Constitutional Patriotism
Canada and the European Union

John Erik Fossum

RECONSTITUTING DEMOCRACY IN EUROPE

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Abstract

The purpose of this paper is to discuss the question of allegiance in complex multinational and poly-ethnic entities, with specific focus on the EU and Canada. Constitutional patriotism is a mode of attachment that is conducive to respect for and accommodation of difference and plurality. How thick does this form of allegiance need to be to work in highly diverse societies? I consider what might be understood as the minimum requirements for this form of allegiance to serve the necessary integrative needs for a community, and how accommodating of difference and diversity that constitutional patriotism may be understood to be. Note that this latter point is not only about the scope for voicing dissent; it is also about the prospects for exit (understood in a communal and/or territorial sense). Some claims for difference are simply very difficult to accommodate within a common framework. With exit being an available option, the conditions for fostering loyalty and effecting voice change. Constitutional patriotism, as nationalism, is a mode of attachment that is based on a particular constellation of exit, voice, and loyalty. I try to discern what kind of constellation(s) of exit, voice, and loyalty that sits best with constitutional patriotism, including how different/similar to nationalism this is. After that I try this out on the EU and Canada. The focus is on three sets of dimensions which help shed light on each entity's particular understanding of constitutional patriotism and the underlying constellation of exit, voice and loyalty. I examine what these cases tell us about the role of rights in promoting/fostering constitutional patriotism, through focus on each entity's Charter. Further, I look at each entity's commitment to difference/diversity through examining their respective multiculturalism policies. I seek to identify the philosophy of allegiance underpinning each entity's policy framework so as to establish whether these are informed by the spirit of constitutional patriotism. An important concern is to establish whether the policies are essentially reflective of respect for difference/diversity or are simply a more subtle form of integration. This should be considered together with the final point, that of exit options. The focus is on democratic provisions for territorial exit. Is constitutional patriotism based on an approach to territorial exit that is different from or similar to that of nationalism?

Keywords:

Introduction

The purpose of this chapter is to discuss the question of allegiance in complex multinational and poly-ethnic entities, with specific focus on the EU and Canada. Both are claimed to be multinational and poly-ethnic, with such traits also being reflected in their official doctrines. Diversity awareness is thus an explicit concern that has to figure in their policies on allegiance formation.

The particular approach to allegiance formation that I will examine here is constitutional patriotism. Both the EU and Canada have formulated institutional-constitutional and policy arrangements that have been informed by the spirit of constitutional patriotism.[1] The kind of identity we can associate with constitutional patriotism is one that is conducive to respect for and accommodation of difference and plurality.

Constitutional patriotism refers to a mode of attachment wherein citizens are bound together by subscription to democratic values and human rights, rather than through the traditional pre-political ties that nation states have appealed to (Habermas, 1994, 1996, 1998; Ingram, 1996; Eriksen and Fossum, 2000; Fossum, 2003). Constitutional patriotism is contextual; it however also contains an inbuilt tension between general legal principles and the context within which and on which they operate. These tensions are readily available in the rapidly growing body of literature on constitutional patriotism (Habermas, 1994; 1996; Bohman, 2005; Booth, 1999; Calhoun, 1992, 2002; Canovan, 2000; Cronin, 2003; Fossum, 2003; Ingram, 1996; Kumm, 2005; Lacroix, 2002; Markell, 2000; Michelman, 1999), a body of literature with quite different positions on how constitutional patriotism can broach these tensions. How thick this form of allegiance needs to be to work in highly diverse societies is a greatly disputed matter. To shed light on this it is useful to consider (a) what might be understood as the minimum requirements for this form of allegiance to serve the necessary integrative needs for a community, and (b) how accommodating of difference and diversity constitutional patriotism is. Note that this latter point is not only about the scope for voicing dissent, it is also about the prospects for exit (understood in a communal and/or territorial sense). Some claims for difference are simply very difficult to accommodate within a common framework. With exit being an available option, the conditions for fostering loyalty and effecting voice change. Constitutional patriotism, as nationalism, is a mode of attachment that is based on a particular constellation of exit, voice, and loyalty.[2]

In the following I first provide a brief definition of constitutional patriotism. Thereafter I try to discern what kind of constellation(s) of exit, voice, and loyalty that sits best with constitutional patriotism, including how different/similar to nationalism this is. After that I try this out on the EU and Canada. The focus is on three sets of dimensions which help shed light on each entity's particular understanding of constitutional patriotism and the underlying constellation of exit,

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[1] On the analysis of the European Constitutional Treaty as a case of thick constitutional patriotism, see Kumm 2005, on the Canadian Charter as a case of constitutional patriotism, see Cairns 2003 and Fossum 2001.

[2] I here draw on the categories developed by Hirschman in his famous *Exit, Voice and Loyalty*, although I adapt these to suit my purposes.

voice and loyalty. I examine what these cases tell us about the role of rights in promoting/fostering constitutional patriotism, through focus on each entity's Charter. Further, I look at each entity's commitment to difference/diversity through examining their respective multiculturalism policies. I seek to identify the philosophy of allegiance underpinning each entity's policy framework so as to establish whether these are informed by the spirit of constitutional patriotism. An important concern is to establish whether the policies are essentially reflective of respect for difference/diversity or are simply a more subtle form of integration. This should be considered together with the final point, that of exit options. The focus is on democratic provisions for territorial exit. Is constitutional patriotism based on an approach to territorial exit that is different from or similar to that of nationalism?

What are the minimum requirements for such a mode of allegiance to serve the necessary integrative needs for a community?

Constitutional patriotism defined

The contextualization of democratic values and human rights in a constitutional structure permits the willing acceptance of a system of authority embedded in the constitution, and this is what holds people together and makes for their constitutional patriotism. Citizens are bound to each other not by traditional pre-political ties that nation states have appealed to but by subscription to democratic values and human rights (Habermas, 1996: 465f; Habermas, 1998; Ingram, 1996). This type of identity is conducive to respect for and accommodation of difference and plurality. It is post-national and thinner than national identity. It is thin also in that its substantive content is shaped by and ultimately made subject to consistence with a set of constitutionally entrenched procedures. Habermas notes that the 'universalism of legal principles is reflected in a procedural consensus, which must be embedded in the context of a historically specific political culture through a kind of constitutional patriotism' (Habermas, 1994: 135). The procedural consensus is founded on the notions that:

> the rationally based conviction that unrestrained freedom of communication in the political public sphere, a democratic process for settling conflicts, and the constitutional channeling of political power together provide a basis for checking illegitimate power and ensuring that administrative power is used in the equal interest of all.
>
> Habermas, 1994: 135

Rights are central to this notion of allegiance, through our recognition of other persons, as holders of rights. Rights can ensure both an individual sense of self and a collective sense of membership of a community. The core of modern rights is their individual nature. Individual rights are based on a notion of reciprocal recognition that ensures personal autonomy, which is intrinsic to the medium of law (Habermas, 1996: 88). Legal relations highlight the general and universalizable aspect of the recognition relationship, so that what is recognized is the person as a holder of rights, not the particular personality traits or attributes of the person. This relationship is not universally applicable but reflects the view of law as bounded in that it applies to

specific settings. The social recognition serves to underline that rights are always steeped in and shaped by a particular political culture.

Minimum requirements: Autonomy

Autonomy has two facets, private and public, associated with the constitutional state and democracy, respectively. Private autonomy presupposes protective rights that guarantee against state incursions into the affairs of individuals, whereas public autonomy presupposes rights to participation to enable the citizens to see themselves not only as subject to the law but also as the authors of the law (Habermas, 1994: 112; 1996: 120). Without fundamental rights, which guarantee the private autonomy of citizens there would be no assured way to institutionalize in a body of law the conditions for future citizens to utilize their public autonomy. The public and private autonomies are interrelated because:

> in the final analysis, private legal persons cannot even attain the enjoyment of equal individual liberties unless they themselves, by jointly exercising their autonomy as citizens, arrive at a clear understanding about what interests and criteria are justified and in what respect equal things will be treated equally and unequal things unequally in any particular case.
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> Habermas, 1994: 113

Democracy and the rule of law, both of which are critical components of constitutional patriotism, stand in a relation of tension. Habermas has more recently noted that:

> the allegedly paradoxical relation between democracy and the rule of law resolves itself in the dimension of historical time, provided one conceives of the constitution that makes the founding act into an ongoing process of constitution-making that continues across generations.
>
> Habermas, 2001a: 768

Claims for differential treatment must be assessed with direct reference to how they affect this internal relation between the citizens' public and private autonomy. If such claims undermine either set of autonomy, they cannot be justified. If serious enough they would undermine the foundation for constitutional patriotism.

Habermas' insistence on the primacy of individual private and public autonomy does not necessarily detract from recognition of the political salience of ethnic or other differences. Whilst the system of rights is universalistic in its content, rights are not necessarily blind to cultural differences. In fact, '(a) correctly understood theory of rights requires a politics of recognition that protects the integrity of the individual in the life contexts in which his or her identity is formed' (Habermas, 1994a: 113).

How thick? Two conceptions of constitutional patriotism

Constitutional patriotism is often thought of as a bit of an oxymoron: as it is seen as simultaneously an attempt to bridge the universalism of basic rights and the particularity of a community of allegiance and identification. Built into the concept there are two seemingly opposite pulls: universalist and particularist.

I will approach thickness by examining how far we can 'stretch' the constitutive features of constitutional patriotism in either of these two directions. More concretely, I measure thickness by examining different conceptions of constitutional patriotism in relation to three dimensions: exit, voice, and loyalty. Every mode of allegiance is based on a particular or distinctive constellation of exit, voice, and loyalty. Scope for exit (in its various dimensions – synchronic as well as diachronic) has strong bearings on diversity: for its scope, type, and handling. (Ethnic) nationalism for instance largely assumes away the question of exit, as its main preoccupation is with a distinctive community and its protection. Nationalism posits a community with no real exit from its past, as nationalism 'makes us one with our past and thus fully accountable for it' (Booth, 1999: 252). The memory of the past helps sustain the sense of community and identity, whose continued protection is again premised on high thresholds against most forms of exit (through separation, and secession, that is through sub-unit exit); strong onus on loyalty; and voice is always sought mitigated or modified whenever the issue of communal needs and protection is activated.

Thus, to properly understand the thickness of the mode of allegiance embedded in constitutional patriotism we need explicit attention to exit, both to understand how constitutional patriotism relates to the past – with focus on the issue of memory - as well as to properly handle the structural-institutional dimension of allegiance formation and sustenance. The law is a central means of social integration (Habermas, 1996). When the law and culture are embedded within the institutions of the state, that is, when there is no real recourse for exit, their embedding in the state produces a strong system for ensuring loyalty, channeling voice, and sustaining a sense of memory of the past and a sense of commitment to the common future.

Which constellation of exit, voice and loyalty best suits constitutional patriotism? Given the onus on patriotism, how strong is the communal dimension of constitutional patriotism? On this dimension, how far from the ethnic nationalist constellation is constitutional patriotism? In the following I draw on the debate on constitutional patriotism. My concern is not to provide accurate reconstructions of authors' positions; instead I draw on these positions to try to understand the particular constellation of exit, voice and loyalty that underpins constitutional patriotism.

It might be useful to start with Calhoun's criticism of Habermas, whose notion of constitutional patriotism he finds too thin and as cast too narrowly. What Calhoun thinks Habermas ignores is a broader view of the constitution: not simply as a legal-political arrangement but also as '*the creation of concrete social relationships*; of bonds of mutual commitment forged in shared action, of institutions, and of shared modalities of practical action' (Calhoun, 2002: 152-3). In my framework, Calhoun stresses loyalty more than does Habermas. He also sees Habermas's notion as overly narrow, as Habermas apparently casts it as an opposite to nationalism rather than as a possible complement to it. Calhoun argues that this is based on a misconstrual of nationalism, as it does not simply rest on pre-political identities, but can also be a mode of fostering a form and level of 'peopleness' within the political sphere. Calhoun (2002: 152) notes that '(t)he U.S. example could inform a different conception of constitutional patriotism, stronger than that advocated by Habermas'.

The question is whether Calhoun's notion stretches constitutional patriotism beyond its reasonable limits, that is, undermines constitutional patriotism's fragile balancing

of different concerns. Underpinning Calhoun's conception of constitutional patriotism, we can discern a distinctive pattern or constellation of loyalty, voice and exit. Nationalism, also the kind that Calhoun argues is compatible with constitutional patriotism, has necessarily a strong element of *loyalty* built into it. Nationalism is based on a categorical type of identity: people hold such a strong allegiance to their nation that they are willing to ultimately die for it.

This position clearly makes up one definite end-scale of the identitarian dimension of constitutional patriotism. Here we can posit the presence of a positive identification with something which is designative of us; a set of mechanisms to instill a positive sense of identification; and the ability to define the other and also to exclude those that are deemed to be different – the non-us or *others*. This position is highly attentive to the patriotism component of constitutional patriotism; it is not clear that it is equally attentive to the constitutional component.

What is important to underline is that this constellation is premised on a particular role attributed to *exit*, a point that is not much broached within the national frame but whose salience is raised when we look at it from the cosmopolitan angle (which is where Habermas after all locates constitutional patriotism).[3] The national community is bounded, with clear provisions on exit. When constitutional patriotism is linked back to nationalism this automatically brings in the relation to the state and the states system – as also Calhoun did with his reference to the U.S. Doing so has deep implications for the scope for exit. Three aspects of exit are here particularly relevant, which we may label as argumentative, communal, and territorial. On the first, argumentative, the legal provisions on private autonomy ensure argumentative exit through protection of silence or license to step out of the communicative space; citizens need not partake in all forms of activities. Neither do they have to avail themselves of voice. But the onus on positive identification also likely sets social limits on the scope even for argumentative exit. On the second, communal dimension, the issue is how far individual communities can exit from the norms of the larger society. Societies generally accept various forms of 'functional exit'. We see this in relation to religious communities, which may be able to opt out of public school systems or military service or the like. Similarly, ethnic and other groups may be allowed partial opt-outs of the majority language community through provisions for the protection of own language and through federal arrangements. But these run up against the third and most serious case of exit, that of *territorial* exit: Calhoun's nationalist version of constitutional patriotism can hardly be said to be compatible with provisions for sub-unit exit through secession or separation.

Thus, when we operate within the states system and the nationalist frame is our reference; physical exit is possible for individuals and to a limited extent also for groups, but the threshold for territorial exit through secession or separation is very high and subject to strict national and international legal provisions. In today's world states are legally ordained to and also mostly physically able to uphold sovereign territorial control. High barriers to exit can thus serve as vital mechanisms for sustaining the peculiar constellation of loyalty and voice that is set out above. In other words, such limited recourse to exit greatly increases the state's ability to instill a

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[3] Eriksen and Weigård note that in Habermas more recent work (from the early 1990s on) 'we see the contours of a discourse-theoretical conception of the cosmopolitan order' (Eriksen and Weigård 2003: 232). Note that this is a complex and contingent conception of cosmopolitanism.

common sense of allegiance through additional provisions for socialization, disciplining, and control.[4] This distinctive constellation of loyalty, voice and exit may thus have less to do with the *particular* mode of allegiance involved, and more to do with the state's ability to exercise sovereign control of a given territory. Allegiance formation takes place within a national frame, where this frame is accepted as legitimate and where the state is equipped with strong sanctioning measures to ensure compliance.

Any close association with nationalism produces a conception of constitutional patriotism whose underlying mode of allegiance ends up being too thick. I think Calhoun falls into this trap, whereas Habermas does not, precisely because he operates with a thinner conception of allegiance. In effect, drawing on Habermas rather than Calhoun, the model of constitutional patriotism that I see emanating from the patriotism end of the scale sees this as requiring a cosmopolitan orientation, with weak territorial exit provisions, and a link to the past, 'as a storehouse of lessons' (Booth, 1999: 256); a *post-national* rather than a national form of loyalty; and a communicative community with a strong onus on fostering a communal sense of allegiance.

But this is not the only conception of constitutional patriotism. Given nationalism's hankering towards particularity, the obvious step would be to argue that the other end of the constitutional patriotism scale would be occupied by identification with normative universals. Apparently, Habermas' early position was precisely that, but with identity understood in postconventional terms, not in relation to concrete others but to a kind of 'anticipated … community of others…'.[5] In later work, notably *Between Fact and Norms* (English version 1996), Patchen Markell detects a greater emphasis on how any effort to ground normative universals in particular structures has to contend with the fact that any such grounding will yield an inadequate and/or weak reflection of the universal principles. This means that there is no safe anchor for affect (of such kind as to sustain democracy) in concrete institutions. There are therefore limits to how far positive identification with a specific set of principles can go in allegiance terms. Markell (2000), in his reconstruction of the philosophical position that informs Habermas's more practical-political writings detects a different understanding of constitutional patriotism, one that is ultimately based on reflexivity (which only rests on certain procedural preconditions). Any set of principles and institutional arrangements has to be open to deliberative challenge if their true universal potential is to be properly unleashed. The net result is not positive identification, but rather what may be termed an ensuing identitarian ambivalence:

> If universal normative principles always depend on supplements of particularity that enable them to become objects of attachment and identification but that are also never quite equivalent to the principles they purport to embody, then constitutional patriotism can best be understood not as a safe and reliable identification with some pure set of already available universals, but rather as a political practice of refusing or resisting particular identifications – of insisting on and making manifest

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[4] Kymlicka (1998), in his assessment of Canadian multiculturalism policy, which has been widely critiqued for fostering ethnic ghettoization , underlines the state's strong identity forming role.

[5] Markell 2000:42, with reference to Habermas 1974.

this failure of equivalence – for the sake of the ongoing, always incomplete, and often unpredictable project of universalization.

Markell, 2000: 40

This second notion of constitutional patriotism highlights voice over loyalty and exit. Note that it also puts considerable premium on what I would label as 'negative voice'; 'citizens … must learn to fear, be angry at, and be ashamed of the very institutions and cultures that claim their attachment and allegiance'(Markell, 2000: 54). This is a way of establishing and enforcing standards and as such forms a vital component of democratic reflection. This can also be construed as a measure of exit from the past, certainly in positive allegiance terms, albeit not in moral terms, as the past and memories of it are central feeders of the ongoing reflexive process.

Loyalty in the conventional sense would in this understanding of constitutional patriotism play third fiddle, as it is always subject to discursive challenge and is reined in by procedures anchored in universal principles, whose very entrenchment in procedures can also be discursively challenged.

In my reading, the central role of voice in this notion of constitutional patriotism also colors the actors' conception of and relation to constitution; not as an agreed-upon frame but better thought of as a 'working agreement', i.e. 'an agreement which has come about argumentatively, but where the actors may have different but still reasonable and acceptable grounds for their support' (Eriksen, 2003: 204-5).

The critical issue here is whether not the ensuing mode of allegiance might be too thin to sustain a community. How will such a system hold together? The key to the answer in Markell's account is the constitutional democratic state: Markell does not bring in the cosmopolitan dimension. This link to the state – as the frame within which law's role of social integration is given institutional sustenance – must be considered as the key to stability and as guarantor of a measure of thickness. But this also means that the reflexive process is subject to the strong socializing mechanisms of the state; how long can such an open-ended process be carried out before it clashes with the institutional interests of the state and becomes subdued under it? In other words, the issue may not be thinness but ability to sustain the reflexive orientation.

The critical question, then, is how this notion of constitutional patriotism sits with cosmopolitanism. It seems to me that the reflexive character of this notion of constitutional patriotism ultimately presupposes a cosmopolitan frame and hence a very different relation to exit: for this to be truly reflexive, it has to have provisions not only for exit for persons and arguments but also for territorial sub-units. The reason is that citizens' allegiance to the polity is grounded on the universal principles' constant embedding in institutional form, a form of allegiance that is constantly subject to deliberative challenge and is marked by considerable ambivalence. As the character of this grounding varies, allegiance is also always necessarily conditional. Hence, citizens within a sub-unit who do not find the system to operate in line with their interests must have legal procedures available for exit, but of course ones that are consistent with universal principles.

Within this framework, the aggregate political system is only legitimate insofar as the reasons and justifications for staying together are stronger than the reasons for departure or removal through territorial exit. But since exit has profound effects not

only on those that leave but equally as well on those that stay behind – the procedures for exit have to be democratic and be based on reciprocity.

From this discussion what I end up with is two possible interpretations of constitutional patriotism, each of which is based on a distinctive constellation of exit, voice and loyalty. Both versions are inspired by the literature but neither is a direct transposition because the versions presented here are such framed as to take exit properly into consideration. Doing so gives a peculiar twist to each constellation – including what scope for and what character of voice and loyalty is implied.

Table 1.
Two conceptions of constitutional patriotism

	Constitutional Patriotism I (**CP I**)	Constitutional Patriotism II (**CP II**)
Exit	- Moderate 'cosmopolitan openness' for persons and arguments - Exit provisions only from communicative community, not available to territorial entities (3)	-High 'cosmopolitan openness' for persons and arguments - Provisions for sub-unit exit from the polity, in compliance with democratic norms (2)
Voice	- Rights to ensure individual autonomy - Communication aimed at fostering agreement on common norms: pragmatic, ethical and moral - Communication to foster solidarity and sense of community (2)	- Rights to ensure individual autonomy - Communication aimed at reaching working agreements - Communication to foster trust in procedures and rights - 'Negative voice' (1)
Loyalty	- Positive endorsement of culturally embedded constitutional norms - Positive identification with the polity (1)	- Ambivalence toward any form of positive allegiance - Systemic endorsement through critique (3)

Numbers (1, 2, 3) denote descending importance.

In my reading, the issue of the requisite thickness of allegiance in constitutional patriotism has strong bearings on how far from the state frame and the national mode of community that constitutional patriotism can be taken. From the table, we see that the second version presented above takes us the farthest away and represents a significant departure, dependent as it is on an explicit cosmopolitan constellation, whereas the first version essentially relies on the state form and can operate within a system of states.

Below, I apply these two versions of constitutional patriotism to selected aspects of the EU and Canada so as to establish how well these entities cohere with constitutional patriotism, and what this entails for diversity awareness and handling.

Constitutional patriotism in the EU and Canada

Why discuss constitutional patriotism (CP) in relation to the EU and Canada? Neither is able to rely on an agreed-upon national mode of allegiance. In the last several decades, efforts to forge an alternative doctrine to nationalism have been made, most notable of which is multiculturalism. Canada is also a pioneer in that it is the first

democratic state to establish democratic conditions for territorial exit for subunits. The EU was set up as an explicit repudiation of ethnic nationalism – and as a case of possible *exit* from Europe's national past. The EU also permits territorial exit; Greenland for instance left the Union in 1984 (the European Constitutional Treaty has an explicit exit provision).

Both the EU and Canada are to varying degrees multi-ethnic and multinational.[6] Precisely because they test or better exceed the bounds of national allegiance, there have been frequent attempts to consider the mode of allegiance they seek to elicit as evocative of CP.

Below, I look at three relevant dimensions, which are central to constitutional patriotism and which can help shed light on the particular constellation of voice, loyalty and exit that informs each entity. First, charters or bills of rights are central in instilling a sense of allegiance akin to CP, as well as in helping to ensure the institutional conditions for co-originality. Individual rights are also central preconditions for voice. Second are the entities' central policy doctrines on diversity protection/promotion. Here I look at each entity's multiculturalism policy as a case of explicit recognition of diversity. An important issue is whether this policy framework is ultimately set up to foster a deeper sense of loyalty to an implicit or explicit mode or foremost respectful of different ways of life. Third, I look at territorial exit provisions. If such exist, they can be considered as tests of stateness, or conversely, as indicators of each entity's degree of cosmopolitization. The question is whether these three dimensions in each case can be summed up into a coherent constellation of CP, whether along the lines of CP I or II. My initial hypothesis is that Canada will embody the constellation of CP I and the EU that of CP II.

The Canadian Charter

The federal Canadian Charter of Rights and Freedoms (1982) was a central component of the Canadian Constitution Act 1982, which patriated the constitution from Britain. This act was intended as a core vehicle in the symbolic founding of Canada as an independent country and as one based on democratic constitutionalism. The previous constitution (the BNA Act 1867) had of course set Canada up with representative democracy, but suffered from serious constitutional shortcomings, among which was the failure to evoke a common spirit of allegiance within a self-professed democratic constitutionalism (Cairns, 1988: 27).

The Charter can be understood as a central vehicle to rectify this by instilling a sense of constitutional patriotism based foremost on liberal individual rights, albeit with some allowance also to the more complex notion of Canada as a 'community of communities'. The Charter contained certain group-based rights such as language rights but these 'can be justified in terms of individual rights' (Taylor, 1993: 165). The gist of the Charter was to foster an individual rights based patriotism that would confront and challenge the deep diversity required for the fulfillment of the province of Quebec's collective goal of cultural and linguistic survival.

The introduction of the Charter sparked great opposition, in particular from Quebec separatists who argued that it would not foster a viable constitutional patriotism,

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[6] On this see Kymlicka 1995, 1998. See also Gagnon and Tully 2001 and Fossum *forthcoming*.

because the Canadian Charter was introduced without the province of Quebec's explicit consent. They therefore deemed the Constitution Act, 1982 illegitimate. The province of Quebec has still not signed the Constitution Act 1982. Further, they argued that the Canadian Charter was unnecessary in Quebec, as Quebec in 1975 passed its own *Charte des droits et libertés de la personne*. A further objection was that the Canadian Charter did not offer explicit protections for Quebec's cultural or national distinctiveness, and as such would bar exit for the French-speaking language community. To them, the Canadian Charter's strong individual rights basis would prevent Quebec from instituting measures to protect and promote its cultural and linguistic uniqueness. The Charter was therefore seen as in-sensitive to the cultural diversity of Canada.

What this reveals is that the CP that was sought fostered through the Canadian Charter could not be rooted in a common understanding or shared memory of the past; it was inserted into a divided community; and the core vehicle for propounding this sense of allegiance has itself created considerable conflict. Neither the setting nor the Charter is therefore reflective of CP I. The Charter was set up as a mild case of exit from Canada's past, a past that had been constructed as dominated by the two founding peoples.

CP – both versions I and II – is intended to overcome past divisions, even through a certain distancing from the past. CP sees the past as a repertoire of lessons. The Canadian Charter could henceforth be thought of as an attempt to embody the set of minimum common denominators that the long period of co-existence had taught people to respect.

Nevertheless, the Canadian Charter was such structured as to be barred from doing so in line with the criterion of co-originality, which is central to both versions of CP. It is clear that the Canadian Charter contained a significantly strengthened constitutional recognition and protection of individual rights; however, and this is the crux, it also contained group-based rights and a notwithstanding clause which were communal exit provisions in the sense that they permitted governments to opt out of several Charter provisions.

The apparent opposition to the Charter in Quebec might suggest that the Canadian Charter only fosters constitutional patriotism outside of Quebec. However, Quebec also has its own Charter. One question is whether a system of dual charters is compatible with CP. The two charters are quite similar in their strong insistence on basic rights. Such insistence could help to further a liberal rights-oriented convergence in Canada (Schneiderman, 1998; Taylor, 1993; Norman, 1995). But both Charters also contain elements that may negatively affect the internal relation between private and public autonomy, in the sense that they both include group rights. The Quebec Charter offers far stronger protections of French language rights and is more conducive to the pursuit of collective goals than is the Canadian Charter. The latter is therefore more conducive to CP in either version (I or II), because of its stronger focus on individual rights, its clearer cosmopolitan orientation, and its more inclusive nature, in cultural terms.

When we look at Canada's development post-1982, we find that Canada has undergone a Charter revolution (Morton and Knopff, 2000; Cairns, 2003). This process has served to strengthen individual public and private autonomies and the vital links

between these so that the constitutional arrangement does speak to tenets of democracy and the constitutional state. The Canadian Charter can therefore be seen as a step in the direction of founding the Canadian Constitution on some notion of CP.

The Canadian Charter has over time won acceptance, even in Quebec (Cairns, 2003). It has also fostered a constitutionally based and driven participant democratic culture which has proven quite hostile to political leaders and the jurisdictionally based claims of governmental actors. The Charter has expanded the public autonomy of a range of groups whose former status was marginalized. This has occurred at the same time as the traditional liberal rights of citizens have been given a stronger constitutional footing. These developments have taken place within a setting that has *not* managed to reach an agreed-upon constitutional settlement. Further, Quebec has taken language protective measures that do not comply with the Canadian Charter. An important driver of the constitutional struggle is the presence of different, distinct and particular identitarian narratives, with conflicting communal aspirations. These have in their active engagement with the past been unable to come to terms on a constitutional settlement. Nevertheless, rather than through a working agreement we could say that they have converged on what may be considered a working arrangement: basic constitutional principles are agreed-upon together with a commitment to a peaceful and reasonable interchange on its subsequent development. We may conclude that insofar as the Canadian Charter experience can be said to comply with CP in the first place, the dynamic of contemporary and historical contestation and reflection it set in motion is closer to CP II than to CP I.

The European Charter[7]

CP is the philosophical approach to the fostering of allegiance that we can discern from the European Charter. The European Charter's approach to CP is also 'rooted' in ethical content, in particular through the commitment to social rights and social solidarity, as part of the Communities' socio-economic structure. In my previous assessment of the Charter's basic philosophy I noted that it appears thicker than that of a classical liberal statement of fundamental rights and freedoms. This commitment may however not amount to that much, given the limited competence the EU has in the social policy area (Menéndez, 2003).

This latter point has a strong bearing on how pervasive this embrace of constitutional patriotism can be, given that the Charter's provisions will be steeped in the particular legal-institutional context that makes up the Union. If we start with the provisions for ensuring *public* autonomy and for ensuring the mutually supportive interaction of citizens' private and public autonomies presupposed by CP, we find that the Charter reflects the *weakly* developed citizenship rights of the EU. Still, European Union citizenship is an 'open-textured concept' with considerable transformative capacity.

The problem of weakly developed citizenship rights in the Charter is likely to be amplified by the fact that the Charter does not affect the pillar structure. Note that although there has been a gradual move of policy areas from pillars two and three to one, the ECJ is excluded from pillars two and three and Parliament's role is merely consultative.[8] Citizens' private autonomy can thus be considered as weakened in the

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[7] The following analysis draws on Fossum 2003 but has been updated.

[8] The ECJ has only jurisdiction on what regards articles TEU 35 and 40 as specifically provided in Article

sense that and insofar as persons are not able to appeal to the ECJ when their rights are infringed upon.[9] Such weakening applies even more clearly to citizens' public autonomy. Note that institutionally speaking it is only within the first pillar that the entire populace of the EU can conceive of itself as a lawmaker. Within pillars two and three the citizens are represented by their respective national representative systems and here decisions are reached by unanimity. In other words, here citizens' deliberations are not reflected in the decisions of one set of institutions over which the entire body of citizens can exercise control and accountability. Co-originality suffers.

A further issue pertains to the constitutional status of EC law. Treaty changes, filtered by the jurisprudence of the Court of Justice, have contributed to the forging of a material constitution at the European level. The European legal order is thus self-sufficient, with fundamental rights as a founding principle.

Nevertheless, the principled and practical status of this material constitution is controversial. It did not come about through the drafting of a formal constitution. The historic lack of a democratic constitution-making process deeply influenced the Laeken Convention, which sought to rectify this. The Charter was also touted as an important step in the efforts to bridge this gap. The Convention that drew up the Charter drafted the text *as if* it were to be incorporated in the Treaties.[10] This text is based on already existing rights (from the EC treaties, the ECHR, the constitutional traditions of the member states, and other international conventions).

Koen Lenaerts, Judge of the First Instance of the European Communities and Eddy de Smijter argue that the effects of the proclamation will be the same as if the Charter were inserted into the Treaties. They note that:

> to the extent that the Charter is to be regarded as an expression of the constitutional traditions common to the Member States, the Court will be required to enforce it by virtue of Article 6(2) *juncto* Article 46(d) EU "as general principles of Community law"… The Charter is thus part of the *acquis communautaire*, even if it is not part yet of the Treaties on which the Union is founded.
>
> <div align="right">Lenaerts and de Smijter, 2001: 299</div>

The Charter could give impetus to the process of forging a *democratic* EU constitution through fostering a rights-based CP. In legal terms, the Charter is more than a declaration of intent and already in the Laeken process served as a spearhead for CP in the EU (Duff, 2000; Eckhout, 2000). The great uncertainty today appears political more than legal. The French and Dutch rejection of the Constitutional Treaty in popular referenda in June 2005 has created considerable uncertainty as to the further pursuit of a formal-democratic constitution for the Union. In the absence of such a political will, the Charter's being steeped in and adapted to the Union's structure, could defang it as a significant spearhead for CP.

TEU 35, Section 1 and Article TEU 40, Section 4, second paragraph.

[9] Citizens may have recourse to other legal instruments such as the national constitutional systems and the ECHR.

[10] CHARTE 4105/00. See also European Commission 2000.

The European Charter is no doubt a weaker instrument for fostering CP than is the Canadian Charter. Further, the prospects for CP in the EU more than even in a contested state such as Canada hinge on the Union's overall development *as polity*. The Union as a non-state entity is to a considerable extent institutionally barred from instilling CP I. Without a further continued constitutional commitment it may also be saddled with the negative voice of CP II but without the modifying or unifying elements that make it CP in the first place. The risk facing Europe is that the integration process unleashes voice along particular identitarian lines but without at the same time being able to ensure that these are subjected to a constitutional *working arrangement* (as we saw in Canada) that helps ensure agreement on basic rights and mutually respectful procedures of communication and interaction.

The EU's and Canada's multiculturalism policies

Canada

The diversity of Canada has long been officially recognized. What is particularly notable is that this has given rise to a public rhetoric that is quite different from that associated with nationalism, which when provoked would always refer to some cultural symbol of unity. To illustrate, when asked in 1999 to define the Canadian identity, the then Minister of Intergovernmental Affairs, Stephane Dion said that it consisted of respect for basic rights and respect for diversity.[11] No explicit reference was made to a common heritage or common traditions.

The recognition of Canada's diversity has been propounded through minority rights and multiculturalism. The country is officially bilingual and multicultural.[12] It offers official recognition of immigrant ethnicity. As Will Kymlicka (1995; 1998) has underlined, multiculturalism as a 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 ghettoization. It is also an ideology that speaks to interethnic tolerance and the benefits that accrue to society from its diversity (Norman, 2001). 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 these notions, although it is contested how well it has done.[13] They also claim that it has contributed to heightening awareness of difference and the need for accommodating difference and diversity (Kymlicka, 1995, 1998).

Multiculturalism's approach to socialization and incorporation is clearly different from that of nationalism. In what sense is it consistent with CP? In my reading it seems to straddle the line between CP I and II. It is more focused on integration than

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[11] Speech by Stephane Dion to the 7th Triennial NACS Conference, Reykjavik, Iceland, August 1999.

[12] The Canadian multiculturalism policy was introduced in 1971 and in 1988 it became officially enshrined in the Multiculturalism Act.

[13] It should also be noted that the very doctrine of multiculturalism is debated and challenged.

on diversity awareness, although the onus on reciprocal adaptation speaks to a kind of reflexivity that is closer to CP II because it to some extent at least deprives the receiving community of automatic resort to a given set of norms and traditions. Traditions – this is how we do things here – do not only have to be communicated to the newcomers (with the assumption that they be adopted and emulated) but have to be explained and justified; hence are open to deliberative challenge and change.

The European Union

The European Union's approach to diversity can be said to be based on universal principles, as well as on recognition of difference, notably national such. There is no real agreement within the Union as to how this balance is to be struck. This also colours the academic debate. Some analysts stress that the Union should, and to some extent also does, do more than simply accommodate existing national identities. It represents an attempt at forging a distinct *post-national* mode of belonging (Habermas, 1998; 2001b). This is based on the notion of the Union as a vehicle to *exit* from central aspects of Europe's past. Efforts to invoke Europe's past and history as a resource to foster agreement on a constitutional arrangement will very likely backfire and generate negative voice. Europe is apparently confined to CP II or abandon CP altogether.

Other analysts stress that national diversity awareness is a defining feature of the Union. Joseph Weiler has argued that the Union's normative hallmark is the *principle of constitutional tolerance*, which is premised on consolidation of democracy within and among Member States and on 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 internalization – individual and societal – of a very high degree of tolerance' (Weiler, 2001: 68). In this reading the national community is seen as the locus of primary and deeper attachments. The overarching European entity is equipped with some form of constitutional authority, but its authority is not entrenched in a system of strong sanctions; as it has a strong voluntaristic component. If Weiler's assessment is correct, such an entity would be closer to deep diversity (Taylor, 1993; Fossum, 2004), that is, accepting of different conceptions and visions of what the polity is, and ought to be, than to CP.

These comments suggest that the Union's handling of diversity is not reflective of CP I, as there is no common identity or sense of community, however frail. Neither is it entirely correct to say that it is marked by CP II. There are several competing efforts to develop a mode of allegiance that appears thicker than the deep ambivalence to any sense of positive identification that is reflective of CP II, but the past crops up and renders agreement difficult.

Provisions for Territorial Exit

The cosmopolitan universal dimension of CP presumes that a polity permits human rights norms and universal conceptions of justice and fairness to play a core role in the determination of its critical internal issues. In one reading of CP, this also includes provisions for territorial exit.

In Canada, in the aftermath of the 1995 Quebec referendum, the federal Canadian government sought to clarify the legal framework surrounding a possible future Quebec secession referendum. The question of Quebec separation was taken to the Supreme Court which handed down its advisory opinion in 1998.[14] 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.[15]

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 in the world to have spelled out a set of democratic procedures for separation or break-up.[16] 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.[17]

The secession reference at least to some extent takes inspiration from a cosmopolitan conception of political community. It noted 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.[18]

This statement can be seen to underline the role of global public opinion as a watchdog for upholding the condition of reciprocity. The emphasis on legitimacy serves as a powerful reminder of the need to act in a manner consistent with international standards of legitimacy. The statement cannot be construed to the effect that the international community should serve as *the* source of standards of legitimacy but it is entirely consonant with the notion that democracy is based on universal

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

[15] Ibid.

[16] Note that the Draft Treaty establishing a Constitution for Europe contains a provision (Article I-60) that permits voluntary withdrawal from the Union, CIG 87/2/04.

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

[18] Canada, Supreme Court *Reference Re Secession of Quebec*, [1998] 2 SCR 217.

principles whose proper sustenance requires that they be globally accepted and embraced.

Whether such provisions will comply with CP hinges on the critical issue as to what counts as a viable justification for territorial exit and further that the procedures for determining whether exit can take place are consistent with co-originality: they cannot violate private and public autonomies and their co-constitutive character.

It seems to me that the Canadian provisions for territorial exit may be somewhat consonant with CP II, for two reasons. First is because the Canadian provisions do highlight the principle of reciprocity (although it is not clear until tried whether this principle will be properly embedded in actual practice), and second is because it speaks to the central tenet of reflexivity, which is that any system of authority must justify itself to those affected by it – even to the extent of having recourse to physical withdrawal. It is also noteworthy here that the ECT's exit clause does not contain the same level of reciprocity.

Conclusion

In the above I have tried to clarify CP's ability to handle diversity. There are several different approaches to CP in the literature. I found that once we consider the issue of exit which had not been systematically dealt with in the literature it was possible to identify two notions of CP, each of which was based on a distinctive constellation of voice, loyalty and exit. When we consider CP in relation to nationalism, it is quite clear that both versions of CP are based on constellations of voice, loyalty and exit that are distinctly different from those we can discern from nationalism. The two versions of CP that I have identified here differ foremost on the state vs. cosmopolitan dimension.

I then discussed these two versions of CP in relation to the EU and Canada. I found that both Canada and the EU were trying to draw on CP, with mixed luck. I also found that Canada did not bear out the initial hypothesis: it appears to be closer to CP II than to CP I. The Union has sought to pursue both CP I and II, but whereas it may have tried to pursue CP I more strongly than has Canada, it has not succeeded. A critical difference between the EU and Canada is that whereas in Canada the deliberations are taking place within the framework of democratic constitutionalism as guiding norm-set; the key issue in the Union is *whether* there will continue to be a commitment to further constitutionalization. The norm-set is clearly present also in the Union; what is at stake is this norm-set's ability to shape the Union's self-conception as democratic constitutional entity.

In my reading, the constitutional dimension is the key; it brings to bear the integrative and sanctioning power of the law and the state. What is particularly puzzling with CP then is precisely what is and should be the relation to the state. CP after all is premised on a cosmopolitan rather than a statist frame but how far from the state can we really go? It is here that these two cases can offer new and revealing insights. I tried to argue that Canada's commitment to CP II also has an element of cosmopolitanism built into it. Canada is therefore a very interesting case to follow in allegiance terms. One critical question is how far we may stretch stateness in a cosmopolitan direction before the system starts to unravel or starts to develop

stronger more traditional forms of allegiance based on a territorially reconfigured entity.

Another is the status of constitution as contractual arrangement. CP, as Habermas has noted should be associated with an alternative conception of constitution-making, that of constitution making as an ongoing process. The Canadian situation is closer to a notion of constitution as an ongoing reflexive process (Chambers 1998). The constitution might here be understood as a working arrangement, wherein basic rights are recognized and respected. This helps ensure that the discussion of essential questions of identity and belonging is conducted in a peaceful and respectful manner. The interesting question that the comparison of Canada and the EU can shed light on is whether these conditions can only be ensured within the institutions of the state or whether weaker institutional arrangements can also sustain them. How far from the state can CP really go?

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