The transformation of the nation-state - the EU and Canada compared

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I Introduction

The European Union (EU) is often depicted as a novel type of entity. It is both multinational and poly-ethnic.[1] It is committed to democratic principles, but pursues these within a complex supranational structure that is neither a state nor a nation.

But how unique is the EU? There are many ways of exploring this. One obvious approach is through comparison. The general inclination among students of the EU has been to compare it with the U.S., and this is also what the rest of the chapters in this book do. In this chapter I propose instead to compare the EU with Canada, which is also a highly complex multinational and poly-ethnic entity, which never succeeded in becoming one nation. The EU can be seen as a case of forging a new type of entity out of existing nation states, whereas Canada has never fitted the one-nation mould. Both contain elements that deviate from the nation-state mould but neither makes up an outright departure from this. They are both better thought of as cases of transformation.

These processes *might* have democratic potential. This could stem from a greater degree of *inclusivity* and *reflexivity* than is possible within the nation-state framework. The claim that I will discuss in this chapter is that these two entities converge in their greater inclusivity and reflexivity.

To substantiate this I first need to demonstrate that when it comes to the question of nation state transformation, Canada is a more appropriate case for comparison than is the U.S. The U.S. is a sovereign state with a national identity (albeit one that is not based on the classical referents to nation), whereas Canada is a state but not a nation. Historically, one powerful portrayal has been that of two nations warring within the bosom of one state.[2] Its cultural and ethnic complexity has increased greatly in the post-war period. Today, it is variously referred to as a post-national entity, a multinational and poly-ethnic federation, a confederation etc. These traits might also make it particularly susceptible to further transformation. Further, Canada has already for decades experienced far more uncertainty as to

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[1] For definitions of these terms see Kymlicka 1995; 1998.

[2] Lord Durham, High Commissioner for the adjustment of certain important questions depending on the provinces of Lower and Upper Canada, respecting the form and future government of the said provinces, and Governor General, reported back to the English King in the famous Durham Report of 1838, that " I expected to find a contest between a government and a people: I found two nations warring in the bosom of a single state: I found a struggle, not of principles, but of races; and I perceived that it would be idle to attempt any amelioration of laws or institutions, until we could first succeed in terminating the deadly animosity that now separates the inhabitants of Lower Canada into the hostile divisions of French and English." For excerpts see http://library.educationworld.net/txt28/ Note that this reading is not a consensual reading

its territorial and cultural make-up than has the U.S. This has also shown up in several decades of what is called 'mega constitutional politics' and which involves a broad-based discussion on the constitutional essentials of the polity, combined with large-scale efforts at change. This debate and the change efforts could be relevant to our understanding of transformation of the nation-state. Finally, Canada shares with many of the member states of the EU a more solidaristic conception of community than has the U.S. This solidaristic trait could be of relevance to the direction and substance of transformation. In sum, then, Canada may be a particularly useful case for comparison with the EU in order to shed light on the prospects for *peaceful and democratic transformation* of the nation state.

In the next section, I will outline a set of criteria that permit the assessment of the extent to which the two entities deviate from the nation-state model, seen as template and not as empirical reality. The criteria are set up to permit us to assess the issue of inclusivity and reflexivity. On the basis of this I will try to substantiate a claim to the effect that the transformations can have democratic potential.

II. The transformation of the nation-state

The state is a political institution and an organisational form, whereas the nation is a cultural community and an idea. To Weber the state is "a human community that (successfully) claims *the monopoly of the legitimate use of physical force* within a given territory".[3] This definition only applies to the nation-state form of state.[4] The state is sovereign.[5] The classical doctrine of sovereignty states that: "first, no one can be the subject of more than one sovereign; second, only one sovereign power can prevail within a territory; third, all citizens possess the same status and rights; and fourth, the bond between citizen and sovereign excludes the alien."[6] The international *system* of states is marked by anarchy in the sense that sovereign states do not recognise any superior authority.[7]

Nation refers to a specific type of community based on a form of solidarity. This form

[3] Weber [1948] 1991, 78.
[4] Kaldor 1995, 73.
[5] Krasner identifies 4 types of sovereignty. Cf. Krasner 1999.
[6] Linklater 1996, 95. It has acquired five monopolies: it monopolises control of the instruments of violence; has sole right to tax citizens; orders the political allegiances of citizens and enlists their support in war; right to adjudicate in disputes between citizens; and has exclusive right of representation in international society. Linklater 1998, 28; cf. Held 1993).
[7] Morgenthau 1993; Bull 1977; Held 1993; Waltz 1979; Linklater 1996; 1998.

of solidarity translates into a sense of community - both of which are maintained and shaped by patterns of communication and interaction.[8] A nation is an invented or even *imagined* community[9], i.e. some symbols and aspects of a community's past are highlighted at the behest of other: "Only the symbolic construction of "a people" makes the modern state into a nation-state."[10] National identity derives from: historic territory; "common myths and historical memories; common, mass public culture; common legal rights and duties for all members; [and] (5) a common economy with territorial mobility for members."[11] National identity is based on the conception of a collective national consciousness, whose sources are culturally based, but need not be predetermined or given, and can be forged.[12] Nationalism as a doctrine of popular freedom, sovereignty and self-determination, not the type of community associated with the nation has given the phenomenon such political force and ubiquity. Nationalism is so pervasive that it can be deemed the dominant ideology today.[13]

The nation-state represents a blend of two principles that have historically been in tension with each other, namely state sovereignty (which highlights the link between sovereign authority and territory) and national sovereignty (which stresses sovereign authority and a defined population)[14] or what will here be referred to as national self-determination.

Nation-state formation was a *political project*, with an ideology and a set of architects. The nation-state is *an institutionalised means of exclusion* of those not deemed to belong to that particular nation. The criteria of access and of exclusion are based on whether outsiders comply with some aspect of cultural and ethnic and historic community, and not with individuals' mutual recognition of each other. Nationally based democracy confines the notion of self-rule to those who are acknowledged as nationals of the state. In a system of nation-states, democracy is thus confined by and to the nation.[15]

Today, states have become far more closely linked together than before across the whole range of political, social, cultural, economic and legal domains. Tight links are amplified by the revolution in microelectronics, in information technology and in computers. New

[8] Anderson 1991; Deutsch 1994.
[9] Anderson 1991.
[10] Habermas 2001, 64.
[11] Smith 1991, 14.
[12] There are different views as to how 'thick' this sense of community and belonging is and from where it is derived. A widely accepted distinction is between *civic* and *ethnic* nation. Cf. Hutchinson and Smith 2000.
[13] Smith 1991.
[14] Cf. Barkin and Cronin 1994:108.
[15] There are several problems of democracy that are amplified in such a system. For one, territorial borders cannot be altered by democratic means. Further, in a democracy the people cannot determine who the people are, i.e., establish *viable* criteria for exclusion. Offe 2000.

international and transnational actors have emerged. States are faced with a whole range of boundary-spanning problems pertaining to the environment, international crime, terrorism, tax evasion and so forth. These and other pressing problems reveal grave inadequacies in the state as a problem-solving entity. The developments listed above also affect its ability to claim sole allegiance, and the very legitimacy of such a claim, as well.

Today's process is unprecedented in both spatio-temporal and organisational terms. Global flows are far more extensive, intensive, have a far higher velocity and also impact than earlier processes of globalisation. Contemporary globalization is also more strongly institutionalised than before, through international treaties and conventions, regimes, networks and patterns of interaction and contact. The present situation is unique in its *confluence* of factors and processes.[16] A nation-state, set up as an institutional arrangement to exclude those not deemed to belong, is today faced with the prospect of *decisional exclusion* in that many of the decisions affecting it are made elsewhere.

In the below I present a set of relevant criteria for assessing the EU and Canada as cases of transformation of the nation state. The first set speaks to mapping the deviation; the second to the development of alternative doctrines, as part of democratic experimentation and reflexivity; and the third to constitutional debate and change, also intrinsic parts of constitutional reflexivity[17]. On the first, that of empirical mapping, the criteria pertain to:

a) the extent to which these two entities deviate from core elements of nation state based sovereignty and identity. Such transformations could come through:

- supranational or international bodies or arrangements that tie states up and undermine their sovereignty;
- incompatibility between state sovereignty (link authority-territory) and national self-determination (link authority-defined population) but without the entity breaking up;[18]
- non-state transnational and international actors that seek and propound other types of allegiance than those associated with the nation-state, and the entrenchment of such in institutional structures so as to form viable alternatives

[16] Held et al. 2000.
[17] Bohman 2004.
[18] Hedley Bull has noted that: "if nationalist separatist groups were content to reject the sovereignty of the states to which they are at present subject, but at the same time refrained from advancing any claims to sovereign statehood themselves, some genuine innovation in the structure of the world political system might take place." Bull, cited in Linklater (1996, 79).

to national identity and sense of attachment; and

- the orientation of politics along divisions and cleavages other than those associated with sovereignty and national identity.

To fully understand a transformation we need to know the point of departure, the process of change, and the end result. The indicators above speak foremost to departure and process and less so to result.

Today there is no consensus on the result, i.e., what a democratically viable non-state, non-nation entity might be. In a similar vein, there is hardly a clear blueprint for the EU or for Canada. But there may be self-conscious efforts at developing new justifications and solutions. I have chosen to examine the transformations through the criteria of inclusion and reflexivity. With inclusion I refer to physical inclusion of non-nationals, as well as the taking into account of the interests and concerns of non-nationals. Both are matters of degree – more inclusiveness than within a nation-state, less than in a global community. With reflexivity, is meant the extent to which the polity is open to challenge, reinterpretation and amendment. It entails a process that is open to deliberative challenge, a process of critical self-examination on who we are, who we should be, and who we are thought to be. Rights that ensure individual autonomy – private and public – are critical institutional preconditions for reflexivity.

The second set of criteria look for alternative doctrines:

b) - the espousing of more inclusive and reflexive doctrines to replace nationalism; and their entrenchment in policy programmes and institutional arrangements

Reflexivity could also manifest itself in the search for new terms or a new terminology of association that speak to a more inclusive form of association than nation. This would be particularly effective if it entailed efforts at forging such terms into a coherent *alternative vocabulary of association*. The reason for this focus on terms is because there is a distinct vocabulary of the nation-state. When the nation-state was established in Europe "the whole European vocabulary of association … [was] ransacked for suitable expressions with which to describe and to appraise the formal character of a modern European state."[19] This vocabulary is also highly malleable. Many actors and analysts are also committed nationalists and may even subsume novel phenomena under old rubrics, hence downplay the actual magnitude of change. An indicator of converging change is the presence of a similar search for suitable vocabulary in each entity.

Finally, to get a better sense of the magnitude of reflexivity in a given polity it is necessary to examine:

c) - whether there is an ongoing discussion of constitutional essentials and a willingness and ability to entrench whatever agreement is reached in binding constitutional shape

This presupposes understanding of the link between constitution and reflexivity: Constitutions "are neither simply institutional designs nor merely first-order legislative practices, but rather also make issues of social order and democracy itself open to deliberative decision-making as it is reflexively institutionalized."[20] Constitutional contestation (over the substance of the constitution as well as over how it is forged and amended) is therefore also part of the terrain where reflexivity unfolds.

The next section (III) addresses the first set of criteria (a) and provides a mapping of the extent to which the EU and Canada depart from the central tenets of the nation-state model. In the following section (IV), which deals mainly with the second set of criteria (b), the discussion focuses on alternative doctrines and vocabulary. This also helps shed light on the third criterion (c), whether these issues touch on constitutional essentials. A proper assessment of the extent to which alternative doctrines and discussions become embedded in policy programmes and institutional and constitutional arrangements requires far more space than is available here. The same applies to the degree to which these notions are generally accepted. I make some references to their standing but do not provide a comprehensive assessment here either. In the last main section of the chapter (V), I discuss whether there are ongoing discussions of constitutional essentials, and whether these are confined to the level of elites, or whether they encompass all or most of society. Their degree of openness of course is vital to the democratic quality of these processes.

III. Departing from the nation–state mould? - The EU and Canada Assessed

Today, state sovereignty is challenged by major transformations within the realm of international law. The first is the recognition of individuals and groups as legal subjects of international law. Second, the realm of international law is shifting from primarily being focused on political and geopolitical matters to an increased focus on regulation of economic, social, communication and environmental matters. Third, is the change in the sources of

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[19] Oakeshott 1975, 320.
[20] Bohman 2004:323.

international law – which far more than before include international treaties or conventions, international custom and practice, and "the underlying principles of law recognized by 'civilized nations'".[21] This has also led to an increased focus on the relation between the individual and her own government. "International law recognizes powers and constraints, and rights and duties, which have qualified the principle of state sovereignty in a number of important respects; sovereignty *per se* is no longer a straightforward guarantee of international legitimacy. Entrenched in certain legal instruments is the view that a legitimate state must be a democratic state that upholds certain common values."[22]

These legal developments are not uniform across the globe and have been carried further in Europe than anywhere else. This applies to the European Convention of Human Rights (ECHR of November 4, 1950) and also to European Union Law (the two converge in the field of human rights). The ECHR permits citizens to initiate proceedings against their own governments. The Court is outside of the jurisdiction of the states, and its judgements are de facto legally binding on the states. "Within this framework, states are no longer free to treat their own citizens as they think fit… The European Convention on Human Rights is most explicit in connecting democracy with state legitimacy, as is the statute of the Council of Europe, which makes a commitment to democracy a condition of membership."[23] The most explicit curtailments of state sovereignty have occurred in Western Europe, where the greatest transformations of international law have taken place. Here these are bolstered and sustained by a supranational structure of governance.

A supranational European Union

The EU embeds this legal system in a supranational structure of governance, another obvious curtailment of state sovereignty. In institutional terms, the EU is a highly complex entity, which holds a number of features that set it apart from any state.[24] It is a complex *mixture* of supranational, transnational and intergovernmental features. Its legal system claims preponderance over national systems and has direct effect on the Member States, in the areas within its jurisdiction. Many analysts also claim that the EU has a constitution.[25] The European

[21] Held et al. 2000, 63.
[22] Held et al. 2000, 65.
[23] Held et al. 2000, 68-9.
[24] Schmitter 1992; 1996; 2000; Preuss 1996; Weiler 1995.
[25] This is a unique type of non-state based *constitutional treaty* (cf. Weiler 1995, 1999; Grimm 1995. It has also been referred to as a *material* constitution (Eriksen, Fossum and Menendez 2004).

Parliament, the Court of Justice and the Commission are supranational institutions and are institutionally committed to further integration. But the Member States continue to see themselves as the 'masters of the treaties', and each Member State has the right to veto treaty changes, thus retaining a strong 'statist' imprint on the EU. This is also retained in some of the institutions. The Council is an intergovernmental body but permits an extensive amount of 'pooling of sovereignty' through a consensual decision process ensured by complex voting systems (based on co-decision, co-operation and consultation).

The EU has not been granted international recognition on a par with a state. It also defies conventional conceptions of sovereignty as consistency between a set of rules and the territory on which they operate. On the one hand its rules and regulations spread well beyond its formal bounds. It has signed the EEA agreement with the EFTA states, which effectively extends much of the *Acquis Communautaire* to these countries, and has signed association agreements with applicant countries. On the other hand, it does not have a clearly defined territory on which its own institutions work in an exclusive manner. In that sense it is perhaps better to think of as marked by variable geometry. This has many sources, among which are treaty provisions permitting further integration, as well as a wide range of exemptions. Some countries have exemptions from treaty provisions (Denmark has among others exemptions from European citizenship), some member states have opted out of the Euro, and some are not members of the Schengen Agreement (UK, Ireland), whereas non-members such as Norway and Iceland are.[26] It does not have a clearly established centre of authority. Nor is it entirely clear where its sovereignty is ultimately located. The EU is no doubt the most radical current peaceful attempt to depart from the prevailing doctrine of state sovereignty and national identity. As a novel system of binding interstate interaction it poses a direct challenge to the still prevailing conception of the international system, the Westphalian one.

European citizenship is also different from established nation-state based conceptions: "Union citizenship is not so much a relation of the individual vis-a`-vis Community institutions, but rather a particular legal status vis-a`-vis national member states, which have to learn how to cope with the fact that persons who are physically and socially their citizens are acquiring a kind of legal citizenship by means of European citizenship without being their nationals."[27] European citizenship reflects the *explicit inclusion of non-nationals* into the operations of every Member State. In this context, we are reminded of the tenuous and

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[26] The UK and Ireland take part in some of the fields of Schengen co-operation. http://europa.eu.int/scadplus/leg/en/cig/g4000s.htm#s1

contextual link between citizenship and national identity. Citizenship and national identity, as Jürgen Habermas reminds us, are not conceptually linked, although they may be so empirically.

Such distinct status is not confined to EU citizens. Although there is an important distinction between European citizens and third-country citizens resident in the EU, the latter also have some rights, which vary considerably from one Member State to the other.[28] Terms such as *post-national* citizenship[29] and *denizenship*[30] have been used to depict their role. In the Union there is thus a range of different categories of territorial inclusion, and where different degrees of inclusion are associated with different compositions of rights.

In the EU there is no single language, ethnic group or nation that can command majority support. There is no overarching European identity (although there are numerous efforts to create such). The European Union at present consists of 25 member states (4 are federal or quasi-federal), it has 20 official and working languages, numerous minority nationalisms and ethnic minorities (some of which cross state bounds), and regional movements.

In sum, the EU is emblematic of a major transformation in Western Europe, in that its unprecedented system of law, and supranational institutions and border-transcending/ eliminating arrangements tie the member states (and affiliated states) up and weaken or undermine their sovereignty. The Union itself is not based on established conceptions of sovereignty. It also propounds a *post-national* type of allegiance that is thinner than that of nationalism.[31]

Western Europe, however, is not unique with regard to the changes that are taking place. How extensive are these in Canada?

'Multinational' Canada or post-national Canada

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[27] Preuss 1998, 147.
[28] Habermas 1996, 495ff.
[29] For the definition of this term and how it differs from the conventional model of citizenship, see Soysal 1994.
[30] A *denizen* can be defined as a long-term resident "who possess[es] substantial rights and privileges… The denizenship model [of citizenship] depicts changes in citizenship as an expansion of scope on a *territorial* basis: the principle of domicile augments the principle of nationality. Denizens acquire certain membership rights by virtue of living and working in host countries" (Soysal 1994, 138-9). Soysal critiques this model for being confined to the nation-state model.
[31] Such a political identity is forged through embrace of democratic norms and human rights. Habermas 1998b; Curtin 1997; Eriksen and Fossum 2000.

Canada is recognised as a sovereign state and is one of the oldest constitutional democracies in the world. But there are several aspects of its external connections and internal relations that, when taken together, leave it with weaker territorial control than we associate with a sovereign state and deep tensions between state sovereignty and national self-determination.

The most important external aspect is the (initial CAFTA and later) NAFTA agreement that Canada entered into with the US and Mexico in 1994. The status of NAFTA in constitutional terms is contested,[32] but it is clear that Canada through NAFTA is tied up in a semi-continental economic agreement, which places limits on its sovereignty. This is a far more explicitly economic arrangement than is the EU. It is a system of state restraint combined with corporate empowerment, and without compensatory or market correcting measures. The shock of September 11 ignited a Canadian search for measures to ensure continued open borders, whilst responding to American security concerns.[33]

The external constraint is linked up with a great measure of internal uncertainty. This is foremost but far from exclusively related to the spectre of Quebec secession.[34] The question of the status of Quebec in the federation has been debated throughout Canada's gradual transition from colony to independent state. Formally speaking, it was only in 1982 that Canada patriated its constitution (effected in Britain), through the Constitution Act 1982, and declared that the constitution emanated from the Canadian people.[35] The province of Quebec has still not formally signed this Act. In political terms, the lack of Quebec's acceptance of portions of this Act has helped keep alive the larger question of the role of Quebec within the Canadian federation. This is one of several grounds for considering whether Canada may represent a lasting departure from the nation-state model.

The sceptre of Quebec separation has cast uncertainty on the question of the territorial make-up of the country. At present the threat of Quebec separation has abated, as was evident in the 2003 Quebec election and in public opinion polls. But the memory of the latest referendum in 1995 (the second such referendum), where 49.4 per cent voted Yes, whereas 50.58 percent voted No (the No side won by only 54,288 votes), still lingers. If Quebec were to

[32] Some depict it as having constitution-like features (Schneiderman 1996; Clarkson 2003) whereas others see it as a confederal type of arrangement, which delimits state sovereignty in certain areas (Abbott 2001, 171). It has limited direct effect, confers a form of property rights on foreign investors and prevents expropriation and nationalisation.

[33] The Council of Canadian Chief Executives even argued for a continental 'security perimeter'. Cf. Clarkson and Banda 2003, 11.

[34] The external and internal dimension is also linked in that the CAFTA agreement that the NAFTA was more strongly supported in the province of Quebec than in most of the rest-of-Canada.

[35] Cf. Russell 1993, 3.

separate, the Rest-of-Canada would have to reconstitute itself - a very difficult process due to the strong centrifugal pressures inside the federation.[36] There was also not agreement as to what territory would make up an eventual independent Quebec, a problem that was compounded by pleas for partition. Partitionists claimed that if Canada was divisible then so should also Quebec be.[37]

In the aftermath of the referendum, the question of Quebec separation was taken to the Supreme Court which handed down its advisory opinion in 1998.[38] It stated that Quebec has no legal right – under Canadian or international law – to unilaterally secede from Canada. But it went on to note that:

> Our democratic institutions accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.[39]

The federal government in 1999, through the so-called Clarity Act (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) established a set of more specific procedural guidelines for how secession might proceed.

Canada is the only country to have spelled out a set of democratic procedures for separation or break-up.[40] These apply not only to Quebec, but to any province. Actual negotiations with a province would not be bilateral –between the federal government and the relevant province - but would be conducted among all the governments of the provinces and the federal government.[41] Territorial uncertainty has helped spawn decentralisation, and the Canadian federation is one of the most decentralised ones in the world.

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[36] There is considerable uncertainty and disagreement as to how the Rest-of-Canada is to handle the threat of Quebec secession, as reflected in at least three different scenarios. Cf. Cairns 1997.

[37] The leader of the Reform Party, Preston Manning has noted that "if Canada is divisible, as long as the process employed respects the rule of law and the principle of democratic consent, then Quebec is divisible by the application of the same processes and the same principles."Remarks by Preston Manning, M.P.Leader of the Official Opposition, House of Commons - February 10, 1998, printed in Hansard.

[38] *Reference Re Secession of Quebec*, [1998] 2 SCR 217.

[39] *Ibid.*

[40] Note that the Draft Treaty establishing a Constitution for Europe contains a provision (Article I-60) that permits voluntary withdrawal from the Union. Cg00087/en04.

[41] Bill C-20:3.1. http://www.canlii.org/ca/as/2000/c26/sec3%2Ehtml.

Uncertainty - in territorial and jurisdictional terms – is also likely to emanate from extensive claims for aboriginal self-government. This will not break up the country, but will likely produce a far more complex conception of the location of sovereignty and the nature of citizenship and may complicate the relations between Quebec and the rest-of-Canada.

Together with weakened sovereignty and territorial and jurisdictional uncertainty, Canada is also marked by contestations over nationalism. A major concern is how to maintain even a semblance of national unity. Although there is a clear majority of English-speakers, there are four sets of national identifications that are currently being propounded: a) rest-of-Canada Canadian nationalism (or Canada-without-Quebec nationalism), b) Quebecois nationalism, c) Aboriginal nationalism, and d) Canadian nationalism (Canada as it exists today). At present no national identity can legitimately claim to be the overarching one. For Canada as a whole, language as a basis for identity is highly divisive. The same applies to ethnicity. Originally the tension was between English and French. These groups occupied special status, as 'Founding Nations'. This status has now been challenged by aboriginal peoples, who refer to themselves as 'First Nations'.

These problems have taken on added importance due to increased diversity. The country has, as a result of large-scale immigration from all parts of the world and in particular the so-called Third World, become far more ethnically diverse. In 2001, 18.4 per cent of the population was foreign-born. In relative terms, this is far more than the US, the other major country with immigration-induced pluralism.[42] Leslie Laczko sees Canada as an *outlier* or extreme case of diversity among modern industrialised countries: "it contains more types of pluralism than these others do [United States, Belgium and Switzerland]. It is this *combination* of types of pluralism that makes Canada distinctive."[43]

This brief assessment has revealed that the EU is a new type of supranational arrangement that weakens the sovereignty of the nation-states and that also helps transform both members and affiliated states. Canada is tied up in transnational arrangements that weaken its sovereignty. Even more relevant are internal tensions that create deep incompatibilities between the principles of state sovereignty and national self-determination. Canada has never resolved the fundamental question as to where sovereignty is ultimately to be located.[44]

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[42]In the same year, 11 per cent of the US population was foreign-born. Source: Statistics Canada, "Canada's Ethnocultural Portrait: The Changing Mosaic", p.2. http://www12.statcan.ca/english/census01/Products/Analytic/companion/etoimm/canada.cfm

[43] Laszko 1994, 38.

[44]For this point consult Cairns 1995 and Russell 1993. Russell notes that "the Canadian people may have become constitutionally sovereign without having constituted themselves a people. The Canadian people or peoples have

Both the EU and Canada are multinational, poly-ethnic, and multicultural. The EU does not only challenge established conceptions of state but also of nation. It is increasingly being labelled a post-national entity. Some also see Canada as post-national.[45]

Emergence of New Types of Actors and Transnationalisation of Established Actors

These developments in Europe and Canada are part of patterns of action that cut across national bounds and territorial cleavages, and they are carried by a whole host of different actors. Historically, at the international level, the politics of recognition of unique identity[46] revolved precisely around the protection and propounding of *national* identity. This was institutionally privileged in the Westphalian system. Today, social movements such as 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 globalisation of human rights helps reinforce the political mobilisation of groups and communities that assert rights and identities. In some cases, these developments serve to challenge existing nation-states and bring forth issues of human rights and human dignity, in other cases established democratic standards may themselves be challenged.[47]

To varying degrees the non-national groups and social movements referred to above are proponents of a politics of recognition of identities that are *not* privileged by the Westphalian system: "The increased prominence of the politics of recognition is one key indicator of movement beyond the Westphalian era."[48] Linklater here talks about a particular transnational form of politics of recognition.

In Europe, the integration process enhances transnational activity, formation of networks, and organisations. In Canada, there has been a significant mobilisation of social movements, such as the women's movement, aboriginals, gays and lesbians. Albeit often part of wider international networks, social movements and groups have played critical roles in both Western Europe (at the national and European levels) and in Canada. The European

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not explicitly affirmed a common understanding of the political community they share" (235).

[45] Northrop Frye has noted that Canada "has passed from a pre-national to a post-national phase without ever having become a nation (Frye cited in Lipset 1990, 6).

[46] For this term consult Honneth 1995; Taylor 1994; 1995.

[47] With regard to the latter, extreme right-wing and neo-nazi groups also seek to 'go global' and exploit new technologies. Their objective however is often to close states from foreign people and influences, and nourish ethnically homogeneous societies.

integration process helps forge such transnational groups, through the establishment of a new level of governance, funding, and new institutional access points (such as the EP, the ECJ, the Commission and the system of Comitology). Canada's ethnic heterogeneity affects its foreign policy: it spurs increased demands for liberalisation of immigration and refugee laws and helps put the government under pressure to take side in and action on conflicts outside the country.[49] Its ethnic heterogeneity thus contributes to make Canada particularly sensitive to international developments, through the experiences, networks, and concerns that the various groups bring forth, and which are amplified through the Charter, international agreements and conventions, and official endorsement of multiculturalism and heterogeneity.

These developments correspond with, draw from and themselves help spur, the emergence of a whole range of new actors on the international arena. Of particular note is the great surge in transnational and international social movement activism. These may be benign or malign, as the recent spate of terrorist activity has testified to. Their commitment to democratic procedures varies considerably, albeit they can and do contribute to heightened reflexivity and contestation, they help nationalise and localise global patterns and problems, as well as globalise national and local issues and questions. In that sense individual states face the dual challenge of integration and fragmentation - from 'above' as well as from 'below' by increasingly assertive social movements and regions.

The argument thus far has been that the two entities exhibit a significant measure of divergence from some of the core traits of the nation state model. This is most explicit in Europe, where supranational institutions that greatly weaken state sovereignty have been established. To a lesser extent, it also applies to Canada, due to its membership in NAFTA and in particular because of its unresolved constitutional questions which pertain to the territorial integrity and very existence of the state. Both entities are extremely diverse in cultural terms and neither forms a coherent and agreed-upon nation. They foster transnational activity, and they help sustain non-state actors at the international level, and the orientation of politics along non-territorial divisions. Insofar as there is a systemic transformation afoot it appears to result more from transformation of states and emergence of new quasi-state actors such as the EU than from the emergence of new non-state and social movement actors, however.

These patterns of change may have democratic potential, in that some of them reflect increased inclusiveness and peaceful co-existence within complex and highly diverse settings.

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[48] Linklater 1998, 32.

[49] Riddell-Dixon 2003.

The question is how reflexive these are and also whether the changes are part of *conscious efforts or programmes of action* bent on altering essential components of the nation-state model, whether such are *given normative justifications*, and whether *action follows talk*, in the sense that they show up as constitutional concerns and are part of constitutional change programmes.

IV. Objectives/Self-conceptions: New Doctrines?

Official statements and even constitutional documents reveal that the political elites are aware that the two entities differ from conventional nation states.[50]

The European Union

The founders of the EU were acutely aware of the excesses of nationalism after having gone through two devastating world wars. A central objective in establishing the EU was to preserve peace through legally binding co-operation. Deeply embedded in the EU then is the desire to develop new forms of political association. Jean Monnet and Altiero Spinnelli, two of the most influential figures in the movement towards European unity, envisaged the formation of a political system that built upon but transformed and transcended the nation-state, also in terms of its end product. Monnet saw the EU as an experiment and was less clear on the nature of resultant entity than was Spinelli who envisaged a European federation.[51] The process has been marked by a close interaction between the development of theories of integration and the development of strategies of integration.[52] The dominant ones are functionalism, federalism and neo-functionalism.

But although there is a distinctive 'Community Method' of integration, the pattern of integration has not proceeded towards a clear, predetermined goal. The integration process is better seen as a testing ground of ideas, principles, procedures, institutional arrangements and

[50] With awareness is not implied agreement. For instance, in the Canadian case, there is considerable such endorsement among the political elites at the federal level – including the Supreme Court – but often not shared by elites at the provincial level. For instance, many provincial elites, especially in Western Canada, in Ontario under the Conservatives (1995-2003) and in a particular way in Quebec, do not endorse the view that Canada should substantially differ from conventional nation-states, in particular with regard to inclusiveness and reflexivity. A similar argument pertains to the New Rights in Canada.(See Laycock 2001, 2004) Even more significant such variations in endorsement are found in Europe.
[51] Holland 1996, 102.
[52] Wallace cited in Murray and Rich 1996, 4.

policies.[53] It has been contested throughout from defenders of the nation-state, from de Gaulle to Thatcher, to Berlusconi.

The general principles that the EU has appealed to, in particular post-Maastricht are universal in their orientation. They refer to democracy, the rule of law, solidarity, subsidiarity, tolerance and respect for difference and diversity. These leave considerable room for institutional and even polity choice.

There is also currently in Europe a process of ransacking of vocabulary of association similar to that which took place with the emergence of the modern European state. To clarify its nature as polity some analysts resort to the vocabulary of federalism, such as cooperative confederation,[54] or quasi-federal entity.[55] To cite one prominent contributor, Joseph Weiler argues that the EU has developed a unique federal arrangement, the normative hallmark of which is the *principle of constitutional tolerance*. This is based on two core components. The first is the consolidation of democracy within and among member states. The second is the explicit rejection of the One Nation ideal and the recognition that 'the Union … is to remain a union among distinct peoples, distinct political identities, distinct political communities… The call to bond with those very others in an ever closer union demands an internalisation – individual and societal – of a very high degree of tolerance'.[56] As Weiler notes in a more recent article, 'in the Community, we subject the European peoples to constitutional discipline even though the European polity is composed of distinct peoples. It is a remarkable instance of civic tolerance to be bound by precepts articulated, not by "my people", but by a community composed of distinct political communities: a people, if you wish, of "others"'.[57] The EU, therefore, is accepting of different conceptions and visions of what the polity is, and ought to be. In a similar vein Ulrich Preuss underscores the unique character of the EU's institutional-constitutional structure: dynamism, complementarity with the Member States' constitutions, polycentricity, and dual legitimacy basis. These are features that set the EU apart from the nation state. They permit the EU to accommodate a much greater degree of complexity and diversity than does any state. Preuss' argument can be construed as a plea for prioritizing federalism over statism, and for developing a new combination of federalism and democracy in a non-state entity.[58]

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[53] "(T)here has never been a basic template or "structural ideal"". Walker 2003:.
[54] Bulmer 1996.
[55] Sbragia 1992; Murray and Rich 1996, 13.
[56] Weiler 2001, 68.
[57] Weiler 2002, 568.
[58] Preuss 1996.

Other analysts see the EU as a system of multi-level governance, such as a multi-level polity,[59] a new kind of commonwealth,[60] or a mixed commonwealth,[61] or *condominio*, *consortio*;[62] others think of it as some form of transition, such as partial polity[63] or post-national entity[64] or post-modern entity;[65] and others still think of it in globalist terms, such as cosmopolitanism.[66] These are new terms that depict a more complex and less definite relation between territory and identity. Old pre-nation principles have also been redesigned to try to capture the institutionally complex and asymmetrical nature of this multi-level entity, such as *subsidiarity*.[67] New principles of governance such as *deliberative supranationalism* have been coined to designate the manner in which experts and state representatives deliberate within the ambit of transnational networks. These terms reveal that there is a wide-ranging effort at exploration of new concepts and principles and assessments of their normative status.

This wealth of designations demonstrates that the EU is an *essentially contested* project, in polity terms. This contestation has not precluded the adoption, as entrenched in the treaties and policy statements, of the core principles of the democratic constitutional state, namely democracy, rule of law, justice and solidarity. The standard of democracy and rule of law is applied to the EU and also as entrance requirements for applicants. The EU thus not only projects these standards unto future members but also reciprocally asserts that these are the standards that it has to comply with.[68] This could be construed as a self-reinforcing cycle of reciprocal obligation, a cycle that by its very existence renders the bounds between the Union and its outside world less relevant.

These developments notwithstanding, during the 1980s and 1990s, the pace of integration proceeded much further than did efforts on the part of the responsible elites to clarify the nature of the entity that they are constructing. The last few years has seen a revival of debate, touched off by the German foreign minister Joschka Fischer's speech at the Humboldt University in Berlin on May 12, 2000, where he propagated a European federation -

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[59] Marks et al. 1996, Hooghe and Marks 2003.
[60] McCormick 1999:191.
[61] Bellamy and Castiglione 1997.
[62] Schmitter 1992; 1996.
[63] Wallace 1993, 101.
[64] Curtin 1997; Habermas 1998a,b; 2001.
[65] Ruggie 1993.
[66] Held 1993; 1995. Linklater 1996; 1998.
[67] Cf. Schmitter 1996.
[68] See Eriksen, Fossum and Sjursen 2003 for further details.

not a European nation-state. This speech sparked considerable debate and responses have since emerged from numerous heads of state and academic analysts.[69]

Despite the leaders' hesitation to clarify the nature of the overall European integration project, the integration *process* has to a considerable extent come to focus on the core components of reflexivity, notably rights. The Charter of Fundamental Rights of the European Union, proclaimed at Nice but not part of the Treaties[70] (although incorporated in the Convention's Draft), was the most explicit commitment to individual rights ever presented by the European Union. The Charter holds provisions on civil, political, social and economic rights - to ensure the dignity of the person, to safeguard essential freedoms, to ensure equality, to foster solidarity, to provide a European citizenship, and to provide for justice. Its provisions are similar to most charters and bills of rights, and it is also more updated than most such. It contains, as did the Canadian Charter also provisions for group-based rights, albeit weaker in group promoting terms than the Canadian.

The Charter then in turn also helped propel the process of constitutional clarification further. First announced at Nice in December 2000 was a commitment on the part of the EU to embark on a comprehensive debate on the future of Europe. This was amplified at the Laeken Summit in December 2001, which decided to establish *a Convention on the Future of Europe*. Through this *Constitutional Convention* the EU embarked on a proper constitutional debate, the result of which has thus far been the Convention's Draft Treaty establishing a Constitution for Europe.

The Convention's draft was adopted by the Intergovernmental Conference in Brussels in June 2004, and now awaits ratification in all 25 member states. As is clear from its Preface and provisions, it is simultaneously a testimony to Europe's diversity, and an attempt to evoke a spirit of commonality and community. It speaks not to a set of Europe-specific and confining values, but to universal ones. Europe is cast as a 'civilization', not as a cultural community.

Preface of the Draft Treaty establishing a Constitution for Europe[71]

> DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,

[69] Cf. Joerges, Mény and Weiler 2000.
[70] European Union Charter of Fundamental Rights 2000. Its legal status is more than mere political declaration, however. Cf. Lenearts and de Smijter 2001; Menéndez 2002.
[71] European Council 2004, cg00087/en04.

> BELIEVING that Europe, reunited after bitter experiences, intends to continue along the path of civilisation, progress and prosperity, for the good of all its inhabitants, including the weakest and most deprived; that it wishes to remain a continent open to culture, learning and social progress; and that it wishes to deepen the democratic and transparent nature of its public life, and to strive for peace, justice and solidarity throughout the world,
>
> CONVINCED that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny,
>
> CONVINCED that, thus "United in diversity", Europe offers them the best chance of pursuing, with due regard for the rights of each individual and in awareness of their responsibilities towards future generations and the Earth, the great venture which makes of it a special area of human hope…

The Preamble speaks to the need to transcend the ancient divisions of Europe, divisions that have been sustained by exclusive national identities. The onus is on forging a common destiny. The common project is not spelled out through the explication of a clear alternative doctrine. It is rather presented as a search for unity and commonality, a search that is particularly mindful of the rights of the individual, and which also takes Europe's diversity into account. It thus presents Europe more as a meeting-place for different visions than as a hammered-out alternative project. This was also very evident in the Convention's deliberations, in the many constitutional proposals, and in the submissions to the plenary debates, working groups and proposed articles. The Preamble and the Draft speak to the need to develop a mode of allegiance that is more inclusive than nationalism.[72] The openness in the Preamble and the Draft is itself both a testimony to reflexivity and an encouragement to continue the process of self-reflection.

In sum, the EU clearly departs from the nation in terms of inclusiveness and accommodation of difference; it also at present has embarked on a large-scale effort at self-reflection, to establish its constitutional essentials. The Union is inclusive in that non-nationals (in other Member States and in affiliated states) are accorded rights; it is also inclusive in that it is open to membership and has included many new members over time. How far this will extend has still not been settled (Turkey has been accepted as a future applicant). The Union, however, in aggregate terms, is becoming less open to non-Europeans. The element of other-

[72] Articles I: 1-4, 7-9 spell out values and objectives, rights and freedoms. Article I:5 states that the "Union shall respect the national identities of its Member States" but locates these in their legal-constitutional institutions and not in unique cultures or ways of life. Article I:4.2 explicitly rules out discrimination on grounds of nationality.

regard referred to as part of inclusivity is also apparent in the commitment to social solidarity and a European social model.[73]

Canada

Throughout its history, there have been numerous nation-builders in Canada - in the federal capital in Ottawa, in the capital of Quebec in Quebec city, and even in provincial capitals, and in the 600 or so First Nations communities. They do not share the same project. The sheer multitude of self-professed national projects is testimony to the failure to reach agreement on a coherent sense of a Canadian nation.[74] Precisely what type of community it is has been contested. Is it a community of communities, a failed nation, a federation, a multinational federation, a confederation, or a post-national, or even postmodern entity? Samuel LaSelva notes that "Canada is regarded as a difficult country to justify, even by those who accept the distinction [between ethnic and civic nationalism] and understand the implications of civic nationhood."[75]

The Canadian effort to establish an agreed-upon constitutional arrangement made it enter the realm of 'mega constitutional politics':

> First, 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.[76]

[73] This is very clearly expressed in the Charter of Fundamental Rights of the European Union, as well as in the treaties and in various policy measures and commitments from the EU, although the Union's ability to realise this from own competences and means is highly circumscribed.
[74] When asked in 1999 to define the Canadian identity, the Minister of Intergovernmental Affairs, Stephane Dion said that it consisted of respect for basic rights and respect for diversity. (Speech by Stephane Dion to the 7th Triennial NACS Conference, Reykjavik, Iceland, August 1999). This is quite different from how a nationalist would designate his/her country.
[75] LaSelva 1996, 165.
76 Russell 1993, 75.

Mega constitutional politics can take place within an established constitutional framework, but is more appropriately labelled as constitution-making, as in principle the entire constitutional system is 'up for grabs'.[77] This process has touched on virtually all aspects of the political system and society and has produced a wide array of radical proposals for how to address these challenges. As an illustration of the most comprehensive public statement of the diversity of Canada, consider Section 2.1 of the Charlottetown Accord 1992, the latest - and failed - attempt to reach an agreed-upon constitutional settlement. This section was an attempt to be a vehicle through which everyone could see themselves (in reaction to Meech Lake which had focused exclusively on Quebec):

> **The Charlottetown Accord (Section 2.1):[78]**
> (a) Canada is a democracy committed to a parliamentary and federal system of government and the rule of law;
> (b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure the integrity of their societies, and their governments constitute one of three orders of government in Canada;
> (c) Quebec constitutes within Canada a distinct society, which includes a French-speaking majority, a unique culture and a civil law tradition;
> (d) Canadians and their governments are committed to the vitality and development of official language minority communities throughout Canada;
> (e) Canadians are committed to racial and ethnic equality in a society that includes citizens from many lands who have contributed, and continue to contribute, to the building of a strong Canada that reflects its cultural and racial diversity;
> (f) Canadians are committed to a respect for individual and collective human rights and freedoms of all people;
> (g) Canadians are committed to the equality of female and male persons; and
> (h) Canadians confirm the principle of the equality of the provinces at the same time as recognizing their diverse characteristics.

This section depicts a vision of Canada, not as one nation or even as one community, but as a complex and composite community of communities, each of which is worthy of equal recognition and respect. The section can be seen as a reflection of how imbued with considerations of justice – individual and collective – the process of forging constitutional agreement had become following the 'Canada Round' of extensive consultation on the content of the constitutional reform package, and also how difficult it had become to agree on one common conception of Canadianism.[79] The section is also evocative of the need to

77 Russell 1993.

78 Charlottetown Accord 1992.

79 The Accord was subsequently critiqued from many quarters because of its comprehensive nature, which

conceptually *break out of* the nation-state template if the much more complex terrain of identity politics and justice considerations that mark multinational and poly-ethnic entities is to be understood and handled.

This section and to some extent also the Charlottetown Accord offered a kind of deep diversity type solution to how to understand Canadianness. The reasons for rejecting it differed widely. Many people voted against the Accord because they felt they had more in common than was reflected in the Accord.[80]

What is interesting is that the Canadian experience has also generated a sense in Canada that its uniqueness and its struggles have brought forth something valuable: "The Canadian approach to diversity strengthens Canada's reputation as a just and fair society. Canada is renowned for its rich cultural mosaic and the Canadian model has become an example for the rest of the world."[81] The general principles that are used to depict Canada are cultural and linguistic tolerance, inclusive community, federalism, interregional sharing, democracy, rule of law, and equality of opportunity, as well as respect for and accommodation of difference.

Federalism has played a key role in the accommodation of difference, but has been 'stretched' or extended, precisely to accommodate deviations from the nation-state model.[82] As noted above, federalism as principle and as mode of attachment is distinct from nation and a federation need not be a state: "the federal principle represents an alternative to (and a radical attack upon) the modern idea of sovereignty."[83] In no other country is this tension more apparent than in today's Canada. Analysts use the term federation and confederation almost interchangeably, with few attempts to differentiate between them. They also supplement the federal component with other terms such as 'multinational federation'[84], 'asymmetrical federalism'[85], and pluralist federalism, executive federalism, and federalism as cultural compact. The attempts to grapple with the whole complex of identity politics and the accommodation of multiple forms of difference have led to a whole new vocabulary to

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mobilised so many overlapping antagonists to the values and perceived outcomes of the Accord. For a comprehensive discussion see Johnston et al (1996).

[80] Johnston et.al. (1996:247) note that "voters for the most part saw the Accord as an expression of the politics of group accommodation."

[81] "Foreword by the Prime Minister", in Department of Canadian Heritage 1999, *10th Annual Report on the Operation of the Canadian Multiculturalism Act*, Ottawa: Minister of Public Works and Government Services Canada.

[82] Federalism is distinct from nationalism and a federation need not be a state. Daniel Elazar has observed that "the federal idea and its applications offer a comprehensive alternative to the idea of a reified sovereign state and its applications."(Elazar 1987: 230).

[83] LaSelva 1996, 165.

[84] Resnick 1994; Gagnon and Tully 2001.

[85] Webber 1994.

properly depict the types and forms of difference that make up Canada. Relevant terms to depict the entity are *cultural mosaic* (as opposed to the American notion of melting-pot), *pluralistic civilisation*,[86] and *multicultural and poly-ethnic society*. Charles Taylor has argued that Canada is marked by 'deep diversity' and James Tully has talked of the need for 'diversity awareness'.

Federalism, thus cast wide, has always been part of the Canadian experiment. To Sam LaSelva, the Canadian experiment has been that of creating a political nationality through federalism. The existence of a French-Canadian (mainly catholic) and an English-Canadian (majority protestant) community meant that the essential challenge was to create a sense of common allegiance, whilst also respecting the uniqueness of each group. This was a very different challenge from that facing the American founders. "Canadian nationalism presupposes Canadian federalism, which in turn rests on a complex form of fraternity that can promote a just society characterized by a humanistic liberalism and democratic dialogue."[87] To address this, Canada had to develop its own special version of federalism. La Selva attributes this to one of the founders, George-Étienne Cartier, and argues that this notion is based on federalism as a way of life. "For Cartier, the justification of federalism was … that it accommodated distinct identities within the political framework of a great nation. The very divisions of federalism, when correctly drawn and coupled with a suitable scheme of minority rights, were for him what sustained the Canadian nation."[88] Such accommodation of difference presupposed tolerance, co-operation, mutual accommodation, and minority justice. The requisite sense of attachment is not nationalism but *fraternity*. Nationalists appeal to the value of fraternity but confine it to one group, or culture or language community, whereas federalists *expand* it: "the idea of fraternity looks two ways. It looks to those who share a way of life; it also looks to those who have adopted alternative ways of life."[89] Intrinsic to this idea of fraternity are a reflexivity and other-regard that break down the distinction between us and them intrinsic to nationalism.

The idea of *fraternity* can be seen to have structured inter-cultural relations within Canada. It marks those that seek to hold the country together, as well as those that seek to separate from it. What gives Quebec nationalism its strength, as Charles Taylor[90] has noted, is

[86] LaSelva 1996, 165.
[87] LaSelva 1996, xiii.
[88] LaSelva 1996, 189.
[89] LaSelva 1996, 27.
[90] Taylor 1993.

recognition. The quest for recognition revolves around the need to ensure recognition of the special status of Quebec, as a distinct nation or society *within Canada*. Even most Quebec sovereignists insist on a formal arrangement with Canada *after* Quebec independence. They have opted for *sovereignty-association*, or some other close relationship with Canada, rather than complete independence. For instance, on June 12, 1995, 5 months before the Quebec referendum, the key proponents for sovereignty signed an agreement which would commit the Quebec government to propose "a treaty on a new economic and political Partnership" with Canada after a successful referendum on sovereignty.[91] A significant aspect of Quebec separatism is the redefinition of the terms of communion rather than outright separation from Canada.

Aboriginal nationalism is certainly not about separation from Canada but about redefinition of the terms of co-existence so that their uniqueness and cultural traditions are properly preserved.[92] This has manifested itself in a demand for aboriginal self-government.

Large-scale immigration has greatly increased the ethnic diversity of the country. The diversity of Canada has long been officially recognised and propounded through minority rights and *multiculturalism*. The country is officially bilingual and multicultural.[93] It offers official recognition of immigrant ethnicity. Multiculturalism *as doctrine* is premised on the notion of integrating immigrants from diverse cultural backgrounds into society - without eliminating their characteristics. It seeks to avoid the twin evils of assimilation and ethnic separation or ghettoisation. It is also an ideology that speaks to interethnic tolerance and the benefits that accrue to society from its diversity.[94] This doctrine is premised on the notion that integration or incorporation of people from different backgrounds is a two-way process, which places requirements on those that integrate, but also on those who are already there. The essence is to heighten social inclusiveness as well as self-reflection on the part of both the arriving minority(ies) and the receiving majority, to ensure a process of mutual accommodation and change. Analysts find that the Canadian multiculturalism programme has been informed by

[91] Cited in McRoberts 1997:225. Lucien Bouchard, leader of the Quebec separatists in the federal parliament proposed that the nature of this partnership could be inspired by the European Community.

[92] Canada also retains vestiges of the internal colonial past, such as specific legal categories for native people. These are reformed and converted into rights to self-government – a complex status of simultaneous inclusion and exclusion from Canadian society and government.

[93] The Canadian multiculturalism policy was introduced in 1971 and in 1988 it became officially enshrined in the Multiculturalism Act. The policy had four objectives: "to support the cultural development of ethnocultural groups; to help members of ethnocultural groups overcome barriers to full participation in Canadian society; to promote creative encounters and interchange among all ethnocultural groups; and to assist new Canadians in acquiring at least one of Canada's official languages" Kymlicka 1998, 15.

[94] Norman 2001.

these notions, although it is contested how well it has done.[95] They also claim that it has contributed to heightening awareness of difference and the need for accommodating difference and diversity.[96] Multiculturalism's approach to socialisation and incorporation is different from that of nationalism, which is far more attuned to integrating people into a set mould, or into a community with a clear sense of itself and its national identity.

Multiculturalism as doctrine is about the just integration of immigrants. The concern with justice has also been incorporated into Canadian foreign policy, through the official embrace of the notion of *human security*. "For Canada, human security is an approach to foreign policy that puts people – their rights, their safety and their lives - first. Our objective is to build a world where universal humanitarian standards and the rule of law protect all people; where those who violate these standards are held accountable; and where our international institutions are equipped to defend and enforce those standards. In short, a world where people can live in freedom from fear."[97] This doctrine bespeaks a notion of global responsibility. It highlights the need for a *consistent pursuit* of justice, a pursuit that does not stop at the state's borders. The same commitment is found in that one of the core aims of Canadian foreign policy since 1995 has been to project Canadian values and culture abroad. These values are: "respect for democracy, the rule of law, human rights, and the environment."[98]

Insofar as there is a divide between Europe and America, as Kagan suggests,[99] in human security terms Canada's foreign policy stance has a neo-Kantian orientation and is closer to that of the majority of states in Western Europe. Canada also did not support the US invasion of Iraq.

But for the notion of global responsibility to be consistent, a further test of consistency is whether the polity is willing to have the outside world apply the same standards to it. In other words, are they willing to have human rights norms and universal conceptions of justice and fairness determine their critical internal issues, in particular issues of vital importance to sovereignty, such as secession?

As noted above, in the aftermath of the Quebec referendum, the federal Canadian government sought to clarify the legal framework surrounding possible future Quebec

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[95] It should also be noted that the very doctrine of multiculturalism is debated and challenged.
[96] Kymlicka 1995; 1998.
[97] DFAIT Human Security Programme. http://www.humansecurity.gc.ca/psh-e.asp, 16.07.02. Canada was active in the development of ICC. The president of the International Criminal Court and its chief architect, Phillippe Kirsch is also a Canadian.
[98] Canada, *Canada in the World: Government Statement* (Ottawa, 1995). See also Nossal 2003 http://www.cdfai.org/PDF/The%20World%20We%20Want.pdf

referenda. The Court was careful to note that the issue had to be determined politically. But it did however also note that: "The ultimate success of [an unconstitutional declaration of secession leading to a *de facto* secession] … would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession, having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition."[100] This statement can be construed as a warning not to proceed unless the condition of reciprocity is complied with. But its emphasising legitimacy can also be seen as a powerful reminder of the need to act in a manner consistent with international standards of legitimacy. Given the different commitments to such in practical politics, it would not be consistent with the principle to require that the international community should serve as *the* source of standards of legitimacy. It *is* significant however in the sense that Canada is the first country to have developed democratic procedures for such a serious act as secession and possible break-up of the state.

In sum, in Canada we see the emergence of doctrines to replace nationalism. These are to a large extent justifications from the practice of handling diversity. Will Kymlicka has noted that: "Canada is a world leader in three of the most important areas of ethnocultural relations: immigration, indigenous peoples, and the accommodation of minority nationalisms. Many other countries have one or more of these forms of diversity, but very few have all three, and none has the same wealth of historical experience in dealing with them."[101]

New terms have been developed, most of which have roots in federalism, but which could also be seen as terminological innovations, in that they differ from the terminology associated with the nation-state, and open up for considerably more flexible terms of association. They speak to inclusiveness and reflexivity. It is not clear that they form a coherent set of principles to denote an alternative mode of association. In Canada, many groups and collectives still aspire to become nations. The term 'nation' is increasingly disassociated from state, in particular in relation to aboriginals or 'First Nations' who see each aboriginal community – however small - as a nation. But such a designation may not only serve to further weaken the semantic association between nation and state. The question is also whether such usage might actually eliminate the distinctive features of nation and open up for a new and more precise vocabulary of association.

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[99] Kagan 2003.
[100] Canada, Supreme Court *Reference Re Secession of Quebec*, [1998] 2 SCR 217.

[101] Kymlicka 1998, 1, 2-3.

This brief presentation has revealed that both in the EU and in Canada new doctrines have been developed that are far more inclusive than those of nationalism. In both entities, whilst they have developed such and also put these into practice, it is still not clear how far these will serve as *explicit departures* from the nation-state framework. There are different views and positions. Academics have played a critical role in devising the justifications of many of the policies and practices that have been developed. In fact, in many cases academics and intellectuals have had to try to fill the void left by the architects' and practitioners failure to spell out what kind of structure they are erecting and what kind of justifications such require. This has sparked a wider search to understand the nature, magnitude and implications of the challenges that these entities face and have led to a range of novel solutions.[102]

'Europe' appears as a meeting ground or place for ideas and visions, not a clearly hammered out intellectual project. This also applies to Canada, where there are also competing visions. In the next section we will look closer at the constitutional debates in the two entities.

V. Democratic constitutional conversations?

As noted above, one indicator of reflexivity is whether there is an ongoing discussion of constitutional essentials. The substance of the debates has been touched on above and has revealed that this has been the case. But for this to be truly reflexive it has to be open and inclusive of all those potentially affected. The main focus here will be on core aspects of the organisation of the process of debate.

Constitution making through' intergovernmental diplomacy'

Historically speaking, neither entity appears to come close to the notion of open, democratic constitutional conversation. Both the EU and Canada long sought to fashion constitution-type settlements in a manner *borrowed from the realm of international politics*. In both Canada and the EU, the key actors have been state officials (heads of governments and their supportive staffs). They have come together in intergovernmental fora, and have sought to fashion

[102] For a brief selection, please consult Archibugi et. al. 1998; Bellamy et. al. 1996,1997,2001; Benhabib 1996; Cairns 1988; 1991a,b; 1992; 1995; Carens 1995; Chambers 1996; 1998; Habermas 1993; 1994; 1996; 1998a,b; 2001; Held et. al. 2000; Kearney 1992; 1997; Kymlicka 1995; 1998; Kymlicka and Norman 2000; Linklater 1996; 1998; Taylor 1985; 1986; 1989; 1993; 1994; Tully 1995, 2002, Tully and Gagnon 2001; and Weiler 1995; 1999; 2001; 2002.

agreements of a constitutional nature in a closed manner, akin to interstate diplomacy.[103] Their multinational character had essentially forced them to step outside of the single nation-state framework and instead adopt models from the international society of states.

In the EU, treaty changes have been made within a specially designated European Council, labelled Intergovernmental Conference (IGC). Treaty changes are negotiated by executive heads of government and their respective staffs, in a formal system of summitry, with the European Council at its apex, rather than in specifically designated constitutional conferences. Every member state has the right of veto. Ratification procedures vary, from parliamentary ratification to popular referendum. In formal terms, the European Parliament has a very limited role in the process. This system has lasted up to and including the Treaty of Nice and important elements will be retained even if the Convention's draft is ratified.

The system of treaty change that has emerged in the EU, finds an obvious parallel in the Canadian First Ministers' Conference (FMC), which consists of the Prime Minister and all the Provincial Premiers, or First Ministers. It is this body that has played the most important role in the numerous efforts to fashion constitutional change in Canada. A critical feature of Canada is that there has never been agreement on how constitutional changes should be organised,[104] neither has there been agreement on a constitutional amendment formula. In the absence of such agreement the heads of governments adopted an approach similar to that which marks international diplomacy. This was a flexible arrangement and permitted both bilateral dealings between Ottawa and Quebec, and multilateral ones among all First Ministers.

In democratic legitimacy terms, the Canadian system is based on a similar logic as that which marks constitution making in the EU, insofar as each participating government is popularly elected; each First Minister is held accountable by the relevant legislative assembly; and each First Minister has the de facto power to veto a proposal. A main difference with the EU of course is that the federal Canadian parliament is a player on par with the provincial ones, whereas the EP is not in the EU.[105]

The FMC completely dominated constitution making/change up until 1980. Since then, the process of Canadian constitution making has become much more open and complex, but

[103] For the EU see for instance Moravcsik 1991; 1993; 1998. For Canada, see Simeon 1972; Cairns 1988; 1991a; 1992; 1995.

[104] There are rules on constitutional change. Since 1982, Canada has had a comprehensive set of five constitutional amendment formulas. Before that time, the rules for change within Canada were incomplete; hence it had to go to the UK for major changes. But the key point is that the rules are not agreed upon.

[105] This has frustrated many MEPs. Cf. EP Resolution of 17 May 1995, EP, Committee on Institutional Affairs CONF 4007/97. The EP has the right of assent only.

the executive heads have never relinquished their role as the core actors in constitutional change.

Democratising constitution making

In both cases, these ‘international diplomacy’ arrangements have been widely critiqued for being closed, elitist and illegitimate and they have been democratised.

In Canada, the initial impetus for change was not popular mobilisation, but the socio-political transformation of the province of Quebec, with the upsurge of its nationalism and separatism, from the late 1960s. Quebec was conceived by many as a nation on a par with the rest-of-Canada, and often espoused a two-nation view of Canada.[106] This was challenged by the other provinces, which argued that the federal principle entails provincial equality: no single province should have unique weight or importance in constitutional deliberations. Neither of these two principles - *national* and *provincial equality* - has been fully accepted. The federal government under Pierre Trudeau sought to break this deadlock, through the inclusion of the Charter of Rights and Freedoms in the new Constitution Act (1982). The Charter gave constitutional prominence to a third principle of equality, that of *equality of citizens*.[107] The Charter institutionalised and constitutionalised reflexivity through rights. But the Charter gave this a particular twist: it also included group rights which meant that certain groups (minority linguistic rights, aboriginal rights, gender rights, and rights for ethnic minorities) were given special constitutional attention. It also included a government override, a so-called notwithstanding clause (Section 33), which enabled *governments* to opt out of some of the rights provisions of the Charter (sections 2, 7-15, for renewable periods of 5 years each). The Charter thus contained within itself a complex and original mixture of individualist and collectivist principles.

The more narrow political purpose of the Charter was to deflect political attention away from Quebec nationalism and federal-provincial concerns. The group-based rights in the Charter gave special attention to social movement types of identity over more conventional ones associated with territorially based nationalism, in an explicit effort to weaken the governments’ – in particular provincial ones’ – hold on the population. Language provisions to make the country bi-lingual were explicit efforts to weaken the association of French with the

[106] Quebec was not consistently portraying itself as a distinct nation and asked for different things over the years.
[107] For more comprehensive accounts of these ‘three equalities’ see Cairns 1991b, 77-100; 1995, 216-237.

province of Quebec. At the same time, the notwithstanding clause raised concerns in those groups, especially women, whose (equality) rights would be subject to government override.

The Charter spoke to every citizen as a rights holder and a stake-holder in the constitution and the process of constitutional change, and served to deeply alter the debate on how comprehensive constitutional changes should be organised.[108] The ensuing 'Charter mobilisation' greatly increased the number of self-conceived constitutional stake-holders, in particular women's groups, gays and lesbians, Aboriginals, immigrants and disabled people. Some of the groups given special attention in the Charter issued demands for direct participation in the process of intergovernmental negotiations, and Aboriginals or First Nations groups later obtained such. They and numerous other groups and persons demanded a truly consultative and open process, i.e., one based on debates and deliberations at all stages of the process, and there were also demands for a popular referendum to sanction the proposed changes. At various stages many of the demands were met.

The inclusion of the Charter and the popular mobilisation did not rally people around one conception of Canada, but instead helped spark a period of mega-constitutional politics. Canada is unique in that it has been involved in mega constitutional politics *for so long* (from the mid-1960s to the mid 1990s). A mega politics constitutional setting is marked by *multilogues*, discussions "among many members of various kinds…".[109] There is an enormous amount of deliberation, but it is so multifaceted as to make it very hard to reach consensus. Mega constitutional politics is also marked by great concern with the legitimacy aspects of process, a concern that is generally injected into the process by those who feel left out. They bring up the critical issue of how to organise constitution making in such a manner as to render it legitimate in the eyes of all stakeholders?

To illustrate this, consider the two latest efforts at constitutional change. The Meech Lake Accord 1987 was presented as an attempt to accommodate Quebec's demands for recognition as a *distinct society* within Canada, and thus induce it to sign the Constitution and accept the Charter. The other provinces refused to make this a bilateral agreement and prevailed. The Accord was forged through the pre-Charter intergovernmental mode. It was negotiated among all the heads of governments and their staffs in a classical intergovernmental fashion. It sparked strong popular resentment and mobilisation, especially among the groups that were recently empowered by the Charter to see themselves as constitutional actors:

[108] Cairns 1991a; 1992; 1995.
[109] Tully 2001, 21

women's groups, aboriginals and ethnic minorities. The Accord was subsequently rejected by the legislative assembly in Manitoba and the province of Newfoundland. Popular mobilisation played a significant role in this rejection.

The next effort, the Charlottetown Accord 1992, was the most open and experimental process ever in Canada. One and a half years of public discussion and large scale popular consultation preceded the intergovernmental negotiations. The main bodies were, in Quebec, the Belanger-Campeau Commission (which consisted of 36 representatives: political parties, business, labour, the cooperative movement, the arts, education and municipalities) held public hearings and so did political parties. In the rest of Canada a much more extensive process was launched. The Citizens' Forum on Canada's Future engaged 400.000 Canadians in discussions on the future of the country. A federal parliamentary committee was established to interact with provincial and territorial representative bodies and to conduct public consultations: "(f)or the first time since Confederation an attempt would be made to conduct constitutional negotiations through interlegislative rather than intergovernmental channels."[110] The other provinces and territories also established popular consultative processes. A parallel process of consultation with the aboriginal peoples was also organised and linked up to the federal parliamentary committee. Later on, 5 regional mini-conventions were held (organised by the federal government) on consecutive weekends, with 200 invited participants each (politicians, experts, interest-groups and 'ordinary citizens'). The Beaudoin-Dobbie federal parliamentary committee summarized the debates and produced a 125 page-report. The debate preceding this report had been the most extensive ever undertaken: "Besides the official constitutional forums sponsored by governments and legislatures, there had been a myriad of panel discussions, study groups, and town-hall meetings sponsored by all kinds of organizations – business and labour, schools, universities, churches, synagogues, service clubs, interest groups, and neighbourhood organisations. Canada surely had a lock on the entry in the Guinness Book of Records for the sheer volume of constitutional talk."[111] But it was hardly a country-wide debate – there were two parallel debates, one in Quebec and the other in the rest-of-Canada.

After the Beaudoin-Dobbie report, the heads of government came together. Here representatives from 4 Aboriginal organisations were also present, together with large staffs, although otherwise organised in the intergovernmental manner. The result was sought ratified in two referenda – one in Quebec, the other in the rest-of-Canada - that were held on the same

[110] Russell 1993, 168.
[111] Russell 1993:177.

day. Both referenda failed.

The failure of the Charlottetown Accord saw the end of mega constitutional politics. Since then further changes have taken place within the constitutional structure, and the threshold for formal constitutional change has been raised considerably. For instance, the provinces of British Columbia, Alberta and Saskatchewan introduced mandatory referendum requirements in connection with constitutional change.[112] Provincial governments had never given up on seeing themselves as constitutional veto players, but now their respective populations would be directly consulted. These high thresholds against formal constitutional change could affect the conception of, as well as conduct, of constitutional conversation.

But high thresholds to formal change have not precluded significant actual changes. During Charlottetown it became clear that there was wide agreement that the plight of aboriginals was a more pressing issue than that of Quebec's demand for special constitutional status. The governments proceeded with this, through their acknowledgement of aboriginals' inherent right to self-government and title to land, as set out in the Constitution Act 1982. This "has brought about a partial reconceptualization of the constitutional identity of Canada as a whole, yet without any formal constitutional change."[113] This example shows that it is possible to retain a constitutional conversation that results in significant changes, even in the absence of formal constitutional change.

In sum, then, Canadians have gone from a highly elitist system to broad-based popular consultations and comprehensive debates. The Charter was of critical importance to the popular empowerment and democratisation of the process of constitutional change. How has the European process changed?

In Europe, the popular opposition during the ratification of the Maastricht Treaty placed the question of the legitimacy of the EU on top of the political agenda.[114] This had limited overall effect on the organising of the process, until after the Nice Treaty process (2000). Nice had been marked by high tensions and weak results. It became clear to many of the decision-makers that the executive-led and intergovernmental approach to constitution making was itself a part of the problem, and was no longer tenable. Further changes to the Treaties were seen to

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112 Cf. CHAPTER 67, BC CONSTITUTIONAL AMENDMENT APPROVAL ACT [RSBC 1996] http://www.qp.gov.bc.ca/statreg/stat/C/96067_01.htm, Article 2(1) of Alberta's CONSTITUTIONAL REFERENDUM ACT 2000, http://www.canlii.org/ab/sta/csa/20030217/r.s.a.2000c.c-25/whole.html. Article 2.3 Bill 208 - Referendum and Plebiscite Amendment Act, 1999 (Constitutional Amendment Referendum) http://www.qp.gov.sk.ca/documents/english/opposition/1999/bill-208.pdf

113 Tully 2001, 23.

114 Those in charge of the process refrained from couching it in constitutional terms. For an assessment of the

be needed to face the upcoming large-scale enlargement, itself an event of major constitutional importance.[115]

The critics could point to a viable and far more democratic alternative. At the same time as the Nice Treaty was being negotiated, the European Charter of Fundamental Rights was drafted, by a deliberative body, a self-proclaimed Convention. This was the first time that a body with a substantial majority of parliamentarians (46 out of 62 members) participated in a process of a constitutional nature at the EU level. This process was far more open than IGCs.[116] The Charter Convention demonstrates that the Convention approach is a marked improvement on earlier processes of a constitutional nature, in terms of openness, transparency and accountability.[117]

But as a vehicle to institutionalise reflexivity, the European Charter was far more constrained than the Canadian Charter. As noted, it was proclaimed at the Nice IGC Meeting in December 2000, but was not part of the Treaty. If eventually included in the Constitution, which the Convention's draft proposes, its scope of application will nevertheless be constrained by horizontal clauses (51-4), and it will be tied into the weak citizenship provisions of EU law.

Nevertheless, the European Charter has already affected the overall conduct of constitution making in the Union. The Laeken Convention was modelled on the Charter Convention. It was also made up of a majority of parliamentarians (46 out of 66 voting members, and 26 out of 39 from the non-voting candidate countries). The applicant countries were present in the same proportion as were the Member States. The Convention was intended to serve as a preparatory body and instructed to produce one - or several - proposals for the IGC that started its work in October 2003. The mandate was very wide, including that of considering the question of a European constitution. The Laeken Convention's Draft Constitution represents a considerable change from the system in place, and there appears to be agreement among analysts that it has been more successful than would have been an IGC.[118]

The Convention was set up as a deliberative and consultative body. Its working method

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debate on the EU's legitimacy during Amsterdam, see Fossum 2000.

[115] Cf. Weiler 2002.

[116] Cf. De Schutter 2003. Open hearings with representatives from civil society (SN 1872/00) were held and hundreds of NGOs submitted briefs to the Convention, which are available on the internet.

[117] Cf. De Schutter 2003; Fossum 2003.

118 Among the most important changes were: The incorporation of the Charter of Fundamental Rights in the Constitution; The recognition of the legal personality of the Union; The elimination of the pillar structure; The recognition of the supremacy of EU law; Reduction and simplification of the instruments for law making and the decision-making procedures, plus the introduction of a hierarchy of legal acts; A delineation (although far from unambiguous) of the distribution of competences; The generalization of qualified majority voting in the Council and the designating of co-decision as the standard procedure (albeit subject to important exceptions); Changes to the Council

was based on openness and transparency (most of the documents and the deliberations were publicly accessible) and its work has been informed by central tenets of deliberation.[119] It no doubt suffered from representative defects,[120] but was far more representative than earlier treaty preparatory bodies had been. It also sparked discussions in the Member and applicant States, but the overall level of awareness of its work in Europe is quite low.[121]

The Convention's work was deeply affected by its being part of a system of constitution making that is dominated by governments. In the last stages of its work, it did revert more to a bargaining forum, akin to an IGC. The Convention's work would have to be scrutinised by and ultimately made subject to the approval of each member state in the IGC and in the ratification stage. This fact deeply shaped and affected its work. This forward linkage aspect could mean that whatever agreements were struck in the Convention would have greater probability of lasting through the IGC. But it could also affect negatively the Convention's legitimacy as a deliberative body.

To sum up, both the European Union and Canada have modified their previous approaches to constitution making borrowed from the realm of international diplomacy and replaced these with more democratic means of constitution making. There is a clear parallel. Critical to this transition to a more democratic approach has been the insertion of Charters into the constitutions. Charter-insertion has put in relief the democratic deficiencies in the intergovernmental mode of constitution making. In response, more open and inclusive and deliberative, options have been sought. In both cases, the formal bodies involve parliamentarians in the majority, combined with popular consultations and popular referenda. But in both cases, these arrangements have been inserted into processes where governments still play a central role. The overall process dynamics are quite parallel (Charlottetown vs. Laeken). Put sharply, the process starts out in an open manner, with quite extensive public consultations, and these lead to a constitutional proposal. Then the heads of governments come together and negotiate in closed settings to strike an agreement. After that the result is subjected to ratification where all subunits (EU: member states, Canada provinces) have (de facto in Canada) veto power. Subunit referenda figure in both entities.

In both cases, we see that the democratisation of process is accompanied by an often

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presidency (elected for a once renewable term of 2.5 years); A right of voluntary withdrawal from the Union; A popular right of initiative

[119] Cf. Magnette, 2004; Maurer, 2003; Fossum and Menéndez, 2003.
[120] Cf. Shaw 2003, Closa 2004.
[121] In June 2003, in the 25 current and future Member States, 45 % of those asked had heard about the Convention. Source Eurobarometer 142/2, November 2003.

frantic search for agreed-upon procedures. The deliberations have focused on both substantive issues but also on how and in what sense citizens should be represented in constitution making. The ongoing nature of constitution making in both cases could be construed as the embrace of a notion of constitution as conversation. Speaking to the Canadian experience, Simone Chambers argues that the notion of constitution as contract is deficient, as "contracts cannot accommodate deep diversity".[122] The point is that the complex issues that are involved, cannot be settled at a privileged moment and once and for all, and instead require *reconceptualising constitution as ongoing conversation*. James Tully takes this further in his conception of what he thinks should be the nature of contemporary constitutionalism: "Both the philosophy and practice consist in the negotiation and mediation of claims to recognition in a dialogue governed by the conventions of mutual recognition, continuity and consent."[123] In a similar vein, both the analysis of the European constitution – its depiction as a *Wandelverfassung*, a constitution in continuous change, and European constitutional experience – speak to a conversational or deliberative approach to the constitution.

The notion of constitution as conversation no doubt has merit, but it understates those aspects of the constitution that there is agreement upon. In both cases, there has been agreement on constitutional essentials; in particular fundamental rights. Their agreement and inclusion in the constitution also provides the foundation for an ongoing constitutional conversation.

VI Conclusion

This chapter has examined the question of the uniqueness of the EU, through comparing it with Canada. The two were seen as deviating from central tenets of the nation-state model and the claim was that we find elements of convergence, with democratic potential. The larger issue here is the potential for democratic transformation of the nation-state.

It was shown that these two entities deviate in significant respects from the notions of sovereignty and national identity that we associate with the nation state model. These deviations were less the results of architectonic blueprints and more responses to historical and contemporary contingencies. Both entities exhibit highly complex and multifaceted conceptions of identity and belonging which are more inclusive and other-regarding than those

[122] Chambers 1998, 144.
[123] Tully 1995, 209; 2002.

of nationalism. They were both informed by alternative doctrines to nationalism, which resulted from practical experiences with handling complexity and from comprehensive and ongoing processes of self-examination and constitutional introspection. They are alternatives to nationalism, but they are contested. Their novelty is also questionable, as they are informed by the normative standards that we associate with the democratic constitutional state.

Both entities have altered their constitutional systems through the embrace of the central tenet of modern constitutionalism: individual rights. The increased salience of individual rights at the international level (UN, ECHR) is reflected and amplified in their respective constitutional systems, and have indirectly helped generate an onus on consistency between internal and external affairs. The state is generally held to be Janus-faced, with one face looking outwards and the other inwards. Here we confront two entities that break down some of this distinction (Canada in relation to the outside world, the EU mainly in the relations to (and among) the Member States but also through enlargement). In so doing, they address some of the limitations of the nation state, but at the same time they come to confront new and other problems.

In both places this has been a process where the constitutional amplification of a rights-based mode of legitimation has spawned reactions from the complex national and regional and cultural and institutional settings into which it has been injected. The EU and Canada are and have been highly contested entities, and much energy has been expended on institutionalising reflexivity. The doctrines, policies, institutional and even constitutional arrangements can all be seen as attempts to deal with the particular problems posed by complexity, such as 'multilogues', breakdown of communication (non-deliberative disagreement) and intolerance. This has also shaped their very conception of constitution – with a strong onus on conversation - as it has been widely recognised that many of the issues cannot be settled once and for all in a contractual arrangement.

The two entities can be compared not only because they both deviate from some of the tenets of the nation state, but also because many of the problems they grapple with are similar, some of the ways in which they have developed and sought to address the problems are similar, and some of the sought-after solutions have similarities. For instance, the Canadian experience with Charter-inserted constitutional transformation should be an interesting example to consider in relation to the EU which seems on the verge of formally adopting the Charter, and where European elites have claimed to be willing to embark on something akin to mega-constitutional politics (cf Declaration 23, Treaty of Nice; Laeken Declaration; Laeken

Convention). The Canadian case can be used as a template to assess *how committed* Europeans are to such a process.

The present IGC process in Europe has similarities with the Charlottetown process. In both cases the open process of consultation succeeded in coming up with an agreement that was subsequently handed to heads of governments and made subject to complex ratification (including popular referenda). Given these similarities, it would be useful to see how much the European experience deviates from that of Canada – which could shed further light on the relative uniqueness of the EU.

The Canadian experience also provides valuable insights into the many pitfalls and challenges, as well as the learning processes and changes in social valuations that such comprehensive processes bring forth. On the challenges: How to organise a situation of tense and emotionally laden multilogues? How to prevent deliberative disagreement from degenerating into non-deliberative disagreement? Can a constitutional conversation be sustained in a setting of high barriers to formal constitutional change? On the achievements and failures, we are left with a tricky question: how to interpret failure? On the one hand the Canadians have failed to strike constitutional agreement on at least 3 major occasions, but at the same time, the political landscape has undergone significant changes, here referred to in terms of greatly heightened reflexivity. Previously marginalised and ostracised groups have been recognised as valuable contributors to society and even as central constitutional players (aboriginals). Basic constitutional principles (democracy, rule of law, fundamental rights) have also remained unchallenged throughout the process.

To conclude, then, the two entities studied here may be considered as 'vanguards', as they hold important traits of democratic deviation from the standard tenets of the nation-state. Given this, it is necessary to probe more deeply into the intellectual debates that are conducted in the two entities, as well as to look more closely at how the processes of transformation play themselves out. Comparison is needed also to prevent the mistakes in one place from being repeated in the other, and to make sure that the lessons learnt in one place are communicated to others so as to facilitate their embrace.

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