, without paying proper attention also to the *type of entity* that the EU is. If this turns out to be difficult, then that helps to explain why this first issue keeps re-occurring and is posed as a paradox in the first place.

The Integration Paradox

When we consider what type of entity the EU is, rather than obtaining a clear answer, we are instead faced with a further paradox, which we might label the 'integration paradox'. The integration paradox can be summed up as follows: there is an almost inverse relationship between the duration of the integration process on the one hand, and the consensus on what kind of entity that the European Union is on the other. The integration process has gone on for well over five decades, but there is as much uncertainty today as to what type of stable entity this process will produce, as there was at the outset. At no point in time have responsible leaders and institutions offered a clear template or reached agreement on precisely what kind of entity that this should become.[5] What we see instead is a plethora of views and positions, some of which are compatible with mainstream conceptions of constitution, others of which are not. This uncertainty also effectively deprives us of hard and fast answers to the first issue. For instance, if the EU is an unprecedented type of entity, will the EU then at all be able to adopt a democratic constitution that is worthy of its name? Is democratic constitution the preserve of the nation-state, or can non-state entities sustain democratic constitutions? What type of democracy will this be?

Any democratic constitution must comply with certain normative requirements in order to qualify as democratic in the first place. What are the relevant normative requirements? Can we rely on standards associated with modern democratic state-based constitutions, or do we need different standards? This goes to the heart of the European constitutional challenge: in what sense is the European constitutional endeavour also a challenge to constitutional theory? To address this we need to know more about the kind of entity the European Union is.

When we consider normative theory and the EU literature, we find that there are numerous polity models in play. Here the analysis is confined to three distinctly different polity models for the Union, namely the ones we have developed in the RECON (Reconstituting democracy in the European Union) project of which this report is part (cf. Eriksen and Fossum 2007).[6] They should be understood as stylized representations of the Union, rather than as precise empirical depictions. Precisely because they are representations, and given the still-in-the-making character of the Union, they are useful to get at the basic choices facing the Union. Each model presents us with an explicit and distinctive set of principles, institutional arrangements, modes of allegiance, character of the EU's democratic legitimacy, and conceptions of its constitutional arrangement. When we hold these up against the EU's constitutional development we get a much clearer sense of the type of process, as well as the type of entity involved.

The first model envisages the EU as a mere functional regime that is set up to address problems, which the Member States cannot resolve when acting independently. The

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its institutional and decision-making structure was improved. However, neither the Council nor national parliaments were really supportive of the project beyond the courtesy formulae.

[5] Joseph Weiler noted as early as 1995 that "What Europe needs … is not a constitution but an ethos and telos to justify, if they can, the constitutionalism it has already embraced" (Weiler 1995: 220, cf. Weiler 1999).

[6] Available at: <http://www.reconproject.eu/>.

Union is mandated to act only within a delimited range of fields. The relevant determinant for establishing which fields is the EU's ability to offload and to compensate for the declining problem-solving ability of the nation-state in a globalizing context. This pertains in particular to its ability to handle cross-border issues (such as for instance economic competition, environmental problems, migration and cross-border crime). The model presumes that the Member States delegate competencies to the Union. Although this entails a form of self-binding on the part of the Member States, such delegation comes with a powerful set of controls in the hands of the Member States, so as to safeguard that they remain the fount of the EU's democratic legitimacy. The Member States authorize EU action and confine and delimit the EU's range of operations through the provisions set out in the treaties, as well as through a set of institutions that permit each and one of them to exercise veto-power, either individually or collectively. Such an entity is constitutionally speaking based on a Member-State based constitutional treaty, with emphasis on the treaty component. This construction envisages democracy as directly and exclusively associated with the nation-state. The core tenet of this model is that it is only the nation-state that can foster the type of trust and solidarity that is required to sustain a democratic polity. This model is therefore also most explicit in its highlighting that the recent attempt to forge a European constitution is a misguided effort, and a bridge too far.[7]

The second model portrays the Union as an emerging political community based on political institutions that are conducive to an identity-building process, in other words the model posits that the Union is in the process – however gradual and despite however many setbacks suffered – to become a federal nation-state. The EU's legitimacy basis, from this perspective, is based on the community of values that emanates from the revival of European traditions. These common values underpin and render possible collective decision-making at the European level. This model is premised on the classical constitutional claim that all political authority must emanate from the law laid down in the name of the people. The authority of the law stems from the fact that it is made by the people or their representatives - the pouvoir constituant – and made binding on every part to the same degree and amount, and (paradoxically) from the fact that laws are obligatory and coercive. This is so to say inherent in the legal medium itself as it cannot be used at will but has to comply with principles of due process and equal respect for all. A legally integrated community can only claim to be justified when the laws are enacted correctly, and the rights are allocated on an equal basis. Accordingly, the EU then has to develop into a state-based entity based on direct legitimation and with coercive means of its own. Such an order is based on or will forge a sense of common destiny, an 'imagined common fate' induced by common vulnerabilities, that will turn people into compatriots willing to take on new collective obligations to provide for each other's well-being. This is seen to be the solidaristic basis of the nation state as well as of the welfare state (Offe 1998). The EU needs such a symbolized collective 'we' if it is to be authoritative and legitimate. To sustain an ability to make collective decisions over time, a European identity is required (Grimm 1995; Miller 1995). However, it must be added that simply adapting a standard federal model to the EU runs into problems: such a model must be somehow adapted to take cognizance of the fact that the Union is made up of a multitude of nation-building and sustaining projects. Thus, the relevant type of construction would be more complex than a standard federal system; it would be a multinational federation, whose vocation would be to harmonize the national projects under the umbrella of a broader European identitarian-communal project. This model would then explain the present European constitutional effort as having failed because it did not go far enough. It was not a constitutional failure in the sense that the first model depicts this. Rather, it was a case of *ratification failure* because it fell short of a state-based constitution, which could adequately address the social problems facing

[7] "The objectionable aspect was its form: an idealistic constitution… The new document was an unnecessary public relations exercise based on the seemingly intuitive, but in fact peculiar, notion that democratization and the European ideal could legitimate the EU."(Moravcsik 2005)

Europeans. A further reason for why the ratification process failed was the *mismatch* between a European Constitution on the one hand, and *national* veto in its ratification on the other. The process was such set up as to prevent Europeans from seeing themselves as the proper makers of a European constitution, as a European pouvoir constituant.
The third and final model posits that the Union is best considered as the supranational level of government in Europe, and as one, of the regional subsets of a larger cosmopolitan, order (Beck and Grande 2004). The model posits a Union that in its internal make-up is a post-national *government*, with its internal standards projected in its external affairs: it subjects its actions to higher ranking principles – to 'the cosmopolitan law of the people' (Held 1995). In a globalizing world, the nation-states suffer particularly pronounced democratic deficits in that their citizens are affected by decisions taken outside their borders - beyond national control. This underpins the case for supranational *government*; which can be understood as a system of authoritative rule, but which in some opposition to a state-based government, only operates on a limited range of issue-areas. To re-establish democracy, the new level of government must itself meet with the requisite standards of democratic legitimacy. From the vantage-point of this model, such standards refer to the rights of citizens to participate in the deliberation and decision-making processes through which common action norms are established. The Union's democratic legitimacy can thus only be based on the democratic credentials of its decision-making procedures and on its protection of fundamental rights. Hence: the concept of deliberative democratic supranationalism. The post-national model is founded on the notion that the Union's democratic legitimacy is based on citizens who see themselves, not only as members of a territory, but also as citizens of a world order that confers upon them certain rights and duties. Its support resides in a set of legally entrenched fundamental rights and democratic procedures, which make for participation and deliberation conducive to solidarity, civilian affect and identification. Such a construction therefore also requires a democratic constitution. The critical question relates to whether the state form - the organized capacity to act – is required for effective and democratic government. This model, as will be highlighted in the last two chapters of the report, is the one that approximates the best to the manner in which European constitution making has actually unfolded, namely through constitutional synthesis. From the perspective of this model, the Laeken effort was an attempt to go beyond synthesis and initiate a constitutional moment which the process could however not sustain.

When we consider the EU up against these three models, it is clear that the EU has developed *beyond* the first, intergovernmental, model. It has a material constitution; offers citizens rights; and has the world's only directly elected parliament at the supranational level. At the same time, whilst it has moved beyond the first model, whatever movement there has been along the lines of the second, federal, model appears to be stymied. There may still be scope for movement along the third, the cosmopolitan, model but Lisbon has raised uncertainty even over that. We learn more about what type of entity the EU is when we consider more closely *how* the Union has developed as a political community. This requires attention to a further paradox, that of the *authorization* of the constitutional transformation in Europe.

The Authorization Paradox

This paradox refers to the peculiar situation we find the Union in: it has a material constitutional arrangement, which has not been subjected to popular sanction, but which nevertheless trumps national constitutional rules. *Who has authorized this?* Why should national courts comply with such an arrangement? There has been no European constitutional moment where this issue has been settled.

The authorization paradox refers to the gap between the actors' acknowledgement of the Union's preponderant role on the one hand, and their lack of remedial action on the other. It is a paradox because each Member State has veto power and has had numerous

occasions to use it, but has *not* used it to halt or to seriously reverse the integration process. At the same time, analysts have been quick to frame this as a near-illicit process. Consider Weiler's (1994; 1999) and Alter's (2001) powerful rendition of the integration saga: the Union's material constitution emanated from the activist stance of the European Court of Justice seconded by national courts. Weiler labels this a 'quiet revolution' – it could almost also be thought of as a judicial coup d'etat (which is also what Stone-Sweet (2007) suggests).

Behind this and other efforts lurks the perceived need to identify a distinctive pouvoir constituent which would have founded the European legal and political order. Such a power is said to have been exercised by national governments acting collectively (and thus the characterization of national governments as the masters of the Treaties, which does not account properly for the complexities of the amendment process), or by judges (either the European Court of Justice acting alone, or a combination of the European Court of Justice and national judges), which not only leaves many things unexplained (starting from why the judges did what they did, and how they could get away with it), but also requires suspending the basic constitutional principles of democratic and popular accountability. But that would be tantamount to claiming that constitutional transformation was brought about by unconstitutional means, which would not have been contested, but actually endorsed by political leaders, judges, civil servants and citizens, a pretty far-fetched and consequently implausible assumption. But if that does not explain constitutional transformation, how can we account for it? Can we have both a normatively sound and empirically credible explanation? Can a democratic constitution be authorized by anything but the exercise of the pouvoir constituent? Is this a genuine democratic dilemma, or is it a product of prevailing constitutional theory? In other words, can constitutional theory be modified or revised to handle this?

From this we see that in attempting to resolve the first apparent paradox, rather than a clear and sharp answer, we encounter two deeper, more profound paradoxes. Once we open the Pandora's Box of the European constitution, we run into a minefield of paradoxes and contradictions, which make up the European constitutional conundrum. This report underlines that this is as much a theoretical as an empirical issue, as much of the confusion stems from inadequate constitutional *theory*. Two such theories will be developed in the last three chapters. This chapter's focus is on comparability.

Canada – Confronting Similar Challenges?

How relevant is Canada's experience as a comparable case to that of the EU? Is the case of Canada best understood as one of constitutional *reform failure*? If so, the implication would be that the BNA Act 1867 (without the Charter) remains Canada's constitution? Or have the reforms taken root? If so, what does that suggest for the relevance of comparing Canada to the EU?

In line with the diagnostic comparative approach set out in the introduction, we need to be able to demonstrate that Canada faces basically the same challenges that the EU does for this comparative approach to work. Then, the key issue is to establish whether Canada's main challenge is one of fashioning a democratic constitution for a multinational system. To clarify how parallel Canada's situation is to the European one, I will start by considering Canada in light of the three alleged EU-paradoxes outlined above.

A Canadian Constitutional Paradox?

The EU constitution is forged in a setting of already existing constitutional entities. The template for the European constitution is the common constitutional traditions of the member states; in that sense there is a democratically derivative component to the European constitution – amplified in fact by the central rol of the U.S. in developing the German Constitution. Canada's initial constitution was explicitly derivative. The *British North America Act, 1867* was derived from the United Kingdom (UK) and depended on

UK sanction well into the twentieth century. What is also important to underline is that there was a democratic component also to this[8]:

> It is now evident that, for most of post-Confederation history, parliamentary supremacy and the British approach to the protection of rights without a Charter were, to a considerable extent, sustained by the imperial connection. Much of the support for parliamentary supremacy was derivative.
>
> (Cairns 1991:116)

Canada's constitutional paradox can thus be formulated in the following manner: Canada has one of the world's oldest democratic constitutions, yet it was only in the early 1980s that Canada sought to found itself as a constitutional people (Russell 1993). The UK-bequeathed constitution (BNA Act 1867) was based on the principle of parliamentary sovereignty. But the constitutional arrangement and how it was operated and amended in Canada contained several important democratic defects. As the quote from Cairns notes, there was no Charter or Bill of Rights that ensured individual autonomy and that provided symbolic and substantive reassurance to the citizens that the constitution was theirs. Instead, it has been described as:

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

It has also been referred to as the 'Governments' Constitution': in its practical operation it was an arrangement that highlighted the governing concerns of governments, at the behest of a wide range of citizens' concerns. The point is that the system of two-level parliamentary majoritarianism had been significantly modified by the gradual emergence of an extensive system of intergovernmental relations wherein each governmental actor (in the absence of agreement on an amendment procedure) had *de facto* veto. This system is often referred to as executive federalism.[9] It has greatly weakened the vertical nature of the Canadian federal parliamentary system, through executive officials at both levels sidelining all parliaments. This system of 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.[10] This pertained in particular to Aboriginals, but women's issues and the concerns of ethnic and racial minorities were also sidelined. Such *de facto* exclusion of the concerns of large portions of the population was a central component of this system of government-run constitutional elitism.

In Canada, this exclusionary bias has also been labeled as "constitutional avoidance" (Cairns 1995:103). Prior to the late 1970s, the governments' operation of the constitution was marked by a:

> [c]onscious and habitual strategy of avoidance by which many of the "big" questions were put aside or the response interminably delayed until some

[8] Alain Noel notes that "Trudeau presented as a fundamental problem the lack of a strong democratic tradition in Canada."(Noel 2006:427, with reference to Trudeal 1968:103).

[9] Executive federalism is defined as "the relations between elected and appointed officials of the two orders of government in federal-provincial interactions and among the executives of the provinces in inter-provincial interactions" (Smiley 1980: 91).

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

> acceptable state of ripeness had blossomed. Although all constitutions are living, and hence always in transition, the Canadian constitution, and therefore the Canadian people, were in transition in a more fundamental sense. Basic constitutional issues were repeatedly shelved.
>
> (Cairns 1995:103)

In the pre-Charter period Canada practiced ongoing and peaceful accommodation of constitutionally salient difference and diversity within the framework of executive-run intergovernmental relations. Here the passing of time was favored over the pursuit of principle. These systems of elite accommodation were premised on largely "silent" publics. They operated in both the EU and Canada, evocatively labeled a "permissive consensus" in the EU and as "deference" in Canada.[11]

Thus, on the first, the so-called constitutional paradox, we saw that for Europe the constitutional paradox dissolved once we disentangled the notion of constitution. The main issue for the EU was to democratize the constitutional arrangement already in place. It was also this challenge that the Laeken constitutional reform effort sought to address: to convert the EU's material constitution into a formal and a democratic one.

Pre-patriation Canada, we have seen, was faced with a similar challenge. It contained a constitutional arrangement that had never been subjected to direct popular sanction. This is far from unique, but in Canada, as we shall see, this problem was kept alive because of disagreement over community and polity (re: the integration paradox), as well as over the question of authorization. A further parallel to the EU was the governments' operating the constitution, through a system of intergovernmental relations.

Further, Canada has also – far more explicitly and intensely than the EU - seen a constitutional transition: from what posed as a 'Governments' Constitution' in the pre-patriation epoch to a 'Citizens' Constitution' after the patriation and the Constitution Act 1982. But here is also the claim to constitutional reform *failure:* this transition was incomplete: the patriated constitution has never been signed by the province of Quebec. Thus, one major constitutional player has refused to sign on to the new constitution. There is therefore a profound disagreement over the constitutional status of the patriated Constitution Act in Canada. This also relates back to fundamental disagreement over the type of community that Canada is and should be.

An Integration Paradox?

Canada is of course set up as a federation, but there has never been agreement on the type of community or polity. In fact, it could be argued that all three RECON models have to various degrees figured in the Canadian debate, and in constitutional change proposals, although the two first have been the most explicitly articulated. The second RECON (federal), model has of course dominated the Canadian political landscape. But there are distinctly different federal positions: with symmetrical federalism on the one hand, asymmetrical federalism as some form of intermediary position, and multinational federalism at the other side. Thus, federalism has been debated in a manner that is quite instructive to the EU, namely as a way of reconciling federalism with multiple nation-building and sustaining projects, that is, through multinational federation.

But the first RECON model has also been in play: Quebec nationalists, through the notion of sovereignty-association, may be said to have opted for the first model. They have sought an institutional arrangement that ties the rest-of-Canada (ROC) with an independent Quebec. The ensuing joint Canada – Quebec arrangement would be a

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

democratically derivative system; hence resemble RECON model I. Quebec sovereignists have then also earlier propounded a European Community model for a future Quebec-Canada relationship.

What is also important to note is that this issue has if anything been kept alive by the fact that there has *never* been agreement in Canada on a constitutional amendment procedure. This is a matter of *constitutive constitutional politics*, and refers to "existential questions that go to the very identity, even existence, of the political community as a multinational political entity" (Choudhry 2008:168). Quebec has constantly sought veto over constitutional change but rather than agreeing on a constitutional amendment procedure, the disagreement has meant that all governments have been considered to have de facto veto on constitutional change.[12] Profound disagreement over the polity's basic communal identity is another parallel that Canada shares with the EU.

It is also important to note that Canada echoes some of the EU's dynamism: As noted above, the EU has gone through several rounds of re-constitutionalization through incorporation of new members (states). Canada has gone through a similar historical process of incorporation of provinces (with Newfoundland the last to formally join in 1949). What is less obvious is that this pattern *still exists*: Aboriginals or First Nations Peoples have challenged the legitimacy of a fraternal arrangement that privileged the settlers with demands for greater autonomy. The Constitution Act 1982 then also gave particular constitutional recognition to Aboriginals and Inuits. The provisions for aboriginal self-government show that the constitutional inclusion of these hitherto disenfranchised/marginalized groups is also a matter of including *collectives* (consider for instance the Nunavut Territory and Government that was formed on April 1, 1999). Further, Canada's ensuing complex communal configuration also shapes inclusion of new citizens through large-scale immigration. They are incorporated into an entity with an official multiculturalism policy.

These issues have not rendered the question of authorization any less pressing in the Canadian case.

An Authorization Paradox?

Patriation of the Constitution in 1982 was intended to address the problem with colonial roots, namely that of constitutional authorization: Who in Canada had authorized the structure in place? This was as we have seen an issue that had been left unresolved by the governments who operated the constitution according to their needs and with very limited input from their respective parliaments (since first ministers through the first-past-the-post electoral system could generally count on strong parliamentary majorities). Patriation of the Constitution was motivated by a desire to address both the issue of community and that of democratic authorization. The Charter was then also considered as a central political vehicle for entrenching individual rights in the Constitution, and for fostering national unity. Politically speaking, this was also an attempt to weaken the executive style governmental imprint that had marked the Constitution in the pre-Charter era; a vehicle to inject a more participant constitutional ethos into the Constitution; and a means to found the constitution on popular sovereignty. The obvious political goal was for these changes to weaken the ability of the Government of Quebec to foster a French language-based Quebec nationalism by creating a common Canadian national identity.

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

The ensuing Charter Revolution was an intrinsic part of a long process of constitutional debate that has been labeled a period of "mega constitutional politics,"(Russell, 1993:74ff) to signify that this was a broad-based discussion of constitutional essentials, combined with large-scale efforts at constitutional change. The transition that the term Charter Revolution suggests on the one hand brought about an activist Court bent on spelling out citizens' rights (including group-based rights); and a concomitant democratic challenge to the governments' monopoly on constitutional change. Patriation and the Charter Revolution thus brought with them a significant – democratic - change in the manner of conducting constitution making (Russell 1993; Cairns 1995; Noel 2006; Fossum 2007). But and here is another parallel with the EU, the democratizing changes were undertaken *within* the broader framework of executive-run and intergovernmental constitutional making; this was modified but never abolished.

Handling the Challenge

The main challenge facing both the EU and Canada, we have seen, has been to fashion a democratic constitution for a complex *multinational* entity. In both cases this boils down to a question of democratic authorization of the constitutional arrangement in place. The EU's particular manner of forging such a constitutional construct, captured through the notion of constitutional synthesis, has rendered clear that we can rely on the same standards to assess the EU's and Canada's constitutional arrangements. Both entities have come up with constitutional innovations to address the authorization challenge. The challenge can be said to be one of fashioning a democratic constitutional order whilst simultaneously accommodating a vision of the polity as made up of a multitude of constitutional demoi.

Constitution-making in both cases has been carried out by the heads of state and government in systems of intergovernmental diplomacy. The efforts to open up and to democratize these systems of closed and executive-run constitution making have therefore also shown important similarities. In Canada this was first evident at the time of patriation of the Constitution in 1982; in the EU it found its clearest expression in the work of the European Convention (2003-4). In both cases, these efforts failed to pass. The process was thereafter closed: the Canadian PM and provincial premiers negotiated the Meech Lake Accord in 1987 and operating in a similar manner the European heads of state and government negotiated the Lisbon Treaty, in closed quarters. The Canadian (Meech Lake) and the first round of forging the European Lisbon Treaty failed. The Canadians thereafter re-opened the process with the Charlottetown Accord 1992, which was also rejected in two popular referenda (one in Quebec, the other in the rest-of-Canada). In the EU the Lisbon Treaty was ratified after a *second* Irish referendum. But given that Lisbon was emphatically labeled as a treaty and not as a constitution, it is fair to say that the EU leaders have left the constitutional-democratic question in abeyance.

In both cases, we see a pattern of closed executive-led process, which fails to find agreement. There is then an opening and democratization of the process, which also fails; thereafter the process is again closed, but the outcome is either rejected or significantly downscaled in constitutional symbolic terms. In both cases, the efforts to open the process took place *within* a framework of executive-led constitution making. These processes were complex and unwieldy and actually *multi-tracked*; the processes were set up to harmonize the needs and requirements of *multiple constitutional demoi*. These processes show that the EU and Canada, both of which have highly complex systems of rule can hardly rely on a stable agreed-upon constitutional framework; instead, their viability hinges on a set of procedures that ensure ongoing accommodation of difference/diversity.

Conclusion

This chapter has argued that the EU and Canada share a major constitutional challenge, namely that of fashioning democratic constitutions for complex multinational entities. It has further shown that we can discuss this with reference to and by means of the same state-based constitutional vocabulary, norms, and principles. This was made clear through reference to the theory of constitutional synthesis, which posits that the European constitutional construct draws on and is ultimately legitimated by means of the constitutional traditions common to the member states. In Chapter Nine this theory will be further elaborated and in Chapter Ten its applicability to Canada will also be made clear.

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Chapter Three

Canada's Experience with Constitutional Reform
A Comparative Overview

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Introduction

Canada's and the European Union's experience with constitutional reform appear to have striking similarities. Both are political communities marked by deep internal national divisions. Both have struggled over long periods of time to achieve reforms of their constitutional structures that accommodate their internal divisions. Both have become increasingly democratic in their processes of constitutional change. And both have failed to achieve the grand constitutional resolution of their differences to which their leaders aspire. Certainly there are important differences in the origins and structure of these two multinational political communities and in the ways in which concepts such as nation, constitution and federation enter into their political discourse. But despite these interesting and significant contextual differences, the similarities in Canada's and the EU's experience with efforts at major constitutional reform are striking and instructive.

Origins of Canada and the EU

Canada as a constitutional federation began as a British colony and evolved into an independent nation state. Through this evolution from a British colony to a self-governing nation Canada kept its original constitution. But when it came to having their constitution fit their country's status as an independent state, Canadians encountered a problem rooted in their colonial foundations.

When their country was founded in 1967, Canadians did not act as a sovereign people. In both constitutional philosophy and law, the United Kingdom Parliament was Canada's sovereign authority. Canada's Constitution was ratified by a vote of the UK Parliament and, up until 1982, could only be amended by that Parliament. The negotiation and drafting of Canada's constitution was carried out by a small group of white, propertied non-Aboriginal men. A political elite made up of federal and provincial political leaders continued to control the Constitution's development right up to and through the major efforts at constitutional reform that Canada attempted in the 1960s, -70s and -80s.

In the 1990s Canada tried to break away from this process of elite accommodation and adopt a more democratic constitutional process. Many of the country's leaders and most of its politically active citizens had come to believe philosophically in democratic constitutionalism. But when they tried to honour the ideal of popular sovereignty their efforts failed. They found that the Canadian people were too divided in their constitutional aspirations to agree on fundamental changes. In effect, they found that Canadians could not act positively as a sovereign people. Hence the negative answer to the subtitle of my book, *Constitutional Odyssey: Can Canadians Become A Sovereign People*?

The European Union began to take shape when the leaders of a group of sovereign nation states decided that it was in the interests of their countries to form an economic union. Soon after forming the European Community these leaders realized that for it to be significant and effective their economic union must also be a political union. At first, the EU leaders based their union on international treaties.But then many of its leaders (and

intellectuals) aspired to the union being based on a constitution made in a way that satisfies the normative requirements of democratic constitutionalism. Then they found, as have the Canadians, and basically for the same reason, that they could not pull it off because the Europeans did not constitute a sovereign people – a demos.

In these different but converging narratives there are important differences in the key elements of the story – democratic constitutionalism and the democratic deficit, multinational political communities, the acceptance and legitimacy of constitutionalism and federalism.

Democratic Constitutionalism and the Democratic Deficit

In Canada from the beginning there has been a lively union-wide, shared political space – i.e. the Canadian political arena, as well of course as provincial political arenas – and lots of interaction between them. So in Canada there is not the same democratic deficit as Europe continues to experience with the absence of a comparable European political space

But despite having a popular, union-wide political forum, when it comes to carrying out major constitutional reform in a satisfactorily democratic manner, Canada encounters the same difficulty as Europe. We can secure elite agreements through elite accommodation, but cannot get the demos to agree. At the end of this essay, I will say more about why we – and the EU – cannot achieve a popular constitutional accord. But here I want to underline the lesson which I think Europeans should learn from Canada's experience. That lesson is that opening up the popular political space of the union increases political conflict and makes it more difficult rather than easier to reach a constitutional accord. This point is made well by Guilio Itzcovich in his contribution to this symposium when he points out that reducing the EU's democratic deficit is unlikely to help with its legitimacy deficit.

Different Forms of Multinationalism

As Ben Crum makes clear in his chapter, Canada and the EU are multinational societies in very different senses. The nations whose continuing existence within Canada make Canada multinational – the *Canadiens* or Quebecois, and the Aboriginal peoples whose homelands are in Canada – have not acquired the status of nation-states. Whereas the nations that make the EU multinational are the nation-states that are the constituent parts of the EU. Constitutionally in Canada the provinces are the constituent parts of the Canadian federal union.

Quebec may be recognized for symbolic and political reasons as a "nation", and though the Province of Quebec calls its parliament the National Assembly, Quebec has not achieved the status of a European nation-state, or of a national homeland province equal in status to a Canada composed of all the other provinces. Most of Quebec's Francophone population (83 percent) would like to have one or other of those forms of national recognition. Many Aboriginal peoples have gained recognition as nations within Canada and seek large amounts of self-government, in some cases equal to that of a province, but – with a few exceptions – do not aspire to becoming independent nation-states. Some, like the Haudenoswanee Six-Nations consider that they are independent nations. Many Canadians, probably the majority, regard Canada as their nation and view Canada as a nation-state

All of which goes to show that in Canada "nation" is a contested idea at the very heart of the differences that prevent Canadians from functioning as a single sovereign people. Also as Crum points out, when efforts at constitutional reform in Canada fail, the default condition is the continuation of Canada as a federal state with the danger that Quebec might leave the Canadian federal union. Whereas when constitutional reform fails in the

EU, the default condition s the continuation of its member nation-states and the possible break-up of the EU.

Constitution and Federalism

Since Canada's founding in 1867, the idea that it is a federal union based on a written Constitution has not been contested. Initially, federalism was not a popular idea with the leaders of the English-Canadian majority who preferred a unitary state. But very quickly the general idea of the country operating as a federation, with a division of sovereign law-making powers between the federal government and the provinces, was accepted by all - albeit with much debate that continues to the present day over the balance of power within the federation.

French Canadians (and not just in Quebec) talked about Confederation being a "treaty" or "compact" between two founding peoples. But they immediately accepted Canada's written Constitution, the *British North America Act* (renamed in 1982, the *Constitution Act, 1867*) as embodying that compact, insisting that no important changes could be made to it without the consent of Quebec.

From the earliest arrival of Europeans in North America, Indian nations have tried to regulate their relationships with the European Empires and their successor settler states through treaties. In Canada that process continued up to the early 1920s. A modern-treaty making process with Aboriginal peoples was re-instituted in the 1970s. The process of regulating relations with Indigenous peoples by making agreements on land and self-government and of renewing historic treaties continues to this day. This process is under-girded by the recognition of treaties with Aboriginal peoples in Canada's constitution. There is no desire among Canada's Aboriginal peoples to resume the effort that was part of the 1992 Charlottetown Accord to secure a formal detailed constitutional definition of the place of Aboriginal peoples in Canada. Instead, each Aboriginal society is making its own land and self-government arrangements with the federal, provincial or territorial governments. Through the treaties and agreements Aboriginal peoples are making one by one with federal and provincial governments their governments are – piecemeal - becoming a third order of government in the Canadian federation

In contrast to Canada's constitutional federation, basing the union of European states on a constitution rather than on treaties and considering that union to be a federation are highly contested ideas in the European Union**.** There is an advantage here for Canada because once federalism is accepted so is divided sovereignty. And once sovereignty is divided it really loses its sting as a symbolic barrier to constitutional change

Canada's Mega Constitutional Politics

Canada's long season of mega constitutional politics was driven by four different sources of constitutional discontent. First came Quebec's nationalist aspirations. By the 1960s, the Quebecois, transformed from an agricultural, conservative Catholic society to an industrial, urban, secular society, were being mobilized by nationalist leaders to become *maitres chez nous.* Quebec nationalists now pressed for a restructuring of Canadian federalism that would recognize Quebec as the homeland of a founding people. Quebec's provincial government made the achievement of this nation-building project a condition of patriating Canada's Constitution so that it could be amended in Canada rather than in the UK Parliament.

The response to Quebec nationalism was led by Pierre Elliot Trudeau, a francophone Quebecer whose vision of Canada was for English and French speaking Canadians to base their primary civic identity on sharing citizenship in a continental Canadian nation. When Trudeau became Canada's Prime Minister he initiated a process of constitutional reform that focused on strengthening Canada as a nation-state. His priorities were constitutional patriation (i.e. transferring the power of amending the constitution from the UK to

Canada), a constitutional charter of rights and freedoms embodying the common values of Canadians, and the strengthening of national institutions, in particular the Senate and the Supreme Court.

Trudeau's agenda of constitutional reform as well as Quebec's were challenged by the other Canadian provinces. These provinces did not support the centralizing thrust of Trudeau's proposals and were opposed to Quebec acquiring a special status in the Canadian federation. Their mantra was equality of the provinces.

The opening up of Canada's constitutional reform agenda provided Aboriginal peoples, who had been totally excluded from the constitutional founding of Canada, to gain some leverage for consideration of their constitutional concerns. Their leaders began to press for recognition of their fundamental rights in Canada's constitution.

Trudeau achieved a large part of his constitutional reform agenda in 1982 when the UK Parliament passed the *Canada Act* giving up its authority over the Constitution of Canada, and the *Constitution Act 1982* added an all-Canadian amending formula and the Canadian Charter of Rights and Freedoms to Canada's Constitution. The *Constitution Act 1982* also added a section to the Constitution recognizing the existing aboriginal and treaty rights of the aboriginal peoples of Canada". But Quebec's constitutional aspirations which had initiated the era of constitutional reform were not in any way responded to, nor were the constitutional reform interests of other provinces, especially the western provinces. The constitutional changes made in 1982 were accomplished through the old process of elite accommodation. A more democratic process of constitutional change would have advertised deep cleavages within the Canadian body politic.

The last Canada-wide effort to accomplish major constitutional change was the Charlottetown Accord, a package of constitutional reforms designed to meet all the sources of constitutional discontent in the country, negotiated and agreed to by the federal government, all of the provincial governments (including Quebec's) and the leaders of Canada's Aboriginal organizations. For the first time, in Canadian history proposals to amend the Constitutional were submitted to the people of Canada in a popular referendum. On 26 October 1992, the Charlottetown Accord was rejected by a majority of 54 percent. Three years later, the government of Quebec submitted a referendum proposal for an independent Quebec to the people of Quebec. That proposal was rejected by a narrow majority of just over 50 percent of the voters.

Since the failure of the Charlottetown Accord and the Quebec referendum, Canadians have had little appetite for constitutional politics.

For some years now constitutional reformers in the European Union, as in Canada, have been engaged in what I call a "big bang" project of constitutional reform that aims at an improved constitution for the union - improved in being both a democratic Constitution rather than a series of international treaties and improved institutionally for the governance of a much-enlarged union. As in Canada this effort at major constitutional restructuring by popular democratic means so far has failed, and I think for much the same reasons that this kind of big bang constitutional reform failed in Canada.

Common Causes of Failure

Neither Canada nor the European Union has a demos that can act positively as a sovereign people. Among the citizens of each of these multinational political communities, differences of civic allegiance and identity and of constitutional justice are just too deep to yield a popular consensus on constitutional restructuring. Indeed, the very attempt to achieve such a consensus is apt to magnify rather than narrow the differences. Although EU leaders have not attempted a single union-wide referendum on constitutional change, the "no's" that did result from the French, Dutch and Irish

referendums on the Lisbon treaty indicate that the Europeans are as unable as the Canadians to act positively as a sovereign people.

Commentaries on Canadian and European constitutional politics tend to underplay or even totally overlook the importance of television as a crucial factor in explaining the inability of these deeply divided polities to give popular support to constitutional reform proposals. Proponents of deliberative democracy ignore the qualities of the media through which people form their ideas on constitutional issues. The people in these large multilingual communities engage in constitutional politics primarily through television. TV is a horrible vehicle for winning popular support for compromise and compromise is an inescapable feature of constitutional solutions drafted by political elites for deeply divided polities.

Television is made for extremists. The masses get their impressions of the implications of constitutional proposals though the short, sharp, simplistic slogan-like news flashes that are the standard fare of television news. The producers of these programs which are designed to entertain as much as to inform prefer to present a sharp-edged debate between someone who favours the proposals and someone who is opposed. The nay-sayers get equal time with supporters of the proposals and can easily cater to local point of view that has been most seriously compromised in the negotiations that produced the reform proposals. Carefully reasoned analyses of the pros and cons of constitutional proposals are presented in print media that have only small, well-educated, readerships. In this contest for the public will opponents of constitutional proposals are bound to prevail in enough sections of the political community to sink the accord. I have argued elsewhere that democratic people through the media of mass communication will only support constitutional compromise when it is seen as the only alternative to political disaster such as civil war or breakup. I doubt that the internet will change the situation.

Life is OK without Major Constitutional Change

A majority of Canadians and EU citizens have no strong regrets about suspension of large constitutional projects politics. Today Canadians and Europeans today are mostly concerned with practical economic problems. It would be difficult to persuade them that their economic worries could be taken care of by some marvelous package of constitutional reforms.

Abandoning efforts aimed at big bang, mega-constitutional change does not mean constitutional stagnation. It means relying on the normal processes of constitutional evolution and adaptation. These normal processes are incremental, and let's admit it, elitist. Nevertheless they often result in better governance. They include judicial decisions, changes in governmental practice, intergovernmental agreements and ordinary legislation regulating governmental activities. Since the suspension of mega constitutional politics in the mid-1990s, a considerable amount of constitutional development has taken place in Canada through these normal processes of constitutional change. These developments include major judicial decisions on such matters as a province's right to secede from the federation and regulating the extent to which government in combating terrorism can abridge rights to due process of law, formal treaties and informal agreements with many Aboriginal peoples, federal-provincial agreements removing internal trade barriers and legislation establishing fixed election dates for the federal parliament and many of the provincial legislatures.

For the European Union, the Lisbon Treaty would seem to provide a good basis for moving forward "step by step" with the strengthening of the community's institutions, making them both more efficient and more democratically accountable. The fact that these changes are made without direct approval by the European people may trouble democratic fundamentalists and will be used by political leaders who wish to weaken the EU or pull their country out of the EU. But I doubt that the lack of a direct popular

mandate for the changes made in the governance of the EU will do significant damage to it.

Should Constitutional Democrats Keep Trying?

When constitutional democrats in Canada ask whether we Canadians should continue to strive for a popular accord on our constitution my answer is an unequivocal “No”. I believe that so long as the majority in Quebec says “No” to the idea that their province should become an independent state, efforts to revive the mega constitutional game in Canada will do more harm than good. It would be presumptuous of me to answer this question for the European Union – though if asked I think you can guess how I would answer.

Chapter Four

The Complexity of the Word 'No' An Appraisal of the EU's Procedures for Treaty Change

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Introduction

Most political practices sooner or later produce their own *repertoire* of jokes. The European Union's agonised attempts to grapple with its own institutional design are no exception. Following the French referendum in May 2005 the Eurosceptic press asked 'What is it about the word "no" that supporters of a Constitution fail to understand?' When the Member States withdrew the Constitution, substituted an almost identical text in the form of the Lisbon Treaty, and then preceded on the assumption that this justified ratification, wherever legally possible, by national parliaments rather than referendum, the Eurosceptic press quipped that 'Europe's elites' had been pushed into trying democracy in their bid to ratify the Constitutional Treaty, had decided they didn't like it, and had responded by 'abolishing the people' for the purposes of ratifying Lisbon. National parliaments, acting as the poodles of their own governments, would nod Lisbon through, producing the desired result that the people had withheld.

Joking aside, this chapter argues that there has been significant innovation and improvement in the EU's arrangements for deciding questions of institutional design since the Laeken declaration (December 2001). Yet one glaring deficiency remains: namely, the absence of a clear, consistent, principled and defensible means of dealing with rejected Treaty changes.

The chapter proceeds as follows. It begins by proposing standards for evaluating decisions on the institutional design of the Union (Section 1). It evaluates developments since 2001 against those standards (Sections 2 and 3). It then makes its argument that remaining deficiencies include arrangements for responding to rejected Treaty changes (Section 4). *Pace* the joke with which the chapter opened, simple words like 'no' can have complex meanings which need to be properly disentangled if the Union is to develop a means that is widely acknowledged as fair to all points of view of dealing with rejected Treaty changes

Standards

Of course evolution, adaptation and *bricolage* limit how far it makes sense to describe institutions as 'chosen' or 'designed'. Yet the Union comes closer than many to being an intentionally designed polity. Indeed its procedures for making choices of institutional design have been employed on average every four years over the last twenty-five years (the Single Act 1986; the Treaty on European Union 1992; the Amsterdam Treaty 1997; the Nice Treaty 2001; the Constitutional Treaty 2005 and the Lisbon Treaty 2007). In the case of the EU, then, we need not, as contractarian political philosophers do, limit ourselves to the 'thought experiment' of *imagining* whether citizens of known political values coming together to choose a particular set of institutions. We can *observe* and evaluate the actual use of procedures form making institutional choices.

But why is it so important to be able to justify procedures for making choices of institutional design? Perhaps the key point concerns the non-neutrality of institutions. Once chosen, institutions mobilise biases that are hard to reverse. They lock actors into

forms of path dependence by encouraging citizens and society to sink investments in particular capabilities or patterns of organisation, further development of which offers increasing returns, deviation from which incurs exit costs (Pierson 2000). Indeed, institutions typically have circular, self-perpetuating characteristics. They shape identities by which they and their policy addressees bond together as a group; norms by which behaviour and performance, including their own, are judged (March and Olsen 1995); causal beliefs about economy and society that guide demands for collective action (Kahnemann et al. 1982); and feedback loops by which citizens can respond to past experiences by feeding new inputs into the political system (Easton 1957). Where, indeed, there are several dimensions of political values, choice and conflict, the key determinant of outcomes is not the preferences of actors but the institutions or rules themselves by which those preferences are arbitrated and combined (McKelvey 1976).

If then, democracy, is to mean a self-governing and self-legislating people, it must for all the reasons set out in the preceding paragraphs, allows publics acting as equals to control decisions *about* institutions and not just decisions *within* institutions. As James Bohman puts it, 'democracy is that set of institutions by which individuals are empowered as free and equal citizens to form and change the conditions of their common life together, *including democracy itself*' (2007:. 66).

Of course, the indirect nature of Union rule - the fact that it usually only issues 'commands' where they can be safely wrapped in the comfort blanket of national law and national enforcement structures – may well reduce the EU's need for direct legitimation (Barker 2003). Yet, to set against this, are contrary factors which make it especially important that the Union's institutional design should be the product of justified and agreed procedures. First, the very fact that the Union, for whatever reasons, keeps returning to the question of its own institutional design means that those structures are conspicuously the outcome of contemporaneous will formation: of actions by which some actors exercise power 'here and now' over others by choosing institutional solutions which are systematically more likely to favour some allocations of political values over others. Second, as long as there are good reasons for the Union to operate as a complex consensus system in which decisions require a high level of agreement of many actors drawn from multiple levels – many of whom must of the very nature of such an arrangement be authorised and accountable in the regional and national, and not in the European, arena - there will be limits to how far the EU can ever have a single political leadership which can be chosen or removed as a whole (Lord 2004). The harder it is to give – and withdraw – consent from particular political leaderships, and the harder it is to institutionalise collective responsibility not just for the decisions of particular institutions but for those of political system taken as a whole, the more important it is that publics should have opportunities to consent to choices of institutional design which govern the rules under which those political leaders take the decisions that affect individual lives.

But what standards should we use to evaluate choices of institutional design? I suggest the following for the purposes of this chapter.

1. *Public control*. Those who exercise powers of institutions should not be able to control or manipulate procedures by which they are themselves empowered (Elster 1998: 117). To this we might add Locke's requirement that once institutions have been established the people should remain in ultimate control over subsequent decisions of institutional design: as he puts it, those who are 'delegated power from the people should not pass them over to others' (1924 [1690]: 189).

2. *Political equality*. All prospective members of a political system should be equals at the point of consent-giving. Of course this is a fiendishly difficult test to the extent it begs the question equality between whom? Equality between states or between individuals: equality between the individual national political communities of the Union or between all individual citizens of the Union? Many would probably feel uncomfortable with an

unqualified assertion of either of the following positions. First, that only the equal rights of each Member State to reject a Treaty change should count regardless of how many and populous the other Member States calling for change, and regardless of the consequences to those other Member States of insisting that they should continue to get by with the Treaties unamended. Second that only equality between all individual citizens of the Union should count, even though the necessary implication of this principle would be that Member States representing 50 per cent of the population would be able to decide fundamental changes to the institutional design of the Union, regardless of consequences to out-voted Member States (N.b. This is the necessary implication of individual equality since, as Fritz Scharpf puts it, simple majority voting is the only decision rule which treats all individual preferences 'symmetrically' (2006: 848)).

Any person refusing to take either of the foregoing positions would just as necessarily be committed to Jean-Marc Ferry's position that the Union has to be understood as having a 'double normative reference' (2000) in which both its individual Member States and its individual citizens are entitled to some equality of consideration in the definition of its procedures. I will return at the end of the chapter to how this puzzle might be better addressed than at present in the case of arrangements for deciding Treaty change.

3. Right to justification. Much has been said about this principle and how it follows directly from any Kantian understanding of others with whom we find ourselves living together and co-ordinating our actions as 'ends and not means' (Forst 2007). But I would like to add a twist which relates the problem more directly to the circumstances of European integration. Several commentators have noted a normative shortcoming in the construction of the territorially bounded representative democracies: they imply responsibility only to those who have rights to participate in authorising and sanctioning representatives and not to all those who are affected by the actions of the polity in question (Grant and Keohane 2005). In his work on the European Union as a means of dealing with conflicts of laws Christian Joerges (2006; and id. with Neyer 1997) has argued that the justificatory practices of the Union function partly as a means of dealing with this problem: even such arcane processes as comitology provide occasions for national Governments to justify their preferences and policies to one another, taking into account external effects for other Member States. But consider how this argument might be given even greater force if combined with Fritz Scharpf's (2006) claim that the Union as a 'compulsory negotiating system'. By this Scharpf means there are a whole series of values of great importance to their citizens they can only achieve legally and practically through the Union (ibid.). As a result of previous Treaty changes, Member State have partly multilateralised their capacity to provide essential public goods: forms of market regulation with consequences for welfare states, monetary stability, some forms of internal and external security and so on. As long, though, as preferences and technologies change – as long as actors think and value for themselves and 'means-ends' relationships change – Treaty commitments entered into in good faith may become sub-optimal if not downright dysfunctional for a particular Member State. Yet it will be unable to change such obligations without the consent of all the other Members. If, then, there is to be any connection between decision-rules, the consequences for others of individual choices made under those rules, and justifications actors owe one another, it seems reasonable to regard Member States as owing one another justifications for insisting on the *status quo,* and not just for seeking to change the Treaties. It needs to be emphasized that this is not an argument against continued unanimity in Treaty change: it is just an explication of what rights and duties of justification would seem to be implied by such a rule.

Developments since 2001
1. Framing Proposals for Treaty Change

Prior to 2001 proposals for Treaty change were agreed by the heads of government meeting in Intergovernmental Conferences. IGCs were variously preceded by 'sherpa'

groups (the reflection group in the case of the Amsterdam Treaty) by expert committees (the Delors Committee of Central Bankers in the case of the Monetary Union clauses of the TEU) and by ordinary meetings of the Council of Ministers. IGCs were variously followed by votes of national parliaments or referendums to ratify the Treaty changes.

The criticisms of these arrangements that accumulated by the end of the 1990s are too many and varied to be rehearsed here. In terms of the above standards, the following were prominent amongst them. First procedures for assigning powers to the Union were criticised as opaque to the point at which they could not be observed let alone controlled by publics or their representatives. Second access to the agenda was unequal. Only those with access to the negotiating positions of Government could put proposals for the institutional design of the Union on to the political agenda. Other actors were confined at best to participating in ratification procedures that would give them 'take it or leave it' choices over complex menus of changes they had themselves had no chance of shaping. Third there was little public justification of Union Treaty changes. Even where some attempts were made to justify the final package, the closed nature of the process meant that it was a long way from, say, John Stuart Mill's understanding of adequate public justification: all points of view should present themselves 'in the light of day' where they can be tested in 'adverse controversy' such that those whose opinions are rejected can 'feel satisfied that [their opinion has been] heard, and set aside not by a mere act of will, but for what are thought to be superior reasons' (Mill 1972 [1861]: 239-40).

Cumulatively these shortcomings were thought to give Governments undue control over the transfer of powers to Union institutions many of which they would end up by exercising themselves through the Council of Ministers. Indeed, in the view of some, they allowed Governments to pursue integration by stealth, exploiting path-dependent lock-ins in the expectation that integration would be hard to reverse once citizens woke up to the European political system that was being constructed behind their backs (Majone 2005).

So how far did the principal innovation of recent years - the Conventions appointed by the Cologne European Council (1999) to draft an EU Charter of Fundamental and the Convention on the future of Europe appointed by the Laeken European Council (2001) – meet these criticisms?

The Conventions *prima facie* widened access to both the agenda and deliberation of institutional change. Representatives elected to national parliaments were for the first time directly included in face-to-face discussions of the institutional design of the Union. Since each national parliament was allocated two representatives, who in turn had two alternates, national parties of opposition were included in a process previously monopolised by national parties of government. Indeed, in many cases, the representatives from national parliaments attempted to speak to positions developed by their European Affairs Committees (EACs) on which all parties are represented. Using data from written contributions and amendments to analyse how active were the different categories of representative in the two Conventions, Andreas Maurer has shown that national governments, national parliamentarians and Members of the European Parliament (MEPs) were equally active in the Charter Convetion. By the time, however, of the Convention on the Future of Europe, written contributions from national parliaments matched those of the EP and national governments put together (Maurer 2003). This would suggest that national parliaments responded well to the opportunity to shape the design of institutions at the Union level. To the extent the European Council refrained from amending the Convention's text – a point we will discuss in a moment – active participation by national parliaments in the Convention would make decisions over Treaty change less of a 'take it or leave it choice'. The text national parliaments would later be called upon to ratify would approximate that which they had themselves had an opportunity to shape *via* the Convention.

In comparison, say, with the reflection group which prepared the Amsterdam Treaty, the Conventions have also given greater weight to the European Parliament. Above all, MEPs were included as full members and not just observers. In all, the Conventions diluted the control of national governments over the agenda of institutional change by shrinking their direct representation to between 15 and 25 per cent of the total, rising at most to 50 per cent if national parliamentarians from government parties are also included, and delegates from candidate countries disregarded. The decision of both Conventions to proceed by consensus also precluded monopoly control of any one group, such as national governments, on the agenda of institutional change. Although, as we will see, the meaning of consensus was imprecise in both cases, it would have been hard to claim consensus in the face of widespread disagreement from any one of the main constituencies, namely the national parliamentarians, the MEPs or national governments themselves.

In addition to widening access to the agenda, both Conventions were clearly intended to offer improved justification for institutional change by demonstrating that options had been deliberated in public and through a process that exposed claims to mutual challenge. Yet, neither Convention made a full transition from bargaining to deliberation. As will be discussed more fully in a moment, any notion that deliberation and bargaining could be neatly separated into two distinct phases corresponding to Conventions and IGCs was problematic from the start. In the Constitution Convention, deliberations often showed an awareness of who were likely to be pivotal or strategic actors under the decision-rules of the subsequent Convention–IGC. Paul Magnette takes up the story:

> On each and every subject, the British Government drew lines in the sand. It clearly indicated, through its representative in the Convention, the limits it would not surpass. President Giscard implicitly encouraged this attitude by giving Peter Hain a key position in the debates so that some observers called him the 'shadow President' of the Convention. The Conventionals were induced to anticipate the IGC and limit their ambition. Deliberation took place under the shadow of the veto.
>
> (Magnette 2003)

Although there were efficiency gains from limiting discussion to an envelope of negotiable solutions, it is less clear this corresponded to the deliberative ideal of a free-range public space in which all options can be considered and all views and representatives are equal, whether pivotal or not. Indeed, strategic behaviour can be seen in the internal dynamics of the Conventions, even where there was no evident need to anticipate the external bargaining contexts of subsequent IGCs. Justus Schönlau's research of the Charter uncovers an example of a straightforward vote trade in the form of an agreement by the centre right and left of the EP delegation to support the positions of the other on religious rights and the right to strike respectively (2001: xx).

What, though, of the claim that however they mixed deliberation with strategic behaviour, the Conventions would at least be more visible and public than previous means of preparing proposals for the institutional design of the Union? There is little evidence that either Convention penetrated deeply into public consciousness. During 2002–3, the Constitution Convention was included in the somewhat 'soft' Eurobarometer question which asks respondents whether they have recently heard anything about various Union institutions. At the time the Convention was launched, only 28 per cent gave a positive answer against an average of 74 per cent for the main four institutions of the Union. This was no higher when the Convention reached the end of its work than at the beginning (EB 57).

Whilst, moreover, both Conventions were transparent in their debates and their documentation, they were opaque in their decision-rules. In the case of the Charter Convention, the European Council stipulated that 'when the Chairperson, in close

concertation with the Vice Chairpersons, deems the text of the draft Charter elaborated by the body can be subscribed to by all the parties, it shall be forwarded to the European Council' (European Council 1999). This established two things and left a third unclear: it clarified that the Charter Convention should proceed by consensus and that the Praesidium would be the judge of whether a consensus had been achieved, but, it failed to specify exactly who 'all the parties' were whose agreement would be needed. Schönlau observes what followed:

> the Praesidium interpreted the notion of 'consensus' pragmatically by stressing the need to achieve unanimity between the four constituent delegations of the Convention [the European Commission, the European Parliament, national governments and national parliaments] rather than between all sixty-two Convention Members. In fact the final draft of the Charter was approved by acclamation without vote.
>
> (Schönlau 2005)

The decision-rules of the Constitution Convention were likewise imprecise. Giscard only provided a definition of what consensus was not. In specifying that consensus would not be the same thing as unanimity and that the Convention would not take votes, he implied that consensus would be some kind of a feel for an oversized majority in favour of a particular position, without commenting further on how oversized such a majority might have to be, whether it would have to include various elements of the Convention regardless of its size, and crucially, for a deliberative convention, whether the nature of reasons given for dissent would have any role in judgements of whether consensus had been achieved.

So taken overall how far did the Conventions add value to reliance only on IGCs to frame proposed changes to the Union's institution design? It helps answer this question if we recall that the Conventions from the start evoked contrary expectations of what they could achieve. One view was that the Conventions would dominate subsequent IGCs. They would turn the tables on the European Council by offering that body one of the package deals it is so accustomed to serving up to others. Member State Government seeking to do something different would find it hard to justify substituting their own individual preferences for texts that had been publicly deliberated in the Convention. Such a move would too conspicuously re-substitute calculations of 'what is good for me' for a reasoned and agreed view of 'what is good for us'. It would only invite a retaliation that would unravel the whole to the benefit on balance of no-one.

A contrary view was that the IGC would dominate the Conventions, which would only would be façades for the continuation of IGC-style bargaining by other means. They would be little more than public relations exercises behind which old methods of Treaty formation would continue unchanged. Everyone knew from the outset that changes agreed by the Conventions could only be incorporated into the Treaties by an IGC. Both Conventions would be the first stage in a two-stage game, and, with all such games, it would be a struggle to preserve the autonomy of the first stage and prevent it being played to the rules of the second.

So how did the Conventions fare in the light of these contrary expectations? It is hard to deny that both moved beyond the specifications of the European Councils that established them, thus, in effect, demonstrating that they could take the agenda out of the exclusive control of the Governments in matters of fundamental importance. By asking it to identify and 'make more visible' the overlapping rights that were common to the rights jurisprudence of all Member States the Cologne European Council seemed to imply that the Charter Convention should neither originate rights nor adjudicate between them (European Council 1999). Yet it did both (Schönlau 2005). Likewise the Laeken declaration only asked the Convention on the Future of Europe to consider options for

institutional change. It was the decision of the Convention to take the hugely consequential step of presenting those options as a Constitutional text.

It is likewise possible to identify some matters that Member States had struggled for years to settle between themselves and which the Conventions, in contrast, were able to settle with comparative ease. The high level of agreement within the Charter Convention on most of what should go into a code of EU rights contrasted with several failed attempts even to get Member State agreement to put such an initiative on to the agenda of Treaty change. The success of the Constitutional Convention in coming up with a clear voting rule for the Council contrasted with the failures of the Maastricht and Amsterdam European Council to agree these matters at all and with the messy solution offered by the Nice European Council. What is interesting about these two examples is that they correspond to questions that one might expect would be normatively and practically better suited to decision by deliberation than bargaining. The Constitution Convention was of its nature better placed to concentrate on what would be a justifiable and principled distribution of Council votes between Member States than the latter who could hardly approach such a question without making calculations of bargaining advantage or fretting about the domestic presentation of winning or losing votes in a zero-sum game.

On the other hand, there is also evidence that the Constitution Convention in particular was to some degree played out in the shadow of expectations of the bargaining relationships that would prevail in the subsequent IGC. The Giscard Praesidium was suspected of being more interested in steering outcomes past Member State vetoes than in interpreting a consensus from the deliberations of its own membership. Giscard assumed the same brokerage role as Council Presidencies during IGCs, including a tour of national capitals to clarify boundaries of negotiability. In the meantime he kept discussion of specific institutional proposals to the final three months of the Convention, albeit reassuring the plenary that this was sound deliberative practice (European Convention 2002, May Plenary Report: 2) and not a cover for carrying on an intergovernmental negotiation behind its back. Yet some Members of the Convention were unconvinced that the final outcome followed a deliberative routine in which the Praesidium listened and then proposed. In a concerted letter of protest to Giscard the Benelux representatives claimed his proposals bore little relation to deliberations within the Convention itself.

In sum, then, the Conventions were a significant, but by no means unqualified improvement, on previous arrangements for framing proposals for the institutional (re)design of the Union. In terms of my tests, national Governments ceded some *control* to the extent they included a greater variety of other actors in setting the agenda for change. Yet, they retained control to the extent that even the Conventions had to anticipate what might happen in subsequent IGCs.

In so far as they were structured for the consideration of all points of view represented, and avoided any kind of voting, the Conventions effectively circumvented the tricky question of whether equality of states or numerical equality of citizens should count in setting the terms for Treaty of change. But, as seen, this experiment with equality of voices was limited by knowledge that there would be inequalities of vetoes in any IGC. The Convention deliberations could not be completely separated from calculations of which points of view would be more blessed or cursed than others by the relative success of Member States in deploying veto threats. In that sense they were neither 'coercion-free – nor perfectly equal – deliberations.

Finally, even a jaundiced observer, would probably find it hard to deny that what was seen of the Convention amounted to an impressive public justification. But what was unseen was the process for drawing up the final text. Whilst it is fanciful to suppose that could ever have occurred in public, what remains mysterious, and unjustified, to this day

were the exact criteria used for including, excluding and framing proposals in some ways rather than others.

Evaluating Change since 2001
2. Ratifications

The last section sought to evaluate changes since 2001 in procedures for framing proposals for Treaty change. This section seeks to evaluate developments in procedures for ratifying changes to EU Treaties. I start by suggesting that by 2001 the Member States had plenty of evidence that neither of the two methods they used for ratifying Treaty change – referendum or votes by national parliaments – were obviously superior to the other and both had significant defects in relation to the other.

In comparison with ratifications by national parliaments, referendums more obviously meet the Lockean argument with which the chapter started: 'the legislature cannot transfer the power of making laws to any other hands...it being but a delegated power from the people' (p. 189). Indeed the use of referendums can be defended on the grounds that Treaty changes do not simply transfer powers between the national and European levels of government. As seen, national governments are amongst the principal beneficiaries any transfer of powers to the Union, since they participate so intimately in the exercise of those powers. The result is that EU Treaty changes also indirectly redistribute powers within Member States, from legislature to executive and from regions to the centre. To the extent that national parliaments are 'executive dominated', parliamentary ratifications of EU Treaty changes effectively allow governments to approve extensions to their own powers, albeit at a risk of electoral cost.

Though just how far referendums take the decision out of the hands of parliaments controlled by governments, depends on the discretion left to governments to determine timing, the nature of the question and even whether an issue of European integration is to be put to referendum at all. Needless to say this varies markedly across Member States. Only in Ireland is there a constitutional requirement to decide all EU Treaty changes by referendum. Other Member States, notably Germany, have taken a principled position against the use of referendums. In between are many Member States where the use of referendum requires a judgement of whether the Treaty change is sufficiently contentious. In still other cases, the conditions that determine the calling of referendums are unclear. There would appear to be no principled grounds for deciding whether should be referendum or parliamentary vote. Suspicion remains that they are used more opportunistically – in search of a desired result – rather than as a procedurally neutral means of seeking public authorisation.

A further set of criticisms question referendums as instruments for making choices about the institutional design of the Union. Franklin et al. (1994: 487) found that in all countries which put the Treaty on European Union (TEU) to referendum, 'yes' and 'no' votes were significantly correlated with the popularity of the domestic governments of the day and with patterns of partisan support within national politics: 'yes' voters were four times more likely than 'no' voters to be supporters of parties of government. It is not only elections to the EP – but referendums on issues of European integration – that would seem to have the second-order characteristic of being about some other political game: of 'not answering the question the put': of producing expressions of domestic partisanship rather than judgements on proposals for the institutional design of the Union. Yet before blame is heaped on voters, or even campaigners, it needs to be noted that, even those citizens who do use referendums to judge proposed Treaty changes on their merits, face well-known constraints. Treaty changes are complex deals spanning many policies and institutions that are not easily reduced to the simple 'yes'/'no' choice of a referendum question.

One argument for ratification by national parliaments is that they are better placed to soften the impact of what formally at least is a 'take it or leave it choice' whichever mode of ratification is used. National parliaments are able to amend national enabling legislation if not the Treaty itself, and many have used ratifications to demand an amelioration in their own scrutiny not just of the new powers that are being granted but of existing Union decisions. Indeed, national parliamentary ratification offers the possibility of continuous and structured dialogue between the ratifier and negotiator throughout the process of Treaty formation. By the time of Nice, it was common for most national parliaments to receive reports, question ministers and debate options for institutional change throughout the negotiation of Treaty change. A questionnaire conducted by the Swedish Presidency of Conference of the Parliaments of the EU (COSAC) found that several (Austria, Belgium, Italy, Germany, Luxembourg, Portugal and Sweden) passed plenary resolutions or adopted committee reports (as many as 20 in Finland's case) on issues such as the incorporation of the Charter into the Treaties, the scrutiny role of national parliaments themselves, and delineations of competence in EU decision-making. Indeed, it is possible for a national parliament to sustain influence right up to the 'endgame' of IGC negotiations. The European Affairs Committee of the Swedish Parliament held 'telephone conferences with the Swedish negotiators' in the final stages of the Nice negotiations (Sveriges Riksdag 2001). During the preparations for the Nice IGC several national parliaments also included some element of 'public hearing' in their deliberation, though, it has to be said, with varying degrees of originality and openness to spontaneous influence from those outside organised channels of civil society.

How far national parliaments participate throughout Treaty formation depends on how far they have control over their own business and on how far the governing majority operates to the exclusion of the wider parliament. An example of the first is that the European Affairs Committees (EAC) of the German Bundestag put the incorporation of the European Union Charter on Fundamental Rights on to the agenda for plenary debates no fewer than four times during the Nice IGC. An example of the second is that a factional struggle within the UK Governing majority meant the outcome of the Maastricht European Council depended until the last moment on a parallel negotiation between the UK Prime Minister and Employment minister (Forster 1999: 92) which went on unbeknownst to the wider British parliament.

In contrast to the continuous but calculable pressure on governments to align IGC outcomes to national parliamentarians responsible for ratification, the appeal of referendums may lie precisely in greater uncertainty: with less control or information about the views and behaviour of the ratifier or even of who exactly the latter will be once the vagaries of voter participation and abstention are taken into account, governments may have to anticipate a wider range of possible objections while negotiating Treaty changes.

Developments since 2001, however, suggest that either mode of ratification can, to varying degrees, confirm or overcome the shortcomings commonly alleged against it. Indeed there is much variation in how far any one ratification – whether by parliamentary vote or referendum - satisfies or fails the tests of public control, political equality and justification with which the chapter started out. Space only permits presentation here of data which relates to the first test, though the point could quite as easily be made in relation to the other two.

It is by no means always the case that their control of national parliaments allows national governments to control processes by which they are themselves empowered at the European Union. Table 1 shows that even though all but one Member State has attempted to ratify the Lisbon Treaty by national parliamentary vote, there are important variations in what that entails. In 10 cases, national governments have had to obtain supermajorities of between 60 per cent and two-thirds, and thus by implication, opposition support for ratification. Of the remaining 16 cases most were coalition or

minority Governments and a handful also had to manage ratification within the constraints of either a strongly bicameral or strongly federal political system. Only in a handful of Member States are arrangements for national parliamentary ratification purely majoritarian in the sense that a single party majority can expect to 'get its way' on ratification without difficulty. Indeed, most national parliamentary votes that have so far been recorded were far in excess of the minimum winning coalitions needed for ratification of the Lisbon Treaty. On top of all that, it is important to remember that national parliamentary votes were not discrete events, but an obstacle course of 26 authorisations that needed to be crossed for the Treaty to be ratified. It is perhaps not entirely fanciful to see some national parliaments with strong protections against executive domination and exacting standards of scrutiny as providing some measure of surrogate representation for those without such advantages.

Table 1. Lisbon Treaty. Decision rules for Ratification by National Parliaments. Source: COSAC.

	Super-majority needed?	Decision rule for Treaty ratification
AUS	Y	2/3 in both chambers
BEL	N	Simple majority in six elected bodies, including both chambers of the Federal legislature
BUL	N	Simple majority
CYP	Y	Absolute majority
DEN	N	Simple majority with at least 50% members present
EST	N	Simple majority of the parliament
FIN	Y	2/3 majority of Parliament
FR	Y	Const amendment voted by simple majority of both houses and then 3/5 majority of a 'Congress' (National Assembly and Senate together)
GER	Y	2/3 majority in both federal chambers
HUN	Y	2/3 majority with at least 50% members present
IRE	N	Simple majority of both chambers and 50% voters in referendum
IT	N	Simple majority in both chambers
LAT	N	Simple majority of parliament
LITH	N	Simple majority
LUX	N	Simple majority of parliament
MALTA	N	Simple majority in parliament
NETHS	N	Simple majority in both chambers
POL	Y	2/3 majority of both chambers with at least 50% of members present
POR	N	Simple majority of parliament
ROM	Y	2/3 majority in a joint sitting Chamber of Deputies and Senate
SLOVAK	Y	3/5 members of parliament
SLOVEN	Y	2/3 of parliament
SP	N	Simple majority of both chambers
SWE	N	Simple majority of parliament
UK	N	Simple majority of both chambers with Commons able to over-ride Lords

Attempted ratifications of the Constitutional and Lisbon Treaties likewise indicate much variation in how far any one referendums allows publics to make choices and exercise control over Treaty changes. The French, Dutch and Irish referendums were quite different in how far they overcame long-standing criticisms of referendums on Treaty changes. As Table 2 shows the French case was remarkable in producing a clear majority of respondents who felt that they had all the information they needed to make a decision. On the other hand, Table 3 shows the French referendum was the most 'second-order', though curiously, it was also the case where the 'Yes' vote was the least dependent on supporters of parties of Government. Had any of them produced 'yes' votes, a Dutch or Irish ratification would have been the more exposed of the three to the charge of depending on the mobilisation of an uncritical mass of Government supporters.

Table 2. Indicators that voters felt they had sufficient information to make a choice in the French and Dutch Referendums on the Constitutional Treaty and the Irish Referendum on Lisbon. Source: EB 171, 172 and 245.

	France 2005		**Netherlands 2005**		**Ireland 2008**
No Votes, % voting against because of lack of information	5.0		32.0		34.7
Overall Assessment, % agreeing and disagreeing with the statement 'Before voting you had all the information necessary to take a decision	Agree	66.0	Agree	41.0	N/A, question not asked
	Disagree	33.0	Disagree	56.0	

Table 3. Indicator of 'Second-order voting' in the French and Dutch referendums on the Constitutional Treaty (2005), and in the Irish Referendum on the Lisbon Treaty. Dependence of the 'Yes' vote on supporters of national parties in Government and dependence of the 'No' vote on supporters of national parties in Opposition. Source EB 171, 172 and 245.

	France Yes vote.	**France** No vote.	**Neths** Yes vote	**Neths** No vote	**Ire** Yes vote	**Ire** No vote
% identifying themselves as closer to parties of Govt	53.4	14.8	62.2	41.0	67.0	51.9
% identifying themselves as closer to parties of Opposn	41.2	70.1	37.8	59.0	33.0	48.1
Index of second-orderness (% Yes vote from Govt supporters-% Yes vote from Opposn supporters) + (% No vote from Opposn supporters-% of No vote from Govt supporters)/2	**FRANCE** 34.3		**NETHS** 21.2		**IRELAND** 18.9	

The Unanswered Question: How to Respond to Rejected Treaty Changes?

The main development since 2001, however, is that the Union has had to deal with three high profile rejections of proposed Treaty changes. What should be done under such circumstances? Consider first what has happened so far. When Denmark rejected the Treaty on European Union (1992) and when Ireland rejected Nice (2001) the European

Council decided to negotiate special protocols for those particular Member States whilst keeping the Treaty unchanged for all the others. At the time of writing, a similar response is likely to the rejection of the Lisbon Treaty by Ireland in 2008. In contrast, it is harder to establish how the European Council's responded to the rejection of the Constitutional Treaty by France and the Netherlands, or at least to do so in a value-neutral way. According to one perspective the European Council just re-introduced much the same text in the form of the Lisbon Treaty. According to another point of view, the European Council did not re-introduce the Constitutional Treaty. It abandoned it. The Lisbon Treaty is to the Constitutional Treaty as a mouse is to a human: it has 95 per cent of the same text in the same way as a mouse has 95 per cent of the DNA of a human. In both cases, similar matter goes to make up qualitatively different creatures.

So, the possibilities for dealing with a rejection might be summarised as: (i) abandon the rejected text ; (ii) change the rejected text for all Member States in ways large or small, presentational or substantive; (iii) make special exceptions for the country rejecting. But who should chose between these options and how? Before answering this question it helps to consider some lessons of recent experience.

First, it is unclear how well the European Council's responses to 'no votes' since 2005 have corresponded to the reasons for the rejections. As shown in table 4, even French 'no' voters split 66:30 in favour of a Constitution. In so far as the French voted against the text of the Consitutional Treaty but in favour of a Constitution, the eventual decision of the European Council to proceed with a similar text but abandon a Constitutional project, arguably, amounted to the adoption of the French public's least preferred response to its no vote.

Yet, second, where more than one Member State records 'no' votes on the same text, it is not clear how far the European Council *can* always respond satisfactorily and simultaneously to the reasons given for each rejection. Table 4, shows that, unlike the French, the Dutch public would seem to have been opposed to a constitution, and in the latter case, but not the first, abandonment of a constitutional text would seem to have been more justified.

Table 4. Agreement with the statement: 'The European Constitution is essential to pursue the European Construction'.

France, EB 171

	AGREE (%)	DISAGREE (%)
TOTAL RESPONDENTS	75	21
YES VOTERS	90	8
NO VOTERS	66	30

The Netherlands, EB 172

	AGREE (%)	DISAGREE (%)
TOTAL RESPONDENTS	41	50
YES VOTERS	66	27
NO VOTERS	25	66

Third, Table 5 shows that in the French and Irish cases, and somewhat less so in the Dutch case, 'Yes' and 'No' voters differed in their expectations of what would happen in the event of a Treaty rejection; and, in particular, of the prospects of negotiating an alternative text to the advantage of their own point of view or that of their own Member

States. Such uncertainty is undesirable to the extent it exposes votes on Treaty change to manipulation and even to forms of coerced choice. Some who would otherwise vote 'no' may feel threatened into voting 'yes' for fear they will otherwise face repeat requests for ratification until they 'get it right'. Some who would otherwise vote 'yes' voters may be encouraged to cast insincere 'no' votes on the basis of deliberate misrepresentations of the prospects of being able to re-negotiate proposals.

Table 5. Perceived Consequences of a 'No-vote'.

France and the Constitution, Flash EB 171

	Yes voters (%)	No voters (%)
The No vote will allow for the re-negotiation of the Constitution to come to a more social text	30	83
The No vote will allow the text to be re-negotiated in a way that better defends France's interests	27	80

The Netherlands and the Constitution, Flash EB 172

	Yes voters(%)	No voters (%)
The No vote will allow for the re-negotiation of the Constitution to come to a more social text	55	71
The No vote will allow for the re-negotiation of the Constitution in a way which better defends the Netherlands' interests	53	73

Ireland and Lisbon 2008, Flash EB 245

	Yes voters (%)	No voters (%)
The Irish No vote will allow the Irish Government to renegotiate exceptions for Ireland.	38.4	76.1
The No vote will weaken Ireland's position in the European Union	63.9	24.3

Given these difficulties, and the tests with which the chapter started out, it seems to me that there is one fairly obvious change that would be an improvement on the *status quo:* the European Council should take its decisions on what to do about Treaty rejections on a recommendation from a reconvened deliberative Convention.

This would do something to take the decision out of the exclusive control of Heads of Government and make it somewhat harder for them to adopt whichever procedural response best suits them in the circumstances. It would also better satisfy standards of equality and justification. In the introduction I suggested there is no procedure which can guarantee equality of individual Member States, equality of individuals, and equality of points of view, even though each has some claim to consideration in EU Treaty change. I also suggested that each Member State is equally entitled to make its own choices on EU Treaty changes and yet none is free of all obligation to consider the consequences of their choices for others, who through the accumulation of previous decisions in which all Member States have been complicit, have 'bet' their continuing capacity to provide values of great importance to their societies on the continuing functioning of European Union Treaties.

It is precisely at a moment of a Treaty rejection that such predicaments may become salient: that one could imagine circumstances in which the equal right of any one

Member State to veto could collide with a case for change that is publicly supported – and felt to be practically urgent – elsewhere in the Union. Yet, a number of authors – notably Robert Goodin (1986), David Miller (1996) and Amartya Sen (2002) - have demonstrated that predicaments in which no one procedure can possibly be fair between all alternatives can none the less be improved where the actors are prepared, as Goodin puts it, to 'launder their preferences' by justifying them one to another. Crucially they demonstrate this not at a level of philosophical speculation on what amounts to justifiable collective choice but from within the methods of social choice theory: from within the science of how to get from conflicting individual choices to social decisions without offending against some pretty basic principles of consistency, freedom and fairness that are assumed in advance. Whilst this is not the place to reproduce their conclusions in full, they have demonstrated that deliberations can help actors overcome dilemmas involved in aggregating and arbitrating preferences by: (a) removing disagreements that are simply based on misapprehensions; (b) identifying how far their disagreements are of fact or value; (c) clarifying the dimensionality of disagreement; (d) testing the sincerity; and (e) intensity of contrasting positions.

Imagine, then, that the French, Dutch and Irish rejections had been followed by post-rejection Conventions. Assume further that the exercise could have been established with two simple rules. First that any one from the three Member States would have been entitled to represent their reasoned opinion of why the Constitutional or Lisbon Treaty should be accepted, rejected or amended; and any one from anywhere in the Union should have a right to respond to that reasoned opinion. Second that the special Conventions would have a mandate to recommend a procedure for dealing with the Treaty rejection after conducting a full deliberation on the reasons for rejection and responses to them. As suggested above its procedural options might include simple abandonment of the Treaty; changes that would only require countries rejecting to ratify again; or even a recommendation that some sub-set of Member States should proceed on their own within or without the existing Treaties.

Consider now the summary in Table 6 of the reasons French, Dutch and Irish 'no' voters gave for opposing the Treaty. I would suggest that it helps distinguish three reasons for voting against. Some relate to informational defects: mainly simple lack of information (by far the most common reason for voting against in both the Netherlands and Ireland) but also possible misunderstandings (for example, confusion on the question of whether Lisbon would make it more or less likely that Ireland would have a Commissioner). Second reasons for voting against which were domestic in their motivation, and, third, that related to the nature of the Union itself.

Within the last it is possible to detect sub-categories. First, discontents that related to the existing Union *versus* objections to the proposed Treaty changes. Second, objections that related to an economic left-right dimension (not enough social Europe and so on), a GALTAN left-right dimension of identity politics (opposition to Turkish membership) or a pro-anti European integration dimension. Third, objections that are likely to have been 'negative-sum' in nature, i.e. it would be difficult to do much about them without aggravating the known objections of majorities in other Member States to the proposed Treaty changes. The call of the French 'no-vote' for a more 'social' and 'less liberal' Europe would, for example, have increased the probability of a British rejection (Lord 2008).

Table 6. Reasons given for voting 'no' in the French and Netherlands referendums on the Constitutional Treaties (2005) and the Irish referendum on the Lisbon Treaty 2008.

France, EB 171.

% of those claiming to have voted "no" for the following reasons	
The Constitutional Treaty will have negative effects on employment in France	31
The Economic Situation in France	26
The draft is too liberal	19
Opposition to the policies of the French Govt or to particular parties	18
Not enough "social Europe" in the text	16
The CT too complex	12
Opposed to Turkey becoming a Member	6

Netherlands, EB 172.

% of those claiming to have noted no for the following reasons	
Lack of information	32
Loss of sovereignty	19
Opposition to the policies of the Dutch Govt or to certain political parties	14
Europe too expensive	13
Opposition to European integration	8
Negative effects on employment in the Netherlands	7
Opposition to further enlargement	6

Ireland, EB 245.

% of those claiming to have voted no for the following reasons	
Lack of information	34.7
To protect Irish identity	19.5
I do not trust our politicians	10.3
To safeguard neutrality in defence matters	10.3
We will lose our right to a Commissioner in every Commission	9.4
To protect our tax system	8.7
I am against the idea of a United Europe	8.2

Given these considerations it seems to me that a post-rejection Convention might consider at least the following norms:

1. Where a no vote can be mainly explained by informational defects or voting on domestic considerations, these should be reasonable grounds for requesting a Member State to vote again on a Treaty ratification.

2. Whether a Member State should be offered protocols opting it out from parts of the Treaty should depend on an assessment of a) of consequences for other Member States and b) on whether the objection in question is ethical in nature

and sincerely held. Take two examples from the Irish list of reasons for rejecting Lisbon: 'fiscal freedom' and neutrality in defence matters. Conceding either demand could be considered to have adverse consequences for other Member States: the first through the 'negative externalities' that might follow from allowing any one national tax system unconstrained freedom to undercut others; the second to the extent that it could allow one Member State to free-ride on the the publics goods provision of others in the area of security. Yet, to the extent the second, unlike the first, rests on a long-standing and sincerely held commitment, a post-rejection Convention might conclude that it is an exception that could, on agreed criteria, be justifiably included in any attempt to submit the text for ratification a second time.

3. In cases where some reasons for casting a no-vote effectively amount to a demand for more and not less European integration – for example, those French no-voters who demanded a Constitution with greater commitment to social policy – the Member State in question should be invited to vote again on ratification in parallel with some initiative designed to achieve its particular demand for further integration either outside the Treaties or employing the flexible integration clause within the Treaties.

Conclusion

I have argued that the last 10 years have seen improvements in arrangements for setting the agenda for EU Treaty change, and that even arrangements for ratification admit of different degrees of good or bad practice . However, the Union still lacks a procedure for deciding wheat should be done in the event of a Treaty rejection which meets clear standards of public control, equality and justification. I have argued that present arrangements could be improved by calling a 'post-rejection' Convention which would be asked to make a recommendation to the European Council on what would be a fair way forward, taking into account the value-assumptions, dimensionality, and sincerity of arguments for and against ratification, as well as the negative externalities to other Member States of alternative solutions.

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Chapter Five

Democratizing Constitution-Making Reflections on the Canadian Experience

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Introduction

What is the relationship between constitutional change and public participation? More pointedly, in a multinational federation like Canada, is extensive public engagement conducive of constitutional agreement? This essay will seek to shed some light on these questions. It focuses on the Canadian experience with constitutional change broadly defined since the last round of mega-constitutional change that came to an end with the defeat by referendum of the so-called Charlottetown Accord in 1993.

The first section is something of an introduction and a prologue. It includes a very brief overview of the Canadian constitutional predicament with an emphasis on the transition period in the late 1980s when, arguably, the constitution ceased to be primarily a mater of elite accommodation and became the subject of popular debate and discussion. The June 1990 First Ministers' Conference is arguably a key turning point in this regard.

However, the defeat of the Charlottetown Accord has led to four linked claims that are introduced in the second substantive section of the essay. The first claim is that elite accommodation is no longer a viable means of pursuing constitutional change. The second claim, which follows logically from the first, is that there has been a "democratization" of the Canadian constitutional reform process and no change can be made absent some form of engagement with Canadian citizens. Third, and precisely because of this requirement for public involvement, some suggest that the Canadian constitution is exceedingly difficult to amend. Finally, in light of the inherent challenges associated with formal constitutional change in Canada, a number of observers of Canadian constitutional politics have suggested that rather than aim for an overarching constitutional settlement what is now required is something of a constitutional "conversation".

The third section evaluates these claims. By way of a survey of constitutional change in Canada since 1993 this section critically assesses the purported end of elite accommodation, the linked rise of public participation, the ostensibly "unamendable" nature of the Canadian constitution, and, finally the feasibility and indeed the desirability of aiming for an ongoing constitutional conversation. To anticipate, using a reasonably broad conception of both "the constitution" and of "public participation/democratization" it is clear that these claims are overdrawn and the current reality is considerably more nuanced and complex. To summarize, the Canadian constitution is subject to amendment and change, oftentimes as a result of traditional elite negotiations where the public is not directly consulted or engaged. The very nature of public participation is also changing and Canadians are experimenting with a wide variety tools beyond the relatively blunt instrument that is a referendum. Finally, while an ongoing constitutional conversation is desirable in theory, in practice the preconditions may not yet be in place and such a conversation requires sustained and far-sighted political leadership that is currently lacking.

Canadian Constitutional Reform

Prologue: The End of Constitutional Elite Aaccommodation?[1]

For several days in June 1990 dozens of Canadians gathered outside the old railway station in downtown Ottawa which, some years before, had been converted into a conference centre. They gathered to witness to efforts by the Canadian Prime Minister and the provincial premiers and territorial leaders (collectively in Canadian parlance 'First Ministers') to come to an agreement on changes to the so-called Meech Lake Accord, a package of amendments to the Canadian constitution. (Monahan 1991) The Accord had been reached three years earlier but had not yet been ratified by all of the provincial legislatures. The negotiations were designed to generate an amended Accord that would respond to the concerns raised about the implications of the agreement for, *inter alia*, the Canadian Charter of Rights and Freedoms which had been added to the constitution in 1982 and had come fully into force in 1985 only a few years earlier.

In the face of fundamental disagreement over critical issues, most importantly, the implications of a proposed interpretative clause recognising Quebec as a distinct society, the meetings were repeatedly extended in an effort to forge a consensus and First Ministers met in private to allow for hard bargaining. As the meetings, originally envisaged to last for a few days, dragged on an on, citizen interest and concern became increasingly apparent. Not only did crowds gather outside the conference centre, letters, faxes and telephone messages poured in with offers of support, assistance, advice, and of course, criticism. While Canadians were divided on what it is they wanted from the meetings – the merits of the Accord were hotly debated – the simple fact that curious citizens gathered to witness the constitutional deliberations demonstrated in a very tangible way that a significant and vocal minority the Canadian public wanted to play a part in the process of debating the constitution. Arguably constitutional negotiation by means of private agreement between governments was, if not over, then at least significantly challenged. In fact, within a few years it became clear that major constitutional change would require a major role for citizens including ratification by means of referendum.

A Very Short and Selected History of Formal Canadian Constitutional Reform

In 1867, the Government of Canada requested that the British Parliament pass the British North America (BNA) Act creating the Dominion of Canada. The provisions of the BNA Act were negotiated by elites, as was to be the custom of Canadian constitutional discussions for at least the next 100 years. Unlike the United States, the Canadian constitution was understood by the framers to be a continuation and extension of a pre-existing, British constitutional tradition not the creation of a new founding document.[2] The BNA Act allowed for the creation of Canada as a parliamentary federation and the operative parts of this first cornerstone of the formal Canadian constitution were focused, in the main, on the structure of the legislative branch and the division of powers or competencies between the federal and provincial governments.

It took another fifty years for Canada to become formally independent of the United Kingdom with the advent of the Statute of Westminster adopted by the UK parliament in 1931. But this major milestone is notable in at least two other respects. First, changes to the constitution continued to be the result of an act of the British Parliament a pattern that was to continue until 1982. Second, constitutional change remained very much an elite affair with little or no reference to the citizenry.

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[1] The following is something of a first-person account. I served with the Government of Ontario during the latter part of the Meech Lake negotiations and was part of the Ontario Government delegation to the June 1990 First Ministers' Conference.

[2] It was to some extent the juridification of a pre-existing power structure already understood to be functional and legitimate. For more on this pattern see Mollers (2004: 132-134).

This pattern of elite accommodation or, more accurately, a distinct lack of such accommodation, continued until early 1980s. Over the years agreement was reached on only a handful of constitutional amendments, most importantly, changes to the division of powers to facilitate the building of the welfare state. However, the general pattern was one of failure as Canadian political elites were unable to agree on a package of amendments that would address unresolved issues relating to the Senate, the Supreme Court, the division of powers and, most importantly an amending formula. Disagreements over who should be party to, and have a veto over, changes to the constitution were symptomatic of deeper disagreement about the fundamental nature of the country (Rocher and Smith 2003). Note, however, that almost all of these negotiations took place with little or no role for citizens beyond appearing as witnesses before parliamentary and legislative committees who were occasionally charged with considering possible constitutional amendments.

In 1980-81, as a result of the persistence of then Prime Minister Pierre Trudeau, partial agreement was reached on a package of amendments that included an amending formula (in fact several formulas depending on the nature of the amendment), changes to the division of powers and, most importantly, the inclusion of a Charter of Rights and Freedoms. Agreement was partial for at least two reasons. First, while the new Constitution did recognize for the first time the Aboriginal minority, a number of critical issues with respect to the status of Aboriginal peoples were formally punted to a future round of constitutional negotiations. Second, the government of the Province of Quebec did not support the amendments arguing that the package did not go far enough to address the desire of the Québécois for a constitutional settlement that allowed their government of their province "the freedom to put a distinctive stamp on a modern set of public policies" (Russell 2004: 90). The lack of support from the government of the Province of Quebec was all the more troubling given that only a short while before, in the fall of 1980, Quebec voters had in a referendum rejected a proposal for "sovereignty-association" a radical restructuring of the relationship between Quebec and the rest of Canada. One of the turning points in the referendum campaign was a promise by Prime Minister Trudeau to amend the constitution in a way that would reflect the concerns of the Québécois.

In the face of unaddressed concerns by Aboriginal peoples and a constitutional requirement to do so, the new Prime Minister, Brian Mulroney, elected in 1984, convened a series of constitutional conferences. While these had the effect of drawing attention to the challenges associated with defining a place for Aboriginal Canadians in the constitutional settlement, no substantive agreement was reached. The new Prime Minister also initiated a "Quebec Round" of constitutional negotiations designed to bring Quebec into the constitutional consensus with "honour and enthusiasm" (Russell 2004: 133). Following several months of closed door negotiations between the federal, provincial and territorial governments, the result was the Meech Lake Accord which, among other things, would have seen the addition to the constitution of an interpretative clause that would have recognized that Quebec constitutes within Canada a "distinct society". However, the unwillingness and inability of all ten provincial legislatures to join the Parliament of Canada in ratifying the package of amendments led to the defeat of the Meech Lake Accord which, in turn, triggered yet another round of constitutional negotiations (Monahan 1991; Laforest 2004). This "Canada round" of negotiations led to yet another intergovernmental agreement, this one called the Charlottetown Accord, which would have seen a much more expansive and inclusive set of amendments to the Canadian constitution. The goal was to try and recognize and reconcile not only the aspirations of the Québécois, but also the calls for Aboriginal self-government, concerns about regional alienation notably in Western Canada, and a general desire to assert and strengthen Canadian as a single "national" project. The result was highly complex package of potentially contradictory amendments that was designed to satisfy the wide range of constituencies that wanted to "see themselves" in the constitutional text. The result, arguably, meant a package that fully satisfied no one but contained a sufficiently

large number of elements that, together, almost everyone could find something they did not like in the agree. (McRoberts 1997) In other words, the Accord was a compromise that went not far enough for many, too far for most. (Russell 2004)

What is striking about the so-called "Canada round" is that it took seriously the growing public interest in the constitution that became apparent over the course of the 1980s. As described at the outset, this public interest crystallized somewhat at the time of the collapse of the Meech Lake Accord and governments felt increasingly compelled to engage with citizens in constitutional deliberations. Thus, the round included a great deal of popular consultations in the form of legislative hearings, a travelling commission of inquiry, a series of semi-pubic conferences (Chambers 1998 : 159; Russell 2004: 177) and, ultimately, two simultaneous referenda, one organized by the Government of Quebec pursuant to provincial legislation and a second referendum in the rest of Canada organized by the Government of Canada. In those referenda, the Charlottetown Accord was defeated. In Quebec 55.4 per cent of the voters said no and in Canada overall, 54.2 per cent voted against (Russell 2004 : 227).

Does any of this matter? Perhaps not. But it remains the case that two critical minorities, the Québécois and Aboriginal peoples, remain unsatisfied with the constitutional settlement. For at least some Canadians, it is deeply unsettling that the constitutional settlement is deemed unacceptable by the leadership of upwards of one million Aboriginal peoples and 7.5 million Québécois, in a country of only 33 million souls.

The Democratization of the Canadian Constitutional Reform Process and the Desirability of "Conversation"

For the purposes of this essay, four broad generalizations arise from this short overview. First, some have argued that the Canadian constitution is not amendable by simple agreement among political elites. Second, Canadians must be involved in a substantive way in crafting changes to the constitution. Third, the net result is that the Canadian constitution, like that of some other countries notably the United States, is extraordinarily difficult to amend. Finally, in light of all of this, some have argued the goal should no longer be a set of changes to an overarching constitutional settlement but rather an ongoing constitutional conversation.

The End of Elite Accommodation: The Rise of Public Participation

Summarizing much the dominant view of contemporary Canadian constitutional politics, Alain Noël has argued, "constitutional politics had now entered a new era, marked by citizen involvement and demands for more open deliberations." (Noël 2006: 424) This reflects the general sentiment among most scholarly observers of the Canadian constitutional reform process. (Russell 2004; Atkinson 1994; Mendelsohn 2000; Maclure 2003) In general, the consensus seems to be that the advent of the Charter of Rights and Freedom in 1982 had the effect of transforming Canadian constitutional politics. No longer was the constitution primarily a concern only of governments (e.g. disagreements over the constitutional division of powers). Rather, the constitution was now a "people's constitution", a document that articulated the fundamental rights and freedoms to be enjoyed by all citizens of Canada.

The debate over the Meech Lake Accord described at the outset of this essay is usually taken to be a strong demonstration of this shift. Not only were some Canadians (led, *inter alia* by former Prime Minister Pierre Trudeau[3]) concerned about the substantive content of the proposed amendments to the constitution, they and others were concerned about the process by which the Accord had been reached. The fact that "white

[3] Pierre Trudeau, although retired for some time, felt compelled to intervene and in a speech in Montreal and a series of newspaper articles articulated a scathing critique of the Accord. See Russell (2004: 225).

men in suits" (i.e. the Prime Minister and the provincial and territorial leaders[4]) had the power to deliberate on amendments to the constitution was deemed unacceptable. The privileged position given to provincial and territorial governments as a result of the amending formula agreed to in 1982 seemed to many Canadians a reflection of the "old" constitution that was preoccupied with federalism and not the "new" (post-1982) constitution which, in their view, was about individual rights and freedoms. Thus, to take but one example, women's groups outside of Quebec were vocal critics of the Meech Lake Accord because of what they saw as the risk to the equality rights provision of the Charter that would arise if a clause recognizing Quebec as a distinct society were to be included in the Constitution as an interpretative clause. However, they were also highly critical of the Accord because the manner in which the package of constitutional amendments was developed did not, in the main, provide citizens in general and women's groups in particular with many avenues or opportunities to have a say.

The Canadian Constitution is "Unamendable"

Recall that a comprehensive package of constitutional amendments that was the Charlottetown Accord was defeated following referenda in Quebec and in the rest of Canada. This experiment with public participation, both the final referenda as well as the earlier attempts to engage with citizens by means of conferences and a travelling commission, is thought by some observers as the proximate cause of the defeat of the Accord. Public participation, particularly combined with a constitutional politics that is about recognizing different communities, will inevitably lead to failure. Janet Ajzensat has argued that, "the participation of political groups, interests, and individual Canadians in the negotiations is heightening contestation in the constitutional arena and hastening the country's breakup"' (Ajzestat 1994: 112). Michael Lutszig, for his part, argues that extensive public participation in constitutional change makes agreement all but impossible because not only does it make elite accommodation very difficult, opening up the constitutional reform process actually leads to the creation of a multiplicity of competing constitutional interest groups that make it exceedingly difficult to come to agreement on a package of amendments (Lusztig 1994). Alain Noël summarizes this widely held view by arguing that "It is now taken as self-evident that the country's constitution and basic institutions cannot be amended, except at the margins. Merely evoking the possibility of such changes tends to be seen as futile, if not irresponsible" (Noël 2006: 425).

What is Needed is a "Constitutional Conversation"

If, as the argument goes, private negotiation between political elites is long gone and the process of constitutional change in Canada is now necessarily a public process requiring public participation, and the result necessarily means a political and constitutional impasse, what can be done? If Canadians are doomed to debate their constitution in the open and this very openness makes securing agreement all but impossible, what is the future of constitutional conversation, of democratic deliberation designed to foster constitutional change?

Alain Noel has provided a sophisticated and nuanced overview of the Canadian debate on the possibility of democratic deliberation on the Canadian constitution.[5] It is difficult to do justice to his full argument here because he perceptively links the debates about democratic deliberation about the constitution with the reality of multinational federations like Canada where there is not necessarily agreement on the nature of the *demos*. For the purposes of this essay what is perhaps most useful is that he sets out the

[4] In fact, while Canadian first ministers are for the most part white men, at different times over the past 30 years the Prime Minister and the Premier of one or more provincial and territorial governments has been a women (e.g. Kim Campbell), an Aboriginal person (e.g. Nellie Cournoyer), or what in Canada is sometimes called a "visible minority" (e.g. Joe Ghiz).

[5] For another extended account of constitutional politics as conversation, see Chambers (1998).

views of a range of Canadian scholars, including himself, who share an interest in continuing the 'Canadian conversation' about constitutional change even if some are more pessimistic, others less so.[6]

After acknowledging that some proponents of constitutional deliberation are rather sombre about the prospects for success, Noel goes on to makes the case for a continuing constitutional conversation in a number of ways. For example, he cites Matthew Mendelsohn, a long time proponent of deliberative processes, who argues in favour of a wide range of participatory frameworks for thinking about constitutional change in Canada (Mendelsohn 2000: 270–271).

However, Noel places even more emphasis on arguments for continued constitutional deliberation that emphasize the inherent value of constitutional process, even at the expense of concrete constitutional outcomes, at least in the short term. He echoes Jeremy Webber, for example, who argues that continued public deliberation is to be valued not because it will necessarily, or even likely lead to a new constitutional settlement. Rather, Webber argues for the merits of the conversation itself (Webber 1994). James Tully, for his part, argues that in a multinational federation like Canada a stable and wide accepted constitutional outcome is unlikely. Rather, Tully argues, "It is now widely argued in theory and practice that the identities worthy of recognition must be worked out and decided on by the members of the association themselves, through the exercise of practical reason in negotiations and agreements" (Tully 2001: 24). Or, as Simone Chambers puts it, the heart of constitutional politics resides in sustaining a conversation over time where the parties commit to "talk to each other, respond to each other's claims and grievances, consider new options and reevaluate old ones" (Chambers 1998: 161).

Noel seeks to extend these arguments by taking seriously the realities of power politics but, like others, he comes to the conclusion that what should matter in a multinational federation like Canada is continued constitutional conversation where the goal is not a single, final outcomes or settlement but rather, continued conversation. Continuing public deliberation about the constitution is valuable, he argues, because "In the give and take of arguments and of politics, new actors emerge, old ones are displaced or rejuvenated, and social arrangements are remade." This is especially important in multinational federations because, argues Noel, "It means that peoples and social actors change themselves as well as others through their interactions." (Noël, 2006: 434). In other words, though a process of deliberation, the parties to a continuing constitutional conversation will, eventually, be themselves changed, and it is this change process that sets the stage for eventual agreement.[7]

[6] Among the more pessimistic, Noel places political theorist Michel Seymour who has argued that the Government of Canada has effectively undermined the possibility of success for a constitutional conversation, a concept he supports, and argues the case for Quebec sovereignty. Another sombre outlook is provided by Ken McRoberts who is the author of one the best overviews of the Canadian constitutional impasse. (McRoberts 1997) He argues that the project of Prime Minister Pierre Trudeau has failed. The effort to build a Canadian political community on the basis of free and equal rights bearing citizens who are united by a Charter of Rights and Freedoms has enjoyed some success but cannot transcend an older and very powerful view that the Canadian political community is made up of nations and that Canada is, even if it may be openly acknowledged, a multinational federation. McRoberts laments the inability of Canadians to recognize this reality. He is supportive of a constitutional conversation but is not optimistic about the likelihood of success as long as Canadians disagree on something as fundamental as whether or not their Canada is a multinational federation.

[7] This is a fundamental premise for most theorists and practitioners of deliberative democracy and deliberative policy making. See Fung (2006).

What is the Evidence? Constitutional Politics in Canada since the Charlottetown Accord

What is "the Constitution"?

To this point, this essay has not explicitly defined the key terms – "constitution" and "democratization". To some extent the implicit definition of the word constitution has been the formal, written constitution that applies to all Canadians. Similarly, the implicit definition of the words democratization or public participation has been to equate these with referenda and perhaps something more inclusive and engaging than the public consultation that comes with parliamentary or legislative hearings.

However these implicit definitions are far too narrow or overly vague. At a minimum, in a Westminster system of parliamentary government, the constitution is both that which is codified in the formal constitution and a larger body of constitutional conventions. Thus, in Canada it is a matter of convention that the Governor General calls on the leader of the political party that wins the most seats in a general election to form the government.[8]

Moreover, the formal constitution in the Canadian federation has two elements – those provisions that apply to all of Canada and often, but not always, can be modified only with the consent of all provincial and territorial governments as distinct from those provisions that apply to only one province, sometimes referred to as the "provincial constitutions", that form part of the constitutional text and can generally be amended based on the mutual agreement of Parliament and the provincial legislature.

However, beyond the written constitutional text and constitutional conventions, there are a number of pieces of core legislation that are quasi-constitutional in nature. The *Official Languages Act* and the *Supreme Court Act* are good examples where legislation is used to amplify a key part of the formal constitutional text (Official Languages) or as a substitute for formal constitutional provisions (e.g. Supreme Court of Canada). Moreover, while in some countries at least the broad lines of the electoral process are included in the formal constitution, in Canada, these rules are established by statute, the *Canada Elections Act* for federal elections and broadly similar statutes in each of the provinces and territories.

Finally, some have argued that we need to also pay careful attention to what amounts to the 'economic' constitution, notably the North American Free Trade Agreement (NAFTA). (Clarkson, 2008) Particularly compared to the European Union (EU), the NAFTA is a weakly institutionalized form of regional economic integration. And unlike the EU, NAFTA provides for virtually no political integration which, in turn limits the possibilities of parliamentary much less public participation in the decision-making that is required to make the agreement work. Precisely because it is an economic constitution the NAFTA privileges economic actors for whom participation is very often equated with persistent, highly structured, and occasionally very intense lobbying. Absent the equivalent of the Commerce power used by the United States federal government, Canadian governments have also signed on to a multilateral Agreement in Internal Trade and have negotiated bilateral and regional agreements designed to reduce trade barriers. Arguably these would also form part of the economic constitution.

[8] While this convention is generally not much discussed, there are times, including the Fall of 2008, when the nature and merits of the convention are hotly debated. In this case, only a few weeks after the general election, the Prime Minister, facing defeat in the House of Commons at the hands of a nascent coalition of opposition parties, asked the Governor General to prorogue the House. Some argued that the Governor General should refuse the request and call on the opposition parties to form a government. Many others disagreed.

Thus, the constitution is properly understood to be much more than the formal constitutional text. To perhaps oversimplify, it is necessary to distinguish between three types of constitution: (1) the formal written constitution; (2) the "informal constitution" that is manifest in constitutional conventions and constitution as statute; and finally, (3) the economic constitution which is enacted by some combination of statute, treaty, intergovernmental agreement, and regulation.

As a result, understanding the ways in which citizens can influence the constitution is more than looking at those relatively rare moments when the formal text is open for amendment. This begs the question of what we mean by the "democratization" of the constitution.

What is "Democratization"?

To suggest that the constitutional amendment process needs to be "democratized" could be interpreted as a statement that, absent such democratization the process is undemocratic. Of course, this is to overstate the case. In Canada at least, the formal current constitutional amendment process relies on the initiative, leadership and judgement of the elected politicians who serve as First Ministers and members of their cabinets. All of whom are accountable to the federal Parliament and the provincial and territorial legislatures. Thus, in a classic sense, the current formal constitutional amendment process is very democratic based on basic principles of representative government. Thus, to democratize the constitutional reform process is ostensibly to make the process more democratic where "more" is defined as something other than the institutions of representative democracy acting alone.

The formal constitution in Canada does not provide for anything other than representative democracy when it comes time to amend the constitution. Amendments are the purview of Parliament and the provincial and territorial legislatures. The informal constitution, however, requires that any "major" changes to the constitution be approved by Canadians by referendum. This is the legacy of the so-called "Canada round" and the decision of the Government of Quebec to subject the Charlottetown Accord to a referendum, something that the federal government and the other provincial and territorial governments felt compelled to emulate. Moreover, following the lead of Quebec, several provinces initiated a statutory requirement that any formal constitutional changes be put to a vote in a provincial referendum. These statutes reinforce the reality that referenda are now an integral part of the constitutional amending process in Canada.

If, so the argument goes, the process of constitutional reform needs to be rendered more democratic yet referenda are too blunt an instrument, what then? At a theoretical level, the process of constitutional change can potentially be informed by much of the work over the past twenty years seeking to flesh out what a more "deliberative" approach to both democracy in general and policy-making in particular. By extension, would be constitutional reformers can be, and indeed are, inspired by the myriad of ongoing experiments with more participatory forms of policy making. These experiments take many forms – citizen juries, deliberative polls, citizen dialogues – but they all share some common characteristics. They all seek to move beyond crude or divisive[9] tools such as public opinion polls, focus groups or referenda. They all involve engaging a representative subset of the population in a sustained conversation animated by neutral documentation and expert facilitation. As I will make clear below, there are a small number of such deliberative exercises in Canada that have been instituted to allow for changes to the electoral system in Ontario and British Columbia.

[9] In a Canadian context, referenda have a mixed reputation. Some, such as the 1980 referendum in Quebec on sovereignty-association and the much earlier pan-Canadian referendum on conscription were quite divisive and reinforced or at least amplified the strong differences of opinion between Québécois and Canadians (Boyer 1992).

Evaluation: The Persistence of Elite Accommodation

Notwithstanding the concerns raised in the 1980s about the secretive nature of the traditional Canadian approach to constitutional reform, elite accommodation is by no means gone when it comes to realising constitutional change in Canada. As indicated in Table 1 which provides an overview of selected constitutional changes in Canada since 1993, elite accommodation continues to be critical. While a comprehensive package of amendments that would affect the whole country is no longer a priority, Canadian political elites, specifically the federal and provincial governments, have conspired to agree on a series of bilateral amendments. There are several reasons for this.

First, many of the amendments to the formal constitutional text have been bilateral agreements between the Government of Canada and the government of a province pursuant to S. 43 of *Constitution Act, 1982*. Over the past fifteen years this device has been used to, *inter alia*, change the name of a province (Newfoundland became Newfoundland and Labrador), change the structure of education in Newfoundland and Labrador and Quebec, allow for a bridge to built connecting the province of Prince Edward Island to the mainland (the 1867 constitution explicitly provided for a ferry service), and officially make English and French the official languages of the province of New Brunswick, something that had been contemplated in the failed Charlottetown Accord. While some of these amendments are relatively minor (name change, bridge), several codify accepted practice (New Brunswick official languages), and a few have major repercussions beyond the province affected, they all required extensive negotiations between the federal and provincial governments even when, in some cases, the decision was also the subject to legislative hearings, referenda (Newfoundland education), or weak forms of public deliberation.

Second, and more broadly, elite accommodation persists because of the inherent dominance of the executive in Canadian politics. It is exceedingly rare for policy much less constitutional ideas to successfully originate in the federal parliament or provincial and territorial legislative assemblies. This executive dominance is, to some extent, "hardwired" into Canadian constitutional practice by the various amending formulas which almost invariably provide for some form of negotiation between the federal and provincial and territorial governments. (Savoie 2008)

Third, the conviction that the Canadian constitution cannot, or at least should not be amended – for fear of unleashing irresolvable disagreements – means that those outside of government who are looking for enduring solutions to endemic challenges (e.g. status of Aboriginal peoples; environmental protection; the decline in civic engagement) are actively discouraged from doing so. Non-constitutional solutions are preferred whether these be fiscal (e.g. allocating ever more public funds to address the plight of Aboriginal Canadians), legal (e.g. litigation by the government of the Province of Quebec seeking to constrain the ability of the Government of Canada to spend in areas of provincial competence), or simply legislative (e.g. statutory efforts to pursue Senate or electoral reform).

Evaluation: The Necessity of Public Participation

As is also immediately evident from Table 1, Canadian citizens are not yet routinely given an opportunity to deliberate on most constitutional amendments. While it is the case that all amendments to the formal constitution are subject to legislative or parliamentary debate, it is unlikely that many Canadians would find this an effective form of public engagement. Similarly, while most amendments to the formal constitution involve legislative or parliamentary hearings, once again, only a tiny fraction of the population is consulted and then the "usual suspects" – interest groups, university professors, politicians – are predominant. Similarly, changes to the informal constitution – key statutes and constitutional conventions – do not usually involve, and do not require, anything more than legislative or parliamentary approval with the associated

consultations by committee. In fact, when the informal constitution is amended as a result of decisions by the courts (e.g. Secession Reference; Delgamuukw) both the legislature and the public are most definitely not involved.

Moreover, as I noted earlier, in several Canadian provinces, a substantive amendment to the formal constitution must be approved by referendum. This does add a degree of public participation. However, while some referenda have been about substantive amendments (e.g. the Quebec sovereignty referendum and the BC and Ontario referenda on electoral reform), since 1993 many of the provincial referenda have been about relatively uncontroversial matters (e.g. PEI fixed link; Newfoundland name change) or they have served to enshrine in the constitution a policy consensus (e.g. Newfoundland schools).

Of potentially more interest are the more recent deliberative experiments in Ontario and British Columbia with respect to electoral reform. These are remarkable in several respects. First, they represent two relatively rare examples of deliberative democracy in action where a representative group of citizens were asked to consider the merits of change to the electoral system and, having decided that change was necessary what alternative system was preferable. In both cases the deliberative model involved a process lasting several months that included learning about elections and electoral reform, public hearings and other public engagement exercises, and expert facilitation of a deliberative process where the participants sorted through the issues and developed a consensus recommendation for a new electoral system.

Second, in both provinces the recommendations of the citizens' assemblies were submitted directly to the citizens of the whole province by means of a referendum held in conjunction with a provincial election. In effect, while not a change to the formal constitutional text in both cases, a major change to the electoral system (a critical part of what I have called the informal constitution) was designed by a representative group of citizens.

Third, it is critical to mention that in both Ontario and British Columbia the proposed changes to the electoral system were rejected by voters in the referenda. In both cases a supermajority was required for the changes to become law and in Ontario only 37 per cent of voters supported the change. (Elections Ontario 2007) In BC the result was much closer with 57.69 per cent voting yes, just shy of the supermajority of 60 per cent. (Elections BC 2005) Perhaps because of the close result, the proposal of the BC Citizens' Assembly will once again be put a province-wide referendum in conjunction with the next provincial election scheduled for 12 May 2009.

While space does not permit a full analysis of these referenda results, it is likely that in both cases a lack of public understanding and a lack of political leadership are part of the explanation. In both Ontario and in British Columbia, the government of the day, wishing to ensure that the recommendations of the citizens' assembly were put to the voters directly, opted to say relatively little about the recommendations. Arguing for and against the proposal was left to others. In both provinces, electoral reform was not one of the major issues of the election campaign, despite the fact that the election was the precursor to the referendum. Therefore it is not surprising that the proposals for change both poorly understood and ultimately were rejected. In the Ontario referendum on electoral reform, for example, at the outset of the campaign, only 34 per cent of respondents to a representative poll said they were aware and felt very, or somewhat knowledgeable about the referendum. Similarly, must over half of respondents (57 per cent) reported being aware that there were proposed changes to the electoral system and only 33 per cent reported being familiar with MMP (Elections Ontario 2007).

In other words, the political class signalled to the voters that electoral reform was not a priority. This combined with the complexity of the recommendation, a single transferable

vote system in BC, a mixed member proportional system in Ontario, meant that many voters simply opted for the known, opted for the status quo. These results suggest that while deliberative and participatory mechanisms have proved feasible for changes to the informal constitution in Canada, to be truly successful, that is to say citizens understand what it is they are voting, considerable political leadership is required, or at least more than was evident in the Ontario and B.C. referenda. Note that this is not an argument for political leadership so as to ensure that change proposals are adopted. Rather, it is simply to say that a minimal requirement for greater public participation in changes to the constitution, both formal and informal, is that those who bother to vote understand what it is they are being asked to vote on.

In summary then, is public participation beyond the provisions of representative democracy a necessary part of constitutional change in Canada? The short answer is no. It remains possible and indeed quite common, for amendments to the formal, informal and economic constitution to be made absent anything resembling public consultation much less public deliberation. A slightly longer answer is that in a few cases, specifically changes to electoral laws, Canadians have experimented with deliberative processes. However, these are by no means required and there is not yet an expectation that such deliberation will take place. Moreover, to be truly successful a model that would see the results of a citizens' assembly subject to ratification by referendum, considerable political leadership is required.

Evaluation: The Canadian Constitution is "Unamendable"

As should be clear by now, it is simply not the case that the Canadian constitution is unamendable as a result of the decline of elite accommodation as the vehicle for amending the formal constitution. Whether it be changes to the formal constitution (e.g. bilateral amendments under S. 94) or changes to the informal constitution (e.g. changes to key statutes), the constitution has been amended repeatedly since 1993.

Moreover, these amendments have been secured in a number of quite different ways. Some have been the result of explicit efforts to amend the formal constitution. Others are less challenging, but perhaps no less important, changes to statutes. Still others have been the result of evolving constitutional conventions (e.g. nominations to the Supreme Court and the Senate) although the durability of these changes is by no means clear. Most importantly, as should be clear from Table 1, the courts have been a critical vehicle for constitutional change in Canada, particularly with respect to the meaning of the Charter of Rights and Freedoms and the meaning of the constitutional recognition of Aboriginal rights and the commitment to self government for Aboriginal peoples in Canada.

However, while it is correct to say that constitutional amendment is possible and has occurred since 1993, not all constitutional issues can be addressed in a reasonably straightforward manner. For example, if Clarkson and others are correct in arguing that the North American Free Trade Agreement effectively constitutes an economic constitution for the hemisphere and for Canada in particular, what is remarkable is how reticent the parties to the agreement are to amendment. Canadians in particular are reluctant to contemplate "opening up" NAFTA for fear that some of the gains made will be lost.

Equally if not more important, none of the successful amendments to the formal and informal constitution since 1993 have focussed on one of the main drivers of constitutional change in Canada, the place of the Québécois minority. While the 1995 referendum was most certainly about the place of Quebec, the proposal for Quebec sovereignty was defeated, albeit by the narrowest of margins with an extraordinarily high turnout: 93.5 per cent of eligible voters cast a ballot, 49.4 per cent voting yes and 50.58 per cent voting no. (McRoberts 1997: 230; Young 1999) For the most part, Canadians

have avoided talking openly or at least in a sustained way, about the place of Quebec in the federation. While amending the formal constitution to allow Quebec to "sign on" remains the clear long term objective of many Québécois and is the official position of the governing Quebec Liberal Party, talking about such an amendment, much less arguing for it, is rare in the rest of Canada.

Thus, apart from the decidedly incremental and to many, unsatisfying, process of constitutional amendment by judicial interpretation of the meaning of Aboriginal rights, since 1993 Canadians have avoided engaging in a conversation about the place of Quebec and Aboriginal peoples in the constitutional architecture of the country. Yet, as has been observed before, the irony is that while Canadian political and legal theorists have been have been at the forefront of contemporary debates about minority nationalism and the realities of managing multinational federations (Choudhry 2007: 607-608) many Canadians would reject the very idea that Canada is a "multination" such is the power of the political culture unleashed by the Charter of Rights and Freedoms.

A somewhat more optimistic account of recent Canadian political history would focus attention on the commitment of the governing Conservatives to "open federalism" (Montpetit 2007) and the fact that in November 2006 the Canadian House of Commons voted in favour of a motion that the Québécois form a nation. Was this the beginning of a thaw in the willingness of Canadians to deliberate and discuss the multinational character of the country? Perhaps, but there are aspects of the debate which suggest not. First, the motion was a tactical move to forestall a vote on a much divisive motion introduced by the Bloc Québécois, an opposition party committed to pursuing the sovereignty of Québec. The wording of the motion had not been discussed beforehand by the Cabinet and the Minister of Intergovernmental Affairs resigned rather than vote for the motion. Second, it would appear that the motion was a highly partisan move on the part of the minority Conservative government to try and bolster support in the province of Québec. However, in the subsequent election in the Fall of 2008 the Conservatives did not get their hoped for breakthrough in Quebec and within days the Prime Minister was attacking the opposition parties for contemplating a coalition with the Bloc Québécois using rather intemperate language which alienated a large number public opinion leaders in Quebec and elsewhere. All of this suggests that the commitment of the Conservative government to an open federalism that accommodates Quebec nationalist sentiment is very shallow indeed and not the genesis of a constitutional conversation. Is such a conversation indeed possible?

Evaluation: Working towards a Constitutional Conversation…

Just as Canadians have made a significant contribution to contemporary scholarship about minority nationalism, they are also a part of making the normative case for "constitutional conversation" drawing on the work of Habermas (Chambers), Dryzek (Noël) and Wittgenstein (Tully). (Chambers 1998; Noel 2006; Tully 1995; Blattberg 2003) Having earlier very briefly described what is meant by a constitutional conversation, I now want to ask whether there is any evidence that such a conversation is, in fact, possible in Canada and what might be some of the preconditions for such a conversation.

In fact, there is very little evidence that, faced with the seemingly insurmountable challenge of amending the formal constitution as a way of addressing and recognizing the multinational character of Canada, Canadians have opted for a conversation. Of if they have, the conversation has not dealt with some of the key issues that require a *constitutional* conversation. While Canadians would appear to have abandoned, at least for the medium term, the search for a single constitutional outcome or settlement, it is by no means clear that they have opted for a give and take of arguments about the character of the polity. Nor is there much evidence that we are witnessing an active

process by which, as a result of conversation and deliberation, a new understanding of the constitutional settlement will organically emerge.

It is not possible to fully develop this critique here. For the moment, I simply want to offer three arguments that underscore the challenge of triggering a constitutional conversation. The first has to do with the role of intellectuals, the second has to do with the costs of promoting deliberative dialogue, and the third has to do with the intensity of constitutional conversation that we ignore at our peril.

Implicit in much of the writing about such a conversation is the idea that intellectuals, be they university-based or not, will contribute to the conversation, animate it, and nourish it. In making this argument I am thinking of the critical role that intellectuals or experts play in most models of deliberation. In order for citizens to deliberate on complex issues they need to be provided with some more or less neutral information about the issues and a roadmap that charts both the technical issues (e.g. different kinds of electoral systems) and the value conflicts that are inherence in choosing between different policy options and institutional arrangements (e.g. spatial representation that privileges locality vs. proportional representation that privileges interests however defined). As Joseph Weiler puts it:

> Deliberative models are often favoured by the deliberative class – primarily professors who are, naturally, empowered by any process which privileges that which they have and which legitimates, even aggrandizes, their status and actual or pretended modus operandi , and in which the model for ideal government is a well-conducted seminar.
>
> (Weiler 1999: 348, cited by Brunkhorst 2004: 98)

Enter what Peter Russell has called "the chattering classes" (Russell 2004: 99). However, for the chattering classes to contribute fully they must be able to deliver a comprehensive account of the challenges that a constitutional conversation is meant to address. Yet the Canadian case suggests that few actually do so.

While it is true that intellectuals are common among recent Canadian political leaders, with one university professor, Michael Ignatieff, replacing another, Stéphane Dion, as leader of the Liberal Party of Canada, there is a striking lack of dialogue between intellectuals on either side of the linguistic divide. As François Rocher has recently demonstrated, English language Canadian political scientists generally ignore the work of the French language counterparts, even when the latter publish in English. Interestingly the reverse is not true – French language scholars are more likely to cite the work of their English language colleagues. (Rocher 2007) Similarly, even in the narrower confines of federalism studies, it would appear that scholars who work in English rarely engage with their French language counterparts (Fafard and Rocher, forthcoming). Moreover, the two language communities operate with quite different conceptions of the purpose of federalism with efficiency being the watchword among many English language students of federalism in Canada whereas shared citizenship and accommodating minorities is the focus on French language scholarship (Fafard, Rocher and Côté, 2008). Quite often disagreements and debates among university-based intellectuals matters little in the real world of politics. However, in the Canadian case, academics have played a critical role in the past as advisors to governments, framers of the public debate, and as political leaders. Moreover, if there is to be a constitutional conversation among Canadians writ large, it would be helpful if the academics who will be asked to animate and inform[10] that

[10] One of the most common features of deliberative dialogue is the presence of "experts" who can provide participants in the dialogue with reasonably neutral information to participants (Abelson et. al. 2006). More generally, Frank Fischer calls for a cooperative relationship between citizens and experts as part of a more deliberative approach to public policy. (Fischer 2003)

conversation were themselves engaged in a dialogue rather than just talking past one another.

Second, if a constitutional conversation is to be effective and have a meaningful impact on constitutional politics, it must involve citizens in a meaningful way. The good news is that in Canada we have increasing experience with a range of deliberative techniques like deliberative polls, citizen juries and citizen dialogues (Abelson 2006). However, almost all of these experiments have been initiated by governments. Largely because of cost, only governments have, to this point, been able to initiative deliberation processes on key public policy issues. Yet as long as Canadian governments labour under a phobia about constitutional talk or, in some cases, believe that constitutional talk is no longer required, they are unlikely to be willing to launch the deliberative exercises that would seem to be required if Canadians were to engage in a true constitutional conversation.

In other words, a constitutional conversation does not "just happen". It requires leadership by governments and by intellectuals (and, for that matter the private and volunteer sector). Governments have the funds to create the deliberative spaces that allow for a constitutional conversation to at least get started. Intellectuals play a critical role in allowing enabling the parties to the conversation to move quickly and efficiently to discussing the core issues.

Finally, in multinational federations like Canada, the constitutional conversation must contend with the fact that Canadians have been debating their future together more or less intensely for the past 50 years. In the process citizens, and especially the political class, have learned that, like with all negotiations, a constitutional negotiation is about advancing disparate interests and reconciling divergent views. When required, governments have not hesitated to play hardball. This has taken the form of two referenda on variations on sovereignty for the province of Quebec, a reference to the Supreme Court followed by a law, the *Clarity Act* that tries to establish a minimum set of rules for secession and countless claims and counterclaims of unfairness, selfishness, and small mindedness. As Noël has argued:

> Like all deliberative processes of significance, the Canadian constitutional debate never was a nice and polite conversation, carried by well-meaning participants who had previously checked their interests and their advantages at the door. It often involved tough bargaining or verged on plain domination, was always less than perfectly democratic, and incorporated many restrictions and constraints that disadvantaged some or many constituents.
>
> (Noël 2006 : 438)

Conclusion: The Challenges of Democratization in a Multinational Federation

Despite claims to the contrary, the Canadian constitution is subject to amendment and change. Bilateral amendments to the formal constitution and a myriad of changes to the informal constitution have allowed the Canadian constitutional order to evolve. Moreover, while there is now a constitutional convention that requires major changes to the formal constitution to be subject to referendum, much can and is accomplished using the traditional mechanisms of elite negotiations where the public is not directly engaged although some consultations may occur. Moreover, the very nature of public participation is also changing and Canadians are experimenting with a wide variety tools beyond the relatively blunt instrument that is a referendum. Finally, while an ongoing constitutional conversation is desirable in theory, in practice such a conversation requires sustained and far-sighted political leadership and is hampered by challenges of cost, the lack of dialogue between and among the intellectual who would animate such a conversation, and the legacy of many years of often hardball constitutional wrangling.

The very possibility of constitutional change in Canada, broadly defined, is thus defined by three linked realities. First, any changes that seek to address the core definition of the polity (e.g. two or three nations; a pact between provinces; a single national and civic project; a rights-based citizenship regime) requires a multilateral amendment to the constitution,[11] and the result is subject to ratification by referendum. Second, the very fact that the threshold for major changes to the constitutional order is so high means that such change should, ideally, be the result of an ongoing constitutional conversation although the preconditions for such a conversation do not yet obtain. Finally the net result is that constitutional change does occur in Canada, much of it involving innovative tools to consult if not engage citizens. While these incremental changes are, in some cases, quite important (e.g. electoral reform), for the most part they sidestep the fundamental questions that constitutional change was meant to address.

[11] For a contrary view that makes the case for a bilateral amendment to the Constitution recognizing the Québécois nation in the Constitution of Canada, see Cameron (2008).

Table 1. Selected Changes to the Canadian Constitution Broadly Defined Since 1993.

Constitutional Change	Part of the Constitution	Elite Accom.	Nature of Public Participation
Prince Edward Island Terms of Union with Canada Act, 1993	Formal	Yes	Legislative Referendum
Constitution Amendment, 1993 (New Brunswick)		Yes	Legislative
Nunavut Act, 1993	Formal	Yes	Legislative Referendum Some deliberative
North American Free Trade Agreement, 1994	Economic	Yes	Legislative
Quebec Referendum, 1995	Formal	No	Legislative Referendum Some deliberative
Constitutional Amendment Act (1996) (Regional Veto)	Informal	Yes	Legislative
Constitution Amendment, 1998 (Newfoundland Act)	Formal	Yes	Legislative Referendum
Secularization of Quebec Schools, 1997	Formal	Yes	Legislative Some deliberation
Delgamuukw Decision, 1997	Informal	No	None
Nishg'a Final Agreement, 1998	Informal	No	Legislative Referendum (Nisga'a)
Secession Reference, 1998	Informal	No	None
Clarity Act, 1998	Informal	No	Legislative
BC Citizen's Assembly on Electoral Reform, 2004	Informal	No	Legislative Strongly deliberative
BC Referenda on electoral reform, 2005/2009	Informal	No	Referendum
Ontario Citizen's Assembly on Electoral Reform, 2006	Formal	No	Strongly deliberative
Quebec as a Nation Resolution, 2006	Informal	No	None
Ontario Referendum on electoral reform, 2007	Formal	No	Referendum
Legislative Attempts to Proceed with Senate Reform in the 39th Parliament, 2007-2009	Informal	No	Legislative

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Chapter Six

Gender Democracy and Canadian Constitutional Trialogue

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> We now have a Charter which defines the kind of country in which we wish to live, and guarantees the basic rights and freedoms which each of us shall enjoy as a citizen of Canada. It reinforces the protection offered to French-speaking Canadians outside Quebec, and to English-speaking Canadians in Quebec. It recognizes our multicultural character. It upholds the equality of women, and the rights of disabled persons.
>
> The Hon. Pierre Elliott Trudeau, Prime Minister of Canada, 17 April 1982[1]

Introduction

This chapter is largely a retrospective by a feminist lawyer engaged in Canadian constitutional activism for the past three decades. Some of the information in this chapter about Canadian women's constitutional activism spans eighty years and some of it is not documented in formal accounts of constitutional evolution in Canada, perhaps because it is firmly from a woman's perspective. The first section – A Brief Herstory – describes key events in women's constitutional engagement through litigation, political mobilisation and law reform – prior to the constitutional patriation process initiated by then Prime Minister Pierre Trudeau in the late 1970s. The second section – Quest for Substantive Equality – looks at women's responses to the notion of a charter of rights and freedoms with constitutional status, leading to the entrenchment of the *Canadian Charter of Rights and Freedoms*[2] in the *Constitution Act, 1982*, with particular reference to the model and the impact of the Women's Legal Education and Action Fund – LEAF – and LEAF's contributions to some significant constitutional cases in Canada The last section – Questions on Gender Democracy – explores aspects of common concern in the constitutional experiences of women in the EU and Canada.

As Canadians celebrated and reflected upon twenty-five years of our constitution and its entrenched *Charter of Rights and Freedoms*, the vision for Canada's constitutional democracy articulated in the quote of then Prime Minister Trudeau, above, was widely accepted. Many of us, who had been personally involved in the constitution-making of that time, came together with divergent views of what had happened twenty five years before, and of the health of our democracy as a result. For the author, speaking invitations became opportunities to share some of the less-known aspects of the social mobilisations – by Aboriginal peoples, persons living with disabilities, and women, in particular – which altered Canadian constitutional history. Articles were written for

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[1] Pierre Elliott Trudeau, *Remarks by the Prime Minister at the Proclamation Ceremony on 17 April 1982*. (Ottawa: Office of the Prime Minister, 1982) Library and Archives Canada. Online at: <www.lac-bac.gc.ca>.

[2] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. I I [hereinafter "Charter"]. Section 32 states: "(1) This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force".

Canadian law journals to tell a truer story about constitutional activism in order to situate a third wave of citizen engagement in constitution-making – a phenomenon that is seldom acknowledged as valuable or essential by mainstream journalists and academics in Canada. It was respectfully suggested that the notion of "Charter dialogue" introduced in a series of articles by the prominent Canadian constitutional scholar, Peter Hogg and his co-authors, as a bilateral dynamic between legislation and adjudication was too limited.[3] In arguing for a more inclusive understanding of how the Canadian constitution was built and is sustained, the "trialogue" metaphor was introduced to acknowledge the ongoing engagement and influence of social movements in the drafting of constitutional text and in securing equality rights in sections 15 and 28 of the Charter. These articles suggested that constitution-working requires sustainable citizen participation for realizing systemic changes and benefits in the "living" of the rights and freedoms articulated in the *Charter;*

> Too often, judges and politicians fail to appreciate that Canadians, invested in an equality-based constitutional democracy – often engaging directly through interventions in Parliament and in the courts – have turned the dynamic into a *trialogue*; surely one of the most significant outcomes of the s.15 impact on Canadian society.[4]

Evidence is mounting to suggest that the trend for gendered dimensions of constitution-working in Canada is toward decline, due largely to complacency and disappointment among many rights seekers about the Charter, reinforced by increasing systemic resistance to inclusion of rights seekers, from the federal government and the Supreme Court of Canada, which has become more evident over the past decade.[5]

The author's presentation at the request of ARENA at the University of Oslo RECON workshop was on the same theme of 'trialogue'; this chapter builds on that presentation, supplemented by some comparative observations informed by the discussion at the RECON workshop. Comments from a Canadian perspective address some points made by Yvonne Galligan and Sara Clavero in their online working paper on assessing the quality of democracy in the European Union from a gender perspective.[6] Speaking to the RECON Workshop that is the source of this report, Yvonne Galligan suggested that effectiveness measures for court-based litigation should not be isolated from representative-participatory institutions in delivering policy changes that seek to equalize gender relations.[7]

Nancy Fraser has argued for "the overarching normative principle of *parity of participation*":

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[3] Hogg, P. W. and Bushell, A. A., "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75 ; Hogg, P. W., Bushell, Thornton, A. A. and Wright, W. K., "Charter Dialogue Revisited - or "Much Ado About Metaphors" (2007) 45 Osgoode Hall L.J. 1.

[4] McPhedran, M. (2005) "Reflections on the 20th Anniversary of Section 15: The Impact of S. 15 on Canadian Society Equality Rights: Beacon or Laser?", 19 *National Journal of Constitutional Law* (Carswell), p.9.

[5] McPhedran, M. (2007) "A Truer Story: Constitutional Trialogue", *Supreme Court Law Review,* Second Series, Volume 36, 101-136.

[6] Galligan, Y. & Clavero, S. (2008) "Assessing Gender Democracy in the European Union - A Methodological Framework", RECON Online Working Paper 2008/16.

[7] Galligan, Y. and Clavero, S. 'European constitution making and the role of gender', draft paper for discussion at the RECON Workshop: Lessons from Europe's and Canada's constitutional experiences, 20-21 March 2009, Oslo, Norway.

> On the view of justice as participatory parity, overcoming injustice means dismantling institutionalized obstacles that prevent some people from participating on a par with others, as full partners in social interaction.[8]

This chapter is a reflection on 'what', 'why', 'how' and 'was it worth it?' of Canadian women's social mobilization for parity of participation in the development of constitutional equality rights, and some of the results of that engagement, more than twenty five years later. Alexandra Dobrowolsky described the breadth of Canadian women's constitutional activism:

> This view of representation, as it is limited to public, political institutions, fails to appreciate that women have engaged in activities and advanced concerns previously excluded from conventional politics. In seeking representation, they have bridged public and private domains, state and civil society. Indeed, they have pursued a number of interconnected representational channels that traverse institutional / non-institutional political public/private spaces.[9]

With the goal of gaining genuine access and full participation in our democracy, Canadian women have been engaged in dismantling institutional barriers to equality in many ways – including the strategy of bringing court challenges, beginning with the "Persons Case" of 1929, more than eighty years ago.

A Brief H*erstory* of Canadian Women's Constitutional Activism

The Persons Case, 1929

In 1928, five women from western Canada collectively challenged the institutionalized obstacle of only men being accepted for judicial and senatorial appointments, by petitioning the Supreme Court of Canada, using a provision in *The Supreme Court of Canada Act* that allowed for government funding of significant questions of constitutional law. [10] Because the federal government provided the funding for the case, it also determined the wording of the question:

> Does the word "person" in Section 24 of (what then served as the Canadian constitution) *The British North American Act*, include female "persons"?

Chief Justice Anglin answered with a firm negative for a unanimous Supreme Court of Canada.[11]

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[8] Fraser, N., "Abnormal Justice", essay 28.06.2007, p.16. Accessed online at: <http://criticalinquiry.uchicago.edu/issues/Fraser.pdf>.

[9] Dobrowolsky, A. "Of 'Special Interest': Identity and Feminist Constitutional Activism in Canada" (1998) *Canadian Journal of Political Science* XXXI: p.4.

[10] Millar, *N., The Famous Five - Emily Murphy and the Case of the Missing Persons*, (Western Heritage Centre, 1999) at 9 - 15. In 1907, as a young pastor's wife in Edmonton, Alberta, who had grown up protected by the customs of privilege, Emily Murphy was shocked to hear poor women describe how they were not protected by custom or by law and so she went to the legislative library to find out for herself that property laws did not protect a wife's interest in the family home. These inquiries led to her connection with Henrietta Muir Edwards (whose name became the lead citation for the Persons Case), of Fort Macleod, AB, the "convener of laws" for the volunteer federation National Council of Women. Widely read under her popular pen name "Janey Canuck" as the author of *Black Candle* about addiction to opium and cocaine in Canada in 1922, but less popular under her own name – Judge Emily Murphy - Judge Murphy paid most of the legal costs for the Persons Case and managed their case through the courts in a way that the other four of the "Famous Five" did not.

[11] *Reference as to the Meaning of the Word "Persons' in Section 24 of the British North America Act, 1867*, [1928] S.C.J. No.19 (S.C.C.) (QL)., [1928] S.C.R. 276 "…women are not eligible for appointment by the Governor General to the Senate of Canada under Section 24 of the British

Facing this barrier to their participation, the five petitioners had to choose between strategies, to: (a) build the political momentum to convince the government to legislate in their favour; or (b) use government funds to litigate further to the Judicial Committee of the Privy Council of England, which had higher authority than the Supreme Court of Canada, at that time. The "Famous Five" – as they have become known in Canada – were all seasoned, well-connected activists who understood what it took to mobilize politically. The women opted to pursue their collective litigation, but could not afford to travel to England to hear their case argued by their government appointed lawyer.[12] On 18 October 1929, Lord Chancellor Sankey of the Privy Council, likened a constitution to a "living tree" and delivered a unanimous decision,

> and to those who would ask why the word [persons] should include female, the obvious answer is, why should it not?[13]

Royal Commission on the Status of Women – Equality First Report – 1967-70

The Persons Case can be seen as the first wave of the Canadian women's movement, but the momentum was not sustained. Thereafter, during severe economic downturns and devastation of two world wars, women's participation parity was seldom seen as a focus for organizing. As Canada entered its centennial year in 1967, traditional roles for women were again being questioned but litigation for attaining equality rights was not among the strategies being considered. Instead, women's organizations brought pressure on then Prime Minister Pearson to fund a Royal Commission on the Status of Women (RCSW or Royal Commission) – so named because of Canada's continued membership in The British Commonwealth and recognition of the English monarchy.

The Royal Commission set a new standard in Canadian public discourse on a wide range of topics, not typically considered to be "women's issues", including tax policy and education, Aboriginal women's problems under the *Indian Act*, health care, reproductive rights, child care – most involving civil and criminal law reforms. A new activist quality characterized how the commissioners approached their collective task. An unprecedented degree of women's engagement as citizens was reflected in the findings of research that had been commissioned to ask questions of Government that had never been asked before.

After thirty-four research reports and public hearings across the country, the Commission delivered its Final Report, *Equality First*, to considerable media attention in 1970.[14] Many of the 167 recommendations spoke to social and economic rights still unrealized in Canada today, including a national day care program with sliding scale fees based on family income and a federally guaranteed annual income to the heads of all one-parent families with dependent children. Soon thereafter, the National Action Committee on the Status of Women (NAC) a national federation of women's organizations was founded to

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North America Act, 1867, because they are not 'qualified persons' within the meaning of that section".

[12] The "Famous Five" were pleased when Prime Minister Mackenzie King agreed to provide more funding for the eminent barrister (and fellow Liberal), Newton Rowell, to again argue the case, but this time Rowell traveled to London in July of 1929 to argue before the Judicial Committee on behalf of the five women. Rowell succeeded. His granddaughter, Senator Nancy Ruth, is a founding mother of LEAF - the Women's Legal Education and Action Fund.

[13] *Edwards v. Canada (A.G.)*, [1930] A.C. 124 (P.C), [1930] 1 D.L.R. 98 Note: October 18th is now officially celebrated in Canada as "Persons Day". For different perspectives on this historic case, see also: Bright, D., "The Other Woman: Lizzie Cyr and the Origins of the "Persons Case" (1998) 13(2) Can. J. of Law & Soc. 99; and Lahey, K., "Legal 'Persons' and the Charter of Rights: Gender, Race and Sexuality in Canada" (1998) 77(3) *Canadian Bar Review* 402.

[14] "Equality First", Report of the Royal Commission on the Status of Women in Canada (Ottawa: Information Canada, 1970).

maintain momentum toward establishing programs and mechanisms envisioned in the *Equality First* report. By the early 1980's NAC comprised over 230 affiliated organizations – with millions of members – all working towards the recommendations outlined in the RCSW *Equality First* report.[15] As a result, women were primed for participation parity as the constitution-building politics of the late 1970s and early 1980s intensified.

Equality-Promoting Mechanisms

For its part, the Government of Canada established an internal agency, Status of Women Canada (SWC) staffed by the civil service, as well as an external body, the Canadian Advisory Council on the Status of Women (CACSW), with its own research and program staff, to which the Government appointed well-known women leaders from regions of Canada. For many, these initiatives were heralded as evidence of the Government conceding an undeniable inequality between men and women. Establishing and staffing these mechanisms required the greatest financial commitment that any Canadian government had ever made in improving the status of women. Both of these bodies proved to be critical to galvanizing the largest social mobilization in Canadian history, which focussed exclusively on women's rights in the public and private spheres during the patriation of the Canadian constitution from England to Canada in the 1980s.

Women Lose to Formal Equality

In 1960 the *Canadian Bill of Rights* was enacted; limited to federal laws, it could be amended at any time, because it was not part of the constitution.[16] Ironically, the launch of the equality promoting mechanisms of Status of Women Canada (SWC) and the Canadian Advisory Council on the Status of Women (CACSW) occurred around the same time as every claim brought by women seeking equality protections under the federal *Canadian Bill of Rights* was lost. Moreover, the institutions that defeated them were mechanisms created by governments with the stated goal of providing assistance: divorce, unemployment insurance, and protection for Canada's indigenous First Nations. Gender based analysis of the promise in the *Canadian Bill of Rights* for "equality before the law and the protection of the law" never occurred.

Judicial gender blindness obscured the disparate impact of laws on women and girls - invisible to those empowered to assess whether discrimination of an illegal nature had occurred. Judges failed to factor in the lived reality of women challenging those laws and so the mechanisms that were obstacles to women's parity participation were reinforced by the judges. Canadian women started to react to systemic discrimination inherent in those judicial decisions, mobilizing to spend some of their collective political capital, and as a result, some rapid legislative changes marked the 1970s.

It was the Irene Murdoch loss in 1975 that accelerated family law reform in jurisdictions across Canada. Having put part of her inheritance into land in her husband's name, Mrs. Murdoch was asked to describe the nature of her work at trial, and she had replied, "Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done".

There was also evidence of violence in the marital relationship resulting in Mrs. Murdoch having her jaw broken. Nonetheless, in dismissal of her lifetime of work with her husband for more than 25 years, the Supreme Court of Canada – with only one dissent – awarded Irene Murdoch two hundred dollars (less than EUR 135 in 2010) a month, agreeing with

[15] Manfredi, C. P., *The Canadian Feminist Movement, Constitutional Politics, and the Strategic Use of Legal Resources,* (Vancouver: UBC Press, 2000) at 19.

[16] S. C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

the trial judge that she had only done the "routine" work of "any ranch wife" – which was not enough to create a legal claim to their matrimonial property.[17]

Canadian politicians soon experienced the social mobilization of women in response to what the courts did to Mrs. Murdoch, resulting in a national sea change of family law reform. At the close of the 1970s, just as Prime Minister Trudeau was introducing his plan for a constitution with an entrenched charter of rights, every province and territory had adopted matrimonial property and other equality-based amendments. This participatory success demonstrated the value of citizen engagement to many of the "average" Canadian women who had pressured their governments, laying the foundation for their readiness to consider constitutional activism as a means to achieve participation parity.

Fired because she was pregnant, Stella Bliss sought, but did not find, appropriate employment after her baby was born, and so she applied for unemployment insurance as a regular worker. The Unemployment Insurance Commission turned down her application – because she had been pregnant when she lost her job and she did not meet the more stringent criteria applied to pregnancy coverage. Canadian courts found no sex discrimination in the Bliss case, reasoning that all pregnant women were equally denied regular unemployment benefits. The Court determined that the proper comparitor was not women to men, but rather it was between pregnant and "non-pregnant" persons.[18]

Two other losses for women under the *Canadian Bill of Rights* drove home the realization that judges saw the language of the law as formal, that substantive rights were not available under the law in Canada in the 1970s. For more than one hundred years Aboriginal women and their descendants have been discriminated against in the determination of who can obtain and transmit Indian status. In contradiction to many Aboriginal traditions in Canada, the *Indian Act* was designed by non-Aboriginal legislators to be patrilineal. Although the concept of Indian status was originally imposed on Aboriginal people by the federal government, it developed into a powerful source of cultural identity for individuals of Aboriginal descent and Aboriginal communities. Under the 1876 *Indian Act*, and subsequent iterations, women who married a non-Indian lost their status as 'Indians' – as did their children. Under s. 12(1) (b) of the *Indian Act,* women were legally defined as Indians if their fathers were Indians or if they married Indians, but were not defined as Indians if their mothers were Indians. When this law was challenged by Jeanette Lavell and Yvonne Bédard, the Court defined "equality before the law' as formal equality of same treatment, holding that all Indian women were treated the same by the law and finding that any denial of Indian status on the basis of their sex was not an injustice that could be redressed by the *Canadian Bill of Rights.*[19]

The Lavell and Bédard defeats prompted a dramatic activist response involving a group of Aboriginal women who left the Tobique Reserve on the eastern coast of Canada, with their small children, fathered by non-status men, to walk in protest to Canada's capital city, Ottawa. They were joined along the way by other Aboriginal women and their children, similarly denied their status as Indians. One of their leaders, Sandra Lovelace (now Senator Lovelace-Nicholas), a Maliseet woman of the Tobique reserve, gained international attention when she became the first Canadian to petition the United Nations Human Rights Committee, alleging violations by Canada under the *Optional Protocol to the International Covenant on Civil and Political Rights,* to which Canada had just

[17] *Murdoch v. Murdoch* [1975] 1 S.C.R. 423, at 443 Note: The monthly $200 stipend was supplanted later by a "lump sum" settlement of $65,000 without the monthly payments. Note: The conversion (in 2010 values) would be approximately EUR 44,000 - for more than 25 years of her contributions to the matrimonial business of ranching.

[18] *Bliss* v. *Canada (AG),* [1978] S.C.J. No. 81 (S.C.C.) (QL)., [1979] 1 SCR 183.

[19] *A. G. Canada* v. *Lavell,* [1973] S.C.J. No. 128 (S.C.C.) (QL), [1974] S.C.R 1349V.

acceded.[20] Canada defended its *Indian Act*, but the UN Human Rights Committee held that Canada had violated Article 27 of the *International Covenant on Civil and Political Rights.*[21]

Embarrassed internationally by the UN finding, Canada reviewed its law, slowly.[22] Sustained lobbying from a wide range of women's groups persisted for nearly ten years after the march from Tobique, until the Government enacted partial redress in 1981, just as the UN Convention on the Elimination of all forms of Discrimination Against Women – CEDAW[23]– was coming into force for Canada and in the midst of Canadian constitutional patriation disputes. Aboriginal women's status and succession rights were left in a discriminatory state that persists to this day. Aboriginal women leaders continue to challenge the damage being done by the *Indian Act*. Ongoing post-Charter litigation and lobbying on this issue are discussed later in this chapter, as part of the resistance of governments and courts to women's rights.

Canadian equality initiatives were part of the broader international context punctuated by four UN World Conferences on Women from 1975 to 1995. Although initially considered problematic by many women's activists and UN member states, the first UN World Conference on Women, held in Mexico City in 1975, launched the UN Decade for Women, which culminated in Nairobi, Kenya in 1985. For the first time, a transnational feminist network emerged, but its members were still largely defined in national or regional terms, often highlighting the North-South, First World-Third World divides.[24] The North tended to define issues and develop strategies in terms of legal equality and reproductive rights, while many feminists from the South saw social and economic development barriers erected by colonialism, and imperialism as more significant obstacles to women's advancement. These tensions were evident at the Second World Conference in 1980 in Copenhagen, where Canada was one of four countries to oppose the overall Programme of Action, along with the United States, Australia, and Israel.[25] Canada defended its opposition by criticizing some delegations that "preferred the comfortable ring of global political platitudes to the unfamiliar and perhaps threatening terrain of sexual inequality".[26]

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[20] (1966) G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (no.16) at 59, U.N. DOC.A/6316 (1966) In force for Canada 23 March 1976.

[21] Lovelace v. *Canada* (1981) Report of the Human Rights Committee, GAOR 36th Sess., Supp. No.40 (AQ/36/40), Annex XVIII, 166 Article 27 of the ICCPR states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, *to enjoy their own culture*, to profess and practise their own religion, or to use their own language". [emphasis added].

[22] Bayefsky, A. (1982), "The Human Rights Committee and the Case of Sandra Lovelace," *Canadian Yearbook of International Law* at 244. Weaver, S. (1993), "First Nations Women and Government Policy, 1970-92", Chapter 3 in: S. Burt, et al. (eds), C*hanging Patterns: Women in Canada* (2nd ed.) Toronto: McClelland & Stewart Inc.

[23] CEDAW, GA Res. 34/180, UN GAOR, 34th Sess., Supp. No. 46, UN Doc. AIRES/34/190 (1980), at 193 (Canada acceded in 1981).

[24] Moghadam. V. M. *Globalizing Women: Transnational Feminist Networks* (Baltimore: John Hopkins University Press, 2005) at 5.

[25] United Nations, *Report of the World Conference of the United Nations Decade for Women: Equality Development and Peace, Copenhagen, 14 to 30 July 1980, (*New York: United Nations, 1980) at 203.

[26] Ghodsee, K. "Revisiting the United Nations Decade for Women: Brief Reflections on Feminism, Capitalism and Cold War Politics in the Early Years of the International Women's Movement" in: *Women's Studies International Forum.* Available at: <http://www.elsevier.com/locate/wsif>.

The Case for Positive Action

Following the Second World Conference on Women, the United Nations *Convention on the Elimination of all Forms of Discrimination Against Women*[27] was coming into force as Canada's proposed *Constitution Act,* with its entrenched Charter *of Rights and Freedoms* (Charter), was being drafted. The proactive standards set for governments in *CEDAW* were evident in changes to the Charter proposed by Canadian women, such as the obligations in CEDAW Article 2 for "state parties to embody the principle of the equality of men and women in their national constitutions [...] and to ensure, through law and other appropriate means, the practical realization of this principle".

Canadian constitutional activists also noted the positive actions expected of states in Article 5 of CEDAW to "take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority of the superiority of either of the sexes or on stereotyped roles for men and women".[28]

Women and Constitutional Trialogue

The platform for Canadian "constitutional trialogue" in the 1980s was built by the women's rights losses to formal equality in the 1970s – reinforced by the public education flowing from the *Equality First* report and the resulting creation of equality-focused mechanisms, such as the federal and provincial advisory bodies on the status of women that were funded by governments mentioned previously, the CACSW and the SWC department in the federal government. As the 1980s opened, the Canadian federal government of Pierre Trudeau demonstrated its preference to continue executive style federalism as the means of bringing in a new constitution, releasing wording of a proposed constitutionally entrenched anti-discrimination clause that echoed the impugned *Canadian Bill of Rights*.

In fact, "equality rights" was not a title or term used in any of the drafts of the *Charter* developed by government officials or political leaders from the 1960s through to 1981. One of the arguments for accepting the Trudeau government's "people's package" for constitutional reform was that an entrenched charter would apply to governments across Canada and thus rights would be equally available. Equality rights in the *Charter* came out of the grass roots mobilization of people and groups in Canada – mostly women's rights organizations and representatives of people living with disabilities. Accounts of this struggle vary, perspectives differed depending on the position of the participant in the constitution building processes – for example the focus of a disability rights advocate on inclusion in the package was different from the focus of a federal politician who saw reaching a broad agreement among the powerful regional leaders on the whole constitutional reform package as the top priority.

Initially the Trudeau government was not prepared to "open up" the constitution building process, but public pressure convinced the government to name a Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada ("Special Joint Committee") in 1980, with members drawn from all the parties of both houses of Parliament. For the first time in Canada, a parliamentary committee was televised and millions of Canadians witnessed what was happening at the hearings, so the co-chair of the Special Joint Committee, Senator Hays, made national news when he

[27] *Convention on the Elimination of All Forms of Discrimination against Women.* Available at: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

[28] Personal knowledge of the author, who acted as a *pro bono* counsel to executives of the National Action Committee on the Status of Women for their presentation to the Special Joint Committee on the Constitution in 1980.

addressed the National Action Committee on the Status of Women (NAC) executives in the following manner:

> I want to thank you girls for your presentation. We're honoured to have you here. But I wonder why you don't have anything in here for babies or children. All you girls are going to be working and who's going to look after them?[29]

After months of presentations by concerned citizens and their organizations to the Special Joint Committee, Attorney General of Canada Jean Chrétien announced major changes to section 15 in January of 1981. Mary Dawson and David Lepofsky wrote first hand accounts of what went into these changes,[30] including altering the title to "equality rights", creating an opening for non-enumerated or analogous grounds of discrimination (which made it possible for Canadian judges to "read in" a ground, for example, reading in "citizenship" in the *Andrews* decision in 1989 and sexual orientation in *Vriend* in 1998)[31], reversing the order of "age" and "sex", as well as adding another enumerated ground – "mental or physical disability".

One of the major concerns arising from the string of losses under the *Canadian Bill of Rights* was to ensure that the new Charter contained language that would signal to judges that they had the authority to order results-based remedies – clearly beyond the notion of formal equality attributed by judges to the words "before the law". For this reason, the wording in s.15 of the Charter became: "Every individual is equal *before and under* the law and has the right to the *equal protection and equal benefit* of the law without discrimination […]" (emphasis added). Penney Kome reviewed the record on non-governmental organizations that made presentations to the Special Joint Committee and found:

> Most attention was paid to Clause 15 ... Women wanted the section renamed "Equality Rights," to emphasize that equality means more than non-discrimination.[32]

In his explanatory remarks on the Government's revision of the proposed s. 15 text, the attorney general credited the title change - from "Non-discrimination Rights" to "Equality Rights" – primarily to the Canadian Advisory Council on the Status of Women (CACSW, now defunct) then chaired by the late Doris Anderson, with Mary Eberts acting as her legal counsel.[33] Before Chrétien announced his decision, the CACSW had addressed the Special Joint Committee in the fall of 1980, and Eberts brought to the attention of the Joint Committee a rising sense of exclusion about the "executive federalism" model for constitution-building, predicting the intensification of women's constitutional engagement that did in fact arise a few months later, in early 1981.

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[29] The author was present as a NAC legal advisor. This exchange was filmed and forms part of a segment of a documentary series hosted by Canadian journalist Patrick Watson (1988), "The Last Citizens" in *The Struggle for Democracy.* See also P. Watson and B. Barber (1988), *The Struggle for Democracy*, Toronto: Lester & Orpen Dennys Ltd., at 141-69.

[30] Dawson, M. "The Making of Section 15 of the Charter" (2006) 5 *Journal of Law & Equality* 25, at 31; Lepofsky, M. D. "The Charter's Guarantee of Equality to People with Disabilities: How Well Is It Working?' (I 998) 16 *Windsor Y.B. Access Just*. I 55, at 156.

[31] *Andrews v. Law Society of British Columbia* [1989] 1S.C.R. 143; *Vriend v. Alberta (Attomey General),* [1998]1 S.C.J. No. 29, [19981 1 S.C.R. 493.

[32] Kome, P. *Taking of Twenty-Eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983) p.35.

[33] Senate and House of Commons, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada,* 32nd Parliament, Ist Sess., issue no. I (12 January 1981).

The Ad Hoc Committee of Canadian Women on the Constitution, 1981

Canadian women's constitutional activism was sparked when Doris Anderson abruptly resigned as chair of the CACSW in January of 1981, in public protest against what she considered to be government interference in the women's constitutional conference being organized by the CACSW. Bruised by such attitudes and their major losses under the *Canadian Bill of Rights*, thousands of women arrived in Ottawa, Canada's capital city, for their own unauthorized constitutional *ad hoc* conference thereby launching an unprecedented grassroots constitutional campaign, led by the Ad Hoc Committee of Canadian Women on the Constitution.[34] A single priority emerged for thousands of Canadian women: to amend the proposed constitution's entrenched charter of rights – before it was patriated – to strengthen women's equality rights. To reach this goal, seasoned women's rights activists joined newly minted women lawyers as unpaid women's rights lobbyists in the federal government headquarters on Parliament Hill, in Ottawa.[35] The populist constitution-building soon grew beyond the capital. The women's constitutional lobby in the capital ebbed and surged throughout 1981, as elected federal and provincial representatives were besieged by concerned women voters in their home ridings, and crowds of angry women confronted provincial government leaders (premiers) inside and outside their legislative buildings, until the tide turned, thereby laying claim for a place in Canadian legal history for women's constitutional activism – a claim that has yet to be fully realised.

The Section 28 Equal Rights Amendment and the Section 33 Override

Throughout 1981, while Canadian women were mobilizing to strengthen constitutional equality rights, proximity to the American media raised awareness of the intense political battle being waged by American women facing their 30 June 1982 deadline for an Equal Rights Amendment (ERA) to the American constitution – which seemed unlikely to succeed.[36] The fact that the ERA had been introduced into every American Congress since 1923, without success, served to reinforce the shared sense of urgency among many Canadian women to secure their equivalent ERA in the immediate patriation process. By April 1981, the Trudeau government introduced a new constitutional package that included a last-minute, unanimous all-party approved insertion of the s.28 equal rights amendment, which passed the House of Commons and the Senate. Section 28 was designed as a guarantee in the form of a *non obstante* clause:

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[34] The awareness and readiness that bolstered the determination of thousands of Canadian women to seek participation parity in constitution-building was due in large part to the leadership of the late Doris Anderson. At the close of the 1970s, Doris Anderson, the popular long-serving editor of Canada's largest women's magazine, was appointed by the federal government as president of the Canadian Advisory Council on the Status of Women (CACSW), She traversed the country raising awareness, funded the only constitutional research to focus on women - such as the formative feminist constitutional analysis in Audrey Doerr and Micheline Carrier, (eds) *Women and the Constitution in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1981) and sparked national media attention and a massive mobilization when she resigned suddenly, citing governmental interference. Recorded personal interview, 20 August 2004, York University Library – Clara Thomas Archives and Special Collections, Toronto, Canada (Marilou McPhedran fonds).

[35] The Canadian women's Ad Hoc constitutional lobby of 1981 was the principal occupation of the author.

[36] The ERA was written in 1923 by suffragette Alice Paul, seen as the next necessary step after the 19th Amendment (affirming women's right to vote) in guaranteeing "equal justice under law" to all citizens. The ERA was introduced into every session of Congress between 1923 and 1972, when it was passed and sent to the states for ratification. By the June 30, 1982 deadline, the ERA had been ratified by only 35 states, leaving it three states short of the 38 required for ratification. In the 110th Congress (2007 - 2008), the Equal Rights Amendment was introduced as S.J. Res. 10 (Sen. Edward Kennedy, MA, lead sponsor) and H.J. Res. 40 (Rep. Carolyn Maloney, NY, lead sponsor) – with no deadlines on the ratification process in their proposing clauses. Available at: <http://www.equalrightsamendment.org/overview.htm>.

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.[37]

But by the end of 1981, the prime minister had responded to the Supreme Court of Canada's constitutional reference decision by calling together the premiers to try to reach broader consensus in support of his constitutional patriation package.[38] Thousands of women, who had mobilized across Canada through Ad Hoc lobbying, were shocked when, what they thought was their significant participatory victory as embodied in the s. 15 and 28 equality rights adopted by Parliament just months before, had been undermined in the backroom deal announced by federal and provincial leaders on November 5, 1981, that included a new s. 33 of the Charter that could override certain specified rights and freedoms in the Charter – in effect "untrenchment" of freedoms in s.2, right to life and liberty in s.7 and equality rights. When questioned in the House of Commons about the vagueness of the new override, the prime minister announced that it was only logical for the proposed s.33 to override *both of the equality rights provisions* – sections 15 and s.28. Women constitutional activists immediately spoke out against the override as a "surtax" on their hard won constitutional rights and the women's lobby re-mobilized to convince the politicians to lift the s.33 override.[39]

By the end of 1981, the third wave of the Ad Hoc women's constitutional lobby had stopped the "taking of twenty eight" – but the s.33 override was lifted only from the s.28 ERA, not from s.15.[40] Although much of the legal commentary of the time validated the grassroots campaign that attempted to secure s.28 as a protective legal tool for women, s.28 was designed to work with s.15. To compound the challenge, when the Queen of England came to Canada to sign the constitutional proclamation on April 17, 1982, s. 15 was the only rights-bearing section in the *Charter* that was not activated with the rest of the constitution, due to a moratorium placed on it by s.32 of the Charter.[41]

Section 15 states:

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[37] The author contributed to the lobbying for, and drafting of, s. 28.

[38] In *Reference Re Amendment of the Constitution of Canada* (Nos. 1,2 and 3) [1981] 1 S.C.R. 753 the Supreme Court encouraged the federal government to redress its unilateral constitutional process, prompting Prime Minister Trudeau to convene another federal provincial negotiation from Nov.2-5, 1981, which resulted in the insertion of the s.33 *non obstante* clause.

[39] For a more detailed account, please see Kome, P. *The Taking of Twenty Eight: Women Challenge the Constitution*, (Toronto: Women's Educational Press, 1983) Available at: <http://www.lulu.com/content/213547>.

[40] Concerns about s. 33 and potential tension between s. 33, s. 28 and s.1 are not the focus of this chapter, but it is relevant to note that s.1 simply requires the rights and freedoms identified in the Charter to be balanced against the needs and values of a free and democratic society, while still supporting and maintaining the existence of the enumerated rights and freedoms "subject only" to reasonable limits. In contrast, section 33 enables governments to circumvent any restrictions imposed on government action by the rights and freedoms listed in the Charter. S. 33 allows for the total avoidance of Charter protections- except perhaps if blocked by the sex equality guarantee in S. 28 – something yet to be determined. Although the Supreme Court of Canada has yet to give definitive meaning to s. 28, the Court did conclude in *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627 that the function of s.28 is interpretive - a more limited role than if the Court had concluded that s. 28 is rights-bearing. This in turn weakens s.28 in the face of the s.33 override, because s.33 can be applied to the equality rights-bearing s.15.

[41] Section 32 of the Charter states: (1) This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability**.**

The Quest for Substantive Equality in a Post-Charter Canada

> But what if social life is unequal? Legal equality then becomes a formula for reinforcing, magnifying, and rigidifying the social inequalities it purports to be equalizing and might have rectified.[42]

High Impact Litigation

The Ad Hoc women's constitutional rights leaders and their advisors assessed the longsanding Canadian judicial penchant for making decisions limited to formal equality, the demonstrated political resistance to equality rights encountered in the constitutional patriation process, and concluded that an independent constitutional defence fund for high impact litigation was a crucial mechanism for ensuring that the rights language of the *Charter* could be turned into "lived rights". They understood that the earliest cases to be decided under the Charter would set the precedents for generations to come, but the model to be used had not been decided.

1982 Charter of Rights Education Fund

During the forced hiatus of the moratorium on s.15, from 1982-1985, the Charter of Rights Education Fund was founded to encourage women constitutional activists to conduct volunteer independent statute audits at the provincial and federal levels. The statute audits revealed that governments were prepared to make alarmingly modest efforts at reform, limited mostly to *prima facie* discrimination, rather than less visible forms of systemic discrimination.[43]

LEAF – The Women's Legal Education and Action Fund

This growing realization reinforced the decision to build a women's legal defence fund and the period of the moratorium on s.15 was used to create LEAF – the Women's Legal Education and Action Fund – as an independent non-governmental organization (NGO) with the capacity to conduct litigation selected for its potential high impact in effecting systemic changes to promote gender equality.[44] Many of the "founding mothers" of LEAF had been active in the Ad Hoc constitutional social mobilization for women's rights, and they knew that true equality in Canadian society could not be achieved through the

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[42] MacKinnon, C. A., *Are Women Human? And Other International Dialogues*, (Boston, MA: Harvard University Press, 2006), 107.

[43] Including founders of LEAF, members in the National Association of Women and the Law chapters in several provinces and the Charter of Rights Education Fund, of which the author was also a founder.

[44] The Canadian Advisory Council on the Status of Women commissioned a study of possible models for a constitutional legal defence fund for women. The authors, Atcheson, Eberts and Symes, recommended the model of the National Association for the Advancement of Colored People – NAACP – that had been developed by Thurgood Marshall (before he was named to the United States Supreme Court). On a parallel path to the CACSW researchers, the "LEAF mothers" determined that an independent litigation fund supported by volunteers and staff with specialized litigation and education skills would be essential to actually obtaining any of the equal protections and benefits promised by the new constitution.

words of constitutional amendments alone. [45] The "LEAFmothers" saw gender democracy as encompassing evidence and arguments grounded in women's daily realities being presented in the courts where decisions on equality were made. In Christopher Manfredi's study of feminist legal activism, he characterized the launch of LEAF as the women's "microconstitutional campaign for substantive equality".[46]

The third anniversary of the new Canadian constitution, 17 April 1985, was also the first day on which it was possible to use both equality provisions of the Charter (ss.15 and 28). At this first opportunity, LEAF launched constitutional challenges to laws that governments had left unchanged during the three years of the moratorium.[47] The LEAF model was not limited to cases explicitly on women's rights, and it included making application to the court to be accepted as an Intervener – often a more cost efficient way to convey analysis and evidence than representing a party to the litigation.

In the same time period as LEAF was founded, other non-governmental mechanisms for raising awareness and expertise in women's rights were launched, including:

- the first national conference for prominent jurists and academics to focus on equality rights, after passage of the Charter;
- the launch of the two-pronged (research and litigation) LEAF model of evidence based advocacy;
- the National Association of Women and the Law (NAWL) founding of the *Canadian Journal of Women and the Law;* and
- the first textbook on equality rights, published in the same year that LEAF was launched.[48]

[45] The author was a *pro bono* counsel to the Ad Hoc Committee of Canadian Women on the Constitution from 1981 through 1992 and a founding mother of LEAF in 1985.

[46] Manfredi, C. P. *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004) at 49.

[47] The Women's Legal Education and Action Fund (19 January 2010). Retrieved from: <http://www.leaf.ca>.

[48] Anne Bayefsky and Mary Eberts (eds), *Equality Rights and the Canadian Charter of Rights and Freedoms*, (Toronto: Carswell, 1985).

Table of Canadian Women's Equality Benchmarks 1929-2010

1929	"Persons Case" - Lord Sankey, writing for the Judicial Council of the House of Lords, overturns the Supreme Court of Canada, in deciding that Canadian women should be recognized as full persons under the British North America Act, 1867.
1960	Canadian Bill of Rights is enacted.
1967	Canada's Centennial: Prime Minister Pearson announces the Royal Commission on the Status Of Women (RCSW).
1970	"Equality First" - RCSW Final Report released with 167 recommendations.
1972	NAC - National Action Committee on the Status of Women founded - by 1981 NAC was a national federation with 3 million members.
1974	NWAC - Native Women's Association of Canada founded.
1975	UN Decade For Women began in Mexico City, with the first of four UN World Conferences on Women, culminating in Beijing in 1995.
1978	Sandra Lovelace and her sister Karen Perley, Maliseet women from the Tobique Reserve in New Brunswick, join Mary Two-Axe Earley (founder of Indian Rights for Indian Women) and other Aboriginal women in a march of women and children from the Oka Reserve in Quebec to Ottawa to protest loss of status due to s. 12(1) (b) of the Indian Act, & to raise awareness of the first complaint out of Canada to a UN human rights treaty monitoring body: Lovelace v. Canada.
1980	- Canadian Advisory Council on the Status of Women launches research and national public education campaign in response to Prime Minister Trudeau's constitutional proposal. - Opposition parties force extension of public hearings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada and rights seeking organizations are given opportunity to present concerns and suggestions.
1981	- Revised draft of the Can. Charter of Rights & Freedoms tabled; - Ad Hoc Committee of Canadian Women on the Constitution founded to hold grass roots conference when Canadian Advisory Council constitutional conference cancelled by the minister responsible for the status of women. - CEDAW UN human rights treaty ratified by Canada, and the UN Human Rights Committee releases its decision in *Lovelace v. Canada*, finding against Canada.
1982	Proclamation of the Constitution Act, 1982 including the Canadian Charter of Rights and Freedoms – April 17, 1982 (except for s.15 equality rights).
1985	Activation of s. 15 equality rights and launch of LEAF – the Women's Legal Education and Action Fund - high impact litigation strategy.
2006	25th anniversary of the Ad Hoc Women's Constitutional Conference and amendments to the equality provisions of the Canadian Charter of Rights and Freedoms.
2007	25th Anniversary of the Canadian Charter activation (except for s. 15 equality rights).
2009	80th anniversary of The Persons Case.
2010	25th anniversary of the activation of s.15 equality rights and the founding of LEAF – the Women's Legal Education and Action Fund.

As the Canadian decisions under the *Canadian Bill of Rights* demonstrated, the Aristotelian-derived formula of "same = equal" was problematic for equality seekers.[49] LEAF lawyers strove to dissuade Canadian judges from following American constitutional Fourteenth Amendment cases, where claimants were required to be "similarly situated" before they could be considered eligible to pursue their equality claim.

For example, in the factum for the LEAF intervention in *Andrews*, the "similarly situated" test was rejected and priority given to evidence of concrete disadvantage, an approach adopted by the Supreme Court of Canada in its 1989 pivotal decision on how equality was to be defined under the *Charter.*[50] LEAF made arguments, reflected in the Court's decision, that the Charter should benefit those who have been historically disadvantaged, thus preventing arguments of reverse discrimination.

> As the disadvantaged must be the beneficiaries of legislative change if they are to achieve equality, section 15 is meant to accommodate legislation which favours the disadvantaged over the advantaged. […] any test developed for assessing whether a denial of substantive equality has occurred should be one that does not prejudice the interests of the disadvantaged.[51]

Beverly Baines has outlined how Charter litigation:

> provides a vehicle for women to name 'objective reality' for what it is, a world organized consistently with male practices and beliefs.[52]

The decision of the Supreme Court of Canada in 1988 in *R.* v. *Morgentaler* was the case that decriminalized abortion in Canada, serving as an early Charter example of gendered analysis that a woman judge may introduce. Section 7 of the *Charter* states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The first woman to be appointed to the Supreme Court of Canada, Madam Justice Bertha Wilson, extended the traditional notion of the right not to be deprived of "liberty" beyond incarceration, and concluded that the denial of reproductive freedom so reduced a woman's right to make choices about her own body as to also infringe on her constitutionally protected liberty.[53]

Women's Bodies and Constitutional Rights

The world over, control over women's bodies is the crux of equality struggles, in courts and beyond. At the RECON workshop, Yvonne Galligan noted that, if EU constitutionalism is to radically transform gender relations, policy and law that give equal consideration to women's rights in the sphere of personal protection offer the potential for the construction of a more elaborated cosmopolitan democracy, underpinned by a

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[49] Aristotle *(*W. D. Ross, Trans.) (1980) *Nichomacean Ethics*, Oxford, UK*:* Oxford University Press.

[50] *Andrews v. Law Society of British Columbia* [1989] 1S.C.R. 143.

[51] LEAF factum in *Andrews v. Law Society of British Columbia* at paragraph 36. Available at: <http://www.leaf.ca/legal/briefs/1989-andrews.html#target>. See MacKinnon, C. A. *Towards a Feminist Theory of the State* (Cambridge, MA and London: Harvard University Press, 1989), p.320.

[52] Baines, B. and Rubio-Marin, R. (eds), *The gender of constitutional jurisprudence* (Cambridge: Cambridge University Press, 2005) 48 at 54.

[53] R. v. Morgentaler, [1988] 1 S.C.R. 30 The expanded characterization of 'liberty' by J. Wilson, in this case was affirmed by the Court *in R.B. v. Children's Aid Society of Metropolitan* Toronto, [1995], 1 S.C.R. 315, which strengthens the likelihood of its usefulness in other high impact litigation strategies for women's reproductive rights.

constitutional recognition of body rights. In Canada, Justice Wilson's expansion of the constitutional interpretation of "liberty" to factor in women's equality opened a pathway to question other male-centric assumptions in jurisprudence. For the decade following the *Morgentaler* decision, much of the equality jurisprudence was related to sexual assault, accompanied by intense public, legislative and judicial trialogue.

In *Seaboyer*[54] legislation that women lobbied for – known as the 'rape shield' in the *Criminal Code of Canada* – was struck down, but this loss in the Supreme Court stimulated public concern and paved the way for subsequent pro-victim legal amendments by Parliament. In *O'Connor*, (a Catholic priest who sexually assaulted Aboriginal women who had been under his authority in residential school and as their employer), the compelling dissent from Justice L'Heureux-Dubé led to major amendments expanding the understanding of constitutional rights beyond those who are accused of sexual crimes.[55]

R v. Ewanchuk,[56] generated an international precedent in the Canadian 'no means no' legislation on sexual assault, when an Alberta appeal court judge (ironically, the grandson of Nellie McClung, one of the Famous Five in the Persons Case) was overruled by a stinging opinion penned by Justice Claire L'Heureux-Dubé. Following the release of this decision, Justice L'Heureux-Dubé was targeted by prominent defence counsel and Judge McClung in the national media in personally derogatory ways never directed to male judges. As the decade closed, another challenge to the 'rape shield' provisions in the *Criminal Code*, in *R. v. Darrach* resulted in the protective legislation being upheld.[57]

In the animated trialogue on Canadian sex assault cases, various 'sides' have different perceptions of fundamental rights in the Charter, but all have passionately engaged the criminal legal system in these cases. It has been an exhilarating and exhausting series of steps forward and steps back, but, more often than not, women's equality arguments and their public engagement have had real impact in broadening the Court's – and Parliament's – perspectives on just whose 'rights and freedoms' are at stake in sexual assault cases. What constitutes a truly "fair trial" in the current Canadian context may be quite different from other jurisdictions.

For example, following the *Darrach* decision by the Supreme Court of Canada, British judges in *R. v. A.* used the "fair trial guarantee" in the *European Convention for the Protection of Human Rights (ECHR)*[58] to strike down a British version of "rape shield protection" quite similar to the provisions in the *Criminal Code of Canada*.[59] In *R v A,* where the House of Lords was dealing with cross examination of complainants about previous sexual experience, the court relied on a rule of construction set out in s 3(1) of the UK *Human Rights Act 1998,* which provides that:

> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention Rights.

In *R v A,* the Lords appear to have interpreted the ECHR as protecting only the rights of the man accused of sexual assault, to the exclusion of consideration for privacy rights of the complainant. The Treaty on the European Union states in Article 6, Para.2: "The

[54] *R. v. Seaboyer* [1991] 2 S.C.R.577.

[55] *R. v. O'Connor* [1995] 4 S.C.R. 411.

[56] *R v. Ewanchuk* [1999] 1 S.C.R. 330.

[57] *R. v. Darrach* [2000] 2 S.C.R. 443.

[58] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5.

[59] *R .v. A,* UKHL 25, [2001] 3 All E.R. 1.

Union shall accede to" the ECHR, which dates back to 1950. With the Lisbon Treaty coming into force on 1 December 2009, the more modern EU *Charter of Fundamental Rights* becomes legally binding on the EU and its bodies, as well as the Member States, when implementing EU law.[60] The EU Agency for Fundamental Rights (FRA) has noted that a new general obligation for the EU has been activated, stipulating that the Union

> […] shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child.[61]

The Treaty of Amsterdam and *Charter of Fundamental Rights* set out the basic values of the EU regarding gender equality. These two treaties, as Yvonne Galligan noted at the RECON workshop on which this report is based, with their constitutional status and embedded doctrines of direct effect and supremacy over national law, will support the evolution of gender rights policies. *The Lisbon Treaty* may have ushered in a time when it is possible to envision a fairer outcome, if a case similar to *R v A* arises in this new context – will the EU *Charter of Fundamental Rights* and guiding principles of social justice and protection, combined with equality between men and women produce a different judicial interpretation than the sole focus on the rights of the accused in defining the components of a "fair trial"?

Questions on Gender Democracy for the EU and Canada

In the concluding sections of this chapter, observations based thirty years of engagement with the Canadian Charter will be shared with the hope that some useful information and comparisons can be transmitted – if only to add another dimension to issues and concerns already under deliberation.

Internationalisation

John Erik Fossum has compared the EU to Canada – each a "highly complex multinational and poly-ethnic entity",[62] noting the influence of social movements on both, and encouraging meaningful comparisons:

> Today, social movements such the women's movement, aboriginal organisations, gay and lesbian organisations, organisations for the disabled, for anti-war activists and environmentalists and ecologists have become increasingly internationalised. Similarly, the globalization of human rights helps reinforce the political mobilisation of groups and communities that assert rights and identities.[63]

For women's rights, internationalisation of social movements means that we are growing in our understanding of each other – across races, cultures, socio-economic and geographic spaces. We've moved away from the "either/or" discourse (either all women have identical constitutional rights or all don't) to incorporating impact analysis using a lot of "ands": equality and the rights of the collectivity and the individual.

According to Eriksen: "Human rights transcend the rights of a citizen of a state, because they apply to all human beings. […] For a true republic to be realized it must be possible for citizens to appeal to bodies above the nation state when their rights are threatened".

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[60] Art. 6 Para.1 of the Treaty on the European Union (TEU).

[61] Art. 3 Para 3 of the TEU, summarized by the FRA. Available at: <http://fra.europa.eu/fraWebsite/attachments/FRA-Factsheet-Lisbon-Treaty.pdf>.

[62] Fossum, J. E., "The Transformation of the Nation-state, The EU and Canada Compared" in *Constitutional processes in Canada and the EU compared,* Fossum, J. E. (ed.), (ARENA Report No 8/05, 2005), p.7.

[63] Ibid. p.20.

He characterised "democracy at the supranational world level" as part of a cosmopolitan order and the constitutionalisation of the *Charter of Fundamental Rights of the European Union* as "an important step in the institutionalisation of a framework of a cosmopolitan order[…]"[64]

Implementing Positive Actions

Because the *Lisbon Treaty* came into force on 1 December 2009, the *Charter of Fundamental Rights of the European Union* is now binding and can be expected to be an authoritative source upheld by the EU institutions, including the European Court of Justice (ECJ). Galligan noted at the RECON workshop that article 141 of the Treaty of the European Union (TEU) on equal pay was constructed as an obligation on member states, but "the Defrenne cases" of the 1960s and 1970s successfully challenged the state limited definition in article 141.[65] Since then, the equal pay provisions have been developed by the ECJ to allow justiciable actions by individuals in a range of employment-related areas. Burri and Prechal found that the ECJ has delivered over 200 binding judgments on equal treatment of women and men.[66]

The reformulation of article 141 by the ECJ is akin to what Canadian judges have occasionally done in using their authority under s. 24 of the *Charter of Rights and Freedoms* to "read in" a remedy in response to litigation by equality seekers. In a European context, Cichowski concluded:

> […] supranational constitutionalism can lead to the expansion of rights. Faced with little or no protection under domestic law, women experiencing discrimination have utilized general EU gender equality laws to bring claims before their national courts. The findings illustrate that this litigation is often the result of test case strategies and groups of women mobilizing to bring a claim.[67]

A key message at the RECON workshop in 2009 and in this chapter is that it is not only constitution-making that needs to be addressed, but also the longer term challenges of "constitution-working" which sustains a high level of public engagement and parity of participation.

The equal enjoyment of social and economic rights between women and men is an indicator for progress towards gender democracy, characterised by attaining social justice, enjoying human rights, and eliminating poverty in Europe. The European Women's Lobby (EWL), as the largest umbrella organisation of women's associations in the EU, with member organisations in all 27 Member States of the EU, is in a unique and influential position to focus on implementation of positive actions. The EWL has found that gaps persist between women and men in most categories of human political, economic, social and cultural activity and that these gaps need to be closed if Europe is to deliver on its promises of equality and human rights.

The Treaty of Rome established in 1957 the principle of equal pay for equal work. Since then, European legislation has expanded on women's rights, and the promotion of equality between women and men is now one of the missions of the European Union. In

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[64] Eriksen, E. O. "Towards a Cosmopolitan EU?" in J. E. Fossum (ed.) *Constitutional processes in Canda and the EU compared* (ARENA Report No 8/05, 2005) p.76.

[65] Galligan noted, in particular, ECJ 8 April 1976, Case 43/75 Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena [1976] ECR 455 (*Defrenne II*).

[66] Burri, S. and Preschal, S. (2008) *EU Gender Equality Law,* Luxembourg: European Communities.

[67] Cichowski, R. A. (2004) "Women's Rights, the European Court and Supranational Constitutionalism", *Law & Society Review 38(4),* 489-512, pp. 507-8.

2006, the EU Spring Council adopted a Gender Pact, and the European Commission adopted a new Road Map for Equality between Women and Men 2006-2010.[68]

The EWL has recommended:

- *specific positive actions*, for example, reformulating the EU Employment Strategy, concrete objectives and timetables on the closing of the gender pay gap;
- effective institutional mechanisms for closing women's pay gap must be instituted; and
- active involvement of social partners and women's organisations is a prerequisite.[69]

The EWL recommendation on "effective institutional mechanisms" prompt this question: might with the Lisbon Treaty now in force, has the time come for a supranational legal defence fund for women's rights, including, but not limited equal pay issues?

Even with entrenched constitutional equality rights, women's rights activists must be prepared to re-interpret rights in various politically and culturally dominated contexts – they can't afford to stop because the momentum of courts and governments seems more often to flow away from optimal interpretation of women's rights. For example, LEAF has intervened in more Charter related cases than any other NGO in Canada, amounting to almost ten percent of Supreme Court Charter cases. LEAF's position was adopted on 37 of 52 issues in the 31 Supreme Court cases in which it participated between 1988 and 2000 – a success rate of over 70 percent.[70]

As the *Lisbon Treaty* and activation of the *Charter of Fundamental Rights* take effect throughout the EU, some observations on the evolution of positive action in Canada may be of relevance. A brief review of some of the key Canadian Supreme Court rulings on the question of the extent to which governments are obligated to take positive action, pursuant to s.15 (1) and (2) of the Charter, follows.

In 1995, the Court held in *Thibaudeau:*

> Although s. 15 of the *Charter* does not impose upon governments the obligation to take positive actions to remedy the symptoms of systemic inequality, it does require that the government not be the source of further inequality[71]

In 1997, in *Eldridge v. British Columbia (Attorney General):*

> It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau*, *supra*, at para. 37 (*per* L'Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; … In many

[68] European Women's Lobby Statement to the Spring Council 2007, "50 years of European gender equality legislation: Implement gender justice now!" p.1. Available at: <http://www.womenlobby.org/SiteResources/data/MediaArchive/policies/Economic%20and%20social%20justice%20for%20women/EWL%20Spring%20Council%202007_EN.pdf>.

[69] Ibid., p.2.

[70] Manfredi, C. P., *The Canadian Feminist Movement, Constitutional Politics, and the Strategic Use of Legal Resources* (Vancouver: UBC Press, 2000) at 23.

[71] *Thibaudeau v. Canada*, [1995] 2 S.C.R. at p.655.

> circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons; … Moreover, it has been suggested that, in taking this sort of positive action, the government should not be the source of further inequality.[72] …Moreover, the principle underlying all of these cases was affirmed in *Haig*, *supra*, where a majority of this Court wrote, at p. 1041, that "a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15.[73]

In 2007, in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, the Court referred back to its Eldridge decision of ten years before:

> this Court noted that it is "a cornerstone of human rights jurisprudence . . . that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation", which means "to the point of 'undue hardship'". Undue hardship implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate.[74]

Later in 2007, in Baier v. Albert, the Court relied on a previous distinction articulated by Bastarache, J. between positive action triggered by a s.15 rights claim, as compared to fundamental freedoms under the *Charter:*

> The structure of s. 2 of the *Charter* is very different from that of s. 15 and it is important not to confuse them. While s. 2 defines the specific fundamental freedoms Canadians enjoy, s. 15 provides they are equal before and under the law and have the right to equal protection and equal benefit of the law. The only reason why s. 15 may from time to time be invoked when a statute is underinclusive, that is, when it does not offer the same protection or the same benefits to a person on the basis of an enumerated or analogous ground (on this issue, see *Schachter v. Canada*, [1992] 2 S.C.R. 679), is because this is contemplated in the wording itself of s. 15. ... However, while the letter and spirit of the right to equality sometimes dictate a requirement of inclusion in a statutory regime, the same cannot be said of the individual freedoms set out in s. 2, which generally requires only that the state not interfere and does not call upon any comparative standard. [75]

Formal Equality Revisited on Aboriginal Women

Reading the ECHR Protocol No. 12 (Rome, 4 XI.2000) and Chapter III on Equality, of the Charter of Fundamental Rights of the European Union raises a question as to the degree to which formal equality language such as "equality before the law" and "equal protection of the law" may produce similar unsatisfactory judicial interpretations as Aboriginal women have experienced under the *Canadian Bill of Rights* (CBR) and the *Canadian Charter of Rights and Freedoms* (*Charter)*.

A persistent and prolonged Canadian example began with the cases brought by Jeanette Lavell and Yvonne Bédard in the pre-Charter1970s, under the CBR, which produced findings that as long as all Indian women were treated the same by the law, any denial of

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[72] *Eldridge* at Para 75.

[73] *Eldridge* at Para 78.

[74] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at Para 122.

[75] *Baier v Albert,* 2007 SCC 31, [2007] 2 S.C.R. 673 at Para 25, quoting Bastarache, J. in *Delisle.*

Indian status on the basis of their sex was not an injustice that could be remedied under the CBR.

I. M. Young argued against individualist ideology:

> The discourse of liberal individualism denies the reality of groups. According to liberal individualism, categorizing people in groups by race, gender, religion, and sexuality, and acting as though those ascriptions say something significant about the person and his or her experience, capacities, and possibilities, is invidious and oppressive. The only libratory approach is to think of people and treat them as individuals, variable and unique. This individualist ideology …obscures oppression. Without conceptualizing women as a group in some sense, it is not possible to conceptualize oppression as a systematic, structured, institutional process.[76]

From another perspective, Will Kymlicka's work on "group-differentiated rights" in the Canadian context, is consistent with concerns that a constitution should not allow the rights of a collectivity to trump basic constitutional rights of individual members – women members of religiously or culturally defined groups, for example.[77] Whereas, Amy Bartholomew proposed "a procedural conception of rights interpreted through the lens of deliberative democratic theory in the Habermasian tradition" which discusses women's and girls' rights within group rights, in which she concludes:

> On both Kymlicka's and Habermas's interpretations of such rights, it is the particular *practices* that violate individual rights that should not be protected, not entire cultures.[78]

Over time, four sections of the Canadian constitution have been of particular relevance to women's lives: sections 7, 15, and 28 in the entrenched *Charter,* discussed previously, and s. 35(4) – directed to Aboriginal women - placed outside the Charter as part of a set of constitutional amendments on Aboriginal rights made in the *Constitution Amendment Proclamation* of 1983.[79]

As 17 April 1985 – the date for ending the moratorium on s.15 equality rights in the *Canadian Charter* – approached, the Canadian Parliament amended the *Indian Act* in Bill C-31, in what has proven to be an unsuccessful attempt to eliminate sex discrimination from the criteria for determining registration status. As the perpetuation of discrimination under the 1985 amendments became more evident, they were challenged by Sharon McIvor and her son, Jacob Grismer, arguing that the only effective remedy would place all descendants of status Indian women, that is matrilineal descendants, on the same footing as descendants of status Indian men, that is, patrilineal descendants. As in the *Lovelace* challenge under the UN *ICCPR*, McIvor argued that it is a basic expectation to acquire the cultural identity of one's parents; and that parents should be able to transmit cultural identity to their children, as well as the tangible benefits of registration status, including access to non-insured health benefits, financial assistance with post-secondary education, and exemptions from certain taxes.[80] In 2007, McIvor won at trial, but the

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[76] Young, I. M., *Intersecting Voices: Dilemmas of Gender, Political Philosophy and Policy* [Princeton: Princeton University Press, 1997], p.17.

[77] Kymlicka, W., *Multicultural Citizenship: A Liberal Theory of Minority Rights,* (New York: Oxford University Press, 1996), p.34.

[78] In Dobrowolsky, A. and Hart, V. (eds) *Women Making Constitutions* (Basingstoke: Palgrave, 2003).

[79] *Constitution Amendment Proclamation, 1983,* now s. 35(4) of the *Constitution Act, 1982.*

[80] Sharon McIvor's Response to the August 2009 Proposal of Indian and Northern Affairs Canada to Amend the 1985 Indian Act, 6 October 2009; For further information, please contact: Sharon McIvor bearclaw@shaw.ca / Available at: <http://www.nwac-hq.org/en/documents/SharonMcIvorResponseto INACProposal.pdf>.

subsequent decision of the BC Court of Appeal had the effect of continuing the sex discrimination against women in her position.[81] McIvor sought leave from the Supreme Court of Canada to appeal, which was denied in November 2009. The Supreme Court not only refused to hear McIvor's appeal, it ordered her to pay the Government of Canada costs in the action.

Jeanette Corbiére Lavell, now president of the Native Women's Association of Canada (and the claimant on this same issue in the *Lavell* loss under the Canadian Bill of Rights in 1973, discussed earlier in this chapter), responded to the:

> Yesterday's decision represented an opportunity for the highest court of the land to redress historic and ongoing discrimination against Aboriginal women under the *Indian Act*. I am especially disappointed that the court has dismissed the appeal with costs. *This punishes the litigant for bringing an action*. [82] [emphasis added]

Conclusion

Strategic diversity is essential in constitutional activism; the path to equality is not only through the courts and the *Charter.* In its 1999 decision in *Nancy Law v. Canada (Minister of Employment and Immigration)*, the Supreme Court of Canada unanimously reformulated the *Andrews* test, stating that burdensome differences in treatment on the basis of prohibited grounds are discriminatory *only if they can reasonably be said to violate "human dignity".* [emphasis added] Although the term "dignity" is no where to be found in the *Charter*, it figures prominently in the international human rights treaties, and has become significant in many Canadian judicial interpretations of equality. Through its N*ancy Law* decision, the Court established a tougher test for claimants. Now claimants have the additional step of proving to the Court that their human dignity has been impaired. Since the *Nancy Law* case, most equality seeking claims have been lost before the Supreme Court. [83] Soon after the *Law* decision, Beverly Baines predicted that the Court's unusually unanimous decision in *Law* would create additional barriers through which equality seeking litigants would have difficulty passing.[84]

Assessments on the extent to which s. 15 equality rights in the courts have been the source of progress for women are mixed. Dobrowolsky (2009) and Bashevkin (2009) include the political sphere as equally important as the courts for women's equality gains.[85]
Newfoundland (Treasury Board) v Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.), [20041 S.C.J. No. 61, [2004) 3 S.C.R. 381, is another example of the shift in our Supreme Court away from women's equality. The Charter and the Newfoundland Human Rights Code both prohibit sex-based discrimination, which includes sex-based wage discrimination, but the governments were not held accountable for their

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[81] *Sharon Donna McIvor v.* Canada (Registrar, Indian and Northern Affairs), 2009 BCCA 153.

[82] Available at: <http://www.nwac-hq.org/en/documents/PressReleasereMcIvorDecisionNov6-09.pdf>.

[83] As of September 2006, all five appeals initiated by women were lost: Symes v. Canada, [1993] S.C.J. No. 131, [1993) 4 S.C.R. 695; Native Women's Assn. of Canada v. Canada, [1994] S.C.J. No. 93, [1994) 3 S.C.R. 627; Thibaudeau v. Canada, [1995] S.C.J. No. 42,[1995] 2 S.C.R. 627; Vancouver Society of Immigrant and Visible Minority Women v. M.N.R., [1999] S.C.J. No. 5, [19991 1 S.C.R. 10; Newfoundland (Treasury Board) v Newfoundland and Labrador Assn. of Public and Private Employees (N.A.P.E.), [20041 S.C.J. No. 61, [2004) 3 S.C.R. 381.

[84] Baines, B. (2000), "Law v. Canada: Formatting Equality" 11 Const.F.70, 71-73.

[85] Dobrowolsky, A., *Women and Public Policy in Canada: Neoliberalism and After?* Toronto: (Oxford University Press, 2009); Bashevkin, S., *Women, Power, Politics: The Hidden Story of Canada's Unfinished Democracy, (*Toronto: Oxford University Press, 2009).

contract breaking. The remedial power of the Court in s.24 was not used and the governments were allowed not to honour their agreements on equal pay. Yet this case is a compelling example of successful political engagement in the face of judicial defeat.

Public expressions of disappointment in the government persisted after the Court defeat, until the premier reversed the government's position two years after the Court decision:

> Premier Danny Williams said the longstanding pay-equity issue had been regularly identified as a "black mark on Newfoundland and Labrador that should be corrected. It is something that we felt we had to deal with and that's why we made the ex gratia payment," Williams said, noting the $24 million was a mutually acceptable price tag at this point in time. [86]

The times have become more challenging for constitutional equality activists, and the venues have become more remote. Gender democracy seems further away for Canadian women and it has become harder to include civil society in constitutional trialogue. Resources assigned to implementation of rights entitle some stakeholders to resources that could very much determine practical outcomes that reduce – or perpetuate – systemic discrimination to which constitutional rights and freedoms are addressed.

It is clear that the *Charter* has changed Canada – s.15 equality rights and s.15 equality values intersect with Canadian perceptions and concerns. For example, a Trudeau Foundation poll found that 49 percent of the population feels immigrants should be free to maintain their religious and cultural practices in Canada, but the vast majority (81 percent) also feel that gender equality "trumps" multiculturalism – an opinion shared almost equally across demographic, income, education, age and gender lines.[87]

Nevertheless, there is concern that a negative shift in the impact of how the courts are dealing with equality rights is emerging – from constructive to damaging. We have yet to see what would happen if arguments in a key women's rights case linked the s. 28 sex equality guarantee with the s.15 articulation of equality rights. When LEAF launched its first cases as soon as the moratorium on s.15 had lifted, on 17 April 1985 – s.15 was seen as a beacon in our constitution to illuminate and value the struggles against inequality in ordinary lives. In the 25th anniversary year since its activation, many worry that the Court is now using s.15 as a laser to burn away the years of litigation and law reform that have been the foundation for gender democracy in Canada.

As Chief Justice McLachlin cautioned:

> The Canadian Charter of Rights and Freedoms guarantees a panoply of rights [...] like most modern bills of rights, it guarantees equality. Of all the rights, this is the most difficult.[88]

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[86] "Pay Equity Cash 'Addresses a Wrong'" St. John's Telegram, 26 March 2006, p.A3. Reprinted at: <http://nlpayequity.cupe.ca/www/nlpayequity/Article from the St>.

[87] Environics Poll conducted from 18 September-12 October 2006 for the Trudeau Foundation. Poll results available at: <www.trudeaufoundation.ca>.

[88] The Right Honourable Beverley McLachlin, P. C. (2001) "Equality: The Most Difficult Right" 14 *Supreme Court Law Review* (2d) 17, at 17.

Chapter Seven

European Constitution-Making and the Role of Gender

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Introduction

The cornerstone of the EU corpus of gender equality laws and policies resides in article 119 of the 1957 Treaty of Rome, which provided for 'equal pay for equal work' (now article 141 of the Treaty of the European Union). Modestly constructed as an economic provision to enable the harmonization of social costs in the interests of equalizing market competitiveness (Hoskyns 1996:49), Article 119 was later to provide the anchor for the development of gender equality policies in the European Union. In this, the European Court of Justice (ECJ) has been instrumental in shaping the Treaty of Rome as a supranational constitution, to which individual citizens can apply for redress (Cichowski 2004: 489). This has clearly been the case in relation to women's rights, especially in the employment context. The constitutional promotion of gender equality, and with it the development of legal and policy interventions designed to redress gender discrimination in employment was not intended, or indeed foreseen, by the signatories to the Treaty of Rome. Yet, over time, this international treaty has evolved into a semblance of a transnational constitutional legal framework, (Held 1995: 227), giving rise to a complex set of policies, strategies, and procedures that govern women's rights in Europe.

This important reference to a supranational legal order gives individuals the right to judicially pursue their EU-provided rights-based claims through national courts and, if necessary, to the ECJ. For women, this has been an important instrument in making gender regimes in national settings more gender equal. "It highlights the role of supranational constitutionalism in international and domestic policy processes" (Cichowski 2004: 489), and emphasises the power of litigation to secure individual rights and bring about national policy change.

This paper discusses the gendered effects of the EU constitutional experience. It begins by providing an overview of the main milestones in this process and in so doing draws attention to the importance of the ECJ in shaping the jurisdictional opportunities for pursuing rights claims by women. It then addresses the framing EU law, focusing on how the content of two recent directives was shaped and the participatory engagement by interests, including women, in the process. The paper then concludes with some reflections on the democratic constitutional experience for shaping gender relations in a post/transnational environment.

An International Treaty Becomes a Transnational Constitution for Gender Rights

The equal pay provisions in the Treaty of Rome (Article 119, now Article 141 EC Treaty) sought to give French businesses protection from the competitive advantage that could potentially be enjoyed by the other five members of the EEC arising from their less stringent pay policies. Thus, it was constructed as a obligation on member states, and did not grant individuals the power to litigate against gender-based pay discriminations in domestic policy. Nor did the article foresee this eventuality. Indeed, in the first ten years of the EEC, no national government introduced gender-based equal pay policies, despite repeated urging by the European Commission (Burri and Preschal 2008: 4) and the International Labour Organisation.

For almost ten years, then, the equal pay provision remained unchallenged until the Defrenne cases[1], from 1966 onwards, challenged the state-to-state definition of this clause at the European Court of Justice. The story of the Defrenne cases, and their prosecution by Belgian labour law specialist, Vogel-Polsky, is now well known (Hoskyns 1996). The outcome endowed individuals with a right to judicially seek redress of discrimination under Article 141. This decision was of profound significance, as it reformulated Article 141 as a provision with direct effect, broadening its status from that of an international, state-to-state treaty to a constitutional provision, that conferred EU citizens with individual rights enforceable through the EU.

Subsequent organized strike action by working women, who drew on the Defrenne case-law developments gave further substance to the equal pay provisions as women in member states began to see the potential for redress of pay discrimination afforded by EU law (Hoskyns 1996: 60-96). Yet, the EEC's overall commitment to the realization of gender equality during the early period lagged considerably behind that of other supra-national bodies such as the International Labour Organization and the United Nations (Reinalda 1997: 208-209). It took the first enlargement from the six founding members to nine member states (with the accession of Denmark, Ireland and UK in 1973); together with the development of case-law in the European Court of Justice; a commitment to implementing the principle of equal pay in the 1974 social programme; the activism of individual women committed to gender equality within the Commission and support from the active women's groups in the European Trade Union Confederation, to provide the conditions for the creation of a substantial framework of supra-national laws and policies on gender equality (Reinalda 1997: 213-214). This legal framework for gender equality can be seen as constituting the first stage of the EU's gender order. In this regard, the Defrenne cases (Defrenne II in particular) were pivotal in bringing the constitutional principles of direct effect and the supremacy of EU law into gender policy.

The first enlargement, then, paralleled the first real effort to deepen European commitments to gender equality. At the time this gender order was framed in relatively restrictive terms as 'equal treatment', with policies that guaranteed women the same rights as men in the field of employment. During the 1970s, directives on equal pay for work of equal value (75/117/EEC), equal treatment in the workplace (76/207/EEC), and equal treatment in social security (79/7/EEC) were adopted. Individual cases taken before national courts and subsequently brought to the ECJ in pursuit of equal pay and employment equality began to reveal that it was not possible to interpret employment equality without reference to the wider employment context – working conditions and pension arrangements, in particular.[2] The Bilka (1986) case marked an important development of gender equality concepts in that it recognised and elaborated on the nature of indirect discrimination, "where an apparently netural provision, criterion or practice would put persons of one sex at a particular disadvantage compared with person of the other sex…".[3] Since Bilka, the concept of indirect discrimination has been incorporated into rights-based directives. In addition, the extension of Article 141 to occupational pensions through the Barber judgement (1990) found that each element of remuneration must be the same for male and female employees, and applies to occupational benefits and retirement ages.[4] It construed pensions as 'deferred pay' and therefore pensions should be equalised. Once again, indirect discrimination on grounds of sex were exposed and outlawed in the ECJ judgement. In the process, the framing of

[1] In particular ECJ 8 April 1976, Case 43/75 Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena [1976] ECR 455 (Defrenne II).

[2] See, for example, ECJ 13 May 1986, Case 170/84 Bilka-Kaufhaus GmbH v Karin Wever von Hartz [1986] ECR 1607 (Bilka).

[3] Directive 2006/54, Article 5(1), The Recast Directive.

[4] ECJ 17 May 1990, Case C-262/88 Douglas Harvey Barber v Guardian Royal Excahnge Assurance Group [1990] ECR 1-1889 (Barber).

gender issues shifted to encompass equality that accommodated the differential positioning of women and men in social relations. Thus, the 'equal opportunity' principle came to the fore.

Although the equal treatment directive on which much of ECJ findings were based legitimised positive action by allowing measures "to promote equal opportunity for men and women" (article 2(4)) this was a very weak provision. It was vague in prescription and was optional for member states to adopt (Rossilli 1997). It was not until the Treaty of Amsterdam and subsequent developments that the directive was amended in 2002 to better define the concept of positive action (recognising the differential social positioning of women and men) as a tool for equalising the status of men and women. More recently, the intent behind positive action was clarified in the Article 3 of the 2006 Recast Directive to provide that "Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between women and men in working life". The instruments securing positive action include target and quota setting in recruitment and promotion. However, these positive actions cannot be used in an indiscriminate manner, but must be based on an objective assessment of the personal situations of all candidates. The ECJ interpretation in the Kalanke (1995) case, [5] which ruled that positive discrimination in favour of women was against Community law, was softened later to recognise that positive action can be permitted in certain circumstances. [6] The process leading to adoption of the Recast directive is discussed in the next section.

The Amsterdam Treaty significantly increased the powers of the EU to legislate in matters of gender equality. First, it broadened the scope of existing EU legislation regarding gender equality in employment as the new article 13 allowed the Council, for the first time, to take action against all forms of discrimination outside the field of employment, including discrimination based on sex or sexual orientation. Second, article 141 (ex 119) allowed the EU to act not only in the area of equal pay but also in the wider area of equal opportunities and equal treatment in matters of employment and occupation, as well as authorising positive action in favour of women. Third, the Treaty of Amsterdam imposed a general obligation on the EU in all of its activities to eliminate inequalities (article 3.2) and to promote equality between women and men (article 2). Even though these last two articles do not create legally enforceable rights for European women, they do represent a Treaty-based political commitment to gender mainstreaming which the Commission could cite as both legal authority and political cover for its subsequent proposals. And last, but not least, under the new article 141, the Treaty also provided for qualified majority voting in the Council and co-decision with the European Parliament for future equal opportunities legislation. [7] This is an important development, because the enhanced powers of the European Parliament (especially given the strong advocacy of women's interests by the Committee on Women's Rights and Gender Equality) offers a greater prospect of far-reaching gender equality policies in the future. In all, the Amsterdam Treaty marks a significant positive development in the framing of Europe's gender order by extending the principle of gender equal opportunities well beyond that of employment. In this regard, Article 13 has provided another important route for the expansion of women's rights. The article provides the EU with the competence to take "appropriate action" to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, and age or sexual orientation. In the case of women's rights, this has led

[5] ECJ 17 October 1995, Case 450/93 Eckhard Kalanke v Freie Hansestadt Bremen [1995] ECR 1-03051 (Kalanke).

[6] ECJ 19 March 2002, Case 476/99 H. Lommers v Minister van Landbouw, Natuurbeheer en Visserij [2002] ECR 1-02891 (Lommers).

[7] The co-decision procedure also applies to future gender equality proposals based on article 137 (ex 118) on the promotion of employment, improved living and working conditions (which provided the legal basis of the pregnant workers directive).

directly to the Directive on the principle of equal treatment between women and men in access to and the supply of goods and services (2000/113/EC). For the first time, individuals can seek redress against discrimination in the provision of non-employment related goods and services. The process by which this Directive came about is discussed in the next section.

The potential of Article 13 to provide a judiciable constitutional avenue for women's rights claims was supported, and indeed reaffirmed, in the Charter of Fundamental Rights of the European Union. This charter, prohibits discrimination on any ground, including sex (Article 21), recognises the right to gender equality in all areas, and the necessity of positive action for its promotion (Article 23). The Charter is also concerned with the issue of work/family reconciliation, and in so doing, guarantees the right to paid maternity leave and to parental leave (Article 33). Although non-binding, the Charter is seen as an authoritative source of fundamental rights that the EU must uphold and is consulted by EU institutions, including the ECJ. It will enter into force as a binding document once the Lisbon Treaty is ratified by all member states.

The Amsterdam Treaty (TEU) and the Charter of Fundamental Rights (TFEU), then, set out the basic values of the EU regarding gender equality, and the obligations and tasks that flow from a commitment to these values. In interpreting Treaty provisions, the ECJ is often guided by the intent directly or indirectly conveyed by these values. They also provide a framework for the development of gender equality laws and policies in employment and in non-employment spheres that are ultimately binding on member states. Thus, these two Treaties, with their constitutional status and the embedded doctrines of direct effect and supremacy over national law, support the evolution of gender rights policies.

Framing EU Laws on Gender Equality: Two Cases

This section considers the framing of two directives flowing from the constitutional experience discussed above, the Goods and Services Directive and the Recast Equal Opportunities Directive. In uncovering the process constructing these directives, the relationships between EU institutions and civil society actors is highlighted. The intent is to address the scope and effectiveness of the participatory legislative-forming process in contributing to reshaping gender relations.[8]

The 'Goods and Services' Directive

The process leading to the adoption of the 'Goods and Services' directive was long in the making, taking a total of four years to see the light. The process dates back to June 2000, with the Commission's announcement of a proposal for an equal treatment directive in areas other than occupation and employment, based on article 13 of the Treaty of the European Union. This proposal, planned for 2002, first appeared in the Communication on the Social Policy Agenda[9] and in the Community Framework for Gender Equality[10] and was approved six months later by the European Council at its Presidency meeting in Nice[11]. Soon after the Council's approval, women's organisations led by the European Women's Lobby (EWL) began to lobby for a wide-scope directive that touched on all areas of life except those based on article 141 of the Treaty[12] and, in

[8] This section emanates from the recent investigation by Galligan and Clavero into the nature of gender democracy in the EU through the prism of the two directives discussed above.

[9] COM (2000) 379 final.

[10] COM (2000) 335 final.

[11] Conclusion of the Nice European Council. Available at: <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00400-r1.%20ann.en0.htm>.

[12] This article deals with equal opportunities and equal treatment in matters of employment and occupation.

November 2001, the EWL began to draft a 'Shadow Directive' in consultation with its members. The scope of the EWL shadow directive, issued in March 2002, was extensive. It listed ten areas that the Commission proposal should include: (1) parity participation of men and women in decision-making; (2) access to and supply of goods and services; (3) taxation; (4) right to reconcile family and working life; (5) social protection, social security, social benefits and non-occupational healthcare and the fight against social exclusion; (6) education, training and research; (7) family and society-based violence against women; (8) health; (9) the images of women and men portrayed in advertising and the media, (10) the surname. During this time, the EWL cooperated closely with the working group of the Advisory Committee on Equal Opportunities between Women and Men, who were tasked with preparing an opinion for the Commission. This opinion, issued in February 2002, was very much in keeping with the content of the EWL shadow directive, as it cited eight areas to be addressed: (1) decision-making; (2) access to and supply of goods, services and facilities (including taxation and social protection); (3) health; education and training; (4) violence against women; (5) sexual harassment; (6) commercial advertising and the media; and (7) membership of associations.

Despite the creation of a consensus between women's civic and political representatives around the content of the proposed directive, the Commission circulated an unofficial, internal draft proposal for a more narrowly-defined directive addressing access to and supply of goods and services including education, taxation, advertising, and the media. However, this early draft provoked a strong reaction from the insurance and media industries. Media representatives launched a hostile campaign in which they argued that the proposed directive - and more particularly its intention to ban gender stereotypes in media and advertising - represented 'an extraordinary move towards censorship' which would clash with the principle of freedom of expression.[13] This campaign included sexist attacks in the media directed against the Commissioner for Employment and Social Affairs, Anna Diamantopoulou.[14] Similarly, the insurance industry argued that the proposal to eliminate sex differences as a factor in the calculation of insurance premiums and benefits would have serious repercussions for the sector, as well as for consumers, since it would result in an increase in prices in order to compensate for the loss of accuracy in prediction and risk.[15] In addition to the objections of these interest groups, some Member States, as well as a number of key Commissioners[16] also expressed their opposition to this proposal.

When it seemed that the process would not advance due to a strong polarization of positions among the key actors involved, women's organisations (EWL, EWLA, AFEM) continued to lobby in favour of a directive that at least preserved those areas contemplated in the earlier draft which had come under strong criticism: insurance premiums and benefits, taxation, education, and advertising and the media.[17] In addition to this, MEPs from different political groups involved in the work of the Women's Rights and Gender Equality Committee (FEMM) signed a declaration of solidarity with

[13] *Financial Times*, 'EU plan for law against sexism draws fire', 24 June 2003.

[14] Articles had titles such as 'Big sister is watching you: Feminist Eurocrat who wants to ban "sexist" TV shows and adverts'.

[15] The views of the insurance sector on the proposal are described in the Commission's document SEC(2003) 1213: Commission Staff Working Paper: Proposal for a Council Directive Implementing the Principle of Equal Treatment between Women and Men in the Access to and Supply of Goods and Services - Extended Impact Assessment.

[16] A number of Commissioners expressed deep concerns about the proposal, including the Internal Market Commissioner, Frits Bolkstein; the Trade Commissioner, Pascal Lamy; and the Competition Commissioner Mario Monti (*Financial Times*, 'EU plan for law against sexism draws fire', 24 June 2003.

[17] The Commission received statements from the following women's organisations supporting a broad directive that included education, taxation and the media as well as goods and services: EWL (9 July 2003), EWLA (5 September 2003) and AFEM (7 September 2003).

Commissioner Diamantopoulou, stating that the sexist attacks against her 'put into great danger the adoption of a new proposal for a directive aiming to eliminate sex discrimination'.[18]

Yet, despite this active involvement by women's advocacy networks for a wide-scope directive, the proposal finally issued by the Commission was further diluted from the earlier unofficial draft. Its scope was limited to the area of access to and supply of goods and services only, excluding education, taxation and the media and advertising. It further included a provision which allowed the insurance sector an extended transitional period of six years for the implementation of the directive, beyond the general transposition period of two years.[19] The proposal also specified that the legal base of the directive was article 13 of the Treaty, which meant that its adoption required unanimity in the Council, with the powers of the European Parliament limited to issuing an opinion.

This proposed directive was a major disappointment for women's advocacy networks who claimed not to have been properly informed, let alone consulted, about these changes.[20] Thus, MEPs in the FEMM Committee and women's organisations did not know about the decision of the Commission to propose a directive covering only the access to and the supply of goods and services until 2 October, when Anna Diamantoupolou informed them of the Commission's intentions. This lack of communication by the Commission was clear in a public hearing on sex discrimination outside the workplace organised by the FEMM Committee with representatives of the insurance and private pensions industries, the media, and women's organisations on 10 September, where the discussion was based on the earlier version of the proposal.[21]

The narrow scope of the proposal was criticised not only by women's advocacy coalitions but also by the Committee of Regions and the Social and Economic Committee. Thus, in its opinion of April 2004, the Committee of Regions expressed disappointment at the scope of the proposal, regretting the concessions made to some powerful interest groups, and called for a more comprehensive directive that included at the very least the same grounds covered by the race directive.[22] Similarly, the Economic and Social Committee, in its opinion delivered on 28 September, regretted the exclusion of education from the scope of the directive and deemed 'unwise' the provision which deferred the implementation of unisex rates in insurance for an extended period of six years.[23]

It is interesting to note that, despite the controversial character of the Commission's proposal, the position of the European Parliament was clearly focused on reconciling the different positions. The report of the FEMM Committee, prepared by Christa Pets, regretted the dilution of the directive, although it also acknowledged the difficulties of the Commission in bringing the proposal forward. This report presented a total of 34 amendments, none of which related to the scope of the directive. Instead, it included a statement encouraging the Commission to table future directive proposals that would cover the excluded areas.[24] The key amendments it proposed concerned: (1) the inclusion of media and advertising when this is used to advertise the terms and conditions for the provision of good and services;[25] (2) shortening the additional

[18] 02.COM.FEMM/03/D_30306/ES/ddl. Available at: <www.karamanou/gr>.

[19] COM (2003) 657 final.

[20] EWL, Annual Report 2003 (Available at: <www.womenlobby.org>.)

[21] This is obvious in the speech of Mary McPhail (EWL Secretary General) during the hearing. These speeches are available at: <www.europarl.europa.eu/hearings/default_en.htm>.

[22] 2004/C 121/06.

[23] 2004/C 241/13.

[24] A5-0155/2004 Final.

[25] Amendment 14.

transitional period for the implementation of gender-neutrality in actuarial factors from six to four years;[26] (3) tightening of reporting requirements from Member States, shortening this period from five to three years;[27] and (4) eliminating an exception included in the Commission's proposal for the provision of goods and services when these are intendexclusively or primarily to the members of one sex[28]. The report was approved by the FEMM Committee on 16 March 2004, with 29 votes in favour and 3 votes against – indicating a clear consensus across political groups. It was later voted in a plenary session of the European Parliament (EP), on 30 March, with 313 for votes, 141 against and 47 abstentions – a strong majority which, once again, crossed political lines.[29]

However, during the plenary debate the Commission representative stated that the Commission could not support any of the key amendments tabled by the EP. Furthermore, none of these key amendments were considered during deliberations in the Council. It should be noted that the Council debates on this directive mostly focused on the application of the principle of equal treatment to the use of sex-based actuarial factors in the calculation of premiums and benefits in the insurance and related industries[30], despite the fact that a small number of member states[31] voiced dissent on the narrow scope of the proposal.

Nonetheless, while concern about the scope of the directive came only from a small minority of members, the level of polarisation regarding the actuarial provisions (article 4) of the proposed directive was much stronger. The two main points of debate on this issue in the Council focused on whether the use of sex as an actuarial factor constituted de facto discrimination and the potential impacts resulting from prohibiting the use of sex in actuarial calculations. With respect to the first issue, six member states supported the view of the Commission that the use of sex as an actuarial factor could be considered discriminatory (Belgium, Czech Republic, Greece, Denmark, Slovenia and Sweden) while others disagreed with this view (Austria, Finland, Germany, Hungary, Ireland, Slovakia, Spain, United Kingdom). With respect to the second issue, deliberations concentrated on the additional costs to the industry and consumers that could result from a prohibition of the use of sex as an actuarial factor. On this point, nine member states were concerned that this measure would result in an increase of premiums or a reduction of annuities (Austria, Belgium, Germany, Italy, Netherlands, Portugal, Poland, Spain and the United Kingdom) while Italy and the United Kingdom were also concerned about its negative impact on the industry in the EU.

Disagreement among Member States in the Council was resolved with a political agreement between the Commission and the Council, which allowed Member States to permit the use of sex as an actuarial factor provided that this practice was objectively justified. Although Germany did not accept this agreement, it decided to abstain in order to avoid blocking the directive. This political agreement was reached on 4th October 2004 and the directive was finally adopted on 13 December 2004.

The 'Recast' Directive

While the 'Goods and Services' directive was marked by a very long and divisive pre-proposal stage, the proposal-drafting period for the Recast directive was relatively short and straightforward. The origins of this directive can be traced back to the European

[26] Amendment 22.

[27] Amendments 10, 22, 34.

[28] Amendments 9 and 13.

[29] European Women's Lobby, 'New European Directive on Gender Equality in the Area of Goods and Services Adopted in December 2004'. Available at: <http://www.womenlobby.org>.

[30] Article 4 of the Commission's proposal.

[31] These member states were: Belgium, Finland, Luxembourg, Malta, The Netherlands, Portugal and Sweden.

Commission's legislative and work programme for 2003, which included an initiative to undertake a 'recasting of gender equality directives'.[32] This initiative was more fully spelled out in a Commission communication issued in February 2003 on 'updating and simplifying the community acquis'[33] in which equal treatment legislation was identified as a priority area for action. The document sets out three different strategies for achieving the task of simplifying and updating equal treatment legislation – consolidation, codification and recasting.[34]

The proposal-drafting process began with a web-based consultation of member states, interested stakeholders and individual citizens, in which the Commission discussed the three options. The discussion paper discarded the consolidation technique, and presented the codification and recasting methods as the most viable options for modernising equal treatment legislation. Codification was discussed as a technical exercise with no substantial changes to existing equal treatment legislation. Two recasting options were presented, one which would integrate six previous equal treatment directives into a single directive[35] while the alternative recasting option incorporated the employment-related provisions of the pregnant workers' directive, thus involving additional substantial changes in existing legislation. It should be noted, however, that this extended recasting option did not consider the inclusion of the health and safety provisions of the pregnant workers directive, nor did it consider the inclusion of the parental leave directive. In addition to the discussion above, the Commission consultation paper stated a preference for Article 141 as the legal basis for this directive, entailing that the adoption procedure to be followed was that of co-decision rather than consultation, in contrast with the process followed in the case of the 'Goods and Services' directive.

In total, there were thirty responses to the Commission's web-based consultation. While employers preferred codification, the view of governments was split between codification and a limited recasting.[36] On the other hand, trade unions, women's organisations and other civil society organisations favoured either the more extended recasting option or a new, more far-reaching recast to include the parental leave directive.

Nonetheless, only a handful of women's organisations submitted an opinion to the consultation paper and the participation of women's organisations in the overall pre-proposal process was relatively low, especially when compared to their involvement in shaping the Goods and Services directive. The European Women's Lobby, for instance, were only marginally involved in this process – even though they enjoy observer access to the meetings of the Commission's Advisory Committee on Equal Opportunities between Women and Men.

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[32] COM (2002) 590 final.

[33] COM (2003) 71 final.

[34] Consolidation integrates in a single (non-binding) text the provisions of the original instrument with all subsequent amendments made to it. It does not seek clarification so complexities and ambiguities are not resolved. Codification clarifies the law by bringing together all provisions of an act and subsequent amendments, harmonising terms and definitions. This is a textual exercise which maintains the body of the acquis intact, without developing it. Recasting codifies a pre-existing legal act and subsequent amendments while at the same time allows for the possibility of substantial modification and development of pre-existing law. In addition, it also allows the integration on the body of ECJ jurisprudence into the new instrument.

[35] These directives were: equal pay, equal treatment in employment (as amended in 2002); equal treatment in occupational security schemes (as amended in 1996) and the burden of proof in cases of sex discrimination.

[36] One exception is Portugal, as it proposed a more far-reaching option than those presented in the Commission document.

The Advisory Committee issued an opinion in October 2003 and, again, it is possible to detect clear differences of views between on the one hand, trade unions and representatives of national gender equality agencies and on the other hand, employers. The opinion of the Advisory Committee favoured an extended recast directive, although it also called for the inclusion of the health and safety provisions of the pregnant workers directive, as well as some provisions in the directive on equal treatment for the self-employed (a directive not considered in the Commission's consultation paper). Yet, this opinion only represented the views of trade unions and national gender equality bodies. It did not reflect the views of employers, who issued a minority position that clearly favoured a codified directive. In arguing for this minority position, employers stated that no further modification to the existing legislation was necessary, that further amendments to existing legislation would involve costly changes at the national level, and that anything additional to a simple codification would put an unfair burden on employers in acceding countries.[37] The disagreement between employers and trade unions during the consultation process was also made clear in an informal meeting organised by the Commission with representatives of social partners at Elevel, though divergences of opinion also existed among member states, as made evidenanother meeting with the Commission during the pre-proposals.[38]

The Commission finally published its proposal in April 2004.[39] It covered the six directives laid out in the integrative recast option, omitting the directives on maternity protection, parental leave, social security and the self-employed. In addition, the Commission incorporated the extensive case-law of the European Court of Justice into this proposal. The proposal was welcomed by the Economic and Social Committee (EESC) in its opinion of December 2004,[40] which agreed with the Commission that the inclusion of the omitted directives would complicate and lengthen the recast directive. Nonetheless, the EESC called attention to the need to revise and update the directive on the self-employed which, in its view, did not provide sufficient protection for women.

The Commission's proposal gave rise to a 'lively' debate in the FEMM Committee.[41] This debate mainly focused on three issues: inclusion of a reference to parental leave in the recast directive; the elimination of distinctions between women and men in occupational pension schemes and the introduction of unisex tariffs; and the need to put more pressure on Member States and social partners to promote gender equality. Deliberations in the FEMM Committee took place on three separate sessions at the end of which a report prepared by Angelika Niebler (EPP) containing 93 amendments, was adopted.[42] The main amendments related to maternity/parental leave and the reconciliation of work and family life.[43] However, support for this report did not spread across the political spectrum as evidenced by the large number of abstentions during its adoption in the

[37] Both the Advisory Committee's opinion and the employers minority position can be found at: <http://ec.europa.eu/employment_social/gender_equality/gender_mainstreaming/gender/advcom_en.html>.

[38] Information about the consultation process is included in the Impact Assessment Report annexed to the Commission's proposal, SEC (2004) 482.

[39] COM (2004) 279 final.

[40] 2005/C 157/ 14.

[41] These were the words used to describe the deliberations in the FEMM Committee by MEP Joachim Wuermeling, speaking on behalf rapporteur Angelika Niebler, during the plenary session on 5/7/05

[42] A6-0176/2005 Final, adopted in Committee on 26/05/05.

[43] These amendments included: to clarify that parental leave is an individual right for every parent; to ensure that any less favourable treatment of a woman who is pregnant or on maternity leave is also deemed discriminatory; to require member states to encourage dialogue among social partners to promote flexible working arrangements with the aim to facilitate reconciliation of work and family life; to ensure that member states conduct awareness campaigns for employers and the public in general on equal opportunities issues.

Committee.[44] The report of the FEMM Committee was adopted by the European Parliament in its plenary session of 5 July 2005, when a total of 93 amendments were approved. During this session, however, the Commission announced that it could not accept a number of these amendments. Of special note is the rejection of an amendment proposing a review clause for the parental leave directive since, in the Commission's view, parental leave did not fall within the scope of the recast directive.

The amendment relating to parental leave became the main point of disagreement between the European Parliament, on the one hand, and the Council and Commission, on the other, during the inter-institutional deliberations that took place prior to the adoption of the directive. After tripartite negotiations, a political agreement was reached in which both the Council and the Commission made a commitment to put parental leave on top of their gender equality agendas. The recast directive was finally adopted one year later, on 5 July 2006, although the input of the European Parliament in the final text was minimal. Thus, out of the 93 amendments proposed by the European Parliament, the Council only accepted 37, of which 24 related to titles and 10 were already included in the Council general guidelines. This means that EP secured only three substantial amendments to the directive.

Reflections

The above sections explore the constitutional development of women's rights in the EU, giving an indication of the complex set of policies, strategies, and procedures that govern women's rights in Europe. This section reflects on the constitutionalisation experience and addresses current and future challenges.

It is evident from the foregoing discussions that the legal architecture of EU treaties, ECJ interpretations, and emanating laws provide individual citizens with opportunities for seeking redress of discrimination or enforcing of rights in a supra-national arena, with these findings binding on lower levels of governance. This power, it can be argued, reinforces the 'constitutional' nature of the EU legal framework and thereby indicates some measure of a cosmopolitan legal order (Frith 2008: 225). Over time, article 141 has been developed by the ECJ into a structure that allows for justicable actions by individuals seeking redress for discriminations in a range of employment-related areas, including occupational pensions and statutory social security measures. Many of these actions relate to the incomplete, or inadequate, transposition of gender provisions in national law and since 1971, the ECJ has considered and delivered over two hundred binding judgements on equal treatment of women and men (Burri and Prechal 2008: 18). Furthermore, in developing a range of rights designed to foster gender-equal relations, the ECJ has elaborated a number of key rights-supporting concepts – direct and indirect discrimination, and positive action. These developments have formed and influenced secondary EU legislation – the gender equality directives.

While there is an extensive piece of work to be undertaken that evaluates the court-based litigation process against representative-participatory institutions in delivering policies that seek to equalise gender relations in an EU context, this paper suggests that they cannot be seen in isolation from one another. On the one hand, supranational constitutionalism, exemplified by the Treaty and the Charter (indirectly for now), provides a legal framework for the pursuit of individual gender equality claims that enables individual women citizens to challenge an aspect of discriminatory domestic gender arrangements in the supranational context. EU constitutionalism is bound by the doctrine of 'equal opportunity', a classical liberal construction of rights and duties, where the individual is central, and progress in interpretation of EU gender values is dependent on individual agency in various forms. This element of constitutionality delivers binding

[44] The results of the vote were nine in favour, one against and 22 abstentions.

judgements based on judicial interpretations of the meaning of gender justice, derived from EU treaty provision. That the justicability of rights claims now extends far beyond that of equal pay is a testament to the evolving legal framework of the EU and associated findings of the ECJ. In the field of employment rights in particular, the constitutional experience of the EU has had a significant and positive effect on women's rights, and more broadly, on constructing gender relations in the workplace on more equal terms. In creating, pursuing and developing women's rights, individual women have played a critical part, primarily as litigants and legal representatives.

The EU's constitutionalising experience has, however, taken place in a political context – and, given the difficulties with ratification of the Lisbon Treaty (the next phase in the constitutionalisation of the EU), a contested political context at that. The EU's directives, or secondary legislation, in the field of gender equality are as much the products of political negotiation as they are based on the influential judgements of the ECJ. This participatory process, involving various representative actors engaging with one another in the EU's diverse institutional sites, can shape the parameters of gender equality in important ways. The two case studies illustrate both positive and negative examples of this framing of gender equality provision. In turn, these binding directives carve out the scope available to individuals to pursue, challenge, and claim equal gender rights. In the light of this reality, the manner in which the directive is framed, the interests that are represented at the framing stage, the representations that these actors make, and their relative power in relation to one another as group and institutions, all impact on the transformative potential of the gender relation in question. Thus, it can be argued that the Goods and Services Directive is a disappointment to women's rights advocates, while the Recast Equal Treatment Directive contains important clarifications that hold potential for women's further empowerment.

Finally, the glaring weakness of the EU constitutional experience is the fact that it is constructed on an equal opportunities platform. Undeniably, this has provided a powerful source of change in gender relations since the Defrenne judgements, and this achievement should not be diminished. Nonetheless, if the EU is to develop a genuine gender-equal cosmopolitan legal order, it will need to find a way of addressing gender relational issues that lie outside the scope of equal opportunities. Specifically, the issues of violence against women and the trafficking in women for the purposes of sexual exploitation are two areas that pose a challenge to the EU's liberal construction of gender equality. In one sense, this challenge relates to Held's view of individuals as the ultimate unit of moral concern, who "should enjoy, in principle, equal consideration of their interests" (Held 2002: 5, quoted in Frith 2008: 219). Held identified the body as one of several sites of power, and if EU constitutionalism is to radically transform gender relations, policy and law that gives equal consideration to women's rights in the sphere of personal protection offers the potential for the construction of a more elaborated cosmopolitan democracy underpinned by a constitutional recognition of body rights.

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Chapter Eight

Reconceiving Democratic Constitutionalism for Multi-National Polities

Do the Cases of the EU and Canada Point in Similar Directions?

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Introduction

There are interesting parallels between the fate of the attempt to constitutionalise the European Union of the last decade and the constitutional process that followed on the repatriation of the Canadian constitution in the 1980s and 1990s. Both processes sought to reconcile different nations under a common constitutional framework. Both processes oscillated between aspirations to deeply involve the people and moments in which the process was re-appropriated by the elites again. Ultimately, both processes failed to establish a consensus that wholeheartedly included all nations involved, and as a consequence they remain inconclusive.

These failures raise important questions about why they fell short of the desired outcome and also about how these failures are to be appreciated. On both sides, many accounts suggest that they are not to be understood as merely imperfect applications of the ideal of democratic constitutionalism, but rather that the peculiar contexts of present-day Canada and Europe require us to revisit or even to reject the classical, heroic understanding of democratic constitutionalism has it has been shaped by the eighteenth century American and French experiences. These classical conceptions of democratic constitutionalism are found wanting in particular to the extent that they have not been devised with an eye to deeply multi-national political communities, embracing different peoples whose political will formation ('political reason') is embedded in deeply diverging political value systems and structures of political communication ('public spheres'). In different ways, both Canada and the EU are deeply multi-national political communities, and the failure of their respective constitutional processes is thus to be found above all in the failure to develop a shared constitutional understanding across these different communities.

Against this background, this chapter has the following aims. First, it aims to salvage the ideal of democratic constitutionalism also for multi-national political communities by revising it rather than to reject or deconstruct it as has been the dominant response on both sides. In particular I will present an alternative 'two-level theory of supranational democratic constitutionalism' that is to respond to the distinctive character of the European Union as a multi-national political community. Ultimately, such a theory faces a double test. For one, such a theory has to be normatively valid for being based on well-justified premises. This is not enough, however, because also the established, traditional heroic conceptions of democratic constitutionalism are normatively validated, yet they are found wanting when projected on multinational polities. Hence, secondly, this theory will have to be empirically fruitful in that it can be shown to fit the actual case at hand in descriptive and causal terms but, even more importantly, that whenever such fit is found wanting, the theory points to relevant critical insights.

The second aim of this chapter is to come to a more precise appreciation of the differences between the Canadian and the European constitutional challenge. Although

both political communities are aptly characterised as multi-national, I argue that there are important structural differences between the constitutional challenges they face. These differences come more clearly in view when we try to apply the two-level theory of supranational democratic constitutionalism as proposed for the EU to the case of Canada. It is found that such transposition is inappropriate. The reasons for this is that the multi-national character of the EU builds on a Westphalian state system in which nations are organised in self-contained nation-states that stand in symmetrical relations to each other. In contrast, the Canadian nations are considerably less sharply delineated from each other and relations between them are considerably less symmetrical, in particular as concerns the distinctive case of Quebec and the special position of the First nations.

The chapter is organised around two theoretical and two more empirical sections. The first section reconstructs one version of the traditional understanding of democratic constitutionalisation by drawing on the work of John Rawls and his conception of the original position. In the second section I then sketch the two-level theory of supranational democratic constitutionalism as a way to reconceive of the ideal of democratic constitutionalism in the context of the European Union. The third section demonstrates how this theory sheds light on the failure of the European Constitutional Treaty process. The fourth section then turns to Canada by raising a number of issues why the two-level theory would not fit there. Interestingly, these issues highlight some of the systematic differences between the European and the Canadian case and they also feed back to raise some critical questions to the European case. In the concluding section I (re-)turn to the question whether it would not be better to shun the ideal of democratic constitutionalisation in multinational polities.

Foundations and Limitations of Democratic Constitutionalisation

The object of democratic constitutionalism is a constitution, which I conceive of as the 'rules of the game' according to which a body of people organises its common decision-making. In that sense constitutional norms can analytically be distinguished as 'second-order', meta-norms that define the conditions under which normal, first-order, laws and decisions are produced (Kelsen 1960; Hart 1961). This distinct, more abstract character of constitutional norms also makes it possible to think of them as relying on a distinct source of legitimacy and popular appreciation (Ackerman 1991). 'Normal' laws and decisions are appreciated first and foremost by their consequences: people who benefit from them are likely to support them, people who do not may well oppose them. In contrast to 'normal' laws, constitutional norms do not directly determine the distribution of costs and benefits. For sure, they facilitate certain distributional consequences but how these work out exactly remains underdetermined. Crucially, one can fully recognise the validity of constitutional norms without necessarily welcoming each and every decision ensuing from them.

It is thus that constitutions embody the central idea of the modern democratic self-understanding: the idea that the norms that regulate, and hence constrain, people's behaviour can in principle count on their consent; in other words, they can be rationally justified to them (Rawls 1971: 11; 2001: §2; Habermas 1992: 138). Even if each of us may at times find that within the constitutional framework decisions are produced that go against one's interest, ultimately under a democratic constitution we recognise that these are the concessions one has to make for the values and benefits one derives from being part of a functioning political community. The constitution is to guarantee that the chances that one finds a public norm imposed against one's will are in principle distributed fairly. The risk of finding a norm imposed upon one may be further contained by the constitutionalisation of certain basic rights for all which are protected from public infringement. Ultimately, the validity of constitutional norms relies on an appreciation of the reciprocity involved in being part of a political community, sharing in its benefits and having a fair share in its decision-making processes.

Another way to think of this is to note that citizens in modern democracies are not mere subjects of laws but can consider these laws to be made *for* and indeed, indirectly, *by* themselves. If we cannot take it that the public norms under which we live can be rationally justified, then the alternatives to which their effectiveness can be ascribed are habit or tradition (in which case we obey norms without questioning them) or mere power (in which case we obey norms because we realise it is not in our power to challenge them). If we would find the constitutional norms unjust, then little would be left of our sense of political obligation, except maybe for the fear of punishment. In fact, the conviction of the rational justifiability of the constitutional order would seem to be at the heart of the operation of modern democratic states. Without such conviction, it is hard to see how those regimes would be able to sustain their legitimacy and the effectiveness of their decisions.

In the history of political theory, the conditions under which constitutional norms can command rational consent have been most forcefully modelled as a social contract. And the social contract has found its most sophisticated presentation in the form of the 'original position' as elaborated by John Rawls.[1] The original position captures the ideal of a situation in which persons meet "as free and equal, and as properly informed and rational" (Rawls 2001: 16; cf. 80) with the purpose of determining the principles that are to govern, what Rawls calls, "the basic structure" that defines "the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arises through social cooperation" (Rawls 1993: 258; cf. 1971: 7; 2001: 10). Notably, the basic structure includes what Rawls calls 'the political constitution', besides other institutions like "the legally enforced forms of property, and the organization of the economy, and the nature of the family" (Rawls 1993: 258). As the political constitution is a crucial subset of 'the basic structure', Rawls's original position offers itself as a perfect ideal-image of how a democratic constitution is to be rationally designed.

To be able to come to a rational choice of the appropriate principles, the parties in the original position are to be stripped of the particular circumstances, experiences, capacities, worldviews etc. that define them in actual life and may provide them with special interests and advantages. As Rawls puts it, these distinguishing features are to be covered up by 'a veil of ignorance' (Rawls 1971: §24). Thus, rather than having the knowledge of their eventual station of life, rational individuals are to consider society as a collection of positions where they basically have an equal chance of ending up in any of them: they may be born rich or poor, with limited or great capacities, female or male, as part of any ethnic group etc. In this way, Rawls ensures a sense of generalised reciprocity as in principle you are to identify with each and every member of society. Basically, Rawls's original position operates as a test: only those principles that one would expect to be adopted by individuals behind the veil of ignorance in the original position can be considered rational and just (cf. Rawls 1971: 246).[2] Crucially the test of

[1] In conceiving of the conditions of rational constitutional choice, the main contemporary alternative to a Rawlsian approach is of course offered by Jürgen Habermas's (1992) theory of the modern democratic state under the rule of law, which is grounded in his conception of discourse ethics. In fact, I believe that the position developed in this chapter might in principle also be developed on the normative foundation of Habermas's discourse ethics. Yet, there are three reasons why I have opted for a Rawlsian point of departure instead. First, for presentation purposes I think it preferable to draw on the social contract as a device of presentation rather than to rely on the ontological and empirical assumptions of Habermas's discourse ethics. Secondly, it allows me to keep the argument for supranational democratic constitutionalisation purely 'political' (in the Rawlsian (1993: §I.2) sense) and to steer clear of any (quasi-)ethical arguments, in particular Habermas's concept of 'constitutional patriotism'. Thirdly, the strict distinction that Rawls maintains between the national and the international seems particularly useful in the context of a European Union that remains essentially premised on its member states as constituting elements.

[2] In Rawls's own application, he argues that rational actors in the original position would come to a consensus on two principles that should underlie the basic structure of a "well-ordered society".

the original position requires individuals to detach from their immediate interests and to incorporate the perspectives of others in forming their political judgements. Thus political norms are conceived as the product of a rational agreement to which all parties involved can fully consent.

The way the original position requires each participant to step in each other's shoes appears as a rather appropriate way to conceive of the ideal conditions for democratic constitutionalism. Yet, the model of a social contract in general and Rawls's conception of the original position in particular have been the object of much criticism. One critique that has been widely levied against the very idea of Rawls's original position is that the original position fails to heed the importance of culture. Rawls's actors operate as 'unencumbered' selves (Sandel 1982) without any distinctive personality, identity or sentiments. Similarly, the political community he refers to is constructed without any history, culture or traditions; features that, many will argue, ultimately make a political community into what it is; without them there is little sense to speak of a society and to distinguish one political community from another. The critique of the original position being decontextualised and a-historical would seem particularly pertinent if we are to project the rationalist ideal to multinational polities. Each of the nations constituting these polities is bound to come with its own historical legacies that in important respects determine their identities and the language, social, and cultural settings that come with them.

Importantly however, Rawls himself has highlighted how his theory of institutional choice is oriented towards modern societies that are themselves already characterised by 'the fact of pluralism': "the fact of profound and irreconcilable differences in citizens' reasonable comprehensive religious and philosophical conceptions of the world, and in their views of the moral and aesthetic values to be sought in human life" (Rawls 2001: 3). Hence, the original position is not about devising a political structure for a political community that shares a single outlook on life. To the contrary, it is to device a political order under which people with fundamentally different worldviews can nevertheless successfully live together. This presumes that there is no intrinsic logical continuity between one's worldview, expressed in for instance one's religious and moral convictions, and one's political commitments. People from different worldviews may endorse one and the same set of political institutions. The legitimacy of the political institutions thus does not rely on the substance of a particular worldview but rather on a political logic of itself; it is 'a freestanding view' (Rawls 2001:181). As Rawls has phrased it in his later work, the shared political structure must be regarded as the product of an 'overlapping consensus'. The essence of this idea is the claim that people may come to accept and obey the same political order despite them holding widely divergent worldviews.

What is more, the original position need not be seen as completely detached from any concrete reality, and, thus, as prescribing one solution for all democratic societies. It is rather a device that allows us to reflect upon the concrete social circumstances in which we find ourselves (Ron 2006). From its original inception, Rawls has insisted on the reflective nature of the thought-process that the original position engages one in. It is actually in the interplay of the political structure as we find it and the thought-experiment of the original position that our rational judgement is formed: the original

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First, they would agree that each person is entitled to "a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all" (Rawls 2001: 42). Secondly, with regard to the distribution of social and economic goods, Rawls argues that rational actors, rather than insisting on simple equality, would be willing to allow inequalities on the strict conditions that the positions to which advantages are attached are equally open to all and that in the greater scheme of things any inequalities eventually also work to the "benefit of the least-advantaged members of society" (ibidem). These two principles have been widely discussed in the literature (a.o. Daniels 1974; Freeman 2003), but are of no immediate concern for the main argument of this chapter.

position leads us to consider whether indeed each of the members of a certain community could be expected to give his or her consent to the basic political structure (Rawls 2001: §10.4). In that light, the constitutional norms (or what Rawls calls 'the political conception of justice')[3] chosen can vary depending on the conditions that a specific community faces (e.g. the presence of absence of natural resources and wealth) and the range of social stations that needs to be taken into account. Thus in a society with a limited diversity of worldviews, the principles of justice that would be adopted might differ substantially from those that are to be adopted in a society in which the contracting partners have to take a great diversity of worldviews into account. Such a 'dialogical' use of the original position that is more open to context has become particularly pronounced in Rawls's later work (Ron 2006: 180).

Notably, Rawls's recognition of the importance of appreciating constitutional choices in their specific context has led him to device a second, 'international' original position when it comes to specifying the norms that are to obtain between political communities, which is fundamentally different from the first, national, original position. Rather than suggesting that such a situation can be approached as a single choice situation that only involves a wider range of social positions (Beitz 1979: 137ff.; Pogge 1989: Part 3), Rawls argues that the original position as originally conceived is not appropriate for thinking about the fair terms of cooperation between political communities or, what he prefers to call, 'peoples'. While the national original position requires all positions in society to be represented, when it comes to the relations between political communities, the international original position involves representatives of the different peoples rather than the whole range of positions within them (Rawls 1999a: 30, fn.32). As a consequence, the norms that emerge from the second original position have as their object the proper conduct between peoples (cf. Beitz 2000: 678f.). Thus they involve, among others, the mutual recognition of each other's freedom and independence, the duty to observe treaties, the duty of non-intervention and the right to self-defence (Rawls 1999a: 37). Furthermore, Rawls's principles of the law of peoples include the obligation of peoples to honour human rights and the duty of assistance towards peoples living under extremely unfavourable conditions. Yet, the obligations towards members of another people, especially those involving the redistribution of social and economic goods, fall far short of the duties that Rawls assumes to obtain towards the members of our own people.

The distinction between the national and the international original position is testimony to Rawls's recognition of the importance of cultures, since it is based on a definition of peoples as sharing a political structure, cultural orientations (or "common sympathies"), and a political conception of justice (Rawls 1999a: 23/4; Pettit 2006). A political structure, cultural orientations and a political conception of justice are thus taken to be embedded in a particular community, rather than that they are considered as open to all human beings in principle. In Rawls's view, a people merits a certain moral respect and also enjoys a certain self-responsibility. An important implication of this position is that he is reluctant to impose standards of justice on other peoples from the outside, like he also refrains from requiring full international solidarity for any economic misfortune they may suffer (beyond the extreme of a sudden crisis that calls for immediate relief). Typically, Rawls submits that when it comes to the wealth on which a people can draw, "[t]he crucial elements that make the difference are the political culture, the political virtues and civic society of a country, its members' probity and industriousness, their capacity for innovation, and much else" (Rawls 1999a: 108). By adopting this position Rawls thus markedly deviates from advocates of cosmopolitan justice who hold that the principles of social justice obtain irrespective of any particular bonds and accord "a

[3] Note that Rawls would assume all (liberal) political conceptions of justice to subscribe to his two principles of justice. However, beyond the universal threshold posed by these two principles, he allows for context-bound variations or different 'political liberalisms' to be possible, not least in the way political power is organised (cf. Rawls 1999b: §2).

merely derivative significance" to state boundaries (Beitz 1979: 182; cf. Pogge 2002). For Rawls 'peoples' emerge as a distinctive value in and of themselves. In this his position resembles the distinctive value the German *Bundesverfassungsgericht* attached to the nation-state in its famous judgement on the Treaty of Maastricht: only within these communities the proper conditions for establishing just and democratic norms can be found.

The key limitation of the international original position is that it completely nests individuals within their people and thus precludes them from engaging in any moral or political relationships with individuals of another people without the mediation of their peoples' representatives. Importantly, representatives in the second, international, original position do not engage with each other as individual members of their peoples, but as representatives of peoples as a whole (Beitz 2000: 678f.; Pogge 2006). So the question is not 'What would I as a person require to operate as a free an equal person if I were in the conditions on the other side?', but rather 'What do other peoples require to operate as part of the free and equal community of peoples?' A crucial implication of the separation of the international original position for norms between peoples from the national original position is that in the international original position the link with rational consent is severed. As it operates at the level of peoples, it does not speak to persons directly. So, as a rational person, I can use the second original position to appreciate how it may be rational and reasonable for my representatives to sign up to certain norms. However, my own sense of obligation to those norms only follows from my recognition of the authority of those that represent my people externally; it does not follow from me personally being persuaded through the second original position. This is precluded since individual persons are no party in the second original position. However, rational consent is inherently a property of individual persons; its very nature withstands delegation: you may be able to delegate your consent for rational reasons, but rational consent ultimately involves a substantive appreciation of the object of consent that can only be exercised by the individual person.[4]

The Two-Level Theory of the Multinational Democratic Constitutionalisation of the EU

Even if Rawls's two original positions may be appropriate for the domains to which they are assigned (the domestic and the international), neither of them fits the reality of multinational polities, like the EU or Canada. The aim of this section is exactly to outline a theory of multinational democratic constitutionalisation that draws on Rawls's theoretical legacy but takes account of the particular properties of a multinational polity. More specifically, this theory is initially developed with particular reference to the structure of the European Union. Whether this theory is also valid for Canada remains to be seen.

One element that the multinational theory of democratic constitutionalisation can borrow from Rawls's international original position is that it recognises the value of nations as established political embodiments of self-governing communities with their own conception of justice. There is a need to recognise the value of our political communities and the fact that only in their presence we have been able to address the questions of justice and democracy in the first place. Even if we look at the European Union, it does not amount to a state. More importantly, it is not constituted by a single people or 'demos'. The European Union rather emerges as a 'union of peoples', coming from different political cultures and whose capacity of empathy with each other is limited. Rawls's international original position captures well the diversity that separates different

[4] Note however that to highlight the character of the (first) original position as an abstraction of reality, Rawls came to think of the parties in it not just as all persons, but rather as (ideal-typical) representatives who act as trustees or guardians of the actual members of the society to be organised (cf. Rawls 1971: 64; 2001: §24.2).

peoples (nations); how their positions are inherently marked by different interests, cultures and histories, even if they may be able to live in peace and to cooperate with each other. These nation-states are the building blocks on which the supranational political union is set. In that light, it is also clear that the supranational order cannot be conceived as a replacement of the nation-states but rather is premised on them; this applies not only to their role in its establishment but also in its daily operation where the member-states perform crucial mediating roles in the process of collective political will-formation, processes that by many accounts remain deeply rooted in the national contexts.

However, even if states remain crucial elements in the European order, the interrelations between the peoples of Europe range considerably beyond what is assumed in Rawls's international model. Not only are these relations much more intense but many of them are also of a transnational character, which means that they involve citizens directly without the mediation of their states. The double character of the European situation is eloquently summed up by Kalypso Nicolaïdis (2004: 82/3):

> the European Union has established itself as a new kind of political community, one that rests on the persistent plurality of its component peoples, its *demoi*. […] its peoples are connected politically directly and not only through the bargains of their leaders. And yet, to the extent that these peoples are organised into states, these states should continue to be at the core of the European construct.

So here is the challenge that is raised by the conditions of European integration: Is it possible to conceive of a model of constitutional choice that involves the persons from different nation-states but also recognises the moral quality of their nation-state as their primary context for political orientation and engagement?

This challenge can be read as basically involving the coupling of Rawls's two original positions. Following up on the later position of Rawls on the role of the original position, such a model needs to be seen in a reflective or dialogical fashion whereby it allows the actors engaging in constitutional negotiations to critically reflect upon the positions adopted and the principles proposed. Thus, it is also possible to situate the thought-experiment of the original position in the particular context of the European Union. At one level it would then require parties to think of themselves as representing 27 different European nation-states (that I will take from now on as a sufficiently approximating Rawls's 'peoples'). At the other level it involves half a billion individuals that are called upon to consider each other's interests and the norms that would be fair between them. In an obvious way the first level is nested in the second.

Thus, if our aim is to rationally define the constitutional ground-rules of a multinational polity, we can combine these two levels of political deliberation: one involving the international sphere and the other the domestic spheres of the member states involved. This two-level theory suggests that the establishment of common constitutional norms at the international level does not merely require a rational agreement between the parties representing the nation-states but also for this agreement to be in equilibrium with the different national positions. Drawing on the terminology by Rawls, we may think of the consensus at the European level as representing an 'overlapping consensus' of the different conceptions of EU membership at the national level (that are themselves in fact expressions of an overlapping consensus at the national level) (Lehning 1997: 117).

Crucially, to connect the two levels of political deliberation, it is necessary to open up the notion of the 'people' as a party in the international original position. Even if Rawls shuns the concept of a state, his conception of the parties representing 'peoples' is very much informed by a state logic, the classical *raison d'etat*. Thus, the prime virtue of the law of peoples is to provide stability and peace (cf. Rawls 1999a: §5), which supposedly serves the mutual interests of states in protecting their sovereignty and security. Arguably

indeed these concerns constitute the (lowest) common denominator of the rationality (or 'public reasons') one can expect to maintain among states that operate under conditions of equality and reciprocity (cf. Rawls 1999a: §6).

However, the relations between the member states of the EU range considerably beyond the mere possibility of threats and infringements in domestic sovereignty. Much more so, and certainly after fifty years of European integration, they are informed by an awareness of the deep interdependence of their domestic policies. This is of course particularly apparent for the economy of the single market of goods, but it also applies to, for instance, the operation of large-scale companies, student mobility, labour migration and the single currency. For that reason, the common good that European states share is not limited to warding off the mutual threat of war and other instabilities in their international context. It extends to the building up and maintenance of common frameworks that allow the welfare and well-being of each member state to be reinforced by that of the others.

If then in the European Union the scope of the common affairs is considerably larger than it is normally assumed to be between states, these interrelations are further substantiated by the fact that all member states are democracies. Thus the mutual interdependencies are incorporated and elaborated in domestic debates and the views that are developed on the issues involved are likely to be more varied and sophisticated than the mere reinstatement that the national sovereignty and security need to be secured. Rather than assuming the national interest to be more or less rationally and objectively given, it becomes the object of a process of deliberation (Risse 2001). What is more, with increasing international interaction, the elaboration of views may well take account of those being elaborated in other states. One can even expect that foreign positions become at times incorporated into the domestic public reason. Indeed, this is exactly what is indicated to take place through the transnationalisation or Europeanisation of domestic public spheres (Koopmans and Erbe 2004; Risse and van de Steeg 2003).

In the process of realigning international interdependencies with political debates that remain mostly delineated by the domestic sphere, a crucial role is performed by political representatives that represent their states at the international level. Such political representatives are involved in what Robert Putnam has called a 'two-level game' (Putnam 1988). On the one hand, they are supposed to respond to demands put upon them in the democratic politics of the national sphere. On the other hand, they participate in the forging of common norms in the negotiations with their counterparts from other states at the European level. There is little reason to expect the pressures at both levels to coincide. To the contrary, in most cases, one can expect that in the international negotiations the representatives are under pressure to compromise on the position that prevails at the national level. Much of the 'two-level game' literature focuses on how representatives may be able to exploit the tensions between the two levels (Putnam, Evans and Jacobsen 1993). Thus, representatives may raise commitments they have entered into at the domestic level to strengthen their negotiation position at the international level. Also inversely, one can imagine representatives invoking the limited room for manoeuvre at the international level to justify deviations from the prevailing position in the domestic context (Moravcsik 1994).

However, instead of thinking about this two-level role mainly in strategic terms, one can also conceive of it as 'a liaison function' as it provides the crucial connection between the international and the domestic debates. National representatives act as linchpins through which the debates at the two levels become mutually informed. At the international level, they convey the views held by their own people to the other representatives. In turn, in the domestic debate, they can bring in the views held by other peoples. This liaison role of national representative need not be reserved to a single actor, like the Minister for

Foreign Affairs. Certainly in the European Union we find many actors operating between the two levels; this may involve different ministries but also parliamentarians, members of NGOs, and even normal citizens. While the primary processes of public discourse and opinion-formation that they are exposed to still take place within the national confines, these actors operate in an international context in which they encounter the views held in other member states. This condition inevitably involves them in a shuttling process, going back and forth between the international level of engagement and their domestic constituencies.

Clearly, this much complicates the role of national representatives beyond the representative role that they are normally taken to fulfil in representing the mandate they have been given by their domestic constituencies. Here it is crucial to disassociate the notion of representation from what Jane Mansbridge (2003) has identified as its dominant, 'promissory' conception. The promissory conception of representation takes the mandate of representatives to be defined by the platform on which they are elected, and against which they will be evaluated by the voters at the forthcoming election. Representatives are thus taken to be tied to a given platform. As an alternative to this promissory model, Mansbridge outlines an 'anticipatory' model of political representation.[5] In this model, representatives seek to anticipate voters' preferences in their actions, which they then have to justify to them only afterwards. Thus the anticipatory model presents representatives not merely as agents of their constituency (like the promissory model suggests), but gives them an active role as catalysts and facilitators in the process of political will-formation. What crucially distinguishes the anticipatory model from the promissory one is that the former suggests that preferences may be open to change over time and, what is more, that political representatives may be able to induce such changes. The anticipatory model thus opens up for a much more dynamic relationship between representatives and represented. This model seems particularly suitable when thinking of the role of national representatives in international negotiations and how they are to relate back again to their national constituencies. They in fact have a crucial role in feeding external, international information back into the domestic process of will-formation that may indeed change its course as a consequence.

Ultimately, the two-level model requires all political actors to operate at two different levels. This applies not only to the political representatives but also to the citizens at large as the interventions of their representatives induce them to appreciate the positions of other states. Following the work of Deborah Savage and Albert Weale (2006), who have explored the normative implications of two-level negotiations, it can be suggested that ideally one would expect the following "double-barrelled" normative conditions to obtain:

1. At the level of the international negotiation, negotiators not only heed their own legitimate interests but also take account of what their negotiating partners can reasonably be expected to justify to their domestic constituents;
2. In the processes of domestic will-formation, citizens not only consider the reasonableness of the burdens that they are expect to bear but also the reasonableness of the burdens their interests impose on others, given the feasible set of international options (formulated on the basis of Savage and Weale 2006: 15).

For citizens, the domestic context remains the primary context. Still, they also have to take account of the international constellation that enters their process of will-formation

[5] Beyond promissory and anticipatory representation, Mansbridge distinguishes two further models, 'gyroscopic' and 'surrogate representation'. While the latter models add force to her move away from the promissory standard, the distinction between promissory and anticipatory representation is the most fundamental one and for our purposes there is no need to explore the other models.

as an input from the outside, mainly through their national representatives in the international negotiations but possibly also through other transnational channels.

An implication is that the two-level model is inherently dynamic: the tensions that are likely to exist between the international and the national levels, give rise to processes of continuous mutual adjustment, and as positions shift on one level these differences are fed back again into the other where they are likely to occasion shifts in turn. As Savage and Weale (2006: 7), following Putnam (1988: 454f.), put it: "Issues under discussion at the international level may mobilise or change public opinion at home and this 'reverberation' may then affect the international outcome in turn". As an example of such reverberation, they point to how public praise of French President Chirac for British Prime Minister Blair in the 2005 EU multi-annual budget negotiations was received in Britain as an indication that the British government should have held its ground more strongly than it did (Savage and Weale 2006: 7).

Ultimately, a democratic supranational constitution would have to be based on a convergence of all the domestic processes of will-formation involved. Quite appropriately, Putnam (1988: 430) indicates that the two-level game theory aspires to be a 'general equilibrium' theory. However, in many cases the convergence of preferences necessary for an equilibrium is unlikely to be identifiable from the start. It crucially requires mutual adjustments to take place in the process. Here it is crucial to appreciate the dynamic nature of the negotiation process. Mutual adjustments become feasible to the extent that the process of international negotiations enters and reverberates in the domestic debates. Thus external information on the negotiations and the positions of other peoples may come to affect the domestic position. In turn, whenever domestic positions are adjusted this is fed back into the negotiations from where it may find its course again to other domestic contexts. Thus a sense of mediated reciprocity emerges between the different domestic processes of will-formation that may allow them to converge, if the process is indeed allowed to go through the reiterations necessary for that aim.

The EU Constitutional Treaty Process Read from the Two-Level Theory Perspective

My claim is that the two-level theory of multinational democratic constitutionalisation just set out provides an appropriate framework for evaluating the Constitutional Treaty process as it is based on valid normative premises and is empirically adequate to the structure of Europe. Ultimately, the test for the theory is a pragmatic one in that it helps us to make sense of the events as they took place and that it points us to relevant critical insights at those points where the actual train of events deviated from the theory.

The shortest evaluation that the two-level theory suggests of the failed EU Constitutional Process is that of the two requirements that were derived from Savage and Weale (2006) above, the process has been quite successful in meeting requirement (1) of democratic constitutionalisation at the international level, but stranded as it failed to meet requirement (2) in the domestic spheres. However, this conclusion is too simple as the success at the international level was very much premised on its disentanglement from the domestic spheres. So ultimately we are led to focus on the way the two levels were connected.

At the international level, the Convention provided an arena in which negotiators not only heeded their own interests but also took account of what their negotiating partners could reasonably be expected to justify to their domestic constituents. The Convention gathered around the common objective of drafting a Constitutional Treaty for Europe that would not be unravelled by the subsequent IGC. Principled political disagreements were suppressed in favour of a pragmatic and technical style of reasoning that was oriented first of all towards the simplification of the European treaty structure. Within the

framework of that structure, the more contested issues concerning the distribution of power in EU decision-making could be addressed through a combination of radically innovative proposals and pragmatic compromising (as is for instance demonstrated by the introduction of the double-majority in the Council of Ministers as well as the European Council President, both accompanied by elaborate balancing clauses). Still, the consensus achieved on the Constitutional Treaty within the Convention remains an achievement few would have expected to be feasible.

Yet, while the Convention successfully exploited the breadth of its composition and the public character of its proceedings for its self-presentation as well as its autonomy vis-à-vis the member states, it failed to fully live up to these values in practice. In terms of its composition, the Convention displayed some notable gaps. Among its 105 full members, less than 20% were women and religious and ethnic minorities were glaringly absent. In terms of its party-ideological make-up, the Convention membership was very much dominated by affiliates to the dominant mainstream political ideologies that have been central the evolution of European integration over the decades. From its start, more deviant and Eurosceptical voices were rare to be heard in the Convention. Such an ideological composition, assuming that it aptly represents the composition of the polity as a whole, may be appropriate for normal legislative purposes. However, it becomes more problematic when it concerns constitutional issues that warrant a general support that extends far beyond a mere majority.

Furthermore, as its work progressed, the Convention members, rather than engaging with their constituencies, contributed to increasing the gap with them. The technical style in which its debates came to be couched and the rather specific format that its Constitutional Treaty was meant to have, only fed into the general sense of abstraction and disengagement that the Convention's topics for discussion were likely to evoke. Even the experts involved in the Civil Society Forum found that it was almost impossible to engage oneself with the Convention's debate from the outside. As a result of this way of proceeding, as much as people may have admired the Convention's achievements, few felt bound by it even among for instance national parliaments that had had their own delegates in the Convention. Media exposure of the Convention remained limited and only a minority among the public at large was aware of its existence, let alone of the substance of its work.

Also in terms of openness, the Convention fell short. Opening up of the meetings and making all documents available to the public was a useful first step. However, establishing the formal preconditions of meetings in public and public accessibility of all relevant documentation is anything but a guarantee for the willingness and interest to engage on the side of the general public. The Convention members failed to develop a sufficiently active and interactive relationship with their constituencies. Constituencies were unlikely to take much of a spontaneous interest in the Convention's work given its abstract character and the absence of direct stakes. Even if Convention members often lamented about this lack of engagement, it also allowed them to progress with their work. Given the pressure on the Convention to come to a consensus, outside engagement often came as a distraction or even as a handicap. Communication between the Convention and popular constituencies tended to be of a one-way character in that the Convention members would report their experiences but would have very limited patience with taking ideas in from the outside so as to feed them back into the Convention proceedings. As a consequence of this, the Convention's proceedings ultimately hardly reached out beyond the circle of dedicated EU specialists.

The Intergovernmental Conference might have provided the occasion to compensate for the biases inherent in the Convention. If governments had seriously considered the requirement that the Constitutional Treaty would not only be agreeable to themselves but also to the electorates at large (as it was indeed to be tested in several referendums), then they might have felt compelled to scrutinize the Convention's draft Constitutional

Treaty in much greater detail. However, this was anything but encouraged by the way the Intergovernmental Conference proceeded. Instead, the pressure was widely felt to finish the negotiations as soon as possible and to prevent the consensus achieved in the Convention from unravelling. The amendments made to the Convention's draft remained rather limited and reflected more the immediate (institutional) concerns of the governments than the wider, more substantive concerns, that might have been felt among their nature constituencies.

With the text of the Constitutional Treaty thus determined, the referendum campaigns might still have been the occasion to justify the substance of the agreement to the people in a *post hoc* way. Notably, however, in many respects the referendum campaigns turned out to be distinctively unsuccessful in getting the message of the Constitutional Treaty across. While many voters indicated that their knowledge of the Constitutional Treaty was limited and that they only decided on their vote quite late in the day, the campaigns failed to relief them of this uncertainty and hence only confirmed the already lingering scepticism towards the document.

However, the negative votes raised in the referendums are more than a mere reflection of bad campaigning or a communication problem. They revealed that some voices among the public had systematically been marginalised in the conception of the Constitutional Treaty, namely the voices of those who have much at stake in the trusted political structures of the nation-state and see these stakes threatened by the advent of European integration. The Convention failed to cater for them as it involved mostly adherents of the main political ideologies that tend to appreciate above all the efficiency gains that European integration brings. Even if in principle the Convention structure might have allowed deviant voices to be heard, its strong internal culture, its heroic self-perception, its commitment to consensus and its focus on legal reasoning worked to the disadvantage of such more substantial concerns. In the Intergovernmental Conference, the concern to get an agreement and to get it soon, prevailed over any government's inclination to consult its people on the Convention's recommendations. While the majority of government eventually made ratification a matter for the national parliaments only, a significant minority was unable to close the door for popular involvement through a referendum that had been opened by the Treaty's claim to be of a constitutional nature. These referendums proved occasions for those who felt they had been excluded from this European political process, as they had been from so many previous ones, to assert their voice and to reject its outcome.

The big question is then whether if the substantial inclusion of such voices in the process would not have prevented the possibility of any consensus to emerge. Arguably, the more positions a supranational process of democratic constitutionalisation involves that are strongly tight to the existing national arrangements, the less likely it is for an overlapping consensus to be even viable between them. Much of the preceding analysis of the Convention also suggests that it was only able to reach a consensus due to its relative immunisation for public demands. In other words, it appears rather unlikely that its members would have been able to forge as broad and deep a consensus as they did if the Convention had really engaged public opinions across the EU.
Such a sceptical argument is however premised on a distinctively static conception of interests and positions towards international cooperation. It ignores the dynamic nature of processes of will-formation. In contrast, the two-level model of supranational constitutionalisation emphatically conceives of the constitutional process in iterative, dynamic terms. Insights from the supranational level are expected to be fed back into the processes of political will formation in the domestic sphere and be capable of affecting public opinion, if only by challenging the engrained positions. This suggests that positions can evolve and converge, which need not necessarily involve them becoming more similar but at least that they take regard of each other and recognise each other's co-existence. As Kalypso Nicolaidis (2004: 84) puts it, what Europe requires is "informed curiosity about the political lives of our neighbours and mechanisms for our voices to be

heard in each other's forums. In time, a multinational politics should emerge from the confrontation, mutual accommodation and mutual inclusion of our respective political cultures".

If such a European constitutional consensus is to emerge, it is unlikely to be forged in a period of one-and-a-half year as it was available for the European Convention, or even in five years if we consider the whole time span from Joschka Fischer's speech at the Humboldt Universität (Fischer 2000) until the French and Dutch referendums. Instead it is bound to be a long and tortuous process. Still, in the long run, the Constitutional Treaty process may turn out a crucial stepping-stone in the evolution of a mutual, two-level reflection process on the common norms that govern political cooperation in Europe.

The Constitutional Treaty process was an unprecedented attempt to organise such processes of transnational political will formation aiming for a two-level consensus on a constitutional structure of the European Union. It failed for many reasons. But we can learn from its experiences to organise those aspects of future processes of democratic constitutionalisation beyond the nation-state that are indeed open to design. If European cooperation is to persist, it will sooner or later come to face the question of democratic constitutionalisation again. Then it can build upon the Constitutional Treaty experience to design a procedure that allows for a better articulation of the two levels involved and ensures that any consensus that emerges at the supranational level is indeed anchored in the domestic processes of political will formation.

Can the Two-Level Theory be Transferred to Canada?

Having argued the value of the two-level theory for conceptualising democratic constitutionalisation in the EU, the question now is whether this theory is also valid and helpful in analysing the case of Canada. The closest reading of the Canadian case in light of the two-level theory would be to model Canada as involving three nations: the English speaking provinces, Quebec and the First nations. Democratic constitutionalisation of Canada would then be conceived as having to involve representatives of these three nations at the supranational level who would have to transmit their findings back to their national constituencies. I doubt that that this approach is appropriate to Canada. Yet, the reasons why this is the case are very instructive for appreciating the distinctive challenges each of the two multinational polities – Canada and the EU -faces.

So why can the two-level theory not be applied to Canada? An obvious observation to start from is that while in the case of the EU the national level of political will-formation can be neatly distinguished from the supranational level of negotiations, such a split is considerably less self-evident in the case of (the most of) Canada. The nations of the EU have generally become institutionalised in full-blown state settings that in principle are largely *self-contained* as far as political institutions are concerned and, importantly, also as concerns their public spheres. In contrast, in Canada there is no such strict correspondence or over-laying of nations with their own states and public spheres.

This point of the absence of self-contained states is closely related to a second one, namely the degree of *asymmetry* that obtains between the Canadian states and that stands in great contrast to the symmetry obtaining among the European nation-states *qua* states. The Westphalian state structure as it has defined the map of Europe for centuries secures a basis of commensurability in the terms in which European states relate to each other. It implies that ultimately each state is to count as one among the others and it brings with it long-standing norms of mutual respect for the handling of each other's internal affairs. It also means that ultimately each state maintains a moral claim to be able to withdraw from the European cooperation would it choose to do so (a claim that is formally confirmed in the Treaty of Lisbon).

In contrast, in Canada the nations interact on deeply asymmetrical terms that cannot be

reduced to a single grid. The asymmetry in Canada comes out first of all in the difference between Quebec as the one province in which French is the predominant language versus the rest of the provinces. Indeed, Quebec is the province that comes closest to being self-contained in terms of political structures and public sphere. In contrast, each of the other provinces can hardly be regarded as being self-contained, not in terms of political structures or public sphere. At the same time, one can also hardly say that that taken together they constitute a single English-speaking nation. Interestingly, while the French speakers may conceive of themselves as a nation within Canada, if I understand it rightly, English speakers tend to perceive their national identity as being Canadian which inherently also includes the French. The notion of asymmetry is even stronger once one considers the political status of the First nations. Although in cultural and social respects the First nations may be regarded as rather self-contained, their political structures put them in a fundamentally different relationship to the dominant state structure.

Another way to appreciate the differences between the EU and Canada is to consider the likely default options if multinational integration would fail. If, short of democratic legitimacy, the European political order would fall apart, the Westphalian system of autonomous nation-states would re-emerge. The scenario of Canada falling apart into autonomous provinces due to the absence of a democratically legitimated constitution seems considerably less likely. The most radical scenario in the Canadian case would rather be for individual communities (Quebec or one or two other provinces or the First nations, whose status arguably already comes quite close to this scenario) to assert their autonomy as individual patches aside of a persisting Canadian federation.

For these reasons, even if the ideal of democratic constitutionalism is to be maintained for Canada, it will require a different and probably more demanding revision than is appropriate for the EU. The two-level theory is clearly premised on the default or starting position of Europe as a Westphalian state system. Due to the much lower level of self-containment of the constituting nations as well as the much greater degree of asymmetry obtaining between them, this theory does not apply to Canada. In other words, the Canadian nations face much greater incommensurabilities and have much less common terms of reference than the European nation-states. Hence it is much harder to identify, let alone codify, the appropriate terms of cooperation between them.

Interestingly, the comparison with the case of Canada goes to underline that a successful attempt to provide the EU with a democratic constitution will probably be premised on the self-containment of its nations as states and on the basic symmetry that is implied in the Westphalian structure in which they are originally embedded. Notably, the EU itself goes to some extent to confirm the importance of the Westphalian state system as it gives states a privileged place within its structure, if only because the only way to join the EU and to attain for instance EU citizenship is through state accession but also because of the special status it grants to states in its internal decision-making procedures, most notably in the Council and the European Council.

In contrast, this perspective also highlights that the EU's constitutional structure (whether or not democratically ratified) may be deficient in how it deals with peoples that do not neatly fall within this state system and that lack their own self-contained states. The most glaring case here are the Roma. Constituting a minority in a broad range of member states but generally without full recognition and presence in the political process, the Roma are even less able to represent themselves at the level of the EU. The initiatives that are taken on their behalf thus appear mostly as a form of charity or paternalism rather than as a consequence of their political emancipation. Alternatively, one can also think of the contingents of labour migrants from countries beyond the EU's frontiers that have settled across the different EU member states without being fully

integrated into their political structures.[6] It looks unlikely that such minority groups scattered across the EU member states will be effectively accommodated within a process of EU democratic constitutionalisation. Still, there is reason to hope that these groups have better chances to effectively promote their interests within a democratically constitutionalised EU.

Concluding Comments: Why not Avoid Democratic Constitutionalisation?

The question remains whether we cannot do without democratic constitutionalisation of multinational polities. Indeed, for the moment it seems that political leaders in Canada and Europe shun any constitutional project. Notably, in the aftermath of the failure of the EU Constitutional Treaty process, this strategy of 'constitutional avoidance' (Fossum 2008) seems to be widely supported by EU scholars, albeit for different reason. Some find in the failure of the European Constitutional Treaty process the confirmation that the whole idea of constitutionalisation was misconceived from the start. Thus, Dieter Grimm (2005; 2006) has found in the failure of the Constitutional Treaty process a confirmation of his position that without a socially integrated European 'demos', no constitutionalisation process could ever live up its expectations; Constitutions do not make a people, they presuppose it. Along a slightly different track, Andrew Moravcsik (most extensively 2006) takes the failure of the Constitutional Treaty to confirm his thesis that citizens have little reason to be concerned about an EU whose powers are limited and of relatively little effect on their daily lives. When confronted with the initiative of Euro-zealots, the citizens' lack of concern led them to respond in a rather capricious way.

Notably, quite some EU scholars oppose any aspiration towards the democratic constitutionalisation of the EU because it would unnecessarily put the achievements of integration at risk. Typically, Simon Hix (2008) argues that Constitutional Treaty had little to add substantially to the EU institutional architecture already in place, while the process by which it was conceived was strenuous, costly and risky. Instead, he submits that the democratic quality of the EU can be adequately increased through "gradually promoting 'limited democratic politics' at the European level", which rather than changing the institutions in place only requires the actors involved to use them more actively and creatively. Along slightly different lines, Liesbet Hooghe and Gary Marks (2006) suggest that Europe's politicians are bound to steer clear from confronting the people in referendums. In their view, this is justified since referenda "weaken the control of party leaders, create dissension within parties, and empower single issue entrepreneurs [i.e. populists BC]" (Hooghe and Marks 2006: 248). Still, they also recognise that so far the parties and the politicians they put their trust in have failed to gain the confidence of their constituencies when it comes to the issue of European integration.[7]

While the 'no demos' thesis and the concerns about the unhindered continuation of European integration might be typically European concerns, a further strand of celebrators of the failure of the Constitutional process draws directly on some of the views that have also been expressed on the failure to conclude the Canadian process of democratic constitutionalisation. The upshot of this argument is well-captured by Richard

[6] Pursuing his line of thought, one might also think of the EU as working against the position of minority regions, like Catalunya or Wales. Here however the actual record seems to be much more mixed, as it is hard to sustain the claim that Europe has reinforced the subordinate status of regions. In fact, much suggests that the EU has been a contributory factor in the increased powers that have in recent years been granted to regions in states like the UK, Spain and Italy.

[7] More generally, there has been a tendency in EU studies to approach EU constitutionalisation (after the failure of the Constitutional Treaty) in purely functional terms. Constitutionalisation is then understood as the progressive development of a specific set of 'constitutional' institutions – in particular "the development of representative parliamentary institutions and the codification of fundamental rights" – irrespective of the question whether or not this occurs with the active engagement of the citizens concerned (see Rittberger and Schimmelfennig 2006 [special issue JEPP]: quote is from p.1149; cf. Christiansen and Reh 2009).

Bellamy's (2006) exclamation: "The European Constitution is Dead, Long Live European Constitutionalism": Now Europe and the European peoples can again concentrate their minds on the actual political decision-making at work without the constraints and the pseudo-legitimating garb of a Constitutional Treaty. Bellamy's objections against aspirations to provide the EU with a democratic constitution derive from his preference for a self-enfolding democratic process (or what he (Bellamy 2007) refers to as the 'political constitution') over any constitutional constraints (a 'legal constitution') imposed upon this process in name of some presumably universal values or a wider-ranging common interest. His position is reinforced by the claim that the EU of 27 member states lacks a common political culture and hence common goods are unlikely to be identified and generally open to (at least) 27 different interpretations.

Bellamy's position would seem to draw support from the Canadian case, which would appear as an interesting example for the EU to follow. Notably, despite the absence of a fully explicated and commonly agreed constitutional framework, the Canadian multinational polity seems to be doing quite well in practice – arguably better than the EU. Importantly, it seems hard to argue that the system as it operates in Canada systematically works against certain nations. In fact, the Canadian constitutional framework and the political culture coming with it would seem to be quite exemplary in the provision it makes for any nation who would feel itself treated unfairly in a systematic way. Thus the Canadian case demonstrates that it is possible for a multinational polity to live together in peace without there being an explicated consensus on the norms appropriate to the relations between the nations.

Bellamy's position sounds a strong and valuable warning against any attempt to constitutionalise the EU, or any multinational polity, in a 'top-down' way; that is, on the basis of abstract ideas that find favour among some group of political, legal or intellectual elites but that are not necessarily compatible with the interests and views EU citizens hold in practice. We should be very cautious to impose common, uniform norms where there is no demonstrable need to do so and even more so to do so despite widespread popular scepticism. At the heart of the constitution of any free and democratic political community needs to be the recognition of the diversity it embraces and that this diversity need not hamper its ability to operate peacefully and effectively but may in fact be conducive to it. Such a warning takes on particular importance in multinational polities that embrace different forms and dimensions of diversity.

Still, I am reluctant to concede that these considerations suffice to make a principled case against the democratic constitutionalisation of multinational polities. For one, Bellamy's position suggests that there is some kind of inherent validity to the practical relations as they have emerged between nations and even that these relations are inherently bound to comply with some democratic standards. There is however little reason to assume that the relations between the EU nations naturally tend to be legitimate and democratic. To the contrary, obviously these relations have been shaped by historical contingencies, like the order of accession and the size of the member states, of which one can doubt whether they can stand the test of rational justification. Consider for instance the central challenge of the EU's constitutional order of how to reconcile the political equality of each and every person subject to its decisions with the respect for the distinctive democratic qualities embodied by the member states. This question and the way it is best embodied in political institutions lies at the heart of any conception of EU constitutionalisation. Its solution can hardly be left to the natural course of things since in that case the risks loom all too large that, for instance, the bigger member states impose their will on the smaller ones or that the decision-making process falls prey to a technocratic elite.

Moreover, Bellamy's position downplays the virtues of stability and security that are attached to constitutionalisation. Short of codification, norms between nations remain

insecure and confidence between the parties can quickly evaporate. As institutional analysis has widely shown, even if every norm involves a prohibition, it ultimately also provides a framework for action as it provides actors with trust and confidence in their expectations (North 1990). More generally, being a party in any community involves being empowered but also subordinating to certain obligations. A political community does not operate on a pick-and-choose basis. It can only function on a grander commitment to share the benefits as well as the costs. What is more, formal institutional guarantees are of particular importance for those parties that enjoy fewer resources than others and that are vulnerable to being pushed over or, more surreptitiously, to have the ideas and norms of the dominant actors imposed upon them. In the absence of formal guarantees, it are the stronger powers that are most likely to exercise their opt-out rights since they may well be able to manage their affairs on their own. In contrast, the weaker parties are generally more dependent on the benefits of the community of which they are an integral part and whose surroundings allows them to flourish. In fact, even if imperfect, the very presence of provisions by which weaker groups can assert their claims, still provides them with a means to engage in political contestation and with a focus-point for an amelioration of their status within the community.

Maybe Canada can do without some form of democratic constitutionalism; for sure, it is even less susceptible to a comprehensive solution than the European case. One reason that might justify the lack of completion of Canada's constitutional process might be that, by coincidence rather than design, Quebec and the rest of Canada find themselves in a rather appropriate balance of powers. Still, on theoretical grounds my hunch would be that, unless some acceptable formula is found to constitutionalise this balance, the Quebec issue is unlikely to go away by itself and will continue to be a feeding ground for resentment on both sides. Furthermore, I would hypothesise that the way this issue remains at the forefront of constitutional debates and the way it keeps the constitutional framework in suspension is likely to come at the cost of those peoples who are not the main parties in it, most notably the First nations and migrant minorities.

With regard to the EU, it is harder to see how it can be sustainable without securing the consent of its citizens sooner or later. For one, one may question whether this strategy is still viable given the increased politicisation of European integration which has also been fed by the Constitutional Treaty process, or whether there will not always be an "Ireland" to spoil its success. More fundamentally, however, the way European integration is perceived to have proceeded over people's heads (most recently on such issues as EU enlargement and monetary integration) has in many respects been a contributory factor to the increasing resentment against European integration. After the failure of the Constitutional Treaty process, a return to 'integration by stealth' is likely to engender such discontent to build up again at an even quicker pace. At some point, such discontent may well turn against European integration as a whole or against the politicians at the national level (van der Eijk and Franklin 2004). Here it is important to remember that ultimately it is easier in the case of the EU to envisage its dissolution and to default to its 'natural' Westphalian state than it is in the case of Canada.

Hence, if European cooperation is to persist, it will sooner or later come to face the question of democratic constitutionalisation again. Then it can build upon the Constitutional Treaty experience to design a procedure that allows for a better articulation of the two levels involved and ensures that any consensus that emerges at the supranational level is indeed anchored in the domestic processes of political will formation. Even if this attempt may fail again, it will contribute to an iterative process in which the European peoples step-by-step come to forge the shared constitutional order, and make sure that it is indeed democratically appropriated by them rather than imposed upon them.

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Chapter Nine
The Theory of Constitutional Synthesis

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> The imperfection of all modern government must […] in a great measure have arisen from this simple circumstance, that the constitution, if such an heterogeneous mass deserve that name, was settled in the dark days of ignorance, when the minds of men were shackled by the grossest prejudices and most immoral superstition. And do you, Sir, a sagacious philosopher, recommend night as the fittest time to analyse a ray of light?
>
> *Mary Wollstonecraft*
> *Vindication of the Rights of Man*

Introduction: The Core Ideas behind Synthesis

In this paper we put forward the key theoretical component of a constitutional theory for a democratic European Union, what we label as the *theory of constitutional synthesis*. In particular, we flesh out and substantiate the theory behind the claim that the constitutional law and politics of the European Union are more aptly described as an instance of *constitutional synthesis*.

In essence, constitutional synthesis refers to a process in which already established constitutional states integrate through constitutional law. This is a process where participant states establish a supranational political community (in the European instance, the three original Communities) in which they become integrated *without losing* their institutional structure and identity. [1]

There are three basic insights behind constitutional synthesis. The first is that the constitutional law which frames and contributes to steer this process is neither revolutionarily established in a 'Philadelphean' constitutional moment, nor the outgrowth or cumulation of 'Burkean' constitutional conventions and partial constitutional decisions *à la anglaise*. On the contrary, constitutional synthesis is characterised by the central structuring and legitimising role played by the constitutions of the participating states (*seconded* to a new role as part of the collective constitutional law of the new polity), [2] or

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[*] This contribution is also published as Chapter 2 in John Erik Fossum and Agustín José Menéndez, *The Constitution's Gift. A Constitutional Theory for a Democratic European Union*, Lanham: Rowman and Littlefield, 2011.

[1] Indeed, as is argued in more detail *infra*, postwar constitutions were written or amended so as to include clauses that made possible *and* mandated supranational integration. See references in footnote 8 of chapter 3. This duty to create supranational institutions would render possible the realisation of the constitutional Rechtsstaat and underlies the 'foundational', 'paradigmatic' judgments of the European Court of Justice (*Van Gend en Loos*, *Costa*, *Internationale*), and is now reflected in the explicit subjection of accession to membership and continued membership to compliance with fundamental rights standards. In that regard, see Article 7 of the new Treaty on European Union.

[2] The idea of a supranational constitutional law which is the result of seconding national constitutions was hinted at by the European Court of Justice (ECJ) in Case 11/70 *Internationale*, par 4 when claiming that the lack of a written bill of rights in the primary law of the Union came hand in hand with an unwritten principle of protection of fundamental rights, which was filled in by reference to the 'constitutional traditions common to the Member States' properly spelled out in the context of European integration ('the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community'). In doing that, the Court was following a line of reasoning

what is the same, by the regulatory ideal of a common constitutional law, which is progressively recognised as the constitution of the new polity, and whose normative consequences are fleshed out and specified as the process goes further. To put it differently, instead of a revolutionary act of constitution-making or the slow growth of constitutional conventions, constitutional synthesis is launched by an act which implies the secondment of national constitutions to the role of common constitutional law. This makes synthetic founding much more economical in political resources than revolutionary founding, at the same time that it is much quicker than evolutionary founding. The price to be paid is that instead of an explicit set of constitutional norms, the founding Treaties reflected a scattered set of norms, while the bulk of the common constitutional law remains implicit, *a regulatory ideal* to be fleshed out as integration proceeds. The second is that the supranational legal order comes hand in hand with a supranational institutional structure. But the latter is only partially established at the founding, takes time to be rendered functional in a process where different national institutional cultures and structures try to leave their mark on the supranational level, and its structure is necessarily rendered more complicated as new institutions and decision-making processes are added up to handle new policies. This entails that constitutional synthesis can be described as the combination of normative synthesis and institutional development and consolidation, two processes that have very different inner logics. While normative synthesis exerts a centripetal pull towards homogeneity, institutional consolidation is a more complex process with strong built-in centrifugal elements — it serves as the conduit through which the constitutional plurality of the constituting States is wired into the supranational institutional structure. The third is that the regulatory ideal of a single constitutional law comes hand in hand with the respect of national constitutional and institutional structures. This entails that while supranational law is one, there are several institutions that apply the supranational law in an authoritative manner. The peculiar combination of a single law and a pluralist institutional structure results from the fact that there is no ultimate hierarchical structuring of supranational and national institutions, and is compounded by the pluralistic proclivities of institutional consolidation at the supranational level.

The key intuitions behind constitutional synthesis can be explored with the help of the spatial metaphor of the constitutional field.[3] Before the on-start of European integration

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pioneered by Pierre Pescatore, 'Fundamental Rights and Freedoms in the System of the European Communities' *American Journal of Comparative Law* 18 (1970): 343-51. On the technical aspects of legal synthesis, it must be stressed that a critical comparative approach has underpinned the case law of the ECJ since its very inception. See Koen Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law', *International and Comparative Law Quarterly* 52 (2003): 873-906. On the constitutional aspects of the idea of constitutional synthesis, see Agustín José Menéndez, 'The European Democratic Challenge', *European Law Journal* 15 (2009): 277-308.

[3] Our use of the concept of 'constitutional field' intends to visualize, provide a metaphorical device to understand more clearly what we intend by a process of constitutional synthesis. While we find the whole body of literature that we refer to in this note inspirational, we find more suggestive the way organisational sociology uses the notion of the field. Here organisational field has been characterised by 'those institutions that, in the aggregate, constitute a recognised area of institutional life'. P. DiMaggio and W. W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', *American Sociological Review* 48 (1983): 147-60, at 148. The field is made up of a set of organisations that are interconnected and structurally similar. A characteristic feature of the organisational field is that it is marked by strong isomorphic pressures. On the other hand, the notion of legal field has also been introduced in the study of the EU but then drawing on Bourdieu's notion of field. See Pierre Bourdieu, 'The Force of law: Towards a Sociology of the field of law', *The Hastings Law Journal* 38 (1987): 805-53; Michael Rask Madsen, 'Transnational Fields: Elements of a Reflexive Sociology of the Internationalisation of Law', *Retfærd* 29 (2006): 34-41. See also the special issue of *Law and Social Inquiry*, 32 no. 1, (2007); Pascal Mbongo and Antonin Vauchez, *Dans la Fabrique du Droit Européen* (Bruxelles: Bruylant, 2009); and Antonin Vauchez 'The Force of a Weak Field: Law and Lawyers in the Government of the European Union', *International Political Sociology* 2, no.2 (2008): 128–144.

national constitutions were separate from each other (akin to different islands); with the unleashing of the process of European integration they willingly placed themselves in a common constitutional field. They not only acquired a collective identity (as members of this field) but also started to look to each other. Constitutional synthesis is thus a path to end *constitutional autarchy* and engage in amicable openness and cooperation. This cannot but slowly and steadily transform the very identity of the participating constitutions (through horizontal processes of mutual learning and adaptation); in the process this alters the identity of the participating states.[4]

We elaborate and specify the theory of constitutional synthesis by reference to five core elements, which we consider sequentially in this section, namely: (a) the regulatory ideal, distinguishing between normative synthesis and constitutionally protected institutional pluralism; (b) the set of preconditions that render this peculiar and complex form of constitutionalism possible; (c) the peculiar blend of constitutional dynamics involved in the process, including the limits to synthetic integration, emanating from the character of the structure and its vulnerability to changes in the external socio-economic environment (exogenous limits) and complex internal dynamics (endogenous limits, such as pluralism, resistance to integration, and diverging patterns of socio-economic and political development); (d) the mechanisms through which the structure of the synthetic polity takes shape, including notably replication, adaptation and experimentation. In the last section of the paper, we complete the exposition of constitutional synthesis by considering how it is placed and how it relates to other political and legal theories of integration.

The Regulatory Ideal
Integration through a Common Constitutional Law; or Placing National Constitutions in a Common Constitutional Field

The regulatory ideal of synthetic constitutionalism is the establishment of a common constitutional law,[5] or what is the same, the institution of a new constitutional order that is anchored in the fundamental norms of the states that participate in the process of integration.

This regulatory ideal becomes relevant when a specific constellation of circumstances takes hold. Firstly, state constitutions must open themselves to integration beyond national constitutional borders by acknowledging the limits of constitutional autarchy. Despite the cosmopolitan underpinnings of constitutional thought in the American and the French revolutions, the form of constitution that states adopted was made subject to the structural logic of the territorially demarcated, and formally sovereign, nation-state.[6] The fundamental law of the state was not only the constitution of a *nation-state*, but of a

[4] This process transforms the very attitude of national political and legal systems towards foreign institutions and foreign laws. See for example Basil Markesinis, *Engaging with Foreign Law* (Oxford: Hart Publishers, 2009).

[5] The theoretical framework of reference is to be found in Francisco Rubio Llorente, 'Constitutionalism in the Integrated States of Europe', Jean Monnet Working Paper 98/5. Available at <http://centers.law.nyu.edu/jeanmonnet/papers/98/98-5-.html>; Peter Häberle, *Pluralismo y Constitucionalismo*, *Estudios de la Teoría Constitucional de la Sociedad Abierta* (Madrid: Tecnos, 2002); and Pedro Cruz, *La Constitución Inédita* (Madrid: Trotta, 2004).

[6] This led to the paradoxical result that while the primacy of the Constitution was relativised by denying or at least seriously constraining its legal bite, the fundamental law was regarded as a key element of closure of the national legal order, symbolically representing its self-sufficiency and consequently closure to the external world. On the cosmopolitan underpinnings of republican ideals, see Pierre Bouretz, *La Republique et l'Universel* (Paris: Gallimard, 2002) particularly on the right to vote, see Michel Troper 'The Concept of Citizenship in the Period of the French Revolution', in Massimo La Torre (ed.), *European Citizenship: An Institutional Challenge* (Hague: Kluwer, 1998), 27-50.

self-sufficient and normatively *closed* nation-state.[7] Indeed, before 1945, with the sole and very partial exception of the Weimar Constitution,[8] European constitutions were markedly *insular*, and the primacy of the constitution tended to be equated with the primacy of the *national* constitution. Secondly, state constitutions must reaffirm their commitment to social integration through democratic constitutional law, to democratic self-government mediated by constitutional law. On that basis, the commitment must be projected also to integration beyond constitutional borders if the very idea of democratic constitutionalism is not to be lost in translation, so to say. The commitment to liberal constitutionalism was uneven and essentially weak in the interwar period; the sobering experience of two tragedies in one generation created the conditions under which Europeans embraced a 'negative' revolutionary zeal.[9] Thirdly, political circumstances must render expedient the democratic constitutionalisation of inter-state relationships either through an explicit act of democratic constitution-making *or* through the slow growth of constitutional conventions among mutually influencing states. In the former case, it may well be the case that a constitutional big bang would not succeed or might result in a constitutional backlash. Democratic constitutions rely on socio-economic preconditions which may or may not be entrenched *across* borders. In the latter case, the need for common institutions, decision-making processes and norms might be urgent, and cannot be left to be worked out over time. That was the situation in which Western Europeans found themselves in the aftermath of the war. Bar from the immediate period after the war, the democratic constitution of a federal Europe seemed beyond reach. And at the same time, mere resort to intergovernmental cooperation such as under the League of Nations seemed the secure path to a third war.

In a setting marked by the recognised need for constitutional integration *beyond the state* and by national unwillingness to rescind constitutional sovereignty by becoming straightforwardly absorbed in a larger supranational unit, integration could only be constitutionally licensed insofar as the primacy of each national constitution was ensured *at the same time* that the process of integration was effectively started. Is that not the constitutional equivalent of squaring a circle?

Not if one considers the potential of the regulatory ideal of a common constitutional law. If we found the polity and the legal order by establishing a common constitutional law, by 'seconding' national constitutions to the collective (and thus shared) role of common constitution,[10] national constitutions remain the supreme law of the land in each participating state. And still, national constitutions acquire a new role as part of the

[7] On the 'national' transformation of the United States, see Bruce Ackerman, 'The Living Constitution', *Harvard Law Review* 120 (2007): 1737-1813.

[8] See Article 4 of the Weimar Constitution: 'The generally recognized principles of the law of nations are accepted as an integral part of the law of the German Commonwealth'. And then Article 148 gears civic and professional education towards both German national culture and international conciliation, while Article 162 crucially commits the commonwealth towards the international regulation of the legal status of workers, and the promotion of a standard minimum of social rights.

[9] Carl Friedrich, 'The Political Theory of the New Constitutions' in Arnold J. Zurcher (ed.), *Constitutions and Constitutional Trends Since World War II* (New York: New York University Press, 1951) (second edition 1955), 13-35.

[10] In terms of the legal dogmatics triggered by the case law of the European Court of Justice, the constitutional law of the new legal order has always been grounded on the collective of national constitutions, a fact which the Luxembourg judges are keen to refer to with the rather misleading phrase of 'common constitutional tradition'. The proper construction of this term refers back to constitutional synthesis; the idea of a common constitutional tradition implies that each national constitution has come to play a double constitutional role: individually, as the higher law of the national legal order; collectively, as part of the fundamental law of the European Union. One could say that national constitutions 'wore a double hat' well before any official ever imagined doing so. The analogy refers to the Lisbon Treaty's High Representative of the Union for Foreign Affairs and Security Policy because the office holder has to wear two 'hats', namely to preside over the Foreign Affairs Council and to serve as Vice President of the Commission. (Article 18).

collective of national constitutions embedded in the new supranational constitution.[11] This offers an economical way of launching a process of integration. But there is more to it. The establishment of a new legal order framed by common constitutional law, by the pre-existing national constitutions, offers an alternative solution (albeit, as we will see in Section V, temporary and provisional) to the legitimacy characteristic of revolutionary constitution-making, and to the progressive acquisition of democratic legitimacy characteristic of evolutionary constitutionalism. This is so because the new constitution is formed by national constitutional norms, and consequently can draw on the democratic legitimacy that they were invested with in their national constitutional processes (whether they were revolutionary or evolutionary). In particular, by constructing the new supranational legal order according to this constitutional key, the validity of each and every legal norm of the new supranational order depends on its supranational constitutionality, to be assessed by reference to supranational constitutional law. But that constitutional law is indeed defined by reference to the collective of national constitutional norms. As a result, the democratic legitimacy of national constitutional norms is transferred to the supranational constitutional law, and then radiated to all the norms of the supranational legal order, when interpreted and constructed according to the basic principles of the supranational constitutional law (i.e. the constitutional law common to the states that form the new polity). This provides the supranational polity with a measure of democratic legitimacy in the absence of a constitution-making act or an extensive process of constitutionalisation.

How this applies to the European Union is something that we consider at length somewhere else.[12] But as a means of illustration of what at first may seem a very speculative and too abstract concept, let us consider the synthetic founding of the European Union.

The founding Treaties of the Communities (the 1951 Paris Treaty and the 1957 Rome Treaties) should be construed as the opening move in a process aimed at realising the mandate to integrate enshrined in post-war national constitutions. At the same time they should be seen as unleashing a process of supranational integration *beyond mere intergovernmental cooperation* but without an explicit act of constitution-making, which would have backfired at that stage. The foundational act formalised in the founding Treaties of the Communities did not only result in the creation of a new political community, but also in a new legal order, *because this was a process of integration through law*. While the form of the act was that of an international treaty, even a cursory glance would show that the Member States had not only agreed to a considerable transfer of competences, but also to create a new institutional structure, a specific decision-making process, and a system of sources of law. For such a bold process of integration through law to be in compliance with national constitutions, it would have to be regarded as capable of realising the mandate to integrate which was explicit in most national constitutions; it would also have to be framed *by constitutional law*, so that the primacy of the national constitution could be rendered compatible with integration. And that was so because national constitutions started to play a double constitutional role, because they were transferred or projected *as a collective* to the role of common constitutional law of the Communities.

A synthetic understanding of European integration implies that the founding Treaties resulted in the creation of a new polity and a new legal order, but this did not entail multiplying political or legal entities. In the same way that the European Union was not something radically different from the collective of its Member States, Community law

[11] See Pedro Cruz, *La Constitución Inédita* (Madrid: Trotta, 2004); Rainer Arnold, 'The European Constitution and the Transformation of National Constitutional Law' in *A Constitution for Europe: The IGC, the Ratification Process and Beyond*, eds. Ingolf Pernice and Jirí Zemánek, 1-11 (Baden-Baden: Nomos, 2005).

[12] See chapter 3 of *The Constitution's Gift*, Lanham: Rowman and Littlefield, 2011.

was not something radically different from the legal order of its Member States. The 'constitutional' parts of the founding Treaties are to be regarded as a partial explication of what the common constitutional law entails in a process of integration. But most of the constitutional law of the Union is not new; it results from the secondment of national constitutions to the collective role of fundamental law of the Union. Metaphorically speaking, European constitutional law can indeed be said to be old wine in a new bottle. But creating the new bottle and inserting old wine into it from many sources would provoke chemical reactions that would change the composition of the wine, especially in the long run (in particular, as one might say post-war history proves, reducing toxicity and hangover).[13]

The 'Double' Constitutional Pluralism Characteristic of Constitutional Synthesis and the Two Subcomponents of Constitutional Synthesis

The image of the constitutional field renders clear that what is eventually created is not a sovereign state, at a higher supranational scale. Instead, synthesis produces a system of tightly interlocked yet distinctive constitutional orders that authorise a common supranational legal structure *which is to come into existence through the process of integration*.

The fact that the synthetic constitutional path is one where participating states retain their separate existence, and their separate constitutional and institutional identity implies that constitutional synthesis is a peculiar breed of pluralistic constitutional theory. On the one hand, it *is not* pluralistic to the extent that it endorses the monistic logic of law as a means of social integration through the *regulatory ideal of a common constitutional law*, in the terms discussed in Section I. The integrative capacities of law (its role as complement of morality in the solving of conflicts and the coordination of action by means of determining in a certain manner what the common action norms are) require law to be as conclusive as possible. Were law to be as inconclusive as morality, it would not add much to our practical knowledge and it would not be capable of operating effectively as a means of social integration. Both autonomy and the motivational force of law require that we assume that law gives one right answer to all the problems to be solved through it. Legal argumentation breaks down if we assume that one and the same case can have different, even contradictory solutions. That may be the case *empirically*, but from an internal perspective of law that cannot be endorsed as part of the social practice of integration through law. Democratic legal systems are further pushed into this peculiar form of 'monism' by the normative requirements of the principle of equality before the law.[14] On the other hand, constitutional synthesis is pluralistic in a double sense. For one, the regulatory ideal of a common constitutional law coexists with the actual plurality of national constitutional laws. As we will see in Section IV, the constitutional moment in synthesis only results in the endorsement of a regulatory ideal and bits and pieces of the set of common constitutional norms. Most constitutional norms remain *in nuce*, or better put, in several drafts, as many national constitutions participate in the process of integration. Only slowly (and not without setbacks and backlashes) the regulatory ideal of a common constitutional law is fleshed out in *actual* common constitutional norms (and in general in common legal norms). Further, the regulatory ideal of a common constitutional law comes hand in hand with a pluralistic institutional setting. Instead of a hierarchically structured institutional setup, a synthetic polity is characterised by the existence of a plurality of institutions legitimately claiming to have a

[13] See Joseph Weiler, 'Federalism Without Constitutionalism: Europe's Sonderweg', in *The Federal Vision*, eds. Kalypso Nicolaidis and Robert Howse, 54-70, (Cambridge: Cambridge University Press, 2003), and see Tony Judt, *A Grand Illusion?* (New York: Hill and Wang, 1996).

[14] On this, see Alexander Somek, 'Kelsen Lives', *European Journal of International Law* 18 (2007): 409-51. A critique to pluralistic theories of European law in Agustín J. Menéndez, 'Is European Law a Pluralist Legal Order?' in *The Post-Sovereign Constellation*, ARENA Report 4/2008, eds. Agustín José Menéndez and John Erik Fossum, 233-314 (Oslo: ARENA, University of Oslo).

relevant word in the process of applying the 'single' constitutional legal order. That is indeed the *correct* intuition behind pluralistic constitutional theories of European integration.[15]

Indeed, constitutional synthesis has not led (and is not expected to lead) to Member States losing their autonomous political and legal identity (which has been coined in the European constitutional jargon as the national constitutional identity).[16] This is so *thanks to*, and not *despite of*, integration. The constitutional pluralism that comes hand in hand with constitutional synthesis is rendered possible and stabilised by the new institutional structure and the growing substantive convergence between national constitutional orders.[17] Constitutional synthesis could be seen as the political and legal counterpart to the common market of old (not the single market of the Single European Act!) in the objective of rescuing the nation-state;[18] in our view, it is more proper to consider it as a means of reconfiguring and redefining the state, at the very minimum detaching state from nation; and perhaps even getting rid of the idea of the sovereign state completely.[19]

This 'double' constitutional pluralism of constitutional synthesis reveals that when considered in depth, we can distinguish two different sub-processes within synthesis, which correspond to the logic of integration of constitutional norms and of constitutional institutions. The relationship between these two processes is far from easy because they follow different logics, and still they affect each other (and heavily for that matter).

Normative synthesis concerns the process through which the common constitutional law is fleshed out. Its logic is exclusively *normative*. Constitutional synthesis claims that through the foundational act, both the polity and its legal order are constituted. As we have claimed, the democratic legitimacy of this foundation without democratic constitutional politics is ensured by transferring the collective of national constitutions to

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[15] See especially Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999), 121ff. This 'moderate' pluralism under international law was analytically clarified by Catherine Richmond, 'Preserving the Identity Crisis: Autonomy, System and Sovereignty' in European Law, *Law and Philosophy* 16 (1997): 377-420. See also Menéndez, *supra*, footnote 13 for a contrast between constitutional synthesis and constitutional pluralism.

[16] The term 'national constitutional identity' entered the European debate in the famous ruling of the German Constitutional Court Solange I, 1974 WL 42441 (BverfG (Ger)), [1974] 2 C.M.L.R. 540, par. 22: 'Article 24 of the Constitution must be understood and construed in the overall context of the whole Constitution. That is, it does not open the way to amending the basic structure of the Constitution, which forms the basis of its identity, without a formal amendment to the Constitution, that is, it does not open any such way through the legislation of the inter-State institution' (my italics). It was then propelled to the supranational level in Maastricht (resulting in Article 6.3 of the Treaty of European Union, where the principle of respect of national identities in general terms was affirmed). And in the Constitutional Treaty and in the Treaty of Lisbon, this principle was spelled out by reference to constitutional identity. On the academic debate following the Constitutional Treaty, see Armin Von Bogdandy, 'The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe', *International Journal of Constitutional Law* 3 (2005): 295-315; Michel Rosenfeld, 'The European Treaty–constitution and Constitutional Identity: A View from America', *International Journal of Constitutional Law* 3 (2005): 316-31; Jan Herman Reestman and Leonard F.M. Besselink, 'Constitutional Identity and the European Courts', *European Constitutional Law Review* 3 (2007): 177-81. In more general theoretical terms, see the interesting reflectios of Gary Jeffrey Jaconsohn, 'Constitutional Identity', *The Review of Politics* 68 (2006): 361-97.

[17] Cf. Neil D. MacCormick's writings on European constitutional pluralism, partially collected in *Questioning* Sovereignty (Oxford: Oxford University Press 1999).

[18] Alan Milward, *The Rescue of the European Nation-State* (London: Routledge, 1992).

[19] William E. Scheuermann, 'Postnational Democracies Without Postnational States? Some Skeptical Reflections', *Ethics & Global Politics* 2 (2009): 41-63; Hauke Brunkhorst, 'Reply: States with Constitutions, Constitutions Without States, and Democracy - Skeptical Reflections on Scheuerman's Skeptical Reflection', *Ethics & Global Politics* 2 (2009): 65-81.

the supranational constitution. What we add now is that from founding onwards, the *logic* of the process of normative synthesis is one of rendering explicit what is already implicit in the regulatory ideal of a common constitutional law. Thus, as we will see in Section V, the intertwined processes of transformative and simple constitutionalisation. The internal normative code of constitutional law entails that the more the process advances, the more the breadth and scope of the supranational system would tend to grow, the more normative space the supranational constitutional law would tend to occupy. Unless, quite obviously, this *expansion* is checked or interrupted, as we will consider in Section V.C. But the *inertial* trend is one towards normative homogeneity, wired into the normative code of law as a means of social integration (in the terms we have discussed at the beginning of this section, resulting from the irrepressible 'monistic' proclivity of law).

Institutional consolidation concerns the outgrowth and consolidation of the institutional structure of the supranational polity. Its logic is not exclusively *normative*. Institutions are mainly about law, but not exclusively about law. Institutions are organisations infused with value. They occupy buildings, make use of objects with empirical existence, and are represented by very material (when not venial) beings. Institutional organisations cannot be brought into existence by a normative regulatory ideal; they have to be created, staffed and funded and develop their own institutional identity. In a constitutional union of already established constitutional states, this process is complicated by three factors. Firstly, constitutional synthesis presupposes the combination of a single constitutional order with a pluralistic institutional structure, to the extent that supranational and national institutions are not hierarchically organised or ranked. Secondly, constitutional synthesis at the regional-continental level of government (i.e. in between global organizations and nation-states) tends to proceed in a far from crowded institutional space. In contrast to the constitution of a nation-state, which de facto relies on an existing institutional structure, constitutional synthesis requires creating new institutional structures. This usually entails that institution-making proceeds in a fragmentary fashion, that the synthetic polity starts with bits and pieces of an institutional structure instead of with a complete one. Thirdly, the derivative character of the synthetic polity implies that the *institutional void* is only formally a *void*, as the creation of supranational institutions consists in the *projection* of national institutional structures and cultures to the supranational level. But because such structures and cultures are much more idiosyncratic than national constitutional laws, the probable result is that the creation of supranational institutions is the site of a contest between different national institutional structures and cultures.

On such a basis, the *homogenising* logic of normative synthesis contrasts with the manifold pluralistic proclivities proper of institutional consolidation. That tension is aggravated over time. A crisis emerges indeed when the relationship between the two processes is polarised. As normative synthesis proceeds, it fosters some institutional convergence. But the synthetic process can also feed institutional pluralism and conflict; thus produce a constellation incapable of solving institutional conflicts among levels of government. This seems to us is the basic structure of the legitimacy crisis of the European Union since the late eighties. The radical transformation of the jurisprudence of the European Court of Justice on economic freedoms is nothing but a polarization of the *homogenising* effect of Community law through the horizontal application of its constitutional principles, which is hard to correct in the absence of a clear line of checking and balancing in the increasingly pluralistic European political order. This would pose a serious threat to the effectiveness of Community law if national institutions would start articulating their disagreement (and eventually disobedience) on the basis of alternative understandings not so much of national constitutional law, but of European constitutional law itself. This might explain why many Community lawyers reacted so angrily to the Lisbon judgment of the German Constitutional Court.

Preconditions for Synthetic Constitutionalism

Constitutional synthesis entails the integration of separate constitutional systems through a common constitutional law. As indicated, it is geared to the establishment of a single constitutional law; however, it is anchored both to what remains a plurality of national constitutions (the unitary element being a regulatory ideal, which is realised into a set of actual common norms as the regulatory ideal is steadily and slowly fleshed out from the set of different national constitutional legal orders) and to a plurality of institutions (resulting from the lack of a hierarchical ordering of supranational and national institutions, from the somewhat fragmented institutional structure being created at the supranational level, and from the unavoidable projection of bits and pieces of different national institutional traditions into parts of the progressively emerging supranational structure). This coupling of the ideal of a common constitutional law to a pluralistic set of constitutional norms and institutions does away with a basic technique of societal stabilisation and integration which is characteristic in national legal and political orders; namely the coupling of a single constitutional order with a single and hierarchically (or at least competentially) organised institutional structure. In terms of coercive resources, Community law cannot rely on an uncontroversial coupling of its norms and institutionally exerted coercion. The much discussed 'un-coercive' character of Community law is obviously wrong. The fact that Union law is effectively executed by what for all purposes are national administrations does not set the Union apart from systems of 'executive' federalism, as indeed Germany is one example. What is peculiar in the European case is this *double pluralism*, normative and institutional.

This immediately raises the issue of the specific structural conditions (concerning both the *environment* in which the constitution sets itself and the *design* of the constitution)[20] under which such a demanding and potentially unstable political form can be launched and can obtain the measure of stability necessary for the process of synthesis to proceed. Indeed, given the inherent tension between law's unitarian proclivity as a means for social integration,[21] any form of constitutional pluralism is a demanding structure, both in institutional and in legitimacy terms.[22] That is also the case with constitutional synthesis. And doubly so because it comes hand in hand with both a collective of constitutional norms *and* institutions interpreting and applying them, as we have shown. In the following we consider the fundamental preconditions for constitutional synthesis, which do not only reveal the peculiarity of the process of European integration through constitutional law, but also how the complexity of a constitutional union of constitutional states was offloaded by relying on the institutional structures and substantive contents of national constitutional law.

For constitutional synthesis to get off the ground, at least three conditions must be met, namely: (a) that there is a high degree of interconnection and interdependence between the polities that have embarked on integration; (b) that there is social and legal recognition of this interconnection and interdependence and willingness to adapt to it; and (c) that the entities share a basic set of structural and substantive constitutional principles, including compatible institutional and decision-making setups.

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[20] See Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge: Cambridge University Press, 2009). Previous literature on the issue has been dominated by economic analyses of constitutional law.

[21] A powerful (re)statement in Somek, *supra*, footnote 13.

[22] On the demanding character of pluralism, see MacCormick , *supra*, footnote 16 chapter 7 ("Juridical Pluralism and the risk of constitutional conflict") In more general constitutional terms, see Gustavo Zagrebelsky, *La Virtù del Dubbio* (Bari: Laterza, 2007), especially at 50 and 105. This observation makes it natural to consider both (a) the preconditions for synthetic constitutionalism, as done in this subsection, and (b) the limits to synthetic constitutionalism, as done in subsection E *infra*).

High Degree of Interdependence

It is the existence of a high degree of interconnectedness and interdependence between a number of polities that constitutes the first precondition for any process of constitutional synthesis.

Highly interdependent and mutually affected states that do not share a set of common institutions and decision-making processes are prone to inefficiencies, tensions and overt conflicts. In a setting where polities interact but their interaction is not governed by a proper institutional and legal framework, each polity is likely to take decisions that affect citizens of neighbouring polities (including non-citizen residents and what have later come to be understood as second-country and third-country nationals[23]) who will be bound by, but have no formal say in such decisions (because they are foreigners, they are deprived of political rights).

Such a structure contains both *efficiency* and *democracy* deficits that can only be overcome by some form of supranational integration. In the European case, the two World Wars (1914-18, 1939-45; from a European-wide perspective two civil wars whose consequences were exported worldwide)[24] made painfully clear that social integration decoupled from (sufficient) institutional and legal integration could have enormously destructive effects, in both practical and normative terms.[25] But barring a political will to integrate interdependence will simply continue to persist (unless its very destabilising effects lead to changes).[26] There are thus both *prudential* and *normative* reasons to transcend such a state of affairs.[27]

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[23] See Rainer Bauböck 'Why European Citizenship? Normative Approaches to Supranational Union', *Theoretical Inquiries in Law* 8 (2007): 453-488, for the differentiated rights these categories of citizens have in the EU.

[24] Salvador Madariaga, *Victors Beware* (London: Cape, 1946) on the concept of European civil war.

[25] See Tony Judt, *Postwar* (New York and London: Penguin Press, 2005), chapter 1 ('The Legacy of War').

[26] Cf. the British Federalist literature, which is the 'missing link' between the democratic thought about the Commonwealth and European integratuion. See Lionel Robbins, *The Economic Causes of War* (London: Jonathan Cape, 1939); William Beveridge, *The Price of Peace* (New York, Norton, 1945); Barbara Wootton, *Freedom under Planning* (Chapel Hill: University of North Carolina, 1945); and her 'Socialism and Federation', now reprinted in *The Sinews of Peace*, ARENA Report 7/09, Raul Letelier and Agustin Jose Menendez, 579-95 (2009) John Pinder (ed.), *Altiero Spinelli and the British Federalists* (London: I. B Tauris, 1999) (compiling texts of Beveridge asnd Robbins along the Manifesto de Ventotene); W. B. Curry, *The Case for Federal Union* (Harmondsworth: Penguin, 1939) (several times reprinted during the phoney war). On the Italian federalist literature, see Luigi Einaudi, *La Guerra e l'unità europea* (Bologna: Il Mulino, 1986) (a new edition of a compilation of texts written during the First World War and in the interwar period); Altiero Spinelli, *From Ventotene to the European Constitution*, anthology edited by Agustín José Menéndez, RECON Report 1 (Oslo: University of Oslo, 2007); and Altiero Spinelli, 'L'Europa non cade dal cielo', (Bologna: Mulino, 1960). The connection between prudential and normative considerations underpinned Polanyi's arguments in *The Great Transformation* (New York: Rinehart & Company, 1944).

[27] John Rawls, *Theory of Justice* (Cambridge (MA): Harvard University Press, 1971), 334: '[T]he most important natural duty is that to support and to further just institutions. This duty has two parts: first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, *we are to assist in the establishment of just arrangements when they do not exist*, at least when this can be done with little cost to ourselves'. In Morgenthau's classical argument in Politics among Nations, a world state is claimed to be needed in order to ensure peace and order (p. 525). While the functional approach of the European Communities is felt to be 'promising' (and European integration in general 'revolutionary' in terms of method, p. 555: 'The European Communities are, in other words, an attempt at fusing a superior power with an inferior one for the purpose of creating a common control of their pooled strength'), the world state is unattainable under present 'social, moral and political conditions' (p. 563). On the normative underpinnings of Morgenthau's thinking, see William Scheuerman, *Morgenthau* (London; Polity, 2009), especially 132-4. We are quoting from the sixth edition of *Politics Among Nations* (New

Awareness of Mutual Interdependence

The second precondition for constitutional synthesis is a social and legal awareness of mutual interdependence, coupled with a will to deal with its negative normative and practical implications. There must be a proper social and political endorsement of the need to transcend beyond anarchic or intergovernmental forms of cooperation.[28] Such an endorsement must be solidified; to furnish synthesis it has to be translated into proper legal provisions that render the opening up of national constitutions to supranational cooperation possible.[29]

As we discussed in the introduction, awareness of interdependence and will to integrate was reflected in the European case both in innovative constitutional clauses which created the conditions under which national legal and political orders could be rendered open and cooperative; and in the manifold integration initiatives launched in the first decade of the post-war period. It must be stressed that these clauses not only rendered integration possible; they also *mandated* it.[30] By linking the continued realization of national constitutional values (of the effective supremacy of the constitution as the fundamental law of the land) to supranational integration, these clauses turned national constitutions into the constitutional raw material of a common constitution. Or to put it differently, they obligated national constitutions to situate themselves within a common constitutional field. The clauses also obligated democratic institutions to engage in a

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York: MacGraw-Hill, 1986). The strength of Keynes' argument in *The Economic Consequences of the Peace* (London: MacMillan, 1920) derives from the combination of these prudential and normative considerations.

[28] The endorsement of the European project by European citizens was not articulated in electoral terms, but rather obvious in the early fifties. See for example the very informative Gérard Herberichs, 'Is There No European Opinion?', *American Behavioral Scientist* 3 (1959): 3-9. The default positive attitude towards integration was partially reinforced by the experience of resistence and (perhaps even more decisively) by the pro-European (and anti-communist) construction of the memory of resistence. On the resistance movements, the opus magnus is Walter Lipgens (the multi-volumed *Documents in the History of European Integration* (Berlin and New York: De Gruyter, 1988)). See also the collection of French documents in H. Michel and B. Mirkine-Guetzevitch (ed.) *Les idées politiques et sociales de la résistance* (Paris: PUF, 1954), 389ff. A critical analysis of the actual influence of resistence movements on European integration in Pieter Lagrou, *The Legacy of Nazi Occupation* (Cambridge: Cambridge University Press, 2000), especially chapter 14.

[29] See references in footnote 32.

[30] See Ingolf Pernice and Franz Mayer, 'La Costituzione Integrata dell'Europa', in *Diritti e cCstituzioni nell'Unione Europea*, Gustavo Zagrebelsky, 43-68 (Bari: Laterza, 2003), at 59: 'La partecipazione all'intergrazione europea diviene essa stessa una condizione essenziale di esercicio (effettivo) della sovranità nazionale di ogni Stato Membro'. Recently reminded to us by the German Constitutional Court in its Lisbon's ruling. Available at <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>. See especially paragraph 221'The constitutional state commits itself to other states which are standing on the same foundation of values of freedom and equal rights and which, like itself, make human dignity and the principles of equal entitlement to personal freedom the focal point of their legal order. Democratic constitutional states can gain a formative influence on an increasingly mobile society, which is increasingly linked across borders, only by sensible cooperation which takes account of their own interest as well as of their common interest. Only those who commit themselves because they realise the necessity of a peaceful balancing of interests and the possibilities provided by joint concepts gain the measure of possibilities of action that is required for being able to responsibly shape the conditions of a free society also in the future. With its openness to European integration and to commitments under international law, the Basic Law takes account of this'. Openness to European law is perhaps to dry a translation, as the neologism seems to point to a warmer relationship with hints of normative preference. See footnote 10 to the Italian translation by Jörg Luther. Available at:
<http://www.cortecostituzionale.it/informazione/file/Traduzione_sentenza.pdf>. See also Agustín José Menéndez, 'The European Democratic Challenge', *European Law Journal* 15, no. 3 (2009): 277-308, at 287.

process wherein the collective of national constitutions would serve as the guiding framework for a process of supranational integration.[31]

High Degree of Constitutional Affinity

But political will, awareness, and a properly demarcated constitutional path are not enough. Because constitutional synthesis is a form of pluralistic constitutionalism, the third precondition is a high degree of constitutional affinity among the integrating polities. Integration through a common constitutional law can only be launched if the structural and substantive contents of the constitutions of the integrating polities are sufficiently similar,[32] because such affinity furnishes an integrative pull absolutely essential in the absence of the combination of a single constitutional order and a hierarchically organised set of institutions, in terms discussed at the beginning of this section.

There are very good normative and empirical reasons to affirm that only democratic constitutional states will be inclined, and be capable of integrating through constitutional law (they will also be the ones more pressed to integrate once they realize that democracy in one country is simply impossible, pragmatically and normatively, once a certain degree of interdependence is reached). In the European case, the long period of internecine war had created the conditions for greater constitutional affinity by 1945, at least among continental Western European states. All Member States had experienced different forms of political extremism, social and economic collapse, widespread abuse by the authorities and different forms of foreign invasion.[33] This fostered a return to what

[31] On the unfolding of the process through the ratification of the founding Treaties, see Assamblee Commune du Communaté Européene du Charbon et de l'acier, 'Le Traite CECA devant les parliements nationaux', Luxembourg, Fevrier 1958, and the dossiers compiled in ena.lu
(Paris: http://www.ena.lu/ratification_ecsc_treaty-2-36456;
Rome: http://www.ena.lu/signing_rome_treaties-2-26527).

[32] Following basic Kantian insights, a huge literature has observed (and tested) the tendency of democratic countries to solve conflicts in a peaceful manner. [Immanuel Kant, 'Perpetual Peace: a Philosophical Sketch', in *Political Writings* (Cambridge: Cambridge University Press), 93-130; Michael W. Doyle, 'Kant, Liberal Legacies and Foreign Affairs', *Philosophy and Public Affairs* 12 (1983), 205-35 and 323-53 and James Bohman and William Regh (eds.), *Perpetual Peace Essays in Kant's Cosmopolitan Ideal* (Cambridge: The MIT Press, 1997); a long-term empirical discussion in John R. O'Neal and Bruce Russett, 'Kantian Peace', *World Politics* 52 (1999): 1-37]. This seems to be related to a firmer commitment to international cooperation in general [cf. Kurt Taylor Gaubatz, 'Democratic States and Commitment in International Relations', *International Organization* 50 (1996): 109-39]. Supranational integration seems to be more likely among states with a homogeneous political regime; and very especially, among new democracies [on the latter, see Karen Remmer, 'Does Democracy Promote Interstate Cooperation? Lessons from the Mercosur Region', *International Studies Quarterly* 42 (1998): 25-51]. In its turn, the more integrated an international organization (something which seems conditional on its Member States being democratic), the more the awareness about the democratic shortcomings of the institutional setup and decision-making procedures of the organization [Eric Stein, 'International Integration and Democracy: No Love at First Sight', *American Journal of International Law* 95 (2001): 489-534].

[33] The traumatic experience of the Second World War had made clear that democratic constitutional ideals and principles could not be ensured through closed and self-referential nation-states. European federalists may have failed to make their case against the nation-state; but the nation-state that was rescued through European integration was very different from its interwar predecessor. As noted, the European Member State of the European Union was an open and cooperative state, whose constitutional identity required it to open itself up to supranational integration. The effects of such an opening could be amplified through substantive similarities, such as the fact that they were all welfare-states in-the-making. In that regard, the British case stands out. The British state did not only survive the war basically unscathed, but with its highest ever democratic legitimacy. In the immediate postwar period, the building of the British welfare state launched an episode of unsurpassed nation-making. Insofar as the United Kingdom became interested in European integration it was because the postwar period also bore testimony to the

Carl Friedrich aptly labelled as 'negative' revolutionary constitutionalism.[34] Furthermore, this affinity extended to substantive social factors. The six founding Member States of the Union embraced a rather similar form of *Sozialer Rechtsstaat* (contrary to what had been the case in the aftermath of the First World War) if not in its institutional hardware, at least in its basic normative principles. This initial affinity was further reinforced by the establishment of constitutional and legal mechanisms that helped foster convergence of the substantive contents of national constitutions[35] (especially, the European Convention of Human Rights, and after a 'gap' of almost two decades, the European Court of Human Rights).[36]

The Peculiar Blend of Constitutional Dynamics Characteristic of Constitutional Synthesis

It is possible to distinguish three different types of constitutional dynamics: constitution-making, transformative constitutionalisation and simple constitutionalisation.[37] And we further argued that the variants of constitutionalism typical of nation-states (revolutionary and evolutionary constitutionalism) could be defined by reference to particular combinations of constitutional dynamics. Finally, we suggested that contrary to *sui generic* theories of European integration, the dynamics of European constitutional law was not indefinitely 'peculiar', but could be analysed by reference to the same patterns of constitutional transformation that were characteristic of national constitutionalism. What was different was the mix of constitutional dynamics peculiar of the Union.

This paper provides the groundwork for this line of reasoning. In particular, we flesh out the specific way in which constitutional synthesis is a path to the forging of a democratic constitution alternative to both revolutionary and evolutionary constitutionalism, or what is the same, which combination or mix of constitutional dynamics is proper to synthesis. In concrete, we sustain that constitutional synthesis proceeds according to a three-fold pattern. First there is (A) a founding constitutional moment, the synthetic constitutional moment (paraphrasing the very apt Ackermanian terminology developed in the context of revolutionary constitutionalism), in which the constitutional norms of all participating states are projected to the role of collective constitutional law, and are complemented by the laying down of bits and pieces of the set of constitutional norms and institutional structures of the new polity; this reveals the key advantage of constitutional synthesis, its economic character in terms of political resources being needed to launch

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collapse of the imperial project, which revealed the shaky grounds on which the postwar consensus had been built.

[34] Friedrich, *supra*, footnote 9.

[35] See the so-called 'Birkelbach' report of the European Parliament ("Report by Willi Birkelbach on the political and institutional aspects of accession to or association with the Community, European Parliament, 19 December 1961. Available at: <http://www.ena.lu/report_willi_birkelbach_political_institutional_aspects_accession_association_with_community_december_1961-020006013.html>. On socialisation processes in the European Union, see Cris Shore, *Building Europe* (London: Routledge, 2000); Gerard Delanty, *Inventing Europe* (Houndsmills: Palgrave, 1995); Gerard Delanty and Chris Rumford, *Rethinking Europe* (London: Routledge, 2005).

[36] On the complex history of the European Convention of Human Rights and the European Court, with a very sophisticated analysis of its (intended) role in the Cold War and its (unintended) role in de-colonisation, see A. W. Brian Simpson, *Human Rights and the End of Empire* (Oxford: Oxford University Press, 1999); Mikael Rask Madsen, 'France, the United Kingdom and the Boomerang of the Internationalization of Human Rights', in *Human Rights Brought Home*, eds. Simon Halliday and Patrick Schmidt, 57-86, (Oxford: Hart Publishers, 2004), 'From Cold War Instrument to European Supreme Court', *Law and Social Inquiry* 32 (2007): 137-59; Antonin Cohen and Mikael Rask Madsen, 'Cold War Law: Legal Entrepreneurs and the Emergence of a European Legal Field (1945–1965)', in *The European Way of Law* Volkmar Gessner et David Nelken, 175-202, (Oxford: Hart, 2007).

[37] On this see *The Constitution's Gift*, supra, n. 12, chapter 1.

constitutional integration through synthesis; this is followed by the unleashing of (B) simultaneous processes of transformative and simple constitutionalisation, through which the constitutional nature of the polity and its legal order comes to the fore as the concrete normative implications of the regulatory ideal of a common constitutional law are clarified; but as time passes (C) the vulnerabilities of synthesis stemming from its deep pluralism are exposed, a process triggered by significant changes in the environment of the synthetic polity (what we may be labeled as exogenous limits to synthesis) and by the tensions internal to the synthetic model (what we characterize as endogenous limits to synthesis).

It is perhaps appropriate that we reiterate again that our theory is essentially interpretative and re-constructive and thus we are trying to offer a framework of understanding of the founding and the development of the European Union. So our theory is indeed a result of moving back and forth between theory and constitutional history.

The Synthetic Constitutional Moment

As is the case with integration through revolutionary constitution making, constitutional synthesis is launched by an explicit decision. But contrary to what is the case in the revolutionary tradition, the 'constitutional moment' does not come hand in hand with deliberation and decision-making on the literal tenor of the new fundamental law. Synthetic constitutionalism is more economical in political resources. It suffices that the parties agree to start a process of integration through constitutional law (entailing, as we saw, that the collective of national constitutional laws is projected to the supranational constitutional law) *and* that the process is conceptualised in democratic terms for the process to be democratically legitimate. This is so because under such conditions, the 'synthetic constitutional moment'[38] corresponds to the institutional realization and embodiment of the mandate to integrate that is thus enshrined in the national constitutions.

This is not an institutionally speaking open mandate. The mandate underlines the need to sustain the constitutional core and affinity among the integrating entities. This also of course applies to the character of the supranational *institutional* arrangements, including how the democratic principle is institutionalised and substantivised. As will be made clear in the below, supranational representative and responsible government is that arrangement that best ensures both the vertical and the horizontal dimensions of synthesis.[39]

The founding Treaties of the European Communities launched an 'ever closer Union' to be realised in respect of, and also through, national constitutional law. In retrospect, with the benefit of hindsight and through relying on a historically reconstructive approach, we can conclude that the idea that was struggling to be expressed in the innovative language of the Treaties was that of synthetic constitutionalism.

Constitutional synthesis is especially enticing because it economises political resources by creating the conditions under which it is legitimate to create a new polity and legal order by relying on the 'constitutional' foundations of already established constitutional states

[38] The concept of a 'synthetic constitutional moment' contains an intentional echo to Ackerman's 'constitutional moment'. The difference between the two should be clearly established. The synthetic constitutional moment corresponds to the 'new constitutional beginning' in which a new supranational order is established. This is however NOT preceded by a legitimising revolutionary constitution-making process. A similar legitimising role is played by the regulatory ideal of a common constitutional law. On the constitutional moment, see references in fn 26.

[39] The vertical dimension refers to the 'uploading' of institutions from the Member States to the EU-level whereas the horizontal dimension refers to the Member State level. Synthesis speaks to both simultaneously.

(i.e. on national constitutions and their democratic legitimacy). Democratically speaking, there is no need for an initial political mobilization of the kind that is characteristic of revolutionary constitution making. It is clear that intense political debate on the contents and structures of the constitution is a necessary element of democratic constitutionalism. It is also clear that supranational constitutional integration – to be democratic – also requires that citizens conceive of themselves as part and parcel of a wider imagined community. The problem facing Europe after World War II was the inability of most Europeans to consider themselves as part of a wider European community (even if they at the same time felt that some form of integration was needed to avoid a new disaster). Task number one was instead to restore amicable relations among former combatants.[40] In this circumstance, there was a clear absence of a default stabilising collective identity. Further, any effort to launch an intense political debate as a prelude to a constitutional 'big bang' would most likely have backfired very badly.[41] European resistance movements were then also very conscious of the fact that the window of opportunity for constituting a European federation would be closed literally months after World War II had come to an end. [42] The interesting point about constitutional synthesis is that it renders democratic constitution making possible under such apparently inhibiting circumstances. As we will show integration through constitutional law in a setting of well-established constitutional polities comes with procedural-democratic safeguards that render a stabilising collective identity less important *at the outset*. The genius of constitutional synthesis is that it combines democratic experimentation (democratic constitution making at the supranational level) with familiar state-based democratic procedural safeguards. The peculiar circumstances of constitutional synthesis suggest that there is no need for an intense political debate in the *initial up-stream*. In other words, constitutional synthesis offers a way out of the impasse by pointing to a procedure where democratic legitimacy can be assured without an initial constitutional big bang, allowing the process of constitutional integration to start, and creating the conditions under which the new common constitutional identity can be imagined (and consequently solidarity bonds be forged). This in no way rules out the need for popular sanction; the more integration proceeds towards a self-standing constitutional construct the greater the need for popular sanction.[43]

Transformative and Simple Constitutionalisation

Constitutional synthesis reduces the political resources needed to launch the process of constitutional integration, but at the price of leaving implicit the constitutional nature of the polity and of its legal order, and of leaving unexplored the actual normative content of the regulatory ideal of the common constitutional law. This explains why in constitutional synthesis the synthetic constitutional moment is followed by a combination of transformative and simple constitutionalisation.

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[40] Indeed, the actual establishment of European institutions unleashed not only a process of mutual learning about different normative and institutional traditions, but also of reconciliation through integration, if one wishes, of persons who were literally shooting each other during the War. That could well had been the case of, for example, Carl Roemer and Massimo Pilotti on the one hand and Jacques Rueff on the other.

[41] The realisation that the federal path was difficult to follow once the nation-states had consolidated after the European zero hour was very noted by the Federalist literature in the last months of the war and the first of the postwar. See Altiero Spinelli,

[42] That was perhaps further proven by the failure of the European Defence Community (EDC) in 1954.

[43] As correctly affirmed in the Lisbon Judgment of the German Constitutional Court, *supra*, footnote 29, paragraph 262: 'The constitutional requirements placed by the principle of democracy on the organizational structure and on the decision-making procedures of the European Union depend on the extent to which sovereign responsibilities are transferred to the Union and how great the extent of political independence in the exercise of the sovereign powers transferred is. An increase of integration can be unconstitutional if the level of democratic legitimisation is not commensurate to the extent and the weight of supranational power of rule'.

Transformative Constitutionalisation

Because it does away with the explicit process of constitution-making, synthetic constitutionalism resembles in some respects *evolutionary* constitutionalism. The transformative constitutionalisation of the legal order is a necessary part of the evolution of a synthetic polity. The key difference lies in the fact that in constitutional synthesis, transformative constitutionalisation is not so much about the actual content of constitutional norms (which is *programmed*, so to say, by the regulatory ideal of the common constitutional law) but about the full internalisation by institutional legal actors and citizens in general of the constitutional nature of the polity and of the legal order that is being created. The emergence of a pattern of 'substantive' transformative constitutionalisation, or what is the same, changing the content of the constitutional norms of the synthetic polity without regard for the regulatory ideal of the common constitutional law and without resort to explicit constitution-making is indeed an indicator of a crisis in the process of synthetic constitutionalism, something which is clearly not true in evolutionary constitutionalism.

It is important to add that transformative constitutionalisation was especially important in the European case because the European Union was a pioneering synthetic polity. This is what accounts for the specific complexities of a process such as that of accepting the structural principles of primacy and direct effect, or the late and controversial affirmation of the protection of fundamental rights as an unwritten general principle of Community law.[44]

Simple Constitutionalisation

The definition of the constitutional law of the synthetic polity through reference to the regulatory ideal of a common constitutional law implies that while we must assume that the synthetic constitutional order is created at the synthetic constitutional moment, its normative density is rather low. This is so because the synthetic constitutional moment only brings to us the regulatory ideal of a common constitutional law and some bits and pieces of the common constitutional law (in the European case, as reflected in the Treaties).

Synthesis thus presupposes that the specific normative contents of the regulatory ideal of a common constitutional law are then distilled out from the set of national constitutions in a process that is different from that characteristic of both revolutionary and evolutionary constitutionalism, even if it shares some common traits with the latter.[45] It is different from the former because it proceeds comparatively. Instead of one constitutional text, one set of constitutional debates and a 'constituted' political process, the evolutionary constitutionalisation of the synthetic polity proceeds by exclusive reference to the national constitutions of the participating states (there are several, not one constitution; but in contrast, the constitutional debates and the 'constituted' ordinary political process are of less help, precisely because they are too many). In contrast to evolutionary constitutionalism, the simple constitutionalisation under constitutional synthesis does not proceed organically.[46] It is not based on an exploratory trial-and-error

[44] See Joseph H. H. Weiler, 'The Transformation of Europe' *Yale Law Journal* 100 (1991): 2403-2483; Karen Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001).

[45] Because the regulatory ideal needs to be fleshed out in concrete cases, it is not surprising that Courts played a key role in the process.

[46] Constitutional synthesis is different from evolutionary constitutionalism in the sense that there is always an agent (be it the legislature or the judiciary) behind the process of fleshing out the concrete implications of the regulatory ideal of a common constitutional law. Constitutional conventions may be distinguished in European Community law, but the process of concretisation of solidarity in social security arrangements, or on the protection of fundamental rights is one which has been undertaken, respectively, by the European legislature (with the Council of Ministers having the last legislative word) and by the European Court of Justice.

process, but is framed by the collective of national constitutions. As a consequence, the synthetic constitution cannot be said to evolve so much as it is *fleshed out* and *distilled* from national constitutions.

Constitutional synthesis still implies that there is a clear and fundamental reference to *popular authorship* as the ultimate legitimating principle of synthetic constitutional law, a feature typical of revolutionary constitution-making. The regulatory ideal of a common constitutional law makes it possible for such a reference not to have to be mediated to the supranational people as such, but to the *peoples* who authored national constitutions and who are in the process of collectively building a supranational constitutional entity (key here is the transfer, the process whereby national constitutions lend democratic legitimacy to the supranational constitution). Furthermore, the constitution is the result of a process of progressive evolution, but there are always clear *positive constitutional norms* (the national constitutions) that serve as the reference for each and every decision in the progressive constitutionalisation of the fundamental law. This places synthetic constitutionalism at odds with the inductive process of evolution and renders it similar to revolutionary constitutionalism, only that popular authorship is indirect in the synthetic notion, as national constitutional norms are legitimised and seconded as supranational constitutional norms.

Exogenous and Endogenous Constraints
Vulnerability of Synthesis to External Shocks and Inner Tensions

The process of constitutional synthesis is highly susceptible to the many tensions, upsets, and conflicts that emanate from within and without the common constitutional field. Some of these are so-to-speak intrinsic to the field (such as the fact that a field is made up of a range of legal systems and is therefore necessarily diverse); thus we may talk about limits that are intrinsic to any process of constitutional synthesis. In addition, there will be limits that are specific to the European case, but not necessarily to constitutional synthesis, as such; they result from essential but contingent facts.

A first set of constraints stems from the fact that synthetic constitution-making is especially vulnerable to 'exogenous' shocks caused by radical changes in that part of the political and socio-economic environment that is external to the 'integrating' polity. This vulnerability is mainly the result of the low institutional robustness of a synthetic polity when compared to nation-states, whether forged in a revolutionary or in an evolutionary manner. External shocks reveal the extent to which the synthetic polity lacks political resources (in the form of coercive, economic, or even cultural means) to absorb the shock and to create conditions under which a return to stability is possible (and quick).

Second is the extent to which the process of constitutional synthesis *as it unfolds in Europe* can spur resistance to further integration. One relevant factor is that the more the process of synthesis advances, the greater will be the 'institutional temptation' to put forward autonomous conceptions of Community law that are out of synch with what can be understood as a common constitutional law. On the one hand, that is the background for the legitimacy crisis of Community law *as emancipated* from national constitutional law by the European Court of Justice. The case law of the Luxembourg judges since the late seventies has *de facto* emancipated the Community economic freedoms from national constitutional standards. Economic freedoms used to be characterised as *operationalising* the principle of non-discrimination on the basis of nationality. As such, they were essentially enjoyed by non-nationals, who were now to receive the *same* treatment as nationals. But what this treatment consisted of was still to be defined by reference to each national constitutional and ordinary legal order. Since its rulings in *Dassonville* and *Cassis de Dijon*, later extended to other economic freedoms, the Court has re-characterised economic freedoms as part and parcel of the overall status of European citizenship. But contrary to what may be considered, this has not resulted in politicising Community law, but in curtailing the links between national and European

constitutional law. Economic freedoms are now enjoyed by all Europeans (including nationals against their Member States), and are infringed by *any kind of obstacle* to their actual or potential exercise.[47] Such emancipation comes at the price of a reduced measure of *transferred* democratic legitimacy via the common constitutional law.[48] Because in Europe the emancipation has been led by the Court of Justice, there may be a day of democratic reckoning (a first instance of that was the public reaction to Viking and Laval,[49] institutionally enshrined in the Lisbon judgment of the German Constitutional Court).[50] On the other hand, the lack of a complete institutional structure implies the opposite risk, namely, that synthesis may result in national opportunistic moves *cloaked* in constitutional discourse. Or what is the same, that national political or judicial institutions may try to reinforce their strategic options by producing legal opinions which define the common constitutional standard in ways amicable to their own interests.

A third possible constraining element is that the more the integration advances, the greater will be the need to adapt national constitutional structures and the greater the challenge to national constitutional identity. The more that integration expands, the more diverse the Union will be. Here size and numbers matter: the greater the number of new entrants, and the larger their size, the greater the institutional shock because every increase in membership entails a reconfiguration of the Union's constitutional structure.[51] Further, the more that integration advances, the more the tensions between substance and procedure are revealed, and the more they make the normative shortcomings apparent (the snowballing democratic deficit). And the more integration advances, the more the different institutional claims to legitimacy will clash (national governments sitting on a dubious indirect democratic legitimacy, the Commission at a loss once there is another institution that embodies the supranational will and interest i.e. the EP; the European Parliament is trapped in a downward spiral due to the gap between its legitimacy credentials and its lack of consequent power, the ECJ is torn between its aspiration to emancipate European constitutional law from national constitutional law, and the democratic foundation of Community law on common constitutional law).

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[47] See Agustín José Menéndez, 'When the Market is Political. The Socio-economic Constitution of the European Union Between Market-making and Polity-making,' in Letelier and Menéndez, *supra*, footnote 25, 39-61; 'More human, less social: The jurisprudence of the ECJ on citizenship' in Azoulai and Maduro (eds.), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishers, 2009), 363-93. See also Alexander Somek, 'The Argument from Transnational Effects I: Representing Outsiders through Freedom of Movement', *European Law Journal* 16 (2010): 315-44. A draft of the second part of the article can be consulted at:
<http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1397245_code650352.pdf?abstractid=1397245&mirid=3>.

[48] As already indicated, the authority of supranational constitutional law is anchored in the fact that it reflects the regulatory ideal of a common constitutional law. However, the successful unfolding of the process of concretisation of the contents of that common constitutional law is bound to result in constitutional tensions. The more the process of concretisation successfully advances, the more there is a risk of the supranational constitutional law being perceived and eventually becoming 'emancipated' from national constitutional laws. This may result in short-term gains in the authoritative status of Community law, but cannot but undermine in the long-run the democratic legitimacy basis of Community law, crucially dependent as it is on the legitimacy radiated by national constitutions as the deep constitution of the Union.

[49] Case C-438/05, *Viking*, [2007] ECR I-10779; Case C-341/05, *Laval*, [2007] ECR I-11767; Case C-346/06, *Ruffert*, [2008] ECR I- 1989. Paragraph 59 of the Conclusions of AG Maduro is especially revealing.

[50] Lisbon judgment, *supra*, footnote 29.

[51] As Stefan Collignon has argued and showed from an economic standpoint, new rounds of enlargement result in major benefits accruing to new Members, but increasingly less to already existing Members, as the institutional and substantive capacities of the existing Union are increasingly compromised beyond a certain threshold of membership.

A fourth constraining category is direct political resistance to synthetic constitutional integration. This takes many forms. One is explicit rejection of the Union as a constitutional project, and a concomitant unwillingness to frame discussion of treaty reform in constitutional terms. Another is unwillingness to adapt national procedures to serve the process of synthesis. Synthesis implies a gradual harmonisation of national constitutional amendment procedures. Thus, unwillingness to harmonise national constitutional amendment procedures will clearly stymie the process of synthesis. A third form is seen in how national administrations contain their compliance with Union law.[52]

One final constraining factor consists in the fact that actors and analysts have not understood the process as one of constitutional synthesis, certainly not in the sense of a constitutional theory that is able to account for and to justify European constitutional integration. This lacunae has produced diversity in outlooks, heightened uncertainty about process dynamics and results, and given impetus to resistance. It follows that the lack of a proper theoretical explanation of the key innovative features of European constitutional law has major implications.[53]

Field endogenous factors (such as for instance diversity and different orientations to each other and to the outside world), as well as field exogenous factors (such as structural shocks) affect the shape and pattern of integration. Increased field diversity through admission of new Member States sets new limits to synthetic integration. The same applies when shocks or transformations increase the range and character of constitutional models, traditions or visions in the field. Both forms of diversity may have external roots but become embedded in and reconfigure the shape of the field. That is well-illustrated by the neo-liberal turn in the eighties, which represents the incorporation of a new and different conception of the underlying socio-economic constitution. Its fissiparous effects were amplified in the nineties through the disjuncture between monetary and economic policy under the structural pressure of German reunification. Similarly differentiating and fissiparous effects had external sources such as reorientations in American foreign policy first under Nixon and now recently under Bush II. The list of constraining factors can be extended as will become apparent when we consider more concretely how the process of constitutional synthesis has unfolded in the two latest rounds of European constitution making, Laeken and Lisbon.

Constitutional synthesis is a path to the establishment of a democratic constitution that forms an alternative to both revolutionary and evolutionary constitutionalism. But even if all these three constitutional roads may lead to the Rome of a democratic constitution, it must be observed that each of them has different structural implications. The revolutionary path results in a constitution with an intense democratic legitimacy; not only does the process of constitution-making release civic energies and political commitment, but the symbolism of the written constitution is capable of performing a key integrative role in society. Having said that, the revolutionary path has become so closely associated with the *national* constitution that it is hard to apply to the supranational level, but may actually be an obstacle to the democratic constitutionalisation of supranational relationships. And once an evolutionary constitution has become entrenched it provides political stability even in the direst of circumstances. However, its development presupposes not only a firm hold on political power, but also a pre-political common culture. Furthermore, stability comes at the price of the defence of the status quo, including different types of injustices. Consequently, it does not provide by itself much of a guarantee that constitutionalisation will naturally gravitate towards democratic order. And finally, synthetic constitutionalism combines

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

[53] Indeed, the absence of a compelling theory is wrongly taken as conclusive evidence to the effect that Community law is undemocratic or even unconstitutional.

economy of political resources with speed in the process of integration. But synthetic polities are rather vulnerable to external shocks given their 'double' constitutional pluralism and the very success of constitutional synthesis results in the development of factors limiting integration from inside, so to say.

Institutional Development under Synthesis: Replication, Adaptation and Experimentation

As bears repeating, in Europe constitutional synthesis combines the regulatory ideal of a common and single constitutional law with a pluralistic institutional structure. This entails that synthesis proceeds simultaneously albeit quite differently in the *legal-normative* and in the *institutional* dimensions. Constitutional synthesis of course comes with institutional presuppositions, which refer back to the basic institutions that sustain national constitutions. But synthesis does not imply that such a complete set of institutions would be grafted onto the European level; in institutional terms, synthesis is a far more open-ended process, as we saw in Section II. The main structuring factors are on the one hand the regulatory ideal and on the other the frail organisational structure (field) that ties the Member States together.

This implies that we have to pay explicit attention to the institutional development under synthesis; this is also because synthesis offers little assurance that the institutions will end up fully reflecting the synthetic impetus.

On institutional development, note first that the establishment of the Union came hand in hand with the establishment of (only) some supranational institutions, but the relationship between supranational and national institutions was not subject to hierarchical integration; contrary to what is the case in national or federal systems, there is no hierarchical structuring of institutions, not even as a residual or backup rule to solve conflict.

Second, the 'completion' of the Union's institutional structure (both in the sense of adding new institutions and of 'completing' those created by the founding Treaties) unfolded in the constitutional field and was driven by (at least) three processes or mechanisms, namely: (a) replication, copying central principles and institutional elements from the national institutional structures to the European level (which accounts for example for the establishment and consistent empowerment of the European Parliament and the Court of Justice); (b) adaptation, guided for instance by the pressure to apply the same national constitutional principles in an original fashion given the peculiar functional needs of the supranational polity (which explains for instance the structure of the Union's law-making process); and (c) experimentation, which is unavoidable given the unprecedented character of constitutional synthesis (painfully exemplified in the EU by the so-called comitology committees and other related structures).

Third, that the step by step nature of the setting up of the European institutional structure results in a further source of internal pluralism, as different bits and pieces of the institutional structure respond not only to constitutional synthesis, but to various sets of influences. Thus, while the European Court of Justice was institutionally established through what was essentially the transfer of French institutional culture to the European level, the setup of the Commission was a more fragmented process, and depended on the institutional culture dominant within each Directorate General. Similarly, the system of European Central Banks was dominated by a transfer not only of substantive principles, but also of institutional culture from the German system. The ad hoc institutional arrangements of the open method of coordination mainly reflect the predominance of the ideological movement of New Public Management, which had made inroads first and foremost in British institutional structures (but also Scandinavian ones). This process has been constitutionally fuelled by the fragmentation of the process of

integration, first through the narrow remit of *sectoral integration* in the Coal and Steel and Euratom Treaties, by the unleashing of parallel areas of integration subject to international law arrangements (ex TEC 220), and then by the pillar structure.

Fourth, the imperfect manner in which the process of constitutional synthesis gets institutionally embedded accounts for a good number of the tensions and limits that the *universalisation of European constitutional law encounters.* It is indeed a further source of constitutional pluralism.[54]

Since the Union's inception, there has been strong *pressure* to upload [55] familiar institutional arrangements to the EU-level. There has been 'synthesis through replication'. The process had an element of reflexive replication because it unfolded not through the mere uploading of elements from one uniform structure but rather from a range of national arrangements located within a common organisational field. Given that a field will only form insofar as the constitutive entities share certain commonalities, the structural and substantive norms that these entities share in common are natural candidates to become part of the institutional structure and substantive contents of the supranational constitution.

Institutional replication manifests itself in concrete organisational examples such as the European Parliament, as well as a judicial organ with compulsory jurisdiction such as the European Court of Justice.[56] They were not merely to be formally similar; those many pushing for replication have also wanted them to be operationally similar. And even if they were set up at the supranational level, the general expectation has been that their overall location within the EU's overall institutional structure would resemble that of the constitutional state. The normative template was set early on; it guided a more gradual and reflexive process whereby the institutional specifics were gradually worked out. This helps explain why the European Parliament has steadily gained new powers through *constitutional conventions* later codified in successive rounds of Treaty amendment.[57] It also helps explain the general acceptance of the powers and competences that the European Court of Justice has assumed and vindicated through its own activities.[58] Further, the fact that the legal-institutional systems at the European and Member State levels are interconnected, with the Courts also procedurally tied together, ensures that there are strong *isomorphic* pressures on all participating courts.[59] In other words, there

[54] The European Union was forged as a congeries of organizations. But this organizational structure is adapted to and gives distinct shape to the Union's legal-constitutional system. In contrast to the state (including the federal state) the Union's structure is marked by absence of explicit conferral of constitutional authority to the overarching federal level. This sets the EU apart from federations where federalization entailed a new status for the member states. See Andrew Glencross, *What Makes the EU Viable* (London: Palgrave Macmillan, 2009), 27, with reference to Carl Schmitt 1992, 'The Constitutional Theory of Federalism', *Telos* 91 (1992): 26-52, at 55. Instead the constitutional structure is carried by all the component legal-constitutional chaperons (high or supreme courts in all member states and at the Union level). This is what we call the constitutional field. We draw on the notion of organisational field to underline the peculiar manner in which the constitutional dimension is organisationally embedded.

[55] On the Parliament, Berthold Rittberger, *Building Europe's Parliament – Democratic Representation Beyond the Nation*-State (Oxford: Oxford University Press, 2005). See in more detail references in chapter 3. II, section 4.

[56] Berthold Rittberger notes, in his analysis of the formation of the European Parliament, that: 'the model of representative, parliamentary democracy is the template which guides political elites' responses to the perceived legitimacy deficit.' See *Rittberger*, supra, footnote 53.

[57] See ibidem.

[58] See Alter, *supra*, footnote 42, and Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford: Oxford University Press, 2004).

[59] Indeed, the fleshing out of the right of access to a Community Court by the European Court of Justice in the late eighties and nineties (which we consider in Chapter Three) put considerable

are strong (coercive, mimetic and normative) pressures on the institutions in the European field to become more similar over time through processes of copying, emulation, mutual adjustment, and mutual learning.

The above examples show that there are strong unifying pressures in the field. At the same time, the field is diverse, with internal and external tensions. This suggests that in many cases attempts at mere 'uploading' of national structural or substantive constitutional norms would be misplaced, improper, or inadequate. The diversity and complexity of the field often unleashes processes of search for which norm should be defined as the 'common' one, with the result being some form of innovation on the national. Or a process of copying could make actors realise that the constitutional *problématique* was simply different up the governmental scale; thus it was necessary to modify existing ones to suit the new circumstances. An organisational field sustains an element of national difference and divergence and is highly susceptible to differentiating shocks or *punctuated equilibria*,[60] which hit national constitutional systems.

In Europe, institutions, decision-making processes and material norms have at times had to be rethought, the underlying principles figured out, and the result operationalised at the European level in its own peculiar form. We see this clearly with decision-making procedures which for a long time mixed intergovernmental and supranational principles but have gradually converged around a distinct system of supranational representative government.[61] Even the European Parliament is no replica of national parliaments; it is a weak copy because it is a case of gradually adapting the notion of representative government to the supranational level. Even more pronounced, innovation in the institutional shape given to basic constitutional principles helps to account for the institutional identity of the Council of Ministers and of the Commission. Indeed, the Council of Ministers is to be regarded as the *constitutional alternative* to the diplomatic conference. Democratic accountability is structurally fostered not only by rendering the institution permanent (and thus opening the way to the forging of controlling institutions

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isomorphic pressures on national courts. See for example Eduardo García de Enterría, *La Batalla por las Medidas Cautelares. Derecho Comunitario Europeo y Proceso Contencioso-administrativo Español* (Madrid: Civitas, 2006). That is perhaps the main immediate implication of the judgment of the ECJ in C-50/00 P Unión de Pequeños Agricultores (2002) ECR I-6677. See Filip Ragolle, 'Access to justice for private applicants in the Community legal order: recent (r)evolutions' *European Law Review* 28 (2003): 90-101. Denning's incoming tide (H. P. Bulmer Ltd v J. Bollinger SA [1974] Ch 401 at 418) is indeed raising.

[60] This term draws as it is from evolutionary biology refers to a situation where a long evolution is suddenly punctuated by rapid specialization. See Stephen Krasner Sovereignty: An Institutional Perspective, *Comparative Political Studies* 21 (l988): 66-94. The analogy to the field is where a shock or upset reorients the members in different directions.

[61] General normative production (i.e. law-making) proceeded under the founding Treaties through the *standard* Community method, which was based on Commission's right of initiative, Parliament's and European and Social's Committee right of consultation, and the prerogative of final decision-making by the Council acting unanimously. There were in addition several specialised law-making procedures. Over time, law-making has been transformed so as to increase the decision-making powers of the European Parliament. This has resulted in the progressive affirmation of two different definitions of the European legislative *volonté générale*. One that proceeds through the aggregation of national wills (and which roughly corresponds to the classical Community method just described). The other that defines a supranational legislative will, a mixture of a majoritarian aggregation of national wills expressed in the Council and a majoritarian European will forged in the European Parliament (that is the underlying grammar of co-decision). However, it must be noticed that the evolution has proceeded through adding new phases in the legislative procedure, something has diminished the capacity to take effective decisions. On this, see Fernando Losada y Agustín José Menéndez, 'Toma de Decisiones en la Unión Europea. Las Normas Jurídicas y la Política en la Formación del Derecho Europeo' in *El Consejo de Estado y la Integración Europea*, ed. Francisco Rubio Llorente (ed.), 335-467, (Madrid: Consejo de Estado y Centro de Estudios Políticos y Constitucionales, 2008), and above all Anne Elizabeth Stie, *Co-decision: The Panacea for EU democracy*, ARENA Report 1/2010 (Oslo: ARENA, University of Oslo).

at the national level), but foremost by the design of the decision-making process. The consultative or co-decisive role of the European Parliament does not only contribute *directly* with a modicum of democratic legitimacy to the final decision,[62] but also *indirectly* renders possible, even if far from certain, national parliamentary control of national government[63] (especially if national parliaments develop means of acting co-ordinately or even collectively in that regard - a development that may or may not be sparked by the innovations introduced in the Treaty of Lisbon).[64]

But the forging of a common constitutional law may give rise to problems that national constitutional states have not faced. Indeed, synthesis also implies a certain degree of experimentation, given the pioneering role of European integration in this alternative, 'third way' constitutional tradition. In cases where national constitutional norms are unsuitable to the task at hand, either because the problem is radically different at the supranational level, or because the effort to establish a viable common position simply produces results nobody will accept, the obvious solution is experimentation. This is illustrated by the development of procedures of *regulatory decision-making* in the form and shape of comitology committees. The Treaties contained a reference to the form of regulatory instruments (indeed, *regulations* and *directives*), but those instruments were actually defined as statutes in a material sense. There was thus a gap not only in the system of sources of Community law, but also in the set of law-making procedures. Replication seemed inadequate to attend to the functional needs of European integration. In particular, it did not seem a brilliant idea (and probably keeps on not being so) to assign statutory regulatory development to the Commission as a supranational administrative body, as it lacks the knowledge-basis necessary to write the said statutory regulations. Replication was dysfunctional; there was a need to innovate or better experiment, as was indeed the case with comitology committees. The production of regulations was to be led by the Commission, but checked by representatives from the Member States, who could also contribute local and technical knowledge to the process. If understood within the matrix of the democratic system of sources of law, comitology is to be regarded as having added to the democratic legitimacy of Community law, creating means and procedures through which the said legitimacy could be achieved even when *implementing* the essential elements of statutes through regulations.[65]

Institutional development under synthesis thus proceeds through replication, adaptation, and experimentation. And still, because the process is reflexive, the sum total is bigger than the parts, in the sense that these acts of 'putting in common' institutions and fundamental laws have a major transformative potential. They require reconsidering the normative ties reflected in political and legal life on a larger scale, because the very political and constitutional link between citizens was enlarged by creating common decision-making institutions and procedures, which produced common action norms. This necessarily implies a partial re-founding of all national legal orders, in the sense that the validity of all national legal norms is now to be subjected to the condition of being in

[62] Simon Hix, Abdul G. Noury and Gérard Roland, *Democratic Politics in the European Parliament*, Cambridge: Cambridge University Press, 2007.

[63] Ben Crum and Eric Miklin, 'Reconstructing Parliamentary Sovereignty in Multilevel Polities: The Case of the EU Services Directive', Paper prepared for the Workshop 'Inter-Parliamentary Relations in Europe' at the 2010 ECPR Joint Sessions in Münster (D), 22-27 March, 2010.

[64] The structure of inter-parliamentary cooperation is unique in the EU and has taken on the shape of an organizational field. In that sense we are talking about the possibility of further solidifying this field. See Ben Crum and John E. Fossum, 'The Multilevel Parliamentary Field -A Framework for Theorising Representative Democracy in the EU', *European Political Science Review*, 1,2 (2009): 249–271.

[65] See Christian Joerges, "Deliberative Supranationalism: Two Defences", *European Law Journal* 8 (2002): 133-51; Agustín José Menéndez, "The European Democratic Challenge", *European Law Journal* 15 (2009): 277-308.

compliance with the principle of non-discrimination.[66] This is the result of expanding the breadth and scope of the general right to equality of nationals underpinning all national constitutions to all Europeans, whether nationals or not of the Member State in which they are economically active.[67] Accordingly, the European Union's Member States have been profoundly reconfigured, to the point that neither the supranational nor the national institutional and constitutional structure can be understood without taking the other properly into account.[68] Europeanisation has in that regard meant an end to the understanding of the nation-state as an autarchic polity in empirical and normative terms, but is further proven from the perspective of the dynamics of institution-building.[69]

Constitutional Synthesis Distinguished from Other Political and Legal Theories of Integration

In this paper we have fleshed out the basic intuitions behind constitutional synthesis, and described the normative and institutional dynamics through which it unfolds. But in the same way as the Union was not created on a blank slate, constitutional synthesis has not been crafted in a theoretical vacuum. In this final section we consider the five political and legal theories of integration which have been more influential on our thinking. And still, it seems to us for the reasons mentioned below that constitutional synthesis offers a better and more coherent theoretical alternative. But if that is so, we would like to stress, it is because it captures what seem to us as fundamental insights of these theories.

Wessels's Fusion

The most similar-sounding approach to constitutional synthesis is naturally the *fusion theory*, foremostly associated with Wolfgang Wessels.[70] The said author argues for the need to analyse European integration as a process of *gradual fusion*. The point of departure is the challenge of managing growing state interdependence. Within this context national governments and administrations have become intensely included in the entire EU policy cycle. The integration process brings about a fusion of public instruments from several levels (state and EU) – as part of a broader vertical and horizontal process of Europeanisation of national actors and institutions. The upshot is a Union marked by overlapping competences and administrative and political interpenetration across levels,

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[66] Article 7, first paragraph of the original text of the Treaty of European Community: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.' On the principle of non-discrimination as expression of a general right to equality, see Joined Cases 124/76 and 20/77, *Moulins Pont-à-Mousson,* [1977] ECR 1795, especially par. 16 and 17: 'This does not alter the fact that the prohibition of discrimination laid down in the provision cited is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law'. See also Takis Tridimas, *The General Principles of EC Law* (Oxford: Oxford University Press, 2000), chapter 2; Anthony Arnull, *The European Union and its Court of Justice* (Oxford: Oxford University Press, 2006), 201-3.

[67] Indeed, Joseph H. Weiler, 'Europe's Sonderweg' in Nicolaïdis and Howse (eds.) *The Federal Vision* (Cambridge: Cambridge University Press, 2001), 54-70. 'Thou shall not oppress the stranger', *European Journal of International Law* 3 (1992): 65-91.

[68] See Helen Wallace, 'The Impact of the European Communities on National

Policy- Making', *Government and Opposition* 6 (1971): 520-38; see also Johan P. Olsen *Europe in Search of Political Order* (Oxford: Oxford University Press, 2006).

[69] See for example Adrienne Héritier, Dieter Kerwer, Christopher Knill, Dirk Lehmkuhl, Michael Teutsch, Anne-Cecile Douillet, *Differential Europe: The European Union Impact on National Policy-making* (Lanham: Rowman and Littlefield, 2001).

[70] Wolfgang Wessels, 'An Ever Closer Fusion? A Dynamic Macropolitical View on Integration Processes', *Journal of Common Market Studies* 35, no.2 (1997): 267-299; see also Wolfgang Wessels and Dietrich Rometsch, 'Conclusion: European Union and National Institutions', in *The European Union and Member States: Towards Institutional Fusion?*, eds. D. Rometsch and W. Wessels, 328–65, (Manchester: Manchester University Press, 1996).

which makes it quite different from a state-type entity.[71] Fusion results from rational state actors searching for a viable 'third way' in-between intergovernmentalism and federalism. This manifests itself in the EU's legal-constitutional structure which takes on aspects of both a constitution and a treaty (although it seems to us that the theory does not clarify the relationship between the two).[72]

Fusion theory is quite different from the theory of constitutional synthesis. It has a different analytical focus: it is about institutional interaction and policy-processes, not constitution making. It is process-oriented and is particularly concerned with understanding the dynamics of European integration. In that sense it yields valuable information on how the multilevel EU's complex institutional structure operates, but is not clear on its constitutional implications. Fusion theory does not focus on how the EU's legal-political institutions were formed, neither does it pay much attention to their institutional-constitutional identity. It is therefore silent on the core aspect of synthesis, namely the manner in which national constitutional arrangements have become integrated in the aggregate European constitutional order.

Pernice's Multi-Level Constitutionalism

Ingolf Pernice's theory of *multilevel constitutionalism* is the theoretical approach that comes the closest to the theory of constitutional synthesis.[73] Pernice rightly underlines that the European legal system had constitutional character from the outset and further that this was authorised by the national constitutions, but in contrast to the theory of constitutional synthesis, he does not establish what this authorisation entails in constitutional and democratic terms. Pernice does point to the close interdependence that exists between European and national law, an interdependence that is also manifest in the institutional structure, where Member States and their constitutions are increasingly Europeanised through the development of the EU system: '(T)he constitutions of the EU Member States, no less than these states themselves, have undergone some important mutations. In addition to their character as founding instruments of the states, they have become foundational components of the European multilevel constitutional system.'[74] This system, multilevel constitutionalism underlines, is ultimately an instrument for the citizens. During the process of European integration citizens have conferred upon themselves a new political status as citizens of the European Union. In accordance with this, the theory of multilevel constitutionalism seeks to devise a democratic constitutionalism that is adequate to the complex and unprecedented European setting.

Multilevel constitutionalism and constitutional synthesis have roughly the same point of departure: national constitutions authorising European integration. But multilevel constitutionalism does not develop how this structures the relationship between European and national law. Instead, the theory offers a vague account of pluralism and the absence of hierarchy between the two. Further, instead of placing the accent on how the member state constitutions condition the Union (through constitutional synthesis), the accent is on how the Union conditions the members. The development of the Union (a sui generis type of organisation) contributes to transform the Member States in a

[71] This mode of thinking has roots in the German federal-inspired co-operative federalism literature. Consider the large German literature on *Politikverflechtung*, which was initially discussed in relation to the EU by Fritz Scharpf 'The Joint-Decision Trap: Lessons from German Federalism and European Integration', *Public Administration* 66 (1988): 239-78.

[72] Wolfgang Wessels, 'Keynote Article: The Constitutional Treaty – Three Readings from a Fusion Perspective', *Journal of Common Market Studies* 43 (2005): 11-36, at 14-15.

[73] Pernice, *supra*, fn 29; of the same author, 'Multilevel Constitutionalism and the Treaty of Amsterdam: European Constitution-making Revisited?', *Common Market Law Review* 36 (1999):703-50; and 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', Columbia Journal of European Law 15 (2009): 349-407.

[74] Ibid (2009), at 374.

world wherein state sovereignty is undergoing profound changes. We see this in the strong emphasis on experimentation which is held up as the main mechanism in forging the Union's legal order – a system that has emerged through a process of 'trial and error'.[75] Constitutional synthesis, as we have seen, places more emphasis on transfer of constitutional norms and principles, which not only render possible the development of a uniform legal order, but also helps to understand the normative standards that condition behaviour and inform the structure.

Multilevel constitutionalism is also a theory of democratic constitutionalism with normative purport, but where the normative standards are not made explicit. Thus, it is not clear in what sense citizens can claim ownership to this structure. The theory offers no conception of what democratic citizenship entails; thus there is no clear standard to establish under what conditions European citizens can understand themselves as authors of the law, in substantive and procedural terms. In effect, the status of citizenship under Lisbon (deficient in representation, transparency and accountability terms) is said to qualify as multilevel constitutionalism. The closed and secretive manner in which the Lisbon Treaty was forged (more akin to a governments', not citizens' constitution, and with citizens as mere ignorant bystanders) can also apparently be reconciled with multilevel constitutionalism. The theory can thus be accused of seeking to legitimate a particular institutional-constitutional structure. In contrast, the theory of constitutional synthesis underlines the *conditional legitimacy licence* that national constitutions confer on the Union through the integration clauses, which solves the problem of democratic standards. Multilevel constitutionalism thus starts with a correct intuition, and although it provides a number of important insights, it ultimately fails to deliver on this.

Moravcsik's Liberal Intergovernmentalism

Andrew Moravcsik's concern is to explain *why* the EU has emerged, i.e. why states have ceded sovereignty and permitted the emergence of a truly unique international institution.[76] Moravcsik's innovative Liberal Intergovernmental theory (LI) was devised to explain treaty-making/change as a series of great bargains.[77] He concludes that the EU is '*a limited, multi-level constitutional polity*'.[78] Since Maastricht this *material* constitution has developed into a stable constitutional settlement; recent reform efforts have been mere tinkering, including the ill-fated Laeken which was based on a misguided embrace of democratic constitutionalism. The European constitutional settlement is democratically

[75] Ibid (2009), at 372.

[76] Andrew Moravcsik, *The Choice for Europe* (London: UCL Press, 1998), 1.

[77] In numerous publications, he has sought to explain the emergence of the EU. In his major work he devises a three-step liberal-intergovernmental approach, which consists of state preferences, interstate bargaining and institutional choice. The conclusion with regard to European integration is that it 'exemplifies a distinctly modern form of power politics, peacefully pursued by democratic states for largely economic reasons through the exploitation of asymmetrical interdependence and the manipulation of institutional commitments.' Cf. Ibid, at 5. See also Andrew Moravcsik, 'Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community', *International Organisation* 45, no. 1, (1991): 19-56; Andrew Moravcsik 'A Liberal Intergovernmental Approach to the EC', *Journal of Common Market Studies* 31, no. 4 (1993): 473-524; Moravcsik, A., 'Is there a "Democratic Deficit" in World Politics? A Framework for Analysis'. *Government and Opposition* 39, no. 2 (2004): 336-363. Moravcsik, A., 'The European Constitutional Compromise and the Neofunctionalist Legacy', *Journal of European Public Policy* 12, no. 2 (2005a): 349-386. Moravcsik, A., 'Europe Without Illusions: A Category Error', *Prospect Magazine* 112 (2005b): 1-5. Available at: <http://www.prospect-magazine.co.uk/pdfarticle.php?id=6939>. Moravcsik, A., 'What Can We Learn from the Collapse of the European Constitutional Project?', *Politische Vierteljahresschrift* 47, no.2 (2006): 219-41. Moravcsik, A., 'The European Constitutional Settlement', in *Making History: European Integration and Institutional Change at 50*, eds. K. McNamara & S. Meunier, *State of the European Union* 8, 23-50 (N.Y.: Oxford University Press, 2007).

[78] Ibid, 2007, 23.

legitimate because the EU is ultimately a con-federal arrangement whose democratic quality remains anchored in the democratic Member States. The EU also complies with standards of legitimate governance - more attuned to non-majoritarian regulatory bodies than to majoritarian representative-democratic ones because it has a limited remit of action and basically deals with low-salience issues.

LI shares with constitutional synthesis an emphasis on the central role of the Member States in the forging of the Union's constitutional arrangement. But the two perspectives have different analytical foci (government executives versus national constitutions), and offer very different readings of the character and status of the constitutional construct, as well as of the constitutional character and salience of this process.[79] The LI approach lacks proper intellectual tools to capture the normative and symbolic dimension of the constitution.[80] Moravcsik casts Laeken as a misguided and out-of-place constitutional attempt whereas our position is far closer to that of Pernice who argues that "without really changing it in substance, the Constitutional Treaty allowed understanding a little more of what the EU really is and does."[81]

Weiler's Constitutional Tolerance

Joseph Weiler starts from the notion that the EU has developed a stable constitutional settlement which departs from the state structure: 'European federalism is constructed with a top-to-bottom hierarchy of norms, but with a bottom-to-top hierarchy of authority and real power.' This construct's veritable Grundnorm is according to Weiler, the notion of *constitutional tolerance* .[82] Weiler notes that, 'in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to be bound by precepts articulated, not by 'my people', but by a community composed of distinct political communities: a people, if you wish, of 'others''.[83] Tolerance is seen to generate voluntary acceptance and non-discrimination but Weiler is not clear on how far this can carry a constitutional arrangement. He correctly identifies non-discrimination as a key factor in the determination of the Union's normative identity. But non-discrimination does not lead to a constitution of tolerance, but rather to a constitution of equality, to integration through constitutional law (which, however, becomes a problem when it is instrumentalised at the service of a process of partial and limited integration, where the universalistic force of constitutional law is put at the service of values which undermine the very idea of integration through constitutional law). Weiler's notion of constitutional

[79] Moravcsik establishes issue salience through examining whether citizens consider the issues that the EU is presently handling to be of importance to them. For this to work for Laeken, it must be made clear that these issues are of such a character as to render a constitutional project unfeasible. We will show in Chapter 4 that the project was neither considered unfeasible nor unimportant to citizens.

[80] Moravcsik's conception of issue salience follows international relations' high-low politics distinction, but this distinction is vulnerable to issue-redefinition or reframing: low-politics issues such as measurement systems can take on high symbolic salience, consider the 'metric martyrs'. Their role is discussed in Glyn Morgan, *The Idea of a European Superstate – Public Justification and European Integration* (Princeton: Princeton University Press, 2007).

[81] Pernice, *supra*, fn 71 (2009), at 371.

[82] See Joseph Weiler, 'To Be a European Citizen: Eros and Civilization', originally published in *The Journal of European Public Policy* 4 (1997):495-519; *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999); 'Editorial: Does the European Union Truly Need a Charter of Rights?', *European Law Journal* 6 (2000): 95-97; 'European Democracy and the Principle of toleration: The Soul of Europe', in *A Soul for Europe* vol. 1, eds. F. Cerutti and E. Rudolph, 33-54, (Leuven: Peeters 2001); 'Federalism Without Constitutionalism: Europe's Sonderweg', in *The Federal Vision*, eds. Kalypso Nikolaïdis and Robert Howse, 54-71 (Oxford: Oxford University Press, 2001), 'A Constitution for Europe: Some Hard Choices?', *Journal of Common Market Studies* 40 (2002): 563-580.

[83] Ibidem, p. 568.

tolerance captures the frail character of what we label as the Union's constitutional field but Weiler's perspective provides an inadequate account of the forces that keep the field together (which constitutional synthesis offers).

Joerges' Theory of Conflicts

Joerges' theory of European law as a sophisticated system of conflicts of law depicts Community law as a constitutional discipline of conflicts between co-existing legal orders. The key intuition is that Community constitutional norms should be characterised as the norms that establish (and frame) the conditions under which supranational conflicts are to be solved through the mutual recognition of national norms.[84] This can be said not only to be a reelaboration of the core insight of the Cassis de Dijon line of jurisprudence, but a very concrete definition of constitutional pluralism in the European Union. Community law must prevail in so far, but only in so far as, such primacy is necessary to organise the co-existence of national legal orders effectively; such primacy is not unconditional and must indeed be graduated by reference to the 'regulatory interest' of national legislation in each specific case.[85]

The theory has also been developed by reference to concrete institutional setups and decision-making processes. The true *conflictual* template of drafting conflicts' community norms is to be derived from the practice of comitology. And that is because comitology recruits different forms of knowledge and renders the final norms cogniscent of local conditions; at the same time that its institutional design, renders comitology committees into sites that foster a *deliberative* style of interaction. Judicial adjudication also used to hold promise, even if after Viking and Laval, Joerges has become much more critical of constitutional adjudication, perhaps pointing to a further development of the theory in terms of its institutional implications.

However, Joerges' theory does not make up a complete constitutional theory, but provides key insights (albeit within a more limited frame) into fundamental aspects of the European Constitution. He rightly focuses, and in doing so illuminates, institutional structures and decision-making processes which are beyond (or perhaps below?) the radar of traditional constitutional theories in a manner not well enough picked up by the broader community of social scientists. Still, his explicit denial of the democratic foundation of the legitimacy of the European Union sets his theory at odds with constitutional synthesis.

Indeed, he only foresees a remedial function of European institutions, curbing the democratic deficit of a system of sovereign nation-states. And while that latter insight is key in the development of our own theory of constitutional synthesis, it seems to us that the constitutional practice of the European Union has in empirical terms long transcended the stage at which conflicts theory could be a normatively sound reconstruction of European integration. The depth and breadth of normative synthesis entails that a mere conflictual approach cannot solve the key legitimacy problems underlying the

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[84] Christian Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline', *Duke Journal of Comparative and International Law* 14 (2004): 149-196; Christian Joerges and Florian Rödl, 'On the social deficit of the European Integration Projects and its perpetuation through the ECJ Judgments in Viking and Laval', RECON Working Paper, 2008/06. Available at: <http://www.reconproject.eu/main.php/RECON_wp_0806.pdf?fileitem=5456225>.

Rainer Nickel (ed.) *Conflict of Laws and Laws of Conflict in Europe and Beyond Patterns of Supranational and Transnational Juridification*, RECON Report 7. Available at: <http://www.reconproject.eu/main.php/RECONreport0709.pdf?fileitem=29736995>. (including Joerges' own chapter, 'Integration through Conflicts Law: On the Defence of the European Project by means of Alternative Conceptualisation of Legal Constitutionalisation', 531-61); 'Sozialstaatlichkeit in Europe? A Conflict-of-Laws Approach to the Law of the EU and the Proceduralisation of Constitutionalisation', *German Law Journal*, 10 (2009): 335-60.

[85] Joerges and Rödl, *supra*, footnote 82.

transformative interpretation of economic freedoms, or the flawed design of the imperfect monetary Union. Finally, constitutional synthesis offers a rather different diagnosis of the sources of complexity in the European constitutional system. While Joerges sees most of the time outcomes as unstoppable processes of social differentiation, constitutional synthesis detects tensions deriving from the tension between the growing realisation of the regulatory ideal of a common constitutional law and the thinness of supranational politics.

Conclusion

In this paper we have fleshed out the constitutional theory we employ somewhere else in *The Constitution's Gift*[86] to reconstruct the constitutional history of the European Union (with special emphasis on the last two rounds of fundamental reform, the so-called Laeken and Lisbon processes), to solve some of the most fundamental problems in European constitutional adjudication, and to contrast the European and the Canadian 'post-national' experiences. We defined constitutional theory as a path to forge a democratic constitution, to integrate a polity through democratic constitutional law, alternative to the forms of constitutionalism characteristic of nation-states, namely revolutionary and evolutionary constitutionalism. The key element in the theory is the regulatory ideal of a common constitutional law, or what is the same, the assignment of a dual role to national constitutions: as single national fundamental laws and as parts of the synthetic collective constitutional law. We then claimed that constitutional synthesis is characterised by matching the regulatory ideal of a common and thus single constitutional law with two forms of constitutional pluralism, namely, the non-hierarchical amalgamation of supranational and national institutions, and the institutional pluralism resulting from the progressive creation of supranational institutions in which national institutional structures and cultures contrast each other. This led us to characterize constitutional synthesis both by reference to its constitutional and its institutional dynamics. On what concerns the former, synthesis tends to follow a sequence formed by a synthetic constitutional moment, where a 'thin' decision is taken to transfer the collective of national constitutions to the supranational constitution, intertwined processes of transformative and simple constitutionalisation, through which the constitutional nature of the polity and of the legal order are revealed as the contents of the common legal norms are fleshed out by reference to the regulatory ideal of a common constitutional law, and which tends to lead to different forms of crisis, triggered by the proclivity of the synthetic polity to be destabilised by external shocks, and by the internal tensions associated to the synthetic form. On institutional dynamics, we distinguish between processes of replication, innovation and experimentation. These processes fill gaps in the institutional structure, and shape the contest among national institutions and cultures. We finished by contrasting constitutional synthesis with five theories of European legal and political integration from which we have derived key insights, with affinities to or insights of relevance to constitutional synthesis.

It is on this basis that we propose the theory of constitutional synthesis as the best possible account of the European experience. It combines attention to context, to core institutional-constitutional choices, and to the specific trajectory of the European constitutional development.

[86] *Supra*, footnote 12.

Chapter Ten

Canada's Constitutional Experience and Parallels to Europe

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Introduction

The previous chapter has shown that with the appropriate conceptual tools the puzzles and paradoxes that beset Europe's constitutional experience become comprehensible. In this chapter, we further argue that this understanding of the constitutional character, origins and development of the EU's legal order opens up conceptual space for comparison with other polities. Still, the EU defies constitutional orthodoxy; thus the scope for comparison is limited. Comparison needs to take proper heed of the specific constitutional challenges facing the EU. This is why we compare the European Union with Canada.

A noted in Chapter Two, Canada faces constitutional challenges similar to those of the EU, and has also dealt with them in a comparable manner. First, both Canada's and the EU's constitutional law have derivative origins. In the EU, the source was the Member States' constitutional law; in Canada it was the country's colonial master, the UK, that bequeathed the original constitution, the British North America Act, 1867 (renamed in 1982 Constitution Act, 1867; and hereafter referred as BNA Act, 1867), on those setting up Canada in that year. In both cases the new entities obtained their constitutional norms through processes of *transfer* of constitutional norms and dignity. Second, the constitutional law of both the Union and Canada hold pluralistic traits, the EU's distinctly so, but Canada's also, which relates to its multinational and poly-ethnic character.[1] Third, there are important parallels in how the EU and Canada operate the process of fundamental constitutional reform, with key executives (heads of states and governments) playing a central role in both cases. Fourth, we have seen how conflict and contestation over constitutional essentials and absence of agreement on type of community and polity mark the EU, but this to a large extent also applies to Canada. Both are constitutional polities but lack clarity and/or agreement on their constitutional identity. Fifth, we have shown that the EU's constitutional structure has failed to obtain explicit democratic authorization; this EU trait also finds parallels in Canada.

These commonalities suggest that the EU and Canada share several important challenges; there are also important parallels in how these challenges have been dealt with, including a synthetic orientation. Thus, comparison can help us to establish whether constitutional synthesis is a theory with relevance only for Europe, or whether it can also be extended beyond Europe. And in extending it, we may be able to draw lessons from Canada to the European case.

In the following sections, we provide a brief constitutional narrative of the Canadian case that is particularly oriented to ascertain whether the theory of constitutional synthesis can (be adapted to) shed light on the complex Canadian constitutional experience - an experience that does not fit well with either the revolutionary or the evolutionary tradition of constitutionalism. To this end, the chapter has been broken down into two main periods. The first covers the period from Confederation (1867) and up to the patriation of the Constitution in 1982. We discern the main parallels to the EU, with this

[1] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon, 1995); Will Kymlicka, *Finding our way* (Oxford: Oxford University Press, 1998).

period roughly corresponding to the EU pre-Laeken. The second period, from patriation in 1982 to the present, covers the central transformation of Canada's Constitution through what is frequently referred to as the 'Charter Revolution' [2] This effort to 'bring home' and found the Canadian Constitution on an explicit rights-based democratic constitutionalism finds its parallel in the EU's effort to forge a Constitution for Europe with the European Charter as a vital ingredient. Both cases thus represent efforts at 'Charter-driven constitutional transformation' in pluralist legal systems with derivative constitutional origins. The important and instructive difference is that Canada's – cathartic - constitutional transformation has altered the terms of synthesis in a clear constitutional-democratic direction. That realisation is part of the second theoretical purpose of this chapter, namely to clarify what the European Union can learn from Canada, what constitutional lessons can be derived from one version of synthetic constitutionalism to another, so to say.

Canada's Constitutional Development Pre-Patriation

In this section we will show that the Canadian constitution came about through a critical process of constitutional transfer. This process lasted for well over half a century and unfolded with a clear domestic-Canadian synthetic orientation. It shows that the constitutional contestations that have given rise to its synthetic constitutionalism have roots that stretch back to Canada's very founding. The conflicts are over constitutional essentials and are rooted in different conceptions of sovereignty, community and democracy. The conflicts are kept alive today also because, as we will show, scholars *presently* interpreting these events do not agree on what they signify.

An Unconventional Moment for a State Constitutional Foundation Through Transfer

The Dominion of Canada was constituted by the BNA Act, 1867.[3] It resulted from the consolidation into one polity of three former colonies in British North America, and contained initially four provinces, because with the founding the province of Canada was split into two: Ontario and Quebec.[4] The breakup of the United Province of Canada was the result of failed efforts to create a United Province of Canada in 1841 from the previous Upper and Lower Canada. To the newly founded Ontario and Quebec, therefore, "Confederation was a deeply desired coming apart as a prerequisite to the larger coming together with other colonies in the central government of the new nation." [5] Confederation thus restored an institutional home – the province of Quebec – for the majority of Canada's French-speakers (together with a minority of English-speakers).

As with the United States and indeed with the European Union, the territorial scope of the Constitution was open, and the Dominion was gradually extended to today's Canada with 10 provinces, and 3 territories.[6]

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[2] F. L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party*, (Peterborough, ON: Broadview Press, 2000); Alan C. Cairns, "The Canadian experience of a Charter of Rights", in *The Chartering of Europe: The Charter of Fundamental Rights and its Constitutional Implications,* E. O. Eriksen, J. E. Fossum and A. J. Menéndez, eds, 93-111 (Baden-Baden: Nomos, 2003).

[3] The Act was given royal assent as a British statute on March 29, 1867. On July 1, 1867 it was proclaimed into law, thus establishing the Dominion of Canada.

[4] These were: Nova Scotia and New Brunswick and the province of Canada which upon joining was split into two: Ontario and Quebec.

[5] Cairns, *supra*, fn 2, at 96

[6] Manitoba joined in 1870, the Northwest Territories in 1870, British Columbia in 1871, Prince Edward Island in 1873, Yukon in 1898, Alberta and Saskatchewan in 1905, Newfoundland in 1949, and Nunavut in 1999. The Northwest Territories, Yukon and Nunavut are territories, the rest are provinces.

The text of the BNA Act, 1867 granted Canadians the rudiments of a constitutional and democratic order. It established "One Parliament for Canada consisting of the Queen, an Upper House styled the Senate, and the House of Commons."[7] The new system was thus set up with a bi-cameral legislature, with the Senate as an appointed body,[8] and the House of Commons as a popularly elected body,[9] with the consent of all three required for the passage of legislation. The Senate's formal powers were co-equal to those of the House of Commons, albeit with the exception that money bills had to originate in the House of Commons.[10] The Senate was modeled on the pre-Confederation Legislative Councils, notably that of the United Province of Canada.[11] The Senate is clearly similar to the British House of Lords in that both are non-elected, they share many of the same parliamentary procedures, and operate to check legislation. But the Canadian Senate also differed in that it had a fixed membership, there was no time-limit to how long it could delay legislation, and its federal character shaped its composition which was based on the principle of regional representational equality.[12] The House of Commons was to be popularly elected, with an election cycle of five years. The House of Commons was styled on its UK namesake. The BNA Act, 1867 contained no explicit reference to the principle of responsible government but this was a well-established constitutional convention. Also by convention, members of the cabinet had to hold a seat in Parliament (either in the House of Commons or in the Senate).

In overall terms, there was no doubt that "Westminster was the mother of Canadian parliamentary practice."[13] The system was configured to work on the basis of the principle of responsible government but could not be translated into parliamentary sovereignty, because the Canadian Parliament's role was subject to limits imposed by the Imperial mother, the British Empire. Further, the unelected Senate's strong role raised the question of *responsible to whom* – this strong role was a further obstacle to popular sovereignty proper.

The BNA Act, 1867 thus set up the federal parliament; it also affirmed the role of the representative bodies in the provinces, each of which would have a legislature, a lieutenant-governor representing the Queen and an elected lower house, the legislative

[7] BNA Act, ss. 17. Available at: <http://www.justice.gc.ca/eng/pi/const/lawreg-loireg/p1t16.html>.

[8] It was initially stated to have a total of 72 senators, equally distributed between three regions: Ontario: 24, Quebec: 24 and the Maritimes: 24 - 12 from Nova Scotia and 12 from New Brunswick (ss.22). Senators would be appointed by the central government's executive (specifically by the Governor General, acting on the advice of the Prime Minister).

[9] It would consist of 181 seats, with 82 from Ontario, 65 from Quebec, 19, from Nova Scotia and 15 from New Brunswick (ss.37). The number of seats could be increased, "provided the proportionate Representation of the Provinces prescribed by this Act is not thereby disturbed"(ss.52). The federal principle here clearly interfered so that this system was not based on a straight-forward principle of digressive proportionality.

[10] The British North America Act, 1867, ss. 53. Available at: <http://www.justice.gc.ca/eng/pi/const/lawreg-loireg/p1t16.html>.

[11] (The union in 1840 of Upper Canada [Ontario] and Lower Canada [Quebec]).

[12] There is also a small similarity to the US Senate in that both are federal chambers based on geographical equality (although the Canadian Senate is based on regional as opposed to individual state equality), but the two bodies are otherwise quite different because Canadian Senators are not elected and do not take part in ratifying executive decisions. The Senate of Canada, "A Legislative and Historical Overview of the Senate of Canada", Committees and Private Legislation Directorate, Revised May 2001 Available at: <http://www.parl.gc.ca/information/about/process/senate/legisfocus/legislative-e.htm>.

[13] Alan C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change* (Toronto: McClelland and Stewart Inc, 1995), 100.

assembly. In addition, with the exception of Ontario, all the other provinces would each have an appointed upper house, the legislative council.[14]

The Act conferred broad powers on the Crown through the Governor General.[15] The executive was called the Queen's Privy Council. There was no mention of the office of prime minister or cabinet, although it existed through convention - the cabinet is best understood as a committee of the Privy Council[16]. In addition, "[t]he British government's power to "disallow" colonial statutes, which had been included in the *Constitutional Act,* 1791, and the *Union Act,* 1840, was to be continued in the new Canadian state. So, too, was the governor general's power to "reserve" a bill for consideration by the British government."[17] Both practices were only put to an end with the Statute of Westminster of 1931.

From 1875, there was a Supreme Canadian Court, even if the recourse of last appeal was to send litigants to London. However, it was not the will of the Canadians, but of Westminster that turned the Act into binding law, even if the terms of the Act were negotiated with London by representatives from three North American colonies.[18]

Furthermore, until 1982 (with the duo of the Canada Act of Westminster and the "native" Constitution Act) the British Parliament remained the institution empowered to amend the Act in the absence of any explicit provision to the contrary (although from 1949 -with the Second British North America Act- the power to amend the Constitution was partially repatriated).[19] This link back to the UK indicates why the Canadian Constitution is usually

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[14] The Province of Manitoba which was established by the federal Parliament in 1870, was then also provided with an upper house. The provinces that entered later British Columbia, 1871, Saskatchewan and Alberta, 1905, and Newfoundland that entered Canada in 1949 did not have one. Since then, Manitoba, Prince Edward Island, New Brunswick, Nova Scotia and Quebec have all abolished their upper houses. Available at: <http://www2.parl.gc.ca/Sites/LOP/AboutParliament/Forsey/parl_gov_01-e.asp>.

[15] This included the right to appoint senators, judges to the Supreme Court, lieutenant governors of the provinces (24, 96, 58, summon and dissolve the House of Commons (38,50), right to assent to as well as to refuse assent to legislation, and exclusive right to recommend money bills (54). Available at: <http://www.solon.org/Constitutions/Canada/English/ca_1867.html>.

[16] Patrick J. Monahan, *Constitutional Law,* 3rd edition (Toronto: Irwin Law, 2006).

[17] Ibid., 50.

[18] These were the province of Canada, the province of Nova Scotia and the province of New Brunswick. The negotiations had included representatives also from Prince Edward Island and Newfoundland, but they decided not to join then. Prince Edward Island joined in 1873 and Newfoundland joined in 1949.

[19] Between 1867 and 2000 the Canadian Constitution was amended over twenty times, with most of these by the UK Parliament. (Monahan (2002:5) The *Statute of Westminster, 1931* (UK) confirmed Canada's legal independence from Great Britain. However, the statute still also provided that only the UK Parliament could enact amendments to the British North America Act, 1867. In 1949, through the British North America (No.2) Act the federal government sought a limited power to the Canadian Parliament to amend the constitution. This was to apply in areas under federal jurisdiction only, although precisely what this entailed was not easy to establish. This unilateral attempt at partial patriation was met by criticism from the provinces. The government then also implicitly recognised the provincial role by calling a federal-provincial conference in 1950 but the conference failed to reach agreement. Scott notes how this Act entails that the federal government "has withdrawn certain defined classes of matters from its competence, leaving them to be amended by a process to be agreed upon at the Dominion-provincial conference. Thus, it has voluntarily retreated, so to speak, from the position which, by subjecting the legal supremacy of the Parliament to the conventional control of the Canadian Parliament, had accidentally resulted in giving Canada a federal constitution as flexible as the English constitution itself." See F.R. Scott, "The British North America (No.2), Act, 1949", *The University of Toronto Law Journal* Vol. VIII, no. 2 (1950): 201-207, at 203-4. James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Minister of Supply and Services, 1996), 30-1.

characterized as derivative.[20]

In marked contrast to the US constitution of 1787, or for that matter, with the many South American Constitutions of the early nineteenth century, that in symbolic and substantive terms marked a clear break with the colonial European past, the Canadian Constitution reinforced continuity with the past.[21] Continuity was expressed through the combination of an imperial form and a democratic substance. Thus, executive functions remained formally in the hands of the Queen (acting generally through her Governor-General), legislative power continued to be formally vested in the Imperial Parliament, while the Judicial Committee of the Privy Council remained the supreme Court within the Domain.

In brief, the Act containing the fundamental laws of Canada was granted to the people, rendered possible government by the people, but was not made by the people. It had been a Canadian initiative, was negotiated by delegations of executives from the provinces and was ratified by all the provincial legislatures (in some provinces after dissolution and appeal to the people in election, in British Columbia (1871), New Brunswick (1867) and Prince Edward Island (1873).[22]

But it could be said first that the Act was an unconventional constitutional act, as a new polity and a new legal order with a democratic aspiration were established neither through a revolutionary "constitutional moment" nor from a slow constitutional outgrowth. The main difference was that in the Canadian case the *pouvoir constituant* was external to the new polity. Thus in this sense the BNA Act, 1867 did also have the colour of an *octroyé* constitution.

Second, the Act not only *transferred* British constitutional law to the Dominion, but actually brought on board many pre-existing material constitutional arrangements; and critically for the nineteenth-century, grounded the continued validity of a pluralistic system of private law.

The actual contents of the Constitution partially resulted from the constitutional practice of the colonies since their establishment, and especially in the constitutional conventions developed within areas in which formally or informally self-government was the practice.[23] While that implied a clear-cut influence of British constitutional law and

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[20] See Cairns, *supra*, fn 13, p. 110; Peter Hogg, *Constitutional Law of Canada* (Toronto: Thomson & Carswell, 2007); Monahan, *supra*, fn 16.

[21] In this, the Canadian case was typical of the Commonwealth pattern. See K. C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Oxford University Press, 1960), chapters III and IV, where he discusses the concepts of autonomy and autochtony of the Constitution. Indeed the intricacies and logical tensions implicit in derivative constitutionalism were to result in major legal-theoretical puzzles. First in Rhodesia (see J M Eeekelar, "Principles of Revolutionary Legality", in *Oxford Essays in Jurisprudence*, ed. A. W. B. Simpon (Oxford: Oxford University Press, 1973),22-43, at 41; F.M. Brookfield, 'The Courts, Kelsen, and the Rhodesian Revolution', *The University of Toronto Law Journal* 19 (1969): 326-52; Tony Honoré, "Reflections on Revolutions", *Irish Jurist (New Series*) 2 (1967): 268-278.) and then in Grenada (see Simeon C.R. Mcintosh, *Kelsen in the Grenada Court* (Kingston and Miami: Ian Randle Publishers, 2008)). Indeed, it is Commonwealth constitutionalism that made H. L. A Hart ponder about the necessary unique character of the rule of recognition. See H. L. A Hart, *The Concept of Law* (Oxford: Oxford University 1961), 120-3.

[22] Jane Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal: McGill-Queen's University Press 2007), 46.

[23] Joseph Edwind Crawford Munro, *The Constitution o f Canada* (Cambridge: Cambridge University Press, 1896), 3.

practice, there were also elements resulting from the emulation of aspects of the US Constitution (both in a positive and in a negative sense).[24]

Where the British legacy was outstandingly dominant was in the form of the Act. In the preface to the document, it was indeed stated that Canada would have a constitution that would be "similar in Principle to that of the United Kingdom"[25]. This implied that the Constitution was only half-written. In contrast to the U.S. Constitution that contained in a coherent and synthetic manner a rather complete body of fundamental norms, the BNA Act, 1867 only contained the provisions that were strictly necessary to set up the confederation. There was no Bill of Rights, but the reference to similarity with the British Constitution was taken as substantiating an implied bill of rights. Similarly, as already noted, the Act did not spell out explicit provisions for responsible government, despite the fact that they had already been achieved in British North America "in or about 1848".[26] But the British similarity was enough to import several British constitutional conventions into the "living" Canadian Constitution, notably the convention of responsible government, the convention of the rule of law and the convention of parliamentary sovereignty.[27] And as we already pointed out, the drafters of the Act did not insert an amendment clause. This was left to the Imperial Parliament.

Even more importantly at a time where most of legal norms were part of private, not public law, Section 129 of the Constitutional Act affirmed the continued validity of pre-existing laws. This entailed endorsing the essentially dual nature of the private law in the Dominion, as Quebecers had managed to hold fast to their *droit civil*,[28] "in respect of the legal rules governing the relations between and among private individuals in contract, property, and civil wrongs…"[29]

Third, it created a complex system of legislation. In the application of British imperial constitutional law (which had been recently clarified in the 1865 Colonial Laws Validity Act), imperial statutes were to be part of the system of sources of law of the Dominion. English laws that were not suitable to the colonial circumstances were excluded through

[24] "The colonists deliberately aimed to reverse the American system: to the provinces were to be allotted exclusive legislative powers over *enumerated* classes of matters and to the federation should belong the vast *residue* of undefined legislative powers. For better or worse, this seemed an obvious lesson from that war to the colonial statesmen…" W. P. M. Kennedy, "The Interpretation of the British North America Act, *The Cambridge Law Journal* 8 (1943): 146-160, at 147.

[25] Preface of the BNA Act, 1867.

[26] Janet Ajzenstat, *The Once and Future Canadian Democracy: An Essay in Political Thought* (Montreal and Kingston: McGill-Queen's University Press, 2003), 40. Nova Scotia was also the first part of Canada to win *responsible* government: government by a cabinet answerable to, and removable by, a majority of the assembly. New Brunswick followed a month later, in February 1848; the Province of Canada (a merger of Upper and Lower Canada formed in 1840) in March 1848; Prince Edward Island in 1851; and Newfoundland in 1855.

[27] In effect, this approach to the Constitution and the constitutional text underlines first that the Canadian Constitution's normative underpinning was steeped in the principles of rule of law and liberal representative democracy. The UK Imperial Parliament played a central role as the guardian of the core principles of Canadian constitutionalism, including the central representative-democratic component. Gerald Gall, *The Canadian Legal System,* Fifth edition, (Toronto: Thomson & Carswell, 2004), 62.

[28] This drew on the Code Napoleon of 1804. Gall 2004: 264) French civil law This had its roots in the importation of French law to New France in the 1660s. Quebec was deemed a conquered colony. In 1763 the Royal Proclamation of 1763, (U.K.) R.S.C.1985, Appendix II, No. 1. for instituted English law, but this was so contentious that French civil law was reinstated in the U.K. Quebec Act, 1774, (U.K.). R.S.C. 1985, Appendix II, No. 2. This was then also subsequently codified in the Quebec Civil Code of July 1, 1866.

[29] Monahan, *supra*, fn 16, at 35.

a rather vague doctrine of unsuitability.[30] In addition, "autochtonous" institutions were empowered to adapt to local circumstances the core component of the applicable law (British law), even if subject to the strong unifying thrust of the imperial Judicial Committee of the Privy Council.

A brief comparison of this system with the EU shows that both constitutional arrangements were derivative, incomplete, and relied on transferred legitimacy. When comparing their respective starting points we also see that Canada was from the outset institutionally speaking far better democratically equipped: a federal state with broad prerogatives and based on the notion of representative and responsible government. But the centralist-sounding constitutional text was not in line with the political realities and constitutional visions that marked this complex entity.

The Contested Constitutional Status of the BNA Act, 1867

In the previous section, we have considered three key features of the "foundational" act of Canada which do not fit into the typical constitutional traditions or paths of nation-states, namely: (1) the *octroyé* character of a democracy-enabling constitution; (2) the transferred character of constitutional norms (composed of the fact that the written constitution is only a partial statement of the "deeper" constitution, left unwritten and in the form of constitutional conventions); and (3) the plural and rather baroque system of sources of law foreseen in the Constitution. This creates some parallels between the European unconventional foundation and the Canadian constitutional foundation.

In this section, we will consider whether it makes sense to reconstruct Canadian constitutional practice in the first decades under the BNA Act, 1867 as synthetic. That requires us to consider the constitutional dynamics at work and their combination, to determine whether the BNA Act, 1867, instituted a constitutional practice that could be regarded as proper of revolutionary or evolutionary constitutionalism.

While the BNA Act, 1867 was approved by Westminster, it was the result of a Canadian initiative, which was very much influenced by the growing political tension on the other side of the Canadian-US border. Indeed, the *centrifugal* forces unleashed in the extremely bloody American Civil War (1861-1865) gave impetus to a *centripetal reaction* among British subjects in North America to forge a form of Union. The American war was a critical factor in the colonists' decision to opt for a Canadian federation and deeply coloured their constitutional thinking. That resulted in a peculiar combination: a constitution enmeshed in a pluralistic constitutional reality, which takes full notice of and even endorses pluralism, but at the same time also establishes an institutional structure and a division of competences with a clear centralising orientation. Indeed, the ensuing Canadian federal model was a model of parliamentary federalism, based on parliamentary government at both key levels of government and steeped in a federal framework, basically organized and structured along the lines of the bi-polar version of federalism.[31] The BNA Act, 1867 allocated such a great range of powers to the federal

[30] "The Colonial Laws Validity Act, 1865 defined an imperial statute as an "Act of Parliament [i.e., of the Parliament at Westminster] extending to the colony", and provided that an Act of Parliament was deemed to extend to the colony only if it was made applicable to the colony "by the express words or necessary intendment" of the statute itself. The Colonial Laws Validity Act went on to provide that colonial laws were void if they were "repugnant" to an imperial statute (as defined) but were not void if they were repugnant to a received statute or rule of common law. The Colonial Laws Validity Act was intended to remove doubts as to the capacity of colonial legislatures to enact laws that were inconsistent with English law."Hogg, *supra,* fn 20, at 51-2.

[31] Fritz W. Scharpf, "The Joint-Decision Trap: Lessons from German Federalism and European Integration", *Public Administration* 66 (1988), 239-78; Fritz W.Scharpf, "Community and Autonomy: Multi-level Policy-making in the European Union", *Journal of European Public Policy* 1, no. 2 (1994): 219-242.

level of government that some commentators preferred to label Canada 'quasi-federal' rather than federal proper.[32]

What is remarkable is that this apparently centralising arrangement gave rise to a long process of transformative constitutionalism which at numerous instances has appeared to move almost *in reverse*. Or to put it differently, Canada experienced a constitutional practice marked by contestation over the constitutional character of the legal order, resulting from the controversial nature of the polity that had been constituted. The American Civil War, as a major threat to the very integrity of British North America, had temporarily helped to paper over the opposing views of North America. However, once the war was over and the Canadian constitutional system was put into operation, the different underlying constitutional visions came into full play, challenging its very constitutionality.

The pluralistic nature of Canada was strongly asserted by Quebec. Quebecers indeed contested the federalising nature of the BNA Act, 1867 by relativising its constitutional status. By emphasising the subdued constitutional character of the text (a merely partially written constitution) and the more fundamental role played by the Quebec Act of 1774, what they saw as the true constitutive document of Canada, [33] Quebecers highlighted the dualistic nature of the polity, its binational character, [34] and in the process cast serious doubts on the "federal" interpretations of the federal-provincial division of powers and institutional set up of the BNA Act, 1867.[35] Running through Quebec's entire history is the theme of duality, constitutional recognition for Quebec distinctness, and Quebec's ability to protect its cultural and linguistic distinctness through veto on constitutional amendment and other institutional provisions.[36]

This dualistic reading understands Quebec as one nation, and implicitly or explicitly defines the English-speaking majority as the other nation or national community. But such a uniform vision of English Canada was also deeply contested. English-speaking Canadians, especially outside the economically dominant province of Ontario, tended to stress the institutional diversity of English-speaking Canada. This grounded and nourished a *third* conception of the BNA Act, 1867 as a *treaty* "made among the representatives of the British North American colonies, in which they came together to constitute the new federal government."[37]

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[32] Kenneth C. Wheare, *Federal Government,* (Oxford: Oxford University Press, 1963), 19.

[33] "(T)he act's importance cannot be understated, for it was the first imperial statute that recognized a colony's own formal constitution." Alain-G. Gagnon, A.G. and Raffaele Iacovino, *Federalism, Citizenship, and Quebec: Debating Multinationalism* (Toronto: University of Toronto Press, 2007), 29.

[34] This dualistic position sees Canada as a compact between two cultural groups. Ibid., p. 72 This is the *national compact theory* (see Paul Romney "Provincial Equality, Special Status and the Compact Theory of Canadian Confederation", *Canadian Journal of Political Science*, 32, no. 1 (1999): 21-39, at 23), or cultural or racial compact theory (Paul Romney, *Getting it Wrong – How Canadians Forgot Their Past and Imperilled Confederation* (Toronto: University of Toronto Press, 1999), 5.

[35] Notably associated with Canada's first Prime Minister and one of its foremost architects, Sir John A. MacDonald, who saw these features as a step in the direction of his desired (centralistic) legislative union. Hogg, *supra*, fn 20, at 114.

[36] Different legal cultures also induced different constitutional expectations: "One of the constitutional difficulties in Canada has been the instinctive desire of French-speaking Canadians for the definitive document in the grand civil law manner, as distinguished from the Anglo-Canadian pragmatic tradition in legal and political matters."R.I. Chefffins and R.N. Tucker, *The Constitutional Process in Canada* (Toronto: McGraw-Hill Ryerson, 1976), 5. This is also clearly a parallell with the European Union.

[37] Richard Simeon, and Ian Robinson, *State, Society and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990), 21.

This could be labelled as a confederal version with a twist, in that the Constitution was considered as a compact *among the provinces* (the so-called *provincial compact theory*).[38] After all the founding moment was also referred to as *Confederation.*[39] Taken literally, this could refer to a confederative constituting act, by and for the provinces. Indeed each province would have considerable jurisdictional autonomy and a veto in the amendment of the Canadian constitution.[40]

We should note another historical source of pluralism with constitutional implications, namely the system of aboriginal and treaty rights that existed prior to 1867. The 1867 settlement acknowledged this system, albeit in a highly paternalistic (internal colonial) manner.[41] Of particular importance here was the Royal Proclamation 1763. It referred to the "several Nations and Tribes of Indians" and defined them as collectivities, recognised their autonomy and defined the relations between them and the Crown as one between peoples. This kind of relation has continued and marks contemporary relations as well.[42] Thus, underneath the 1867 Founding Act we find at least four more or less well-entrenched and competing conceptions of community, each with its particular conception of whose constitution it was and who the main constitutional stakeholders were. The tension between these four competing visions runs through the entire constitutional history of Canada.

The contested character of the nature of the polity and of the legal order made agreement on how the collective constitutional will was to be forged impossible. In practical terms, federal and provincial governments were not capable of agreeing on a constitutional amending formula. In that state of disagreement, the imperial connection was maintained *malgrais* London as a source of unity that could not be produced within Canada.

Between 1867 and the 1960s some sporadic efforts (1927, 1931, 1935 and 1956) were initiated by the federal government to effect constitutional reform, but they had all stranded for lack of agreement on an amending formula. This became fully apparent during the process that led up to the 1931 Statute of Westminster, based on the spirit of the 1926 Balfour Declaration. The latter accepted the principle that the dominions and the UK were equal in status. Its section 4 stated that no statute of the UK would extend to a dominion unless it is expressly declared in that Act that the dominion has requested, and consented to, the enactment thereof.[43] The Canadian representatives however insisted on an exemption from this (the ensuing section 7.1 which provided that "nothing in this Act shall be deemed to apply to the repeal, amendment, or alteration of the British

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[38] A clear example is constituted by The Provincial Rights Movement championed the provincial compact theory and was able not only to cement the principle of provincial autonomy, in the expansive manner in which they understood it; they were also "able to show that the centralizing mechanisms of the Macdonald constitution were inconsistent with the underlying principles of federalism and British constitutionalism – as they understood those terms." R.C Vipond. " Constitutional Politics and the Legacy of the Provincial Rights Movement in Canada", *Canadian Journal of Political Science* 18, no. 2 (1985): 267-294, at 288.

[39] *Hogg, supra*, fn 20, at 113.

[40] Romney, *supra*, fn 36, at 22.

[41] Section 91(24) of the Constitution Act 1867 left the power over "Indians, and Lands reserved for the Indians…" to the federal government.

[42] Jeremy Webber, *Reimagining Canada,* (Kingston and Montreal: McGill-Queen's University Press, 1994), 87. Patrick Macklem notes that "the Proclamation illustrates … that Canada was literally constituted on ancestral territories. To ignore this aspect of Aboriginal prior occupancy would be to ignore a foundational feature of Canadian constitutional identity." Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2002), 105.

[43] Imperial Conference,1926 Inter-imperial Relations Committee Report Proceedings and Memoranda e (i.r./26) series. Available at: <http://www.foundingdocs.gov.au/resources/transcripts/cth11_doc_1926.rtf>.

North America Acts, 1867 to 1930, or to any order, rule or regulation made thereunder"), because they feared that either level of government in Canada would be able to alter constitutional law through ordinary legislation. The Canadian response to the 1931 Statute of Westminster illustrates how the Canadians' failure to agree to a domestically functional amending formula made them cling to the imperial connection even when the UK sought to loosen the ties. This failure thus meant that the basic question of to whom the constitution belonged, and the kind of community it set out to constitute, remained unsettled.

The contested character of the polity bred the kind of disagreement that blocked the constitution-making path. And the absence of change was bound to reinforce governmental dominance over constitutional issues. The BNA Act, 1867 was indeed a Governments' Constitution.[44] The text was long on intergovernmental relations and framed in a rather detailed way the powers and prerogatives of governments. Furthermore, it was very short on citizen-state relations in a democratic sense because it did not contain a Bill of Rights, provisions for responsible government, or an amending formula, but merely relied on the relevant constitutional conventions. Thus, while perhaps the substance was there, the form of the constitution left little scope to appeal to the constitution in a normative-evocative manner.

The governmental "bias" of the Constitution plus the blockage of constitutional reform reinforced the central role of governments in constitutional dynamics. So only belatedly (from 1964 onwards), in a fragmentary manner, avoiding the big constitutional changes, some marginal tinkering with constitutional norms was undertaken. Compromises were forged in intergovernmental fashion through what was labelled *Federal-Provincial Diplomacy*[45] to underline (a) the parallels this system has with the international realm, and (b) to focus attention on this as a structure for bargaining and negotiation.[46] The main participants have been the heads of governments (or First Ministers) from the federal and the provincial governments, which attended eleven conferences on constitutional issues from 1964 to 1983. Thus, the Federal-Provincial Conference of Prime Ministers and Premiers has arguably "come to be one of the most crucial institutions of Canadian federalism."[47] This system privileges executive officials and sidelines representative assemblies but "the pursuit of jurisdictional autonomy takes place outside a shared acceptance of constitutional and legal norms about the respective powers of the two orders of government."[48]

While no major formal constitutional amendment was effected until patriation in 1982, during the entire post-war period there was much happening in the area of informal constitutional change.[49] The great post-war increase in the state's role in the economy

[44] A.C. Cairns, (1991) *Disruptions: Constitutional Struggles from the Charter to Meech Lake* (Toronto: McClelland & Stewart).

[45] Richard Simeon, *Federal-Provincial Diplomacy: The making of recent policy in Canada*, (Toronto: University of Toronto Press, 1972).

[46] This system of intergovernmental relations was sometimes explicitly labelled Constitutional Conference but was an intrinsic part of the structure that from 1927 was labelled the Dominion-Provincial Conference, then from the 1950s the name changed to Federal-Provincial Conference, and since 1985 it has been termed the First Ministers' Conference. CICS (2004) lists a total of 76 First Ministers' Meetings between 1906 and 2004. From the topics dealt with 25 of these were explicitly addressing constitutional issues, although the substance of many of the other meetings was also directly constitutionally relevant.

[47] Smiley, D. (1980) *Canada in Question: Federalism in the eighties,* 3rd edition, (Toronto: McGraw-Hill Ryerson), 98.

[48] Smiley 1980, *supra* fn 49, at 116.

[49] Out of the total of 76 First Ministers' Conferences that were held during 1906 and 2004, only 9 were held before 1945, with all the remaining 67 held from 1945 onwards. Canadian

and society took place at both levels and underlined the great overlap of federal-provincial powers and competences. To deal with this overlap a comprehensive system of intergovernmental relations with administrative officials at both levels of government was set up to smooth the operation of the federal system. From the early 1960s the system of executive federalism emerged.[50] The intergovernmental affairs ministries at the core of this bureaucratic apparatus have emerged as critically important instruments for elected executive officials in constitutional negotiations. All governments have established Intergovernmental Affairs Ministries to serve as the locus of constitutional research and expertise, including negotiating techniques and expertise in reaching agreements and accords. Thus, elected executive officials play a central role in policy and political processes, and not the least in constitutional dynamics.

Because the limited constitutional reform that was achieved took place through the same process that transformative constitutionalisation, the system was not symbolically designated – and confined – to deal with constitutional issues as in a Constitutional Convention. Officials can designate some of the First Ministers' meetings as Constitutional Conferences, but they are not obliged to use this label. Thus the system leaves them with great flexibility and leverage to frame issues as constitutional. In effect, *constitutional* was what governments and courts defined it to be. Thus in direct parallel to the EU's Intergovernmental Conference (IGC), the First Ministers' Conference (FMC) is an instrument that executive officials can use to amplify, or downplay the constitutional label and the symbolic-constitutional salience of a given issue, with clear bearings on the normative dignity of the constitution.

Under such circumstances, the UK Judicial Committee of the Privy Council (JCPC), as the final judiciary in the constitutional system, was bound to have a key umpire role in the process of transformative constitutionalism "in reverse".

The UK JCPC was first pushed into the constitutional fray because the BNA Act, 1867 had been devised when government had a limited role in the configuration of society. The drafters of the BNA Act, 1867 were still living in a world where states had not dramatically expanded their competences in economic regulation and social policy; they were at a long remove from the very idea of the welfare state. So when such policies came to the political agenda, they were bound to spark jurisdictional conflict and to end up, sooner or later, before the JCPC through litigation.

The judges in London followed two basic principles. First, was to consider the division of competences enshrined in the BNA Act, 1867 as watertight. Here were the competences of the federation, and there those of the provinces; they could and should not overlap; they should be regarded as mutually exclusive categories.[51] The second principle centred on broadly interpreting two key terms defining provincial competences: "property" and "civil rights" as enshrined in section 92(13) of the BNA Act, 1867. In the latter case, they went as far as to consider as civil rights all forms of legal rights possessed by persons within the province. The consequence of this broad interpretation was recognition of provincial authority to enact laws on virtually any subject, since *all* provincial laws would

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Intergovernmental Conference Secretariat (CICS) (2004) "First Minsters' Conferences 1906-2004". Available at: <http://www.scics.gc.ca/pubs/fmp_e.pdf>.

[50] This system has been characterized by "the concentration and centralization of authority at the top of each participating government, the control and supervision of intergovernmental relations by politicians and officials with a wide range of functional interests, and the highly formalized and well-publicized proceedings of federal-provincial conference diplomacy. Garth Stevenson, *Unfulfilled Union: Canadian Federalism and National Unity*, 3rd edition (Agincourt, Ont: Gage Publishing,1989), 224, Bruce Pollard, *Managing the Interface: Intergovernmental Affairs Agencies in Canada* (Kingston: Institute of Intergovernmental Relations, 1986), 2.

[51] Monahan, *Supra*, fn 16.

necessarily deal with civil rights in one form or another."[52] The upshot was that "(t)he Privy Council took a document whose clear intention was to create a centralized federation and interpreted it as allocating many of the most important areas of legislative jurisdiction to the provinces."[53]

This strong provincialist thrust was further reinforced by the JCPC's very narrow interpretation of the federal residual power in section 91, the opening words of which state that Parliament is authorized to enact laws "for the Peace, Order, and Good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Rather than seeing it as a general grant of powers, one that in accordance with the text of section 91 need not be confined to the provisions set out in section 91 on federal authority, the JCPC understood this mainly as a power that came into effect when issues did not clearly fall within sections 91 or 92. From the 1920s onwards the 'Peace, Order and Good Government' clause has mainly been understood as an emergency power, in situations of national crisis.

The JCPC has been widely criticized by Canadian academics for its impact on the workings of the Canadian federal system. But it is clear that it responded to the strong advocates of provincial rights, especially the special demands by the province of Quebec. The broad interpretation of provincial authority in the realms of property and civil rights sat well with Quebec's onus on protecting its Civil Law tradition and on maintaining special provisions to protect the cultural – notably linguistic and religious – features of Quebec, which included education and in more recent times, manpower training and immigration. The supporters of this strong provincialist thrust of the JCPC then also underline that it was important to stem the strong fissiparous powers within Canada. Pierre Trudeau, in fact, argued in 1968 that if the JCPC had not ruled in that direction, "Quebec separatism might not be a threat today: it might be an accomplished fact."[54]

All these developments show that constitutional pluralism is a central component of the Canadian Constitutional edifice. The French fact could not be compartmentalized and stowed away as a quaint feature of Quebec, but has put a deep mark on Canada[55] and has also helped drive a much broader centrifugal process of provincialization, in line with the decentralized conceptions of national community that the other provinces have often propounded.
Under such circumstances, attempts at reconstructing Canadian constitutional dynamics as a matter of revolutionary or evolutionary constitutionalism were bound to exist, but were also bound to be highly unsatisfactory.

The most widely held view is that Canada's founders were not political theorists who were concerned with constitutional democracy but rather political pragmatists who sought Canadian Union as a solution to pressing political challenges, notably the threat posed by the American Civil War. This reading sits well with an evolutionary – Burkean - conception of the development of the Canadian Constitution. Peter Russell notes that "(t)he political elites who put Confederation together were happy colonials. Their basic constitutional assumptions were those of Burke and the Whig constitutional settlement of

[52] Ibid., p. 234.

[53] Ibid., p. 236.

[54] Pierre E. Trudeau, *Federalism and the French Canadians* (MacMillan 1968),198, cited in Alan C. Cairns, *Constitution, Government, and Society in Canada* (Toronto: McClelland and Stewart 1988), 63.

[55] Will Kymlicka, *Finding our way* (Oxford: Oxford University Press, 1998), 139 sees the BNA Act as heralding in a new tradition of federalism, namely multination federalism.

1689 rather than that of Locke and the American Constitution."[56] Russell argues that Canadians failed to consider head-on "the question whether they share enough in common to form a single people consenting to a common constitution."[57]

Against this, Janet Ajzenstat who has studied the Canadian founding debates extensively argues[58] that "the doctrine of popular sovereignty and its corollary, the right of revolution, has underpinned politics in this country from 1867."[59] Her reasoning is based on at least three sets of arguments: the framers were concerned with liberal democracy and set up a system of responsible parliamentary government; this is more firmly entrenched in the provisions of the BNA Act 1867 through explicit provisions (sections 53 and 54) than is generally recognized; and the Constitution rests on the principle of popular sovereignty because the BNA Act, 1867 underwent parliamentary ratification. Parliamentary ratification can be understood as an expression of popular sovereignty. In direct contrast to Peter Russell she then argues that John Locke "is the philosopher of Canadian Confederation…".[60]

These two readings, broadly speaking, draw to different degrees on the two main traditions of constitutional development: the evolutionary and the revolutionary. Russell's reading is very much steeped in the evolutionary tradition. Ajzenstat understands the English Glorious Revolution of 1688 as basically having instantiated the principle of popular consent through parliamentary sovereignty.

Neither reading, however, captures the distinctive traits of the Canadian context, namely the way in which a set of normative principles were embedded in an incomplete, derivative constitutional order, which gradually severed the UK ties and simultaneously sought to work out the relations between its roots in different legal-constitutional traditions.

Understood from this perspective, basic constitutional principles were transferred from Britain to a new entity (Canada). The process of transfer contained several distinct elements. The first refers to the presence of core elements of democratic constitutionalism. So far Ajzenstat is correct. But as Russell also correctly notes, this was not carried to its natural democratic solution because of the second factor that refers to the derivative origin and character of the Canadian Constitution. Canadian Constitutional statutes required approval by the Imperial Parliament in London. This meant that constitutionally speaking, Canada was not. self-standing entity in democratic terms. The democratic quality of the constitutional construct was neither exclusively established, nor exclusively sanctioned, by Canadians and their representative institutions. Neither could Canadians exclusively handle this; constitutional salience depended on compliance with democratic constitutionalism as understood and interpreted by the Imperial Parliament. Neither Russell nor Ajzenstat properly factor in the particular democratic license with which the Imperial connection equipped the Canadian Constitution. Canadians had to comply with English-style liberal-democratic constitutionalism. At the same time, the relative lack of specification in the English model offered them considerable leverage to fashion their political communities and address the fact of Canadian constitutional pluralism. The English Constitution could not simply be grafted on to the new entity

[56] Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 3rd edition (Toronto: University of Toronto Press, 2004), 12.

[57] Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, 2nd edition (Toronto: University of Toronto Press,1993), ix.

[58] Ajzenstat 2003, *supra* fn 22; Ajzenstat, J., Romney, P., Gentles, I. and W. D. Gairdner, eds, *Canada's Founding Debates (*Toronto: University of Toronto Press, 2003).

[59] Ajzenstat 2003 *supra* fn 22, at 83.

[60] Ajzenstat 2003, *supra* fn 22, at 54.

because the English Constitutional tradition was not the only one relevant or acceptable to the new entity. The French and the aboriginal traditions had to be accommodated.

How this pluralism was dealt with is best understood through the notion of constitutional synthesis. The process of synthesis was one wherein the relationship between the different constitutional traditions involved had to be properly worked out, under the guardianship and through the democratic safeguards set up by the colonial power, together with the representative-democratic bodies at both levels of government in Canada. In effect, we see here the makings of a 'constitutional field' wherein the central constitutional stake-holders (the UK government and the federal and provincial governments) are tightly linked and the operating constitution is the result of these forms of bi- and multilateral interactions.

The process as Ajzenstat and Romney underline[61] was not one where representative-democratic institutional arrangements were set up with Confederation (1867); such institutions were already in place. These were also not simply the product of Imperial UK rule; they were also the products of colonists struggling to replace oligarchies with elected systems of responsible government.

This process subjected both relevant constitutional traditions (English and French) to democratic constitutional norms. The battle in Canada stood over the kind of communal expression that these different constitutional traditions should take. Thus, it is quite clear that the Canadian process of constitutional synthesis did not unfold along the same lines as in Europe; at the same time there were important parallels.Tthe process is thus perhaps best understood as one of distilling a distinct constitutional tradition from a complex blend of English, French, a set of already made-in-Canada provisions deeply coloured by these, and (by then to a very limited extent), aboriginal traditions.

Constitutional Avoidance

This was at best a process of stymied synthesis. As time went on it became increasingly apparent that this constitutional construct rested on a number of constitutional assumptions and practices that caused or at least exacerbated the constitutional problems that came to a head in the late 1970s (to be addressed in the next section). As we have shown, the constested character of the polity and of the legal order made it virtually impossible to agree on how the collective constitutional will should be forged. This resulted in a distinct Canadian breed of constitutional avoidance. Thus Canadian synthetic constitutional development came hand in hand with the repression of constitutional politics.

This manifested itself in a plethora of unresolved constitutional issues and conflicts as well as a blatant failure to resolve 'the national issue': what kind of a nation was Canada? The Imperial connection offered at most ambivalent support: it exacerbated the confusion by being the distant framework to which Canadians could resort when domestic consensus could not be achieved.

Was Canada a territorial nation, or a transnational Canadian-British nation (where Canadians retained a strong British allegiance through close ties to Britain)? Or was Canada a compact between two founding peoples, a federal community of communities, or a compact of provinces? These tensions were becoming more acute as time went by through processes of province-building and notably through Quebec's *Quiet Revolution*

[61] Ajzenstat 2003, *supra* fn 22 and Romney 1999 *supra* fn 36.

(1960-66),[62] as a process of modernisation, secularisation and state-building in Quebec which was harnessed to serve the Quebec nationalist cause.[63]

A final element of constitutional avoidance pertained to the popular and citizenship roots of the constitutional construct. The BNA Act, 1867 had systematically organized out or excluded issues pertaining to aboriginal peoples, where status Indians only obtained the right to vote in 1960; exclusion also manifested itself in a strong gendered and ethnic bias.[64]

As the post-war period proceeded, notably from the late 1950s onwards, this elite-based system was becoming challenged. One important change effort was the attempt by Prime Minister Diefenbaker to amend the Constitution to include provisions for individual rights. The provinces refused to support the amendment and Diefenbaker responded with the Bill of Rights, 1960. It was applicable to the federal level only, and the courts interpreted the Bill very narrowly. In retrospect its importance resides as much in the negative example it provided for later constitution makers, who sought to avoid the limitations built into it. Probably the single most vital impetus to constitutional reform came through the election of the Quebec separatist Parti Quebecois in November 1976.

Before examining Canada's constitutional transformation we need to clarify the parallels between Canada and the EU in their respective pre-Charter eras.

How Comparable is this to the EU?

First, Canada's and the EU's constitutional arrangements both represent efforts to learn from and to prevent violent catastrophe: an important reason for Canadian Confederation was the need to prevent a destructive experience similar to the American Civil War (as well as to provide a bulwark against possible U.S. expansionism). European integration through an "ever closer Union" was a central vehicle to prevent further destructive wars on the European continent after two devastating World Wars in the first half of the 20th century. The two entities share some common elements regarding the initial integration impetus.

Second, both Canada and the EU were established in traditional constitutional theory, made in the image of European nation-states, would deem *unconventional acts*. Neither the BNA Act, 1867 nor the Founding Treaties easily fit into the template of revolutionary or evolutionary constitutional moments. In the Canadian case, the constitution was *octroyé*.

Canada's constitution was part of and partly operated through the Imperial UK Parliament. Constitutionally speaking, this tied Canada up in a broader world-encompassing imperial system and rendered the operation of the Canadian Constitution subject to ultimate approval by the UK Parliament. The mode of transfer was through derivation, as the contents of the Act and the companion constitutional conventions derived mainly (but far from exclusively) from British constitutional law at its imperial stage.

[62] Covers the tenure in government in Quebec of the Liberal Jean Lesage government which used the Quebec state to modernise and served to politicize language and class issues, with direct constitutional implications.

[63] Kenneth Roberts and Dale Posgate, *Quebec- Social Change and Political Crisis* (Toronto: McClellan and Stewart, 1980); Gagnon and Iacovini, 2007, *supra* fn 35.

[64] Alexandra Dobrowolsky, *The Politics of Pragmatism: Women, Representation, and Constitutionalism in Canada* (Don Mills, Ont: Oxford University Press, 2000), and Jeremy Webber, 1994, *supra* fn 44.

The EU's constitution was established through a decision to realise the supranational integration mandate of post-war constitutions, and its substantive content referred to the common constitutional law of the Member States (apart from the scattered provisions enshrined in the Treaties). Constitutional amendment (and for a long time period, ordinary law-making) was subject to unanimous approval by all the Union's Member States.

Third, and as a consequence of the second element, both were pluralist constitutions. The EU was set up as a supranational polity with a common constitutional law that encompassed Member States that also retained their own constitutional identities. Canada was set up as a federal state composed of already existing entities with somewhat different constitutional traditions: the British constitutional tradition (as adopted by the different provinces); the French influence through the Quebec Civil Code; and elements of the aboriginal tradition through aboriginal treaty rights. The two former sources of pluralism were well-entrenched in constitutional and political practice, whereas the latter has only obtained constitutional prominence quite recently (post-patriation, through article 35 of the Constitution Act).

Fourth, the ensuing constitutional practice was in both cases marked by the absence of a clear-cut path of explicit constitution-making. In Canada, the contested nature of the polity fostered a process of transformative constitutionalism almost in the reverse, through how the constitutional character of the BNA Act, 1867 was contested. That presented the process of forging a collective constitutional will with an ineffable question. It resulted not only in substantive constitutional avoidance, but also in a retained imperial connection even against the apparent wish of Westminster. Some constitutional changes were undertaken after 1964, but with considerable labour and fatigue. This constitutional impasse exacerbated governmental dominance over constitutional politics, and a process of muddling through with informal changes. The indecisive jurisprudence of the JCPC, itself fostering a centrifugal understanding of the Constitution, could not offer a solution to the problem. In the EU, we may understand the constitutional avoidance as a natural consequence of the daunting task of making the founding Treaties work combined with the quite smooth process of transformative constitutionalisation led by the Council of Ministers and seconded by the Court of Justice. But the more that the constitutional nature of the polity and legal order became clear, the more the same difficulties with the definition of the general constitutional common will that were characteristic of the Canadian polity affirmed themselves in Europe.

Fifth, in both cases, we find a system of organized intergovernmental relations to forge constitution making/change. There is a clear parallel between the Canadian system of First Ministers' Conferences (FMCs) within executive federalism, and the EU's system of intergovernmental diplomacy through the 'IGC approach' to treaty–making/change. And we find in both cases strong sub-unit veto actors and a norm of constitutional unanimity (in the EU this is formalized in Article 45 TEU; in Canada this norm had limited formal support).

Sixth, both Canada and the EU faced the challenge of ensuring proper democratic authorization. The two processes of constitutional transfer shaped the character of the authorization challenge: it was not a matter of democratic sanction of a new constitutional construct (the revolutionary tradition); it was a matter of democratic sanction of a constitutional construct that had operated over time. But in contrast to the evolutionary tradition, the constitution was not simply a manifestation of a domestic tradition but a domestic tradition that had originated from and continued to be mediated by another constitutional agent (in Canada the UK, in the EU the Member States). The more it was dislodged and independent from its origins, the more pressing would be the question of democratic authorisation. Our theory of constitutional synthesis provides a means of understanding the practical steps taken in both Canada and the EU to meting the democratic authorization challenge.

Taken together, these features mark both entities as distinct cases of constitutional synthesis. They are different manifestations of constitutional synthesis because they are different political systems with different roots. Canada is a parliamentary federation, whereas the EU is a quasi-parliamentary non-state. Canada's character as a deeply contested, 'multi-national', and highly decentralized federation, and the EU's make up and operation by Member States show that both rely on elements of statehood. In effect we may say that they exhibit different degrees of 'stateness' (for this conception of state, see[65]). This analysis has shown that constitutional synthesis is compatible with different degrees of stateness. It has also shown that synthesis can unfold in different ways: in the EU the synthetic process operates through a common European constitutional law made up of a distillation of national traditions situated in a European constitutional field, whereas in Canada the synthetic process unfolded in the working out of domestic pluralism under the guardianship of the UK.

Patriation and Chartered Transformation of Constitution and Community

A major difference between Canadian and European constitutional history is that there is a major turning point in Canadian constitutional history that bears some semblance to a revolutionary constitutional moment. This was the constitutional "patriation", literally the bringing of the Constitution home[66] through an Act that in a double move marked the end of British sovereignty and the adoption of a new Constitution, complete with a Charter of Rights. But there was a rub. While the Act was initiated and consented to by most of Canada's democratically elected officials and representative bodies, the province of Quebec refused to sign it. The Quebec Court of Appeal declared that the Quebec government did not possess a veto under the unpatriated amending process,[67] and this was upheld by an unsigned opinion of the Supreme Court of Canada.[68] With this major constitutional stakeholder (and most of its citizens) withholding such assent, Canada's potential constitutional moment did not materialize.

Was patriation simply a case of constitutional failure, as Quebec separatists have argued again and again? And if so, has it really turned the Canadian constitution autochtonous or just put a difference face on the same constitutional status quo?[69] Or should it still be regarded as the moment in which the Canadian people gave itself a democratic constitution? Was patriation the final transcendence of Canada's peculiar version of constitutional synthesis? With the British sovereign finally out of the picture, would the different and contrasting constitutional visions of the Canadian polity finally be reconciled? Or was patriation a mere mending of synthesis, a constitutional moment *manqué* accompanied by some beneficial cathartic effects?

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[65] H. Brunkhorst "State and Constitution: A Reply to Scheuerman", *Constellations,* 15, no. 4 (2008): 493-501, "Law needs means enforcement (state I) but no monopoly of power (state II). What we need for global constitutionalism today is a world state I, not a world state II." H. Brunkhorst, "States with constitutions, constitutions without states, and democracy: skeptical reflections on Scheuerman's skeptical reflection", *Ethics & Global Politics* 2, no. 1(2009): 65-81, at 75.

[66] Patriation is a new term. It was derived from repatriation but since the BNA Act 1867 had never been a Canadian Act, it could not be repatriated to Canada. Hogg 2007, 57. *supra* fn 20.

[67] Russell 1993, 128 *supra* fn 59.

[68] *Reference Re: Amendment To The Canadian Constitution* [1982] 2 S.C.R. 793, 1982: June 14, 15.

[69] How independent patriation made Canada is contested. Hogg 2007 *supra* fn 20 argues that it gave symbolic credence to an existing political reality wherein the UK Parliament had no authority over Canada; it also equipped Canada with autonomy in the sense that the Canadian Constitution would be operated in Canada only; but it did not equip Canada with constitutional autochthony, which implies that its claim to authority only springs from within the polity. This in contrast to the U.S. Constitution whose authority emanates from the U.S. exclusively, whose very forging entailed breaking the links with the colonial past.

To answer these questions, we proceed in two steps. First, we assess patriation, clarifying its constitutional status. This requires considering the main political and constitutional rationales behind patriation; the democratic qualities of the process; and the substantive constitutional changes it produced. Second, we consider the peculiar constitutional dynamics after the patriation and the Charter, focusing especially on the cathartic effects of the series of ratification failures following the constitutional moment manqué of 1982.

Patriation Through the Constitution Act 1982

The Road to Patriation

The Trudeau Liberal government had campaigned for constitutional reform in the 1979 election but this issue did not figure much in the 1980 election that returned Trudeau to power after the short Clark Conservative interregnum.[70] The Liberal's strong Quebec electoral support no doubt reinforced the element that was of greatest importance for bringing the constitutional issue front stage for Trudeau, namely the decisive 'No' win in the 1980 Quebec referendum on sovereignty-association.[71] Trudeau took this as a mandate to proceed with major constitutional reform.[72] It should also be added that survey data from across the country in August 1980 showed popular support for patriation, as well as constitutional guarantees of human rights and minority language rights. Soon after the Quebec referendum result, a Continuing Committee of Ministers was set up to work through a range of issues for the patriation package.[73] The ensuing First Ministers Conference in September failed to reach agreement, whereupon Trudeau sought to break the deadlock by arguing that the federal parliament could unilaterally approach Britain.[74] The process was thus shifted over to the Canadian federal parliament, which heard witnesses and deliberated the issues in public and through televised broadcasts conducted hearings[75] For Simeon and Robinson, this "was an experience of Parliament in action which Canadians had seldom witnessed, and it gave the constitution a popular focus that it had not hitherto possessed."[76] The ensuing popular mobilisation then also produced a number of changes to the proposals.

Several of the provinces took the issue of federal unanimity to their provincial courts, with Manitoba's Court of Appeal ruling 3-2 in Ottawa's favour and Newfoundland's Supreme Court ruling 3-0 against Ottawa and in favour of provincial participation.[77] Ottawa was then compelled to take the issue to the Supreme Court of Canada, which stated that Ottawa could legally patriate the Constitution unilaterally, but that this would also breach the convention of substantial (not unanimous) provincial consent.[78]

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[70] Here Trudeau's Liberals obtained 68.2 percent of the vote and 74 out of 75 seats in Quebec. Clarkson, S. and C. McCall *Trudeau and Our Times: The magnificent Obsession*, Vol. 1) (Toronto: McClelland & Stewart, 1991), 276.

[71] The result was 59.5% opposed to giving the Quebec government a manadate to negotiate sovereignty-association with the federal government, and 40.5% opposed. This result included a No majority in all the linguistic groups in Quebec) Clarkson and McCall 1991, *supra* fn 72.

[72] Simeon and Robinson 1990, 253, *supra* fn 39; Russell 2004,107ff., *supra* fn 58.

[73] Russell 1993, 110 *supra* fn 59.

[74] Ibid., p. 114.

[75] *Ibidem*.

[76] Simeon and Robinson 1990, 276 *supra* fn 39.

[77] Russell 1993, 118 *supra* fn 59.

[78] With a clear majority – seven to two – the justices stated that provincial consent was not required. At the same time a majority of six found that "in terms of constitutional convention, the unwritten fundamental rules concerning the proper use of legal power that have always been an essential element in the British and Canadian constitutions, there was a requirement of a 'substantial degree' of provincial consent." Russell, 1993, at 119, *supra* fn 59.

After new First Ministers conferences, all the provinces except Quebec signed the *Constitution Act, 1982*. Quebec's has still not signed it (although 70 out of the 75 elected members of the Quebec delegation in the federal parliament supported it).[79] In Quebec, the Parti Quebecois and nationalist intellectuals characterized the 1982 constitutional package as a "great betrayal",[80] and as a major denial of recognition.

The patriation event did not qualify as a democratic constitutional moment. The patriated constitution was rejected by the provincial government representative of Canada's most important minority. But given that there was no legal obstacle to proceed, characterising this as a constitutional failure hinges on whether it weakened or strengthened democracy. Procedurally speaking, the federal parliament's important role in the process opened up the system of intergovernmental negotiations, with (as we shall see) clear democratic results.[81] But procedurally speaking, patriation was no clear break with the synthetic past.

The Constitution Act 1982

In formal terms, patriation resulted from a new Westminster statute, the Constitution Act 1982, which put an end to any remnant of British sovereignty over Canada, at the same time that it gave legal force to a new and more complete fundamental law for Canada (critically including a Charter of Rights).[82]

Here London was simply endorsing a text of material constitutional character and colour produced by Canadian institutions. Westminster was not granting anything, but simply renounced all future powers over Canada. So there was a contrast between form and substance, but that by itself did not cast any real doubt on the constitutional character of the Constitution Act 1982.

The new constitution built on the BNA Act, 1867 and was named the Constitution Act, 1982. There was of course no longer a requirement for formal sanction by the UK Parliament. The most important single change was the introduction of the Canadian Charter of Rights and Freedoms, appropriately situated first in the Constitution Act (Part I, Sections 1-33). It provides basic civil and political rights, rights to mobility, protections against discrimination, gender rights, linguistic rights, and educational rights. Part II (Section 35) refers to the protection of aboriginal treaty rights. Part III sets out provisions to ensure equal opportunities and regional equalisation. Part V includes a new procedure for amending the Canadian constitution. Section 92 of the BNA Act was amended to strengthen provincial powers over non-renewable natural resources. There were no changes in the democratic institutions.

With regard to the amending formula, Ottawa had proposed a popular referendum device for the federal government to activate in cases of intergovernmental disagreement. This democratic measure was rejected by the provinces. The ensuing amending formula was based on the so-called 7/50 procedure (consent of the two houses of Parliament, coupled

[79] In 1975, Québec passed its *Charte des droits et libertés de la personne* (partie I de la Loi de 1982 sur le Canada (R.-U.), 1982, c.11, see also online: <http://www.cdpdj.qc.ca./fr/commun/docs/charte.pdf>). The Québec Charter offers far stronger protections of French language rights and is more conducive to the pursuit of collective goals than is the Canadian Charter.

[80] Cairns 1991, 23, *supra* fn 46.

[81] For a list of these changes in the Charter, see Russell 1993, 114 *supra* fn 59.

[82] For a brief selection of accounts of patriation see Keith Banting and Richard Simeon (eds), *And No One Cheered: Federalism, Democracy & The Constitution Act* (Toronto: Methuen, 1983); Edward McWhinney, *Canada and the Constitution 1979-1982* (Toronto: University of Toronto Press); Guy LaForest, *Trudeau and the End of a Canadian Dream* (School of Policy Studies Queen's University, June 1995); Russell 2004 *supra* fn 58.

with consent in the legislatures of two-thirds of the provinces with at least 50 percent of the population) *plus* (governmental) unanimity on a constitutional amendment procedure. Senate consent would no longer be needed for constitutional amendment.

But what seems to us fundamental is to consider that the Constitution Act 1982 was larger than the symbolic affirmation of Canadian constitutional ownership and normalcy. It went beyond signalling (mainly to Quebecers) that Canada was no longer tied to British apron strings.[83] Far more consequentially, the Constitution Act 1982 incorporated a Charter of fundamental rights, which marked a major constitutional break, and indeed unleashed a "Charter Revolution".[84] The political purpose of the Charter was to entrench individual rights in the Constitution, and to foster national unity.[85] This may be construed as a transformative intent in that it was envisioned from several perspectives as: (a) a means of weakening the executive-style governmental imprint that had marked the Constitution in the pre-Charter era; (b) a vehicle to inject a more citizen-participant constitutional ethos into the Constitution; and (c) a means to found the Constitution on popular sovereignty.

A central goal of the federal government in the constitutional reform process was to alter constitutional dynamics by weakening the ability of the Government of Quebec to foster a French language-based Quebec nationalism. This was to be achieved by creating a common Canadian national identity (albeit with a strong bi-lingual tenor), and by removing the symbolic ownership of the Constitution from the governments and instead presenting it to the people as rights-holders.[86] The transformative thrust was thus both directed at individual empowerment and communal reconfiguration through altered allegiances. The insertion of the Charter into the *Constitution Act, 1982* symbolically signalled a transformation from a "Governments' Constitution" to a "Citizens' Constitution".[87]

Having said that, the Canadian Charter was based on a complex democratic constitutionalism that sought to balance the forging of a common sense of community with group-based and communal difference and distinctness. It offered both special constitutional recognition for a range of groups,[88] as well as provisions for government actors to opt out of certain Charter of Rights provisions, hence introducing its own unique blend of rights-based constitutionalism and majoritarian democracy through the so-called "notwithstanding clause".[89] 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 (notably Quebec) nationalisms.

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[83] Simeon and Robinson 1990, 257 *supra* fn 39.

[84] Morton, F. L. and R. Knopff (2000) *The Charter Revolution and the Court Party* (Peterborough, ON: Broadview Press; Morton and Knopff) Cairns, A. C. "The Canadian experience of a Charter of Rights", in *The Chartering of Europe: The Charter of Fundamental Rights and its Constitutional Implications* E. O. Eriksen, J. E. Fossum and A. J. Menéndez, eds (Baden-Baden: Nomos Verlagsgesellschaft, 2003).

[85] Webber 1994, 83-84 supra fn 44.

[86] Cairns 1991, 2003.

[87] (Cairns 1991, 1992, 1993, 1995) Cairns, A. C. *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen's University Press, 1992).

[88] Particularly relevant sections were 15 on Equality Rights (race, national or ethnic origin, color, religion, sex, age or mental or physical disability); 23 on Minority Language Educational Rights; 25 on Aboriginal Rights; and 27 on Multicultural Heritage.

[89] Section 33 of the Charter, the so-called notwithstanding clause, permits governments (federal and provincial) to opt out of sections 2 or 7-15 of the Charter, for renewable periods of five years each. A similar although weaker instrument is section 1, the reasonable limits clause, which provides that the rights guaranteed in the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The Constitution Act, 1982 contained a set of provisions to recognise Canada's aboriginal peoples.[90] This was an important move away from the more or less explicitly stated assimilationist policy stance in Canadian Indian policy for a century, never accepted by many Indians, Metis or Inuits). Explicit constitutional recognition of Canada's aboriginal population reflected an attempt to address an element of Canada's constitutional pluralism that had been largely ignored and even suppressed. The new constitution offer some recognition of existing rights and some guarantees of access to and participation in further negotiations. Constitutional provisions thus committed the majority society to reconfigure its terms of co-existence with a historically suppressed and marginalised group, in a process of constitutional negotiation rather than through a clear settlement.[91]

To sum up, the Charter was intended to create a sense of popular sovereignty, through subsuming diversity under a complex notion of democratic constitutionalism that would induce people to understand themselves in multicultural rather than in mono-cultural or classical, nationalist terms. The Charter (and its aboriginal provisions) aimed at negotiating Canadians' plural selves within a constitutional framework explicitly anchored in a rights-based notion of individual autonomy, where governments would retain a central role in constitutional amendment. The upshot was to continue the path of constitutional synthesis. The patriation package nevertheless altered the terms of synthesis: through the insertion of the Charter, working out Canadians' plural communal and constitutional visions would take place in the interface of representative assemblies, intergovernmental negotiations and courts (notably through Charter-cases and the handling of aboriginal rights claims). This process would also have to be more sensitive to the rights recently obtained in the Charter.

Constitutional Life After 1982

While we saw in the previous section that the process of patriating the Constitution was still basically conducted within the intergovernmental (First Ministers Conference) framework, it nevertheless also had a strong social mobilizing and democratizing effect.[92] This was of course related to the Parliament's role, as well as to the symbolic and substantive role of the Charter which reminded citizens that as rights bearers they could not be content with a system of constitution making in which the heads of government simply negotiated agreements among themselves. Thus, the democratic dynamic of the patriation process coupled with the Charter's insertion in the *Constitution Act, 1982* brought to the fore 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?

These important normative questions were discussed within a deeply politicised context. The province of Quebec had failed to sign the Constitution Act 1982 and also declined to participate in further constitutional rounds so that when the First Ministers discussed aboriginal issues in 1983, Quebec was present but only as an observer. Further, much of the political establishment also outside Quebec was not willing to settle for the status quo.

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[90] See notably Part II Section 35. Section 25 in the Charter also noted that Charter rights should not "abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada ... "

[91] The original Constitution Act 1982 then also contained a provision, Section 37.1 which stated that there should be a constitutional conference on aboriginal and Northern issues within one year.

[92] For different positions on the political mobilizing effect of the Charter insertion, see Brodie, I. and N. Nevitte, "Evaluating the Citizens' Constitution Theory" *Canadian Journal of Political Science* 26, no 2 (1993a): 235-259; Brodie, I. and N. Nevitte, "Clarifying Differences: A Rejoinder to Alan Cairns's Defence of the Citizens' Constitution Theory" *Canadian Journal of Political Science*, 26, no. 2 (1993b): 269-272, Cairns, A. C. "A Defense of the Citizens' Constitution Theory: A Response to I. Brodie and N. Nevitte", *Canadian Journal of Political Science*, 26, no. 2 (1993): 261-267. See also Charles Epp, *The Rights Revolution (*Chicago: University of Chicago Press, 1998).

The Meech Lake Accord

A 1984 change in political leadership in Ottawa and Quebec gave new impetus to constitutional change. Conservative Prime Minster Brian Mulroney replaced Liberal Pierre Trudeau in 1984. Mulroney had campaigned on the need to obtain Quebec's signature to the Constitution Act so as to include Quebec in the constitutional family "with honour and enthusiasm".[93] A new round of reforms that resulted in the 1987 Meech Lake Accord was thus set in motion. The rationale for the Meech Lake Accord was to ensure that the Government of Quebec would assent to the Constitution Act, and that Quebecers would acknowledge that the Constitution recognized their particular contribution to Canada and their distinctiveness, through the insertion of the "distinct society" clause.[94] 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."[95]

The Meech Lake Accord, while initially a matter of recognizing Quebec's difference, became a matter for all the provinces. In a series of bilateral meetings, the federal government and Quebec worked out what the other provinces would accept, with the tacit understanding that there would be another provincial round afterwards to reward the provinces for their restraint in this round.[96] The notion that all provinces were equal was reflected in the process of forging the Accord (and in the preamble of the Accord), in the sense that it was negotiated in a closed setting by the eleven heads of federal and provincial governments.[97] The Accord had to be ratified by every one of these eleven (federal and provincial) governments (with approval by legislature) within three years as stipulated by the new amendment rules. During that period three provinces and the federal government held elections. The Accord was very unpopular, and this was reflected in the election results (in the federal election the Accord was overshadowed by the battle over the Free Trade Agreement with the US, which returned Mulroney to power with strong support from Quebec)). In the province of Newfoundland, new Premier Clyde Wells became the effective leader of the anti-Meech forces and rejected it, as did Manitoba. Opposition came from the political left, and many interest groups that had recently come to understand themselves as constitutional stakeholders, most notably women's groups and aboriginals. Pierre Trudeau also vocally opposed the Accord.[98]

The Meech Lake Accord failed because of strong popular opposition to the elite-based and secretive manner in which the Meech Lake Accord had been forged and because it was based on "an inadequate, outdated constitutional theory."[99] Women's groups also reacted negatively to the 'distinct society' provision for Quebec.[100] The leaders who forged the

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[93] Cairns 1991, 223 *supra* fn 46.

[94] Proposed Section 2(1) (b) of the amended Constitution Act states that "[t]he Constitution of Canada shall be interpreted in a manner consistent with ... (b) the recognition that Quebec constitutes within Canada a distinct society."

[95] Behiels, M.D. (1989) "Deciphering the Distinct Society Clause: Introduction" in Behiels, M. D. (ed.), *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989), 141-2.

[96] Cairns 1991, 225 *supra* fn 46.

[97] Cairns 1991, Russell 1993, 127-153 s*upra* fn 59.

[98] Russell 1993, 127-153 *supra* fn 59.

[99] Cairns 1991, 246. *supra* fn 46.

[100]" [T]he Supreme Court of Canada is the final court of appeal for all of Canada, including Quebec. Cases from Quebec dealing with conflicts between sex equality and the distinct society will, once decided by our highest court, be in our jurisprudence for citation in other sex equality cases, arising in other parts of Canada. It is thus not at all true to say that the relation between sex equality and the distinct society is a domestic matter, for Quebec only." Eberts, M. (1989) "Why

Accord in secret and defended it in public were motivated by the constitutional thinking of the pre-Charter era, in which the key constitutional stakeholders were governments and government executives officials were in charge of constitution making.[101] The public reaction, however, was strongly informed by the democratic constitutionalism of the Charter and the Constitution Act, 1982, which spoke to citizens as constitutional stakeholders. [102] Citizens therefore challenged executive privilege and raised the question of how a democratically legitimate process of constitution making should be conducted.

The fate of the Meech Lake 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. Indeed, once the genie of democratic constitutionalism is brought out of the bottle, it cannot easily be controlled, and even less be put back in. That, we will insist, is a lesson that Europeans should take to heart.[103]

Prime Minister Mulroney, Quebec nationalists, and numerous Accord supporters presented the failure of the Meech Lake Accord as a major betrayal of Quebec. [104] Aboriginals were also pressing for self-government; with the Accord's self-government provisions dashed with the rest of it, they thus sought another constitutional round.[105] The same applied to Quebec. Barring a new agreement, Quebec's political leaders announced that it would reconsider its role in the federation, with a possible secession as one option. The centuries-old issue of addressing Canada's constitutional pluralism remained a central item on the constitutional agenda, but would now have to be addressed in a constitutional context to which Canadian citizens attached much stronger democratic expectations.

The Charlottetown Accord

The next major effort at formal constitutional change, which led to the Charlottetown Accord, was far more open and consultative than even the patriation process had been. Those in charge recognized that a more open process than the Meech Lake round was needed.[106] But when they launched the process there was no plan to place the package before the public for direct approval. The need for that step became evident only after the package had been negotiated. Thus, "the development of constitutional proposals was completely detached from the referendum process",[107] another clear parallel to the EU's Laeken process. The dynamic of the Charlottetown process emerged as a result of a perceived failure; it was far more open in that it was an explicit attempt to go beyond negotiation between governments only. However, the process was also greatly shaped by the Quebec ultimatum.

The Charlottetown process was both more intense and far more comprehensive than Meech Lake. It reversed the Meech Lake sequence in the sense that it started with a constitutional debate involving parliamentary committees and regional constitutional mini-conventions and, most importantly, involving the general public at each site.[108]

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are Women Being Ignored?" in Behiels, M. D. (ed.) *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord* (Ottawa: University of Ottawa Press, 1989), 316.

[101] Cairns 1991, 108-138, 223-63*, supra* fn 46.

[102] Cairns 1991, *supra* fn 46.

[103] J. E. Fossum, "On democratizing European Constitution Making: Possible lessons from Canada's experience", *Supreme Court Law Review*, 37 (2007):343-381.

[104] Cairns 1991, 228 *supra* fn 46.

[105]Russell 1993, 155 *supra* fn 59.

[106] Ibid., 156-68.

[107] Ibid., 207.

[108] Ibid., 190ff.

Following consultation, the documents and proposals were handed over to the heads of government (with Aboriginal representation present), who negotiated among themselves.[109]

During the quite 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, and normative dimension, the Charlottetown Accord was far more comprehensive and complex than its Meech Lake predecessor or even the 1982 patriation, for that matter. The Charlottetown Accord expanded the Meech Lake principle of recognition of Quebec's distinct identity to include Aboriginals.[110] In fact, while initially framed as an effort to rectify the alleged historical injustice to Quebec, the Charlottetown Accord came to revolve as much around what people saw as a deeper and a more profound case of historical injustice: the plight of Canada's Aboriginal peoples.[111] This recognition was to be balanced with equality protection and diversity awareness along gender, ethnic, racial, provincial, and linguistic lines. The Accord thus ended up as a unique attempt to balance four ideas of equality: of citizens, of provinces, of two nations, and of aboriginals. "The product was a document that could appeal to no clear conception of justice."[112]

Canadians were then asked to accept or reject this most substantial change to Canada's institutions since its inception in two popular referenda held simultaneously in the Rest-of-Canada (ROC) and in Quebec. This event prompted Russell to note that: "On 26 October 1992 the Canadian people, for the first time in their history as a political community, acted as Canada's ultimate constitutional authority."[113]

The Accord was rejected in both referenda. Thus the Canadian people (not simply Quebec) could apparently only provide a negative constitutional clarification.[114] The Accord offered constitutional recognition to what divided Canadians as much as to what kept them together. Many of the people that rejected the Accord believed they had more in common than was reflected in the Accord.[115] It was such a comprehensive package of different types of reforms that very few supported the entire reform package (only 12 percent agreed with all six proposals).[116] Further, whereas Prime Minister Mulroney argued early on in the process that it was "Canada's last, best chance for survival", most citizens did not succumb to such threats. Many (45 per cent) reckoned that there would be a further round of constitutional talks.[117] This did not happen.

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[109] Ibid., 193.

[110] Cairns 1995, 216-237 *supra* fn 13.

[111] Ibid..

[112] Alain Noel, "Deliberating a Constitution: The Meaning of the Canadian Referendum of 1992", in Cook, C. (ed.) *Constitutional Predicament, Canada after the Referendum of 1992,* (Montreal and Kingston: McGill-Queen's University Press, 1994), 64-88, at 75.

[113] Russell 1993,190 *supra* fn 59.

[114] Ibid., 5.

[115] Pierre Trudeau articulated this view clearly. He said that the Accord would "institutionalize constitutional bickering"... where collective rights would matter more than would individual ones, where the Accord would create a "hierarchy of classes of citizens" and where "the blackmail [from Quebec] would continue." Trudeau 1992, cited in Richard Johnston, Neil Nevitte, Andre Blais, Elisabeth Gidengil, eds, *The Challenge of Direct Democracy: The 1992 Canadian Referendum* (Kingston and Montreal: McGill-Queens University Press, 1996), 69.

[116] Clarke, H. D., Kornberg, A. and P. Wearing (2000) *A Polity on the edge: Canada and the politics of fragmentation*, Peterborough, Ont.: Broadview Press, 97.

[117] Ibid., 97-102.

The narrow victory for the 'no' side (50.6 per cent) in the 1995 Quebec referendum underlined the need to clarify the procedures for secession set out in the Supreme Court's 1998 Secession reference and the Clarity Act.[118]

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."[119]

Constitutional Catharsis?

Canadian constitutional patriation had a transformative intent but this did not result in a successful constitutional moment. The post-patriation process unfolded as a major struggle for recognition. The constitutional transformation was laden with conflict. Distinct and competing conceptions of political community were mobilized, but the process never degenerated into violence. It is on that basis that we claim that the process is best understood as an unwieldy, cathartic, process of constitutional clarification.

With constitutional catharsis we think of a particularly intense – even traumatic - process of peaceful constitutional contestation with certain democratic effects.[120] Catharsis was sparked through the effort to break the intergovernmental logjam by opening a closed system of constitution-making to public scrutiny and participation. But citizens were only partially let into a process still organised *within* the general ambit of intergovernmental relations. Citizens experienced unstable and unpredictable openings and closings of the process that were not justified by a proper constitutional theory, and bred distrust. Citizens became variously spectators to and direct participants in high-stakes politics marked by first ministers' power-games, strategic action, threats (of secession and break-up) and brinkmanship. Citizens saw this system as bargaining over their rights; as redefining issues and concerns; as organising certain concerns in and excluding others; and as elites using the constitution as a mere strategic resource in their haggles. This process, however traumatic, nevertheless had clear democratizing effects. It also took place in a setting with agreement on the fundamental liberal principles of democracy and the rule of law.[121]

The first effect was a reconfigured conception of justice: weak and disenfranchised groups received some form of constitutional recognition. Canada's constitutional transformation thus helped to shift the standards of justice, at least those articulated in inter-governmental negotiations.[122] In the pre-Charter period these were shaped by the

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[118] Canada, An Act to give effect to the requirement for clarity as set out in the opinion of the Supreme Court of Canada in the Quebec Secession Reference, 2000, C-26. Available at: <http://laws.justice.gc.ca/eng/C-31.8/20100525/page-0.html?rp2=HOME&rp3=SI&rp1=Clarity%20Act&rp4=all&rp9=cs&rp10=L&rp13=50#idhit2>.

[119] Cairns 2003, 109 *supra* fn 2.

[120] Fossum 2007, *supra* fn 105.

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

[122] Evidence of value change is provided in Paul M. Sniderman, Joseph F. Fletcher, Peter H. Russell And Philip E. Tetlock, *The Clash of Rights: Liberty, Equality and Legitimacy in Pluralist Democracy*, New Haven: Yale University Press, 1997. It should be added that the ability of the Harper government to govern as it does suggests that value changes need not translate into effective action. It should also be added that there is not scholarly consensus on the beneficial effects of the Charter. For some critical voices on failures or deficiencies consider Joel Bakan, *Just Words, Constitutional Rights and Social Wrongs,* Toronto: University of Toronto Press; Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights,* Toronto: University of Toronto Press, 1995.

perceived need to accommodate Quebec nationalism. Now this had to compete with the need to rectify historical injustice to Aboriginals, and to accommodate demands from other groups in Canadian society (*i.e.,* women's groups, gays and lesbians, and disabled people). As such, it appears that opening up the process has helped to rank-order conflicts and concerns more in line with people's intuitive conceptions of justice (rectification of historical and contemporary injustice).[123]

Second was heightened constitutional reflexivity. The Canadian political system appears to have developed clearer principles on such issues as Quebec separation. The Supreme Court deemed unilateral secession unconstitutional but still possible, provided it met with a set of procedural requirements.[124] 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 preceded the EU.

Finally, more 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. Finally, we can observe that the constitutional transformation did not put an end to the accommodating style of politics associated with the Canadian intergovernmental approach, but it gave it a more principled foundation.

Canadian Synthetic Lessons for Europe?

Through patriation, Canada underwent a major constitutional transformation where it did away with the remaining vestiges of the initial derivative constitutional order. The Charter was key in the constitutional transformation, and enjoys great popular support across the country.[125] And still, we have seen that patriation was peculiar in constitutional terms, looking more like a constitutional moment *manqué* than a full transcendence of the peculiar Canadian blend of constitutional synthesis. Nonetheless, the "Citizens Constitution" was a major symbolic change; it empowered citizens and produced changes in inter-institutional relations, along both horizontal and vertical lines, all with democratic implications. And all of this was achieved *through ratification failures, not constitutional successes.* We thus have the somewhat ironic result that Canada's patriation, which failed to obtain support from all major constitutional stakeholders ,has effected a major constitutional transformation through the broadly accepted Canadian Charter of Fundamental Rights.

This suggests that there is less of a parallel between the EU and Canada in this second, Canadian post-patriation, phase. The EU seemed to seek to undergo a similar constitutional transformation at Laeken, but this was rejected in referenda in France and in the Netherlands. Indeed, national governments found ways and means - including dressing most of the Constitutional Treaty as a mere reform Treaty, thus avoiding politicisation of the ratification process - to close the ratification crises by getting fundamental reform legally enacted in the form of the Lisbon Treaty. But whether this Treaty, accepted by all major (governmental) stakeholders, would enjoy similar popular support is something on which the jury is still out.

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[123] Fossum 2007, *supra* 105.

[124] Reference re Secession of Quebec, [1998] 2 S.C.R. 217. See also Gagnon, Alain-G and James Tully (eds) (2001) *Multinational Democracies* (Cambridge: Cambridge University Press).

[125] Opinion polls consistently show strong nation-wide support for the Charter Fletcher, J. F. and P. Howe, "Public Opinion and Canada's Courts" in Paul Howe and Peter H. Russell, eds, *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001), 257-9; Cairns 2003, 105 *supra* fn 2.

After each major constitutional efforts in Canada (1982) and the the EU (Laeken process), the elites reverted back to bare-bones intergovernmental/First Ministers type conferences (Canada: Meech Lake and EU: Lisbon). The important difference was that in Canada the Meech Lake Accord met with strong public opposition which killed it, whereas in the EU the European Council dropped the constitutional label and got Lisbon passed, effectively weakening the association between EU democratization and democratic constitutionalism. Indeed, the Lisbon agreement leaves the project of EU democratization on a much weaker normative foundation.

It is therefore useful to pay attention to the important *difference* between Canada and the EU, namely, the long-term effect of the Charter revolution *despite* ratification failures, plus the robustness of the democratic institutional framework.

First, the Charter Revolution took roots because it met with a high level of *citizens' acceptance,* even in Quebec, which has still not formally signed the Constitution Act, 1982. This success allowed the Charter to foster a rights-based (and in allegiance terms thin and reflexive and therefore also more tenuous) constitutional patriotism based more on across the country; it also instilled a sense of democratic ownership of the constitutional construct in place. Further, the state frame also gave normative credence and served to stabilize the process. Constitutional turbulences occurred within a setting of already established representative-democratic government at both levels. These arrangements, as strong publics, worked as important democratic enabling devices as well as important democratic safety-valves. They provided and interpreted information; served as vehicles for critical scrutiny of power-holders; were fora for the inclusion of persons and arguments; and served as platforms for political mobilisation. They dealt with the strong public uproar that built up against the closed and secretive system of constitution making through FMCs. Indeed, the robust institutionalisation of democratic institutions rendered palpable the continued relevance and salience of familiar constitutional-democratic standards. At the same time, this system also contained important mobilising and sanctioning devices with which to limit centrifugal forces.

The Canadian process of constitutional catharsis was driven by actors with competing constitutional conceptions and without an agreed-upon theory of how the process should unfold. This description should strike a chord with observers of European constitutional politics. Still, the Canadian case shows that such a volatile process can still contribute to constitutional clarification. Indeed, constitutional catharsis has allowed Canadians to achieve four major things:

1. A strengthened allegiance to basic democratic constitutional norms and procedures.
2. A set of constitutional precepts within which continued contestation over polity and community can take place without destabilising the polity (indeed the Secession judgment of the Supreme Court and the Clarity Act contain provisions for democratic secession).
3. An altered approach to community co-existence. The nationalist modus is one of a largely taken-for-granted sense of allegiance. Canada's is instead marked by onus on contestation and reflexivity; thus the system appears more attuned to voice than to loyalty.[126]
4. A sense of the risks of judicialisation; constitutional catharsis has made crystal clear the central importance of properly entrenched representative government,

[126] Fossum 2007, *supra* fn 105. See also Fossum, J. E. "Constitutional patriotism: Canada and the European Union" in *Constituting Communities: Political Solutions to Cultural Difference*, Mouritsen, P. and K. E. Jørgensen, eds, 138-161 (London: Palgrave, 2008).

crucial in providing clear political steering and helping to rein in judicial *derrapages* which could have serious democratic implications.

On such a basis, we contend that the Canadian post-patriation transformation has furthered constitutional synthesis, and indeed, has helped stabilising synthesis. The Charter amplified the constitutional-symbolic status of fundamental rights, so that Canadian democracy is now about reconciling democratic majoritarianism with basic individual rights in a rather synthetic fashion (a binding Charter of Rights tempered by a notwithstanding clause to accommodate provincial variation when provincial legislatures take the politically risky step of declaring some Charter rights inapplicable to provincial legislation).[127] We saw this also in the Charter's language rights that sought to reconcile French and English diversity through a nationwide commitment to bilingualism, although the strong Quebec reaction has also shown that the effort was not successful. And we saw it in the major attention that has been paid to aboriginal (First Nations) issues and concerns. This is indeed the most ambitious aspect of Canada's constitutional development, namely the effort to develop a viable synthesis based on a complex and composite conception of underlying community.[128]

Conclusion

In this chapter we have seen how Canada's constitutional arrangement has changed. The initial pre-patriation period marks the gradual process of removing it from the colonial anchor. This was a difficult process because of domestic constitutional pluralism and contestation over type of polity and nature of community with occasionally deleterious effects. It appeared almost as a constitutional transformation in reverse and helped to keep alive a penchant for constitutional avoidance.

Domestic and international developments from the 1960s onwards rendered this situation increasingly untenable, which resulted in the move to patriation in the early 1980s. The Charter excepted, the constitutional substantive changes were quite limited. But the Charter has been key to Canada's subsequent constitutional transformation. We depicted the process as one of constitutional catharsis to underline its contested but also eventually democratizing character. Canada attests to the difficulties of reconciling constitutional pluralism; it also testifies to the central role of proper democratic institutions. However gradual, the entire process has been about establishing an institutional-constitutional apparatus that can put a democratic mark on the complex process of managing pluralism and diversity.

[127] Dobrowolsky *supra* fn 66, and Webber 1994, *supra* fn 44.

[128] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).