JAMES TULLY

Public Philosophy in a New Key

Volume I

Democracy and Civic Freedom

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PUBLIC PHILOSOPHY IN A NEW KEY
VOLUME I
DEMOCRACY AND CIVIC FREEDOM

These two ambitious volumes from one of the world's most celebrated political philosophers present a new kind of political and legal theory that James Tully calls a public philosophy, and a complementary new way of thinking about active citizenship, called civic freedom. Professor Tully takes the reader step by step through the principal debates in political theory and the major types of political struggle today. These volumes represent a genuine landmark in political theory from the author of *Strange Multiplicity*, one of the most influential and distinctive commentaries on politics and the contemporary world published in recent years. The first volume of *Public Philosophy in a New Key* consists of a presentation and defence of a contextual approach to public philosophy and civic freedom, and then goes on to study specific struggles over recognition and distribution within states.

JAMES TULLY is Distinguished Professor of Political Science at the University of Victoria, Canada. He is one of the most influential and distinctive political philosophers writing today.

IDEAS IN CONTEXT 93

Public Philosophy in a New Key
Volume I: Democracy and Civic Freedom

IDEAS IN CONTEXT

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PUBLIC PHILOSOPHY IN A NEW KEY

Volume I: Democracy and Civic Freedom

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University of Victoria

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To Debra

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Pacific Rim National Park

Credits

The author would like to thank the following publishers for permission to reuse and rewrite material that originally appeared in their publications.

Volume I

Chapter 1: From 'Political Philosophy as a Critical Activity', *Political Theory* 30, 4 (August 2002), republished in Donald Moon and Stephen White, eds., *What is Political Theory?* (London: Sage, 2004).

Chapter 2: From 'Wittgenstein and Political Philosophy', in Cressida Heyes, ed., *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca: Cornell University Press, 2003), revised from 'Wittgenstein and Political Philosophy', *Political Theory*, 17, 2 (May 1989).

Chapter 3: From 'To Think and Act Differently: Foucault's Four Reciprocal Objections to Habermas', in Samantha Ashenden and David Owen, eds., *Foucault Contra Habermas: Continuing the Debate* (London: Sage, 1999).

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Chapter 7: From 'Aboriginal Peoples: Negotiating Reconciliation', in James Bickerton and Alain-G. Gagnon, *Canadian Politics: Third Edition* (Peterborough, OH: Broadview Press, 1999).

Chapter 8: From 'The Struggles of Indigenous Peoples for and of Freedom', in Duncan Ivison, Paul Patton and Will Sanders, eds., *Political*

Theory and the Rights of Indigenous Peoples (Cambridge: Cambridge University Press, 2000).

Chapter 9: From 'Recognition and Dialogue: The Emergence of a New Field', *Critical Review of International Social and Political Philosophy* 7, 3 (Autumn 2004).

Volume II

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Chapter 3: From 'An Ecological Ethics for the Present', in Brenden Gleeson and Nicholas Low, eds., *Governing for the Environment: Global Problems, Ethics and Democracy* (London: Macmillan, 2000).

Chapter 4: From 'The Unfreedom of the Moderns in Comparison to Their Ideals of Constitutional Democracy', *Modern Law Review* 65, 2 (March 2002), republished in Melissa Williams and Stephen Macedo, eds., *Political Exclusion and Domination* (New York: New York University Press, 2005).

Chapter 5: From 'On Law, Democracy and Imperialism', in Emilios Christodoulidis and Stephen Tierney, eds., *Public Law and Politics: The Scope and Limits of Constitutionalism* (London: Ashgate, 2008).

Chapter 6: From 'Communication and Imperialism', in Arthur Kroker and Marilouise Kroker, eds., *The Critical Digital Studies Reader* (Toronto: University of Toronto Press, 2008).

Chapter 7: From 'The Imperialism of Modern Constitutional Democracy', in Martin Loughlin and Neil Walker, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).

Chapter 8: From 'A New Kind of Europe? Democratic Integration in the European Union', *Critical Review of International Social and Political Philosophy* 10, 1 (March 2007).

Chapter 9 is new. An earlier article from which I have drawn some parts is 'Two Meanings of Global Citizenship', in Michael A. Peters, Harry Blee and Alan Britton, eds., *Global Citizenship Education: Philosophy, Theory and Pedagogy* (Rotterdam: Sense Publishers, 2008).

Introduction

Public philosophy and civic freedom: a guide to the two volumes

Public Philosophy in a New Key is a new approach to the study of politics. The role of a public philosophy is to address public affairs. This civic task can be done in many different ways. The type of public philosophy I practise carries on this task by trying to enter into the dialogues with citizens engaged in struggles against various forms of injustice and oppression. The aim is to establish pedagogical relationships of reciprocal elucidation between academic research and the civic activities of fellow citizens. The specific role of this public philosophy is to throw a critical light on the field of practices in which civic struggles take place and the practices of civic freedom available to change them. It does this by means of historical and critical studies of the field and the given theoretical forms of representation of it. Reciprocally, this critical ethos learns from citizens and the successes and failures of their civic activities how to improve the historical and critical studies and begin again.

In the studies that follow, I use the term 'citizen' to refer to a person who is subject to a relationship of governance (that is to say, governed) *and*, simultaneously and primarily, is an active agent in the field of a governance relationship. While this includes the official sense of 'citizen' as a recognised member of a state, it is obviously broader and deeper, and more appropriate and effective for that reason. By a 'relationship of governance', I refer not only to the official sense of the institutional governments of states, but to the broad sense of any relationship of knowledge, power and subjection that governs the conduct of those subject to it, from the local to the global. Governance relationships in this ordinary sense range from the complex ways individuals and groups are governed in their producing and consuming activities to the ways peoples and subalternised states are subject to global imperial relationships of inequality, dependency and exploitation. They comprise the relationships of normativity, power and subjectivity in which humans find themselves constrained to recognise themselves and

each other, coordinate interaction, distribute goods, act on the environment and relate to the spiritual realm. 'Practices of civic freedom' comprise the vast repertoire of ways of citizens acting together on the field of governance relationships and against the oppressive and unjust dimensions of them. These range from ways of 'acting otherwise' within the space of governance relationships to contesting, negotiating, confronting and seeking to transform them. The general aim of these diverse civic activities is to bring oppressive and unjust governance relationships under the on-going shared authority of the citizenry subject to them; namely, to civicise and democratise them from below.

What is distinctively 'democratic' about public philosophy in a new key is that it does not enter into dialogues with fellow citizens under the horizon of a political theory that frames the exchange and places the theorist above the *demos*. It rejects this traditional approach. Rather, it enters into the relationships of normativity and power in which academic researchers and civic citizens find themselves, and it works historically and critically on bringing them into the light of public scrutiny with the particular academic skills available to the researchers. Every reflective and engaged citizen is a public philosopher in this sense, and every academic public philosopher is a fellow citizen working within the same broad dialogue with his or her specific skills. Studies in public philosophy are thus specific toolkits offered to civic activist and civic-minded academics working on the pressing political problems of our times.

I first developed this approach in *Strange Multiplicity: Constitutionalism in an Age of Diversity*. By means of a series of historical studies, I argued that constitutional democracies could respond to contemporary struggles over recognition by reconceiving constitutions as open to continuing contestation and negotiation by those subject to them. This would be a transition from constitutional democracy (where the constitution is conceived as founding and standing behind democratic activity) to democratic constitutionalism (where the constitution and the democratic negotiation of it are conceived as equally basic). In the decade since it was published, I have come to see that this approach can be improved and applied to a broader range of contemporary struggles: over diverse forms of recognition, social justice, the environment and imperialism. These two volumes explore this complex landscape.

Volume I, Part 1 sets out this public philosophy, its employment of historical studies, its relation to contemporary political struggles and its orientation to the civic freedom of citizens. Chapter 1 is a sketch of my approach, the tradition from which it derives, the contemporary authors

from whom I have learned this approach, and a contrast with the dominant theory-building approach. Chapters 2 and 3 provide the groundwork of public philosophy through an interpretation and adaptation of the works of Wittgenstein, Foucault and the Cambridge school. These chapters provide the methods that are employed in the case studies that follow in both volumes.

Volume I, Part 2 consists of three applications to the democratic struggles over the appropriate forms of recognition of diverse, multicultural and multinational citizens in contemporary societies. Chapter 4 locates the approach relative to trends in political philosophy over the last thirty years and sketches out the general field of relations of power and the freedom of citizens that is studied in detail in the following chapters. Chapter 5 is a study of ways to democratise various types of contemporary recognition struggles while generating appropriate civic bonds of solidarity among diverse citizens. Chapter 6 is a study of democratic forms of recognition in political associations that are not only multicultural but also multinational, based on the work of an international team of social scientists from the European Union and Canada. This is a comprehensive yet defeasible analysis of the actual legal and political practices of democratic constitutionalism for multinational associations.

Volume I, Part 3 consists of two studies of the struggles of Indigenous peoples for recognition in modern states and under international law. The first sets out a normative framework for the bi-civilisational negotiation of decolonisation and reconciliation of the rights of Indigenous peoples to govern themselves in their own ways over their territories and the rights of states that have colonised them over the last half millennium. It is based on my work for the Canadian Royal Commission on Aboriginal Peoples (1991–5). Chapter 8 addresses the prevailing discursive and practical obstacles to the negotiation of reconciliation proposed in Chapter 7 and the practices of freedom available to Indigenous peoples and their supporters to overcome the obstacles and initiate negotiations.

Chapter 9 concludes *Volume I*, setting out this new approach to recognition and distribution struggles developed in the course of these studies and the ways in which contemporary societies are beginning to adopt this democratic approach in their legal and political institutions. I show how this approach represents a fundamental transformation of the manner in which struggles over recognition are standardly conceptualised today in the dominant schools of thought. It recommends a transition from the orientation to discrete and dyadic struggles for the just and definitive form of legal recognition in a state to multiple and interrelated negotiations over the

always-imperfect prevailing norms of mutual recognition of members of any form of association. This modest democratic approach has a much better chance of bringing peace to the deeply diverse world of the twenty-first century than the standard approaches.

Volume II applies public philosophy in a new key to global politics. It consists of historical and critical studies of global relationships of horrendous inequality, dependency, exploitation and environmental damage, and of the corresponding practices of civic freedom of global *and* local citizens to transform them into democratic relationships. The transition to *Volume II* does not only mark a broadening of the field of public philosophy to the global. More emphasis is also placed on specific locales of civic struggles, the diversity of governance relationships and the range of ways of acting otherwise in them, provincialising Eurocentric traditions and bringing in more non-Western voices and perspectives.

Volume II, Part 1 consists of studies of global relationships and practices of civic freedom available from the perspectives of the dominant schools of globalisation. Chapter 1 critically examines the tradition of international relations and global justice associated with Kant's theory of a world federation of identical nation-states. Chapter 2 examines the theories of globalisation, global governance and cosmopolitan democracy. Chapter 3 examines the activities of environmental movements from the perspective of civic freedom and advances a democratic ethic of ecological politics. Chapter 4 is the most comprehensive. It is an immanent critique of the dominant and agonistic approaches to global justice and international law. The critique leads step by step to the conclusion that only a more historical and contextual approach, related to the actual practices of freedom on the ground, can illuminate the unequal global relationships and the possibilities for their transformation. The conclusion I draw from these four studies is that these approaches, while illuminating and useful, are nevertheless limited and inadequate because they overlook the historically persisting imperial character of the global relationships they analyse. This provides the transition to Part 2.

Volume II, Part 2 consists in studies of global relationships under the description of them as a network of vastly unequal *imperial* relationships between the North and global South (the 120 former colonies that comprise the majority of the world's population). The three chapters show how different aspects of the contemporary global order continue to be structured by imperial relationships inherited from five hundred years of Western imperialism. These relationships survived decolonisation in the twentieth century in a new phase of imperialism, standardly called post-colonial or informal imperialism.

Chapter 5 sets out this argument in historical detail and shows how each of the major approaches to globalisation and international relations overlooks the imperial dimensions of the present in different ways and marginalises other approaches that study globalisation under the category of imperialism. Even some of the approaches that claim to take into account informal imperialism misrepresent the contemporary form of imperialism. With this disclosure of the field of globalisation as the continuation of Western imperialism by informal means and through institutions of global governance, Chapter 6 turns to the networkisation and communications revolution of the last twenty years. I show that this revolution, which is often portrayed as democratising globalisation, has been Janus-faced: helping global citizens to organise effectively at the local and global levels, yet also helping institutions of global governance, multinational corporations and the US military to network and govern informally the global relationships of inequality they inherited from the period of colonial imperialism. Chapter 7 shows how the imperial spread of the modular form of modern, Western-style constitutional nation-states and international law by colonisation, indirect rule and informal rule over the last three hundred years has not freed the non-West from imperialism. Quite the opposite: it has been and continues to be the political, legal and economic form in which relationships of inequality, dependency and exploitation have been extended and intensified around the world.

Volume II concludes by asking the crucial question: what can citizens who are subject to these imperial relationships (in both the North and global South) do to transform them into non-imperial, democratic relationships by bringing them under their shared authority? The general answer is the exercise of civic freedom by citizens in the North and global South and the exercise of academic research in networks of reciprocal learning with these global/local citizen movements: namely, a new public philosophy for a de-imperialising age. Chapter 8 takes the citizenry of the European Union as an example. I argue that European citizens are already taking the lead in improvising new forms of democratising civic activities with respect to immigration, alternative economics and relationships with the global South.

Chapter 9 is the conclusion to *Public Philosophy in a New Key*. It draws together the strands of argument throughout the two volumes and weaves them into a sketch of a new kind of local *and* global citizenship I call 'glocal' citizenship. This mode of citizenship has the capacity to overcome the imperialism of the present age and bring a democratic world into being from the local to the global. Since it is the conclusion to the two volumes,

I will provide a brief synopsis at the outset to give a preliminary indication of where the chapters lead.

The first part of the chapter summarises the imperial character of the present global order and the dominant modular form of citizenship (*modern* citizenship) that has been spread by Western expansion. Far from offering a challenge to imperialism, it actually serves in a number of ways to extend it, in both its national (civil) and its global (cosmopolitan) forms. The second part argues that there is another mode of citizenship (*diverse* citizenship) that also developed historically in both the West and non-West. It provides the democratic means to challenge and transform imperial relationships in both its local (civic) and local/global (glocal) forms. I set out the main features of the traditions of diverse civic citizenship historically and conceptually, and then apply it to global struggles of de-imperialisation and democratisation. It is a form of citizenship that is grounded in local civic practices yet extended globally by democratic networks. The chapter thus brings together the three themes of the two volumes: public philosophy, practices of civic freedom and the countless ways they work together to negotiate and transform oppressive relationships. This is not only possible but what millions of citizens, non-governmental organisations, networks and social movements are doing today. The chapter ends with a view of Gandhi's life as a civic citizen contra imperialism; it stands as an exemplar of civic citizenship and engaged public philosophy.

There are many public philosophers from whom I have drawn inspiration. John Locke, Mary Wollstonecraft, Emma Goldmann, Antonio Gramsci, Sojourner Truth, Paulo Friere, Bertrand Russell, Maude Barlow, Edward Said, Noam Chomsky, Vandana Shiva, Boaventura de Sousa Santos, Iris Marion Young and Gandhi are exemplary. And, as I mentioned, every engaged and reflective citizen is an inspirational public philosopher in this democratic sense. But I have always questioned why more political philosophers and political theorists are not also *public philosophers*. What stops many of them from seeing their work as a discussion with their fellow citizens as equals? I think the answer is that many tend to enter into a relationship with citizens under the horizon of a political theory that sets them above the situated civic discourses of the societies in which they live. This presumptive elevation is standardly based on four types of assumption.

The first assumption is that there are causal processes of historical development (globalisation) that act behind the backs of citizens and determine their field of activity. It is the role of the theorist of modernisation to study these conditions of possibility of civic activity. The second is

that there are universal normative principles that determine how citizens ought to act. It is the role of the theorist of global justice to study these unchanging principles that prescribe the limits of democracy. The third is that there are background norms and goods implicit within democratic practices that constrain and enable the field of democratic activity of citizens in the foreground. It is the role of the interpretative and phenomenological theorists to make these background conditions explicit. The fourth is that there are canonical institutional preconditions that provide the foundations of democratic activity, and it is the role of political scientists to study these legal and political institutions.

In each of these four cases, the theorist is elevated above the *demos* by the assumption that there are background conditions of possibility of democracy that are separate from democratic activity and it is his or her role to study them, not what takes places within them. In the course of the studies in the two volumes, each pillar of elite political theory falls to the ground. Each of the four conditions of possibility is shown to be internally related to and reciprocally shaped by the everyday activities of democratic citizens, not separate from and determinative of their field of freedom. It is this revolutionary discovery that brings political philosophy 'down' into the world of the *demos* and renders it a situated public philosophy in conversation with fellow citizens. Equally important, it enables us to see that we are much freer and our problems more tractable than the grand theories of the four pillars make it seem. For while we are still *entangled* in conditions that constrain and enable, and are difficult to change, we are no longer *entrapped* in background conditions that determine the limits of our foreground activities, for none is permanently off limits. I associate this revolutionary insight with the late Richard Rorty (*Volume I*, Chapter 4). Others will associate it with other writers and their own experiences of human freedom and agency where they were told it was impossible.

I would like to say a few words about the phrase 'in a new key'. Just as a jazz musician plays a composition in a new key relative to the classic performances of it, so too a specific public philosopher plays the role in his or her own new *style* in relation to the classic public philosophers in his or her field. The *style* of these studies is a new key in that it combines historical studies and a reciprocal civic relationship in what I hope is a distinctive way. Jazz musicians play in a new key in the course of improvising with other musicians and in dialogue with classic performances and present audiences. Analogously, public philosophers improvise in dialogues with contemporary theorists, the classics, engaged citizens and in response to the political problems that confront and move them. This is the situated

freedom of a public philosopher. I see the studies in these volumes as improvisations in this sense.[1]

Finally, I would like to respond to a common objection to this style of public philosophy. Radical critics often say, given the radical character of your particular public philosophy, why do you engage in the 'mainstream' academic debates and use the conservative language of citizenship, public philosophy, governance, democracy and civic freedom? Your work will be co-opted by the mainstream you disagree with and alienated from the civic activists you hope to reach. You should write in a language of radical politics.

I acknowledge that my views are somewhat radical relative to much of the literature I discuss. However, there are three reasons for the approach I take. Firstly, the alternative language of radical politics often involves a kind of self-marginalisation and an attitude of self-righteousness that I find incompatible with a democratic ethos. Moreover, there are already many excellent public philosophers, such as Chomsky, who write directly to civic activists and bypass the theoretical debates, and they too write in the same plain and simple language of citizens, public goods and freedom. Secondly, the economic, political and military elites and their ideologists have inherited not only much of the earth and its resources but also many of its languages, including the manipulable language of citizenship, democracy, civic goods and freedom. Yet, it is precisely this ordinary language that the oppressed and exploited of the world have always used to express their outrage at the injustices of the present and their hopes and dreams of another world. Like Edward Said, I refuse to surrender it to our adversaries without a fight and abandon the repository of the history of struggles from which we derive.[2] Moreover, the fall of the four pillars of the *ancien régime* also brings down the fiction of an alternative, pure language of freedom (radical or otherwise) that stands above the fray of politics and is impervious to unpredictable redescription by one's fellow adversaries. Thirdly, I have deep respect for the elaborate Western and non-Western traditions of critical political reflection, the great yet partial insights they can bring, and the people who carry them on today in this public language. While I disagree with the dominant theories that legitimate the status quo in these terms, engagement with them forces dissenters like myself constantly to test our own views against them and, in so doing, to try to move the academic debate in another direction. As we

[1] For this analogy, see Bruce Ellis Benson, *The Improvisation of Musical Dialogue: A Phenomenology of Music* (Cambridge: Cambridge University Press, 2003).

[2] Edward W. Said, 'The Public Role of Intellectuals and Writers', in *Humanism and Democratic Criticism* (New York: Columbia University Press, 2004).

will see, I am far from the first or only one to take this agonistic stance. Furthermore, is it not presumptuous to assume that these debates are alien and of no interest to citizens? The following chapters were written in conversations with engaged citizens. Academic debates are not as far from and unrelated to the public debates as they are often portrayed from the perspectives of the four pillars. They are a historically integral part of the complex field of practical discourses on which public philosophy is inescapably thrown and in which it can find its voice and make a distinctive difference.

Except for the concluding chapter of *Volume II*, all chapters are based on works published previously over the last eight years and then rewritten to bring them together in the sustained argument of these two volumes. The concluding chapter of *Volume II* was written for the two volumes and to bring their themes together in a portrait of global/local civic freedom and public philosophy contra imperialism.

PART I

Approaching practice

CHAPTER I

Public philosophy as a critical activity

INTRODUCTION

This chapter was first written for a special edition of the journal *Political Theory*, in which the editors asked the contributors to respond to the question, 'What is political theory?'[1] This question is as old as political theory or political philosophy. The activity of studying politics, whether it is called science, theory or philosophy, always brings itself into question. The question does not ask for a single answer, for there are countless ways of studying politics and no universal criteria for adjudicating among them. Rather, the question asks, 'What comparative *difference* does it make to study politics *this* way rather than *that*?' Political theory or philosophy spans not only three millennia of studying politics in innumerable ways but also three millennia of dialogues among practitioners over various approaches, their relative merits and the contestable criteria for their comparison. Because there is no definitive answer there is no end to this dialogue. Rather, it is the kind of open-ended dialogue that brings *insight* through the activity of reciprocal elucidation itself. Dialogue partners gain insight into what ruling, being ruled and contesting rule is through the exchange of questions and answers over different ways of studying politics and over different criteria for their assessment relative to how they illuminate different aspects of the complex worlds of politics. And what counts as the 'different aspects of the complex worlds of politics' is also questioned in the course of the dialogue.[2]

I would like to thank Cressida Heyes, Cheryl Misak, David Owen, Paul Patton, Quentin Skinner, Charles Taylor and Stephen White for comments on earlier drafts of this article.

[1] See *Political Theory* 30(4), 2002.

[2] An exemplar of this kind of question and answer dialogue for both Islamic and Western cultures is Plato's dialogues. For a contemporary reformulation, see Hans-Georg Gadamer, *Truth and Method*, 2nd revised edition (New York: Continuum, 1999), pp. 362–81. For the distinction between the logic of a dialogue of questions and answers and one of problems and solutions that I use below, see Gadamer, *Truth and Method*, pp. 376–7. For a history of dialogical political philosophy from Socrates

With this horizon of the question in mind, I wish to respond by introducing one among many ways of studying politics and to initiate its reciprocal elucidation by comparing it with others. I call it a public philosophy. This practical, critical and historical approach can be introduced by a sketch of its four defining characteristics.

Firstly, it starts from and grants a certain primacy to practice. It is a form of philosophical reflection on practices of governance in the present that are experienced as oppressive in some way and are called into question by those subject to them. The questionable regime of practices is then taken up as a problem, becoming the locus of contest and negotiation in practice and of reflection and successive solutions and reforms in theory and policy.

Secondly, the aim is not to develop a normative theory as the solution to the problems of this way of being governed, such as a theory of justice, equality or democracy. Rather, it is to disclose the historically contingent conditions of possibility of this historically singular set of practices of governance and of the range of characteristic problems and solutions to which it gives rise (its form of problematisation). The approach is not a type of political *theory* (in the sense above) but a species of 'practical philosophy' (politics and ethics): that is, a philosophical way of life oriented towards working on ourselves by working on the practices and problematisations in which we find ourselves.[3] However, the aim is also not to present an ethnographic thick description that aims at clarification and understanding for its own sake. Rather, it seeks to characterise the conditions of possibility of the problematic form of governance in a redescription (often in a new vocabulary) that transforms the self-understanding of those subject to and struggling within it, enabling them to see its contingent conditions and the possibilities of governing themselves differently. Hence, it is not only an interpretative political philosophy, but also a specific genre of critique or critical attitude towards ways of being governed in the present – an attitude of testing and possible transformation.[4]

to Hobbes' argument against it and his assertion of an influential style of monological political theory, see Quentin Skinner, *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996).

[3] There are of course many other types of political theory. I am using this specific type as an object of contrast. For the history and renaissance of practical philosophy, see Bernard Williams, *Ethics and the Limits of Philosophy* (Cambridge, MA: Harvard University Press, 1985); Charles Taylor, *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1995), pp. 1–60; Alexander Nehemas, *The Art of Living: Socratic Reflections from Plato to Foucault* (Berkeley: University of California Press, 2000); Stephen Toulmin, *Return to Reason* (Cambridge, MA: Harvard University Press, 2001).

[4] For studies in the history of the critical attitude, see Michel Foucault, 'What is Critique?', in *The Politics of Truth*, eds. Sylvère Latringer and Lysa Hochroth (New York: Semiotext(e), 1997); Michel Foucault, *Fearless Speech*, ed. Joseph Pearson (Los Angeles: Semiotext(e), 2001).

Thirdly, this practical and critical objective is achieved in two steps. The first is a critical survey of the languages and practices in which the struggles arise and various theoretical solutions are proposed and implemented as reforms. This survey explicates which forms of thought, conduct and subjectivity are taken for granted or given as necessary, and so function as constitutive conditions of the contested practices and their repertoire of problems and solutions. The second step broadens this initial critique by using a history or genealogy of the formation of these specific languages and practices as an object of comparison and contrast. This historical survey has the capacity to free us to some extent from the conditions of possibility uncovered in the first step and so to be able to see the practices and their forms of problematisation as a limited and contingent whole. It is then possible to call these limits into question and open them to a dialogue of comparative evaluation, and thus to develop the perspectival ability to consider different possible ways of governing this realm of cooperation.

Fourthly, this philosophy is practical in yet another sense. The hard-won historical and critical relation to the present does not stop at calling a limit into question and engaging in a dialogue over its possible transformation. The approach seeks to establish an on-going mutual relation with the concrete struggles, negotiations and implementations of citizens who experiment with modifying the practices of governance on the ground. This is not a matter of prescribing the limits of how they must think, deliberate and act if they are to be legitimate, but, on the contrary, to offer a disclosive sketch of the arbitrary and unnecessary limits to the ways they are constrained to think, deliberate and act, and of the possible ways of going beyond them in this context. It is an interlocutory intervention on the side of the oppressed. In turn, the experience with civic negotiation and change in practice, and the discontents that arise in response, provide a pragmatic test of the critical and historical research and the impetus for another round of critical activity.

These philosophical investigations thus stand in a reciprocal relation to the present; as a kind of permanent public critique of the relationships of meaning, power and subjectivity in which we think and act politically and the practices of freedom of thought and action by which we try to test and improve them. Hence the title, 'public philosophy as a critical activity'.

Although this type of public philosophy can be interpreted as a tradition which goes back to the Greeks and up through Renaissance humanism and Reformation critical philosophy, I am primarily concerned with its three recent phases: the practice-based political philosophy of the Enlightenment (Rousseau, Wollstonecraft, Hegel, Marx and Mill); the

criticisms and reforms of this body of work by Nietzsche, Weber, Heidegger, Gadamer, Arendt, Dewey, Collingwood, Horkheimer and Adorno; and, thirdly, the reworking of this tradition again in the light of new problems by scholars over the last twenty years. On my account, this eclectic family of contemporary scholars includes the historical approach of Quentin Skinner and the Cambridge school; the critical and dialogical hermeneutics of Charles Taylor; the extension of Wittgenstein's philosophical methods to political philosophy by Hanna Pitkin, Cressida Heyes, Aletta Norval, Richard Rorty, Linda Zerilli and others; the critical histories of the present initiated by Michel Foucault and carried on by Wendy Brown, Colin Gordon, David Owen, Paul Patton and many others; and the critical studies of Edward Said which apply the critical methods of this tradition beyond and against its Eurocentrism.[5] In addition, this practical and historical approach oriented to testing and going beyond limits has been shaped by a continuous critical dialogue with a contrasting metaphysical and universal tradition oriented to discovering and prescribing limits. This contrasting approach stems from scholastic natural law and Kant, draws on some of the same philosophical sources and is carried forward by many neo-Kantian political theorists today, especially the work of Jürgen Habermas.[6]

Over the last two centuries there have been many attempts to summarise this tradition. The essay by Michel Foucault written in the last years of his

[5] See James Tully, ed., *Meaning and Context: Quentin Skinner and his Critics* (Cambridge: Polity Press, 1988); Richard Rorty, *Philosophical Papers*, 3 Vols. (Cambridge: Cambridge University Press, 1991); Edward Said, *Culture and Imperialism* (New York: Knopf, 1993) and *Reflections on Exile and Other Essays* (Cambridge, MA: Harvard University Press, 2000); Richard Rorty, J. B. Schneewind and Quentin Skinner, eds., *Philosophy in History: Essays on the Historiography of Philosophy* (Cambridge: Cambridge University Press, 1984) is a landmark text in the 'third phase' of this tradition. James Tully, ed., *Philosophy in an Age of Pluralism: The Philosophy of Charles Taylor in Question* (Cambridge: Cambridge University Press, 1994); Taylor, *Philosophical Arguments*; Michel Foucault, *The Essential Works of Foucault, 1954–1984*, 3 Vols., eds. Paul Rabinow and James D. Faubion (New York: New Press, 1997–2000); Ruth Abbey, *Charles Taylor* (Teddington, UK: Acumen Publishing, 2000); Cressida Heyes, *Line Drawings: Defining Women Through Feminist Practice* (Ithaca, NY: Cornell University Press, 2000); Quentin Skinner, *Visions of Politics*, Vol. I, *Regarding Method* (Cambridge: Cambridge University Press, 2002); Cressida Heyes, ed., *The Grammar of Politics: Wittgenstein and Political Philosophy* (Ithaca, NY: Cornell University Press, 2003); Wendy Brown, 'At the Edge', in *What is Political Theory?*, eds. J. Donald Moon and Stephen White (London: Sage, 2004); Linda Zerilli, *Feminism and the Abyss of Freedom* (Chicago: University of Chicago Press, 2005); Aletta Norval, *Aversive Democracy: Inheritance and Originality in the Democratic Tradition* (Cambridge: Cambridge University Press, 2007).

[6] For the dialogue between these two traditions, see David Couzens Hoy and Thomas McCarthy, *Critical Theory* (Oxford: Blackwell, 1994); Michael Kelly, ed., *Critique and Power: Recasting the Foucault/Habermas Debate* (Cambridge, MA: MIT Press, 1994); Stephen K. White, ed., *The Cambridge Companion to Habermas* (Cambridge: Cambridge University Press, 1995); Samantha Ashenden and David Owen, eds., *Foucault Contra Habermas: Recasting the Dialogue between Genealogy and Critical Theory* (London: Sage, 1999).

life, 'What is Enlightenment?', is among the best. Within this brief text Foucault presents a remarkable synopsis which can function as a précis of the sketch I have drawn:

> The critical ontology of ourselves must be considered not, certainly, as a theory or a doctrine; rather it must be conceived as an attitude, an *ethos*, a philosophical life in which the critique of what we are is at one and the same time the historical analysis of the limits imposed on us and an experiment with the possibility of going beyond them [*de leur franchissement possible*].[7]

I would now like to discuss the four defining characteristics of this philosophical *ethos*.

1 PRACTICES OF GOVERNANCE

Public philosophy as a critical activity starts from the practices and problems of political life, but it begins by questioning whether the inherited languages of description and reflection are adequate to the task. Over the last two centuries, the main domain of political studies has been the basic languages, structures and public institutions of the self-contained, representative, democratic, constitutional nation-states and federations of free and equal citizens, political parties and social movements in an international system of states. The contending philosophical traditions of interpretation of these practices seek to clarify the just organisation of these practices: the ways in which modern subjects (individuals and groups) should be treated as free and equal and cooperate under the immanent and regulative ideals of the rule of law and constitutionalism on the one hand and of popular sovereignty and democratic self-determination on the other. Yet, over the same period, six types of critical study have brought this orthodoxy of practices and form of problematisation into question.

Social-democratic theorists have broadened the range of political philosophy to include struggles over non-democratic practices of production and consumption, and ecological philosophers have extended the tools of conceptual analysis to our relations to the environment. More recently, feminist political and legal philosophers have drawn attention to a vast array of inequalities and unfreedoms in the relations between men and women beneath formal freedoms and equalities and across the private and public institutions of modern societies. Philosophers of multiculturalism,

[7] Michel Foucault, 'What is Enlightenment?', in *The Politics of Truth*, p. 133. The various versions of 'What is Enlightenment?' are also collected in Foucault, *The Politics of Truth*.

multinationalism, Indigenous rights and constitutional pluralism have elucidated struggles over recognition and accommodation of cultural diversity within and across the formally free and equal institutions of constitutional democracies. Theorists of empire, globalisation, globalisation from below, cosmopolitan democracy, immigration and justice-beyond-borders have questioned the accuracy of the inherited concepts of self-contained, Westphalian representative nation-states in representing the complex, multilayered global regimes of direct and indirect governance of new forms of inequality, exploitation, dispossession and violence, and the forms of local and global struggles by the governed here and now. Finally, post-colonial and post-modern scholars have drawn attention to how our prevailing logocentric languages of political reflection fail to do justice to the multiplicity of different voices striving for the freedom to have an effective democratic say over the ways they are governed as a new century dawns.[8]

To employ Stanley Cavell's striking analysis, we can see our predicament as somewhat analogous to Nora and Thorvold in Ibsen's play, *A Doll's House*. Nora is trying to say something that is important to her but the dominant language in which Thorvold listens and responds misrepresents the way she says it, what she is saying and her understanding of the intersubjective practice in which she speaks. Thorvold takes it as a matter of course that a marriage is a doll's house and he recognises, interacts with and responds to the problems Nora raises always already as if she were a doll, with the limited range of possible conduct this form of subjectivity entails. As a result, Thorvold fails to secure uptake of her speech-act as a 'claim of reason', and so a democratic dialogue over the justice of the oppressive relations between them (which compose their practice of marriage) is disqualified from the outset. She is deprived of a voice in her political world. The first question for political philosophy today is, therefore, 'How do we attend to the strange multiplicity of political voices and activities without distorting or disqualifying them in the very way we approach them?'[9]

The six types of critical study enumerated above suggest that we cannot uncritically accept as our starting point the default languages and practices of politics and their rival traditions of interpretation and problem-solving inherited from the first Enlightenment, as if they were unquestionably comprehensive, universal and legitimate, requiring only internal

[8] I engage in these types of critical study in the following chapters of both volumes.

[9] Stanley Cavell, *Conditions Handsome and Unhandsome: The Constitution of Emersonian Perfectionism* (Chicago: University of Chicago Press, 1990), pp. 101–26. For a helpful commentary, see David Owen, 'Cultural Diversity and the Conversation of Justice: Reading Cavell on Political Voice and the Expression of Consent', *Political Theory* 27(5), 1999: 579–96.

clarification, analysis, theory building and reform. If we are to develop a political philosophy that has the capacity to disclose the specific forms of oppression today, we require an Enlightenment critical 'attitude' rather than a doctrine, one which can test and reform dubious aspects of the dominant practices and form of problematisation of politics against a better approach to what is going on in practice.

One way to proceed is to start with a broader and more flexible language of provisional description, one which enables us to take up a dialogical relation to the political problems *as* they are raised in and animate the concrete struggles of the day, and then adjust it in the course of the inquiry, as the six types of critical study have begun to do. Combining thirty years of research of Quentin Skinner and the Cambridge school and of Michel Foucault and the Governmentality school, one might take as a provisional field of inquiry 'practices of governance', that is, the forms of reason and organisation through which individuals and groups coordinate their various activities and the practices of freedom by which they act within these systems, either following the rules of the game or striving to modify them.[10]

'Government' and 'governance' in the broad seventeenth-century use of these terms and their cognates refer to the multiple, complex and overlapping ways of governing individuals and groups. The 'practice of governance' and the corresponding 'form of subjection' of governing armies, navies, churches, teachers and students, families, oneself, poorhouses, parishes, ranks, guilds, free cities, populations, trading companies, pirates, consumers, the poor, the economy, nations, states, alliances, colonies and non-European peoples were seen to have their specific rationality and modes of philosophical analysis. By the generation of Thomas Paine, Kant, Benjamin Constant and Hegel, the term 'government' (and 'democracy') came to be used primarily in a narrower sense to refer to the formal, public 'practices of governance' of the representative democratic, constitutional nation-state (what might be called capital 'G' Government). Political philosophy came to be restricted to reflection on the just arrangement of this narrow set of governing practices and their problems as if they were sovereign, that is, the foundation from which all others were governed and

[10] For the Governmentality school, see Graham Burchell, Colin Gordon and Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991); Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage, 1999); Nikolas Rose, *Powers of Freedom: Reframing Political Thought* (Cambridge: Cambridge University Press, 1999). For the relationship between it and the Cambridge school, see James Tully, 'The Pen is a Mighty Sword', in *Meaning and Context*.

ordered through a constitutional system of laws (and the remainder could be taken over by other disciplines).

However, practices of governance in the broad sense continued to spread and multiply. The scholars of the second and third phases and the six types of critical study today strongly suggest that we are governed in a multiplicity of ways that do not derive from and cannot be deduced from the inherited traditions of interpretation of the forms of reason and organisation of the public institutions of representative democracy and the rule of law: for example, the ways a host of actors are able to govern our relations to the environment, or transnational corporations try to govern their global employees, suppliers and consumers; the ways we are led to recognise and identify ourselves as members of religions, ethnicities, nations, free and equal democracies, civilisations, and others as non-members; the ways of governance accompanying electronic communications, new forms of material and immaterial labour, and the desires, coded behaviour and 'affects' of individuals and groups around class, education, gender and race; the ways a regime of rights can empower some while excluding or assimilating others; the complex forms of indirect rule that have survived and intensified through formal decolonisation in the latter half of the twentieth century. Therefore, if our studies are to be about the real world of government, we need to start with a language of provisional description capable of illuminating practices of governance in both the narrow and the broad sense.[11]

The study of practices of governance, whether narrow or broad, must proceed from two perspectives: from the side of the forms of government that are put into practice and from the side of the practices of freedom of the governed (as active agents) that are put into practice in response.[12] A form of government includes the language games in which both governors and governed are led to recognise each other as partners in the practice, communicate, coordinate their activities, raise problems and propose solutions, and renegotiate their form of government, including languages of administration and normative legitimation.

A form of government also includes the web of relations of power by which some individuals or groups govern the conduct of other individuals or groups, directly or indirectly, by myriad inequalities, privileges,

[11] For more on this sketch of practices of governance, see *Volume II*, Chapters 2 and 3.

[12] See Foucault, 'What is Enlightenment?', in *The Politics of Truth*, pp. 129–30, and his further discussion of practices of governance and practices of freedom in 'The Ethics of the Concern for Self as a Practice of Freedom', in *The Essential Works of Foucault*, Vol. I, *Ethics: Subjectivity and Truth*, ed. Paul Rabinow (New York: New Press, 1997). For my use of Foucault's work in developing this approach, see Chapter 3, this volume.

technologies and strategies, and who are themselves subject to government by others. Relations of power in this broad sense are relations of governance as these have developed historically in practices of governance. They are not relations of force that act immediately on unfree and passive bodies and constitute subjects without the mediation of their own thought and action. While coercion and violence can be and are employed as means, they are not to be confused with relations of power. Rather, relations of power are relations of governance that act on free agents: individuals or groups who always have a limited field of possible ways of thinking and acting in response. They are the ensemble of actions by those who exercise power that act on the actions of the governed, working by diverse means to guide and direct them to learn how to conduct themselves in regular and predictable ways – actions that aim to structure the field of the possible actions of others.

As governors and governed participate in the intersubjective and negotiated relations of power and coordinated conduct, they gradually acquire a specific form of subjection or practical identity, a more or less habitual way of thinking and acting within the assignment relations and languages of reciprocal recognition. Again, this form of being 'subject' to the languages and powers of a form of government is not to be construed as a form of identity that determines the self-consciousness and self-formation of the governed down to every detail, but, rather, the diverse kinds of relational subjectivity one internalises and negotiates through participation over time, with their range of possible conduct and individual variation. Practices of governance are thus also practices of subjectification, as, for example, members of representative democracies become citizens through participation in practices of citizenisation.

Because an intersubjective relation of power or governance is always exercised over an agent who is recognised and treated as a partner who is free, from the perspective of the governed the exercise of power always opens up a diverse field of potential ways of thinking and acting in response. The ways subjects act on their possibilities are 'practices of freedom' and these range across three general types of case. Firstly, individuals and groups act in accord with the rules of the practices in which they cooperate in a remarkably wide variety of ways of going on as usual. Even in this so-called normal activity, the on-going conversation and conduct among the partners can modify the practice in often unnoticed and significant ways. I call this 'acting otherwise' within the rules of the game. Secondly, subjects raise a problem about a rule of the practice in the languages of communication and legitimation or challenge a relation of governance on the ground, enter into

the available procedures of negotiation, deliberation, problem-solving and reform with the aim of modifying the practice (such as an appeal to in-house dispute-resolution procedures, courts, representative institutions, constitutional amendment, international law, or legitimate procedures of protest and ad hoc negotiations).

Finally, when these institutions and strategies of problematisation and reform are either unavailable or fail because those who exercise power can subvert or bypass them, it is possible to refuse to be governed by this specific form of government and to resist, either by escape or by confronting, with a strategy of struggle, an oppressive, constitutive relation of power that is not open to challenge, negotiation and reform (and thus is a relation of 'domination'), such as the patriarchal property relations underpinning Nora's marriage. In confrontations of this kind (such as struggles of direct action, liberation, decolonisation, revolt, revolution, globalisation from below), the relations of governance are disrupted and the relatively stable interplay of partners in a practice of governance gives way to the different logic of relations of confrontation among adversaries in strategies of struggle. The powers that be aim to reinscribe the old regime, perhaps in a modified form, and to supplement their means of enforcement, and the governed seek to transform it and implement new relations of governance and practices of freedom.

Therefore, although political philosophers have always known that the relationship between governors and governed is some kind of unequal struggle or agonism of mutual subjection, we should be careful to distinguish among the three complex practices of freedom that are always possible, even in the most settled structures of domination (as South Africa and Eastern Europe illustrate), and which give the history of the ways humans govern themselves its freedom and indeterminacy. As Foucault summarises:

> At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom. Rather than speaking of an essential antagonism, it would be better to speak of an 'agonism' of a relationship that is at the same time mutual incitation and struggle; less of a face to face confrontation that paralyzes both sides than a permanent provocation.[13]

Practices of governance imply practices of freedom and vice versa.

The practices of freedom and their institutions of negotiation and reform constitute the 'democratic' side of practices of governance: the extent to

[13] Michel Foucault, 'The Subject and Power', in *The Essential Works of Foucault*, Vol. III, *Power*, ed. James D. Faubion (New York: New Press, 2000), p. 342. See also Clarissa Hayward, *De-facing Power* (Cambridge: Cambridge University Press, 2000), pp. 161–79.

which those subject to forms of government can have an effective say and hand in how they are governed and institutionalise effective practices of freedom (using 'democracy' in its narrow and broad senses corresponding to the two senses of 'government'). When subjects not only act in accord with the rules but also stand back and try to call a rule into question and negotiate its modification, they problematise this mode of acting together and its constitutive forms of relational subjectivity. This is the context in which political philosophy as a critical activity begins, especially when these voices of democratic freedom are silenced, ignored, deemed unreasonable or marginalised.

This provisional language of description of the field of contemporary political philosophy in terms of practices of governance and practices of freedom is the first response to the limitations of our inherited languages of representation. It draws our attention to the languages in which the problems are articulated and the contexts in which the languages are employed without disqualifying new political voices at the outset. This language of description can be used to study the traditional practices and forms of problematisation of modern politics, but within a broader horizon that enables us to see them as a limited whole, as one historically specific ensemble of forms of government and practices of freedom among many, rather than as the comprehensive and quasi-transcendental framework, and so bring doubtful aspects of it into the space of questions. In so doing, this approach also discloses the multiplicity of broader practices of governance and freedom in which we are entangled that are ignored, disqualified or misrepresented in the predominant approaches. To revert to Cavell's analogy, it frees us from prejudging a problem in a practice of marriage as a problem in a doll's house.

2 CONTEMPORARY SURVEYS

As we have seen in the Introduction, the aim of this style of public philosophy is to disclose the conditions of possibility of a historically singular set of problematic practices of governance in the present by means of two methodological steps. The contemporary, non-historical step consists of two critical surveys: of the languages and then of the practices in which the struggles arise, and various solutions are proposed and implemented or not implemented as reforms. These two surveys enable us to understand critically the repertoire of problems and solutions in question, and the correlative field of relations of power in contestation, respectively.

The task of this first survey is not to present another solution to the problem but to provide a survey of the language games in which the

problem and rival practical and theoretical solutions are articulated. There are many methods available in Anglo-American and Continental political philosophy to carry out such a task. The approach I favour draws inspiration from Wittgenstein, J. L. Austin, and the development of speech-act theory into a historical and contextual pragmatics of modes of argumentation by Terence Ball, Foucault, Quentin Skinner, Stephen Toulmin and others.[14] Speaking and writing are viewed pragmatically and intersubjectively, as linguistic activities performed by speakers and writers as participants in language games. Actors in practices of governance and theorists who present rival solutions to a shared political problem are approached as engaged in the intersubjective activities of exchanging reasons and justifications over the contested uses of the descriptive and normative concepts by which the problematic practice and its forms of subjectivity are characterised and disputed. The exchange of reasons in this broad sense of practices of argumentation is both communicative and strategic, involving reason and rhetoric, conviction and persuasion. Participants exchange practical reasons over the contested criteria for the application of concepts in question (sense), including the concepts of 'reason' and 'reasonable', the circumstances that warrant the application of the criteria, the range of reference of the concepts and their evaluative force, in order to argue for their solutions and against others.

Why should public philosophers take this pragmatic approach of surveying the various theoretical solutions instead of developing a definitive theory themselves? The answer derives from two famous arguments by Wittgenstein. The first is that understanding general terms – such as freedom, equality, democracy, reason, power and oppression – is not the theoretical activity of grasping and applying a definition, rule or theory that states the necessary and sufficient conditions for the application of such general terms in any case. The model of applying a rule or theory to particular cases cannot account for the phenomenon of understanding the

[14] Stephen Toulmin, *The Uses of Argument* (Oxford: Oxford University Press, 1958); J. L. Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1962); Hanna Pitkin, *Wittgenstein and Justice: On the Significance of Ludwig Wittgenstein for Social and Political Thought* (Berkeley: University of California Press, 1973); J. G. A. Pocock, *Virtue, Commerce, and History: Essays on Political Thought and History, Chiefly in the Eighteenth Century* (Cambridge: Cambridge University Press, 1985), pp. 1–36; Quentin Skinner, 'Quentin Skinner on Interpretation' and 'A Reply to My Critics', in *Meaning and Context*, pp. 29–134 and 231–89, respectively; Terence Ball, James Farr and Russell Hanson, eds., *Political Innovation and Conceptual Change* (Cambridge: Cambridge University Press, 1989); Ludwig Wittgenstein, *Philosophical Investigations*, 2nd edition (Oxford: Blackwell, 1997); Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton: Princeton University Press, 1997), pp. 38–74; Gadamer, *Truth and Method*.

meaning of a general term, and so of being able to use it and to give reasons and explanations for its use in various contexts.[15]

Secondly, the actual criteria for the application of a general political term are too various, indeterminate and hence open to unpredictable extension to be explicated in terms of an implicit or transcendental set of rules or theory, no matter how complex. When we look at the uses of a general term, what we see is not a determinate set of essential features that could be abstracted from practice and set out in a theory along with rules for their application. We do not find a set of features which make us use the same word for all cases, but, rather, an open-ended family of uses that resemble one another in various ways. We 'see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of detail' and these 'family resemblances' among uses of a concept change over time in the course of human conversation.[16]

The consequence of these two anti-essentialist arguments is that understanding political concepts and problems cannot be the theoretical activity of discovering a general and comprehensive rule and then applying it to particular cases, for such a rule is not to be found and understanding does not consist in applying such a rule even if it could be found. The actual use and understanding of political concepts is not the kind of activity that this model of political theory presupposes: that is, of 'operating a calculus according to definite rules'.[17] Rather, Wittgenstein continues, understanding consists in the practical activity of being able to use a general term in various circumstances and being able to give reasons for and against this or that use. This is a form of *practical* reasoning: the manifestation of a repertoire of practical, normative abilities, acquired through practice, to use the general term, as well as to go against customary uses, in actual cases. Such a practical skill, like all practical abilities, cannot be exhaustively described in terms of rules, for the application of the term is not everywhere bounded by rules. A criterion that functions as an intersubjective rule for testing assertions of correct use in some circumstances is itself questioned, reinterpreted and tested in other circumstances, relative to other criteria that are provisionally held fast.

Understanding a general term thus involves being able to give reasons why it should or should not be used in a particular case, either to provoke or

[15] Wittgenstein, *Philosophical Investigations*, §§81–5. For my use of Wittgenstein's work in developing this approach, see Chapter 2, this volume.

[16] Wittgenstein, *Philosophical Investigations*, §§65–7. For the relation of this line of argument to deconstruction, see Henry Staten, *Wittgenstein and Derrida* (London: University of Nebraska Press, 1984).

[17] Wittgenstein, *Philosophical Investigations*, §81.

to respond to a dispute, being able to see the strength of the reasons given against this use by one's interlocutors, and then being able to give further reasons, and so on. This is done by describing examples with similar or related aspects, drawing analogies or disanalogies of various kinds, finding precedents, exchanging narratives and redescriptions, drawing attention to intermediate cases so one can pass easily from the familiar to the unfamiliar cases and see the similarities among them; thereby being both conventional and creative in the use of the criteria that hold our normative vocabulary in place. Wittgenstein illustrates his thesis with the concept of a 'game':

> Isn't my knowledge, my concept of a game, completely expressed in the explan ations I could give? That is, in my describing examples of various kinds of game; shewing how all sorts of other games can be constructed on the analogy of these; saying that I should scarcely include this or that among games; and so on.[18]

Because the criteria for the application of a term are not determinate, no set of reasons or explanations is definitive. There is always a field of possible reasonable redescriptions: illocutionary acts which evoke another consideration, draw attention to a different analogy or example, uncover another aspect of the situation, and so aim to provoke reconsideration of our considered judgments in this and related cases. These are speech-acts which exercise the kind of freedom Nora tries to practise in *A Doll's House*. Moreover, for the same reasons, the forms of argumentation in which reasons are exchanged are equally complex, and their 'reasonable' forms too are not everywhere bounded by rules but are also open to reasonable disagreement.

Accordingly, understanding and clarifying political concepts, whether by citizens or philosophers, will always be a form of practical reasoning; of entering into and clarifying the on-going exchange of reasons over the uses of our political vocabulary. It will not be the theoretical activity of abstracting from everyday use and making explicit the context-independent rules for the correct use of our concepts in every case, for the conditions of possibility for such a meta-contextual political theory are not available. When political philosophers enter into political discussions and disputes to help to clarify the language being used and the appropriate procedures for exchanging reasons, as well as to present reasons of their own, they are not doing anything different in *kind* from the citizens involved in the argumentation, as the picture of political reflection as a theoretical enterprise would lead us to believe. Political philosophy is rather the

[18] *Ibid.*, §75, compare §71.

methodological extension and critical clarification of the already reflective and problematised character of historically situated practices of practical reasoning.[19] It is therefore an engaged 'public' philosophy and every engaged and thoughtful citizen is also a public philosopher. Public philosophy is democratic.

Hence, we can now see why the first step has to start from the ways the concepts we take up are actually used in the practices in which the political difficulties arise. Here we 'bring words back from their metaphysical to their everyday use' to ensure that the work of philosophy starts from 'the rough ground' of civic struggles with and over words, rather than from uncritically accepted and often arcane forms of representation of them, which may result in 'merely tracing round the frame through which we look at' them.[20]

On this view, contemporary political *theories* are approached, not as rival comprehensive and exclusive theories of the contested concepts, but as limited and often complementary accounts of the complex uses (senses) of the concepts in question and the corresponding aspects of the problematic practice to which these senses refer. They extend and clarify the practical exchange of reasons over the problematic practice of governance by citizens, putting forward a limited range of academic reasons, analogies and examples for employing criteria in such-and-such a way, for showing why these considerations outweigh those of other theorists and so on (often of course with the additional claim that these limited uses transcend practice and legislate legitimate use). A theory clarifies one range of uses of the concepts in question and the corresponding aspects of the practice of government, and puts forward reasons for seeing this as decisive. Yet, there is always the possibility of reasonable disagreement, of other theories bringing to attention other senses of the word and other aspects of the situation which any one theory unavoidably overlooks or downplays. Political theories are thus seen to offer conditional perspectives on the whole broad complex of languages, relations of power, forms of

[19] Compare David Owen, 'Orientation and Enlightenment: An Essay on Critique and Genealogy', in *Foucault Contra Habermas*.

[20] Wittgenstein, *Philosophical Investigations*, §§116, 107, 114. It is interesting to note that Isaiah Berlin recommended that political philosophers abandon their abstract analysis and get back to the way words are actually used in the struggles of the day at the very beginning of his famous Oxford lecture in 1958 ('Two Concepts of Liberty', in *Four Essays on Liberty* (Oxford: Oxford University Press, 1977), pp. 118–21). Yet, his critical and historical survey of two uses of 'liberty' in twentieth-century struggles has been abstracted from practice and treated as two 'theories' of liberty. For recent pleas to ground the study of freedom in the practices of freedom to which I am indebted, see Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995), pp. 3–29; and Rose, *Powers of Freedom*, pp. 1–14.

subjectivity and practices of freedom to which they are addressed. None of these theories tells us the whole truth, yet each provides an aspect of the complex picture.[21]

This first form of survey enables readers (and authors) to understand critically both the problem and the proposed solutions. It enables us to see the reasons and redescriptions on the various sides; to grasp the contested criteria for their application, the circumstances in which they can be applied and the considerations that justify their different applications, thereby passing freely from one sense of the concept to another and from one aspect of the practice to another; and to appreciate the partial and relative merits of each proposal. To have acquired the complex linguistic abilities to do this is literally to have come to *understand* critically the concepts in question. This enables us to enter into the discussions of the relative merits of the proposed solutions ourselves and present and defend our own views on the matter. To have mastered this dialogical technique is to have acquired the 'burdens of judgment' (in a broader sense than Rawls' use of this phrase is normally interpreted) or what Nietzsche called the ability to reason perspectivally.[22] This form of practical reasoning is also a descendant of the classical humanist view of political philosophy as a practical dialogue. Because it is always possible to invoke a reason and redescribe the accepted application of our political concepts (*paradiastole*), it is always necessary to learn to listen to the other side (*audi alteram partem*), to learn the conditional arguments that support the various sides (*in utramque partem*), and so to be prepared to enter into deliberations with others on how to negotiate an agreeable solution (*negotium*).[23]

The second contemporary survey is of the concrete practices – the relations of governance and practices of freedom – in which the problems arise and are fought over. The ways relations of power direct the conduct and shape the identities of those subject to them, and the strategies by which the subjects are able to say 'enough' and contest, negotiate and modify these relations, can be analysed in much the same way as language games. Just as participants in any system of practices of governance think and respond within intersubjective language games, which both enable and constrain

[21] Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988), p. 293.

[22] For this broader interpretation of Rawls as a member of this tradition of political philosophy, see Anthony Laden, *Reasonably Radical: Deliberative Liberalism and the Politics of Identity* (Ithaca, NY: Cornell University Press, 2001). For Friedrich Nietzsche, see *Human All Too Human: A Book for Free Spirits* [1878] (Cambridge: Cambridge University Press, 1986), p. 9.

[23] Skinner, *Reason and Rhetoric*, pp. 14–16, 138–80.

what they can do with words, so they act and contest within correlative intersubjective relations of power, which both enable and constrain the extent to which they can modify some of these while others remain immobile background relations of domination, except in struggles of direct confrontation. These surveys include the interplay of governance and freedom, the means by which the structure of governance is held in place (economic control of information, technology and resources, the threat or use of direct or indirect military power, the organisation of the time and space of the practice, the sciences of persuasion and control, the manufacturing of consent, the techniques for internalising norms of conduct, agenda setting), and the equally diverse means by which subjects are able to resist, organise networks of support, bring the governors to negotiations and hold them to their agreements. Just as an analytical philosophy of linguistic pragmatics has been developed to survey what can be said, so an analytical philosophy of relations of power and practices of freedom has begun to be developed to survey what can be done.[24]

3 HISTORICAL SURVEYS

The first survey enables students of politics to understand critically what can be said and done within a set of practices and problematisation. A genuinely critical political philosophy requires a second type of critique that enables participants to free themselves from the horizons of the practices and problematisation to some extent, to see them as one *form* of practice and one *form* of problematisation that can then be compared critically with others, and so to go on to consider the possibilities of thinking and acting differently. This second, transformative objective is achieved by means of historical or genealogical surveys of the history of the languages and practices that have been explored and understood from the inside through the first two surveys. The transition from contemporary to historical surveys turns on an argument developed in different ways by almost every member of this school of public philosophy.[25]

When problems are raised and solutions discussed and relations of power contested and negotiated in a problematic practice, there are always some uses of words (grammar) that are not questioned in the course of the

[24] See Arnold I. Davidson, 'Introduction', in *Foucault and His Interlocutors*, ed. Arnold I. Davidson (Chicago: University of Chicago Press, 1997); Rose, *Powers of Freedom*, pp. 1–98.

[25] For an introduction to types of genealogy, see David Owen, *Nietzsche's Genealogy of Morals* (Stocksfield: Acumen, 2007).

disputation and some relations of power that are not challenged in practice. These provisionally taken-for-granted uses of the shared vocabulary function as the intersubjective warrants or grounds for what is problematised and subject to the exchange of reasons and procedures of validation in the language games, just as settled relations of power and institutionalised practices of freedom function as the intersubjective conditions of the contested aspects of governance and novel forms of freedom. The background shared understandings are the conditions of possibility of the specific problematisation. They both enable and constrain the form of problematisation. As Wittgenstein puts it:

> All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary or doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the elements in which arguments have their life.[26]

This loose 'system of judgments' or problematisation is neither universal nor transcendental, but provisionally held in place and beyond question by all the disputation within it.[27] He calls the inherited agreement in the language in which the testing of problems and solutions takes place (testing of true and false, just and unjust, valid and invalid, reasonable and unreasonable) 'an agreement in form of life' to indicate the extent to which it is anchored in shared ways of acting as well as speaking: 'it is our *acting* which lies at the bottom of the language-game'.[28] Analogously, the corresponding uncontested relations of power that govern ways of acting function as the enabling and constraining conditions of possibility of the practice as a whole, its forms of government and contestation.

Freeing ourselves from the problematisations and practices in which we think and act is difficult because participation tends to render their shared patterns of thought and reflection and rule-following and rule-contesting pre-reflective and habitual. They come to be experienced as necessary rather than contingent, constitutive rather than regulative, universal rather than partial. As Quentin Skinner writes, 'it is easy to become bewitched into believing that the ways of thinking about them [our normative concepts] bequeathed to us by the mainstream of our intellectual traditions must be *the* ways of thinking about them'.[29] While the first two types of

[26] Ludwig Wittgenstein, *On Certainty*, eds. G. E. M. Anscombe and G. H. von Wright (Oxford: Blackwell, 1974), §105.
[27] *Ibid*., §§140–4. [28] Wittgenstein, *Philosophical Investigations*, §§240–2, and *On Certainty*, §204.
[29] Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998), p. 116.

contemporary survey begin to disclose the unexamined conventions of the language games and the background relations of domination of the practices, the two parallel types of historical survey show how these specific forms of problematisation and practices of governance came to be hegemonic and function as the discursive and non-discursive bounds of political reason, and thereby to displace other possibilities. Skinner continues:

> the history of philosophy, and perhaps especially of moral, social and political philosophy, is there to prevent us from becoming too readily bewitched. The [historian of political philosophy] can help us to appreciate how far the values embodied in our present way of life, and our present ways of thinking about those values, reflect a series of choices made at different times between different possible worlds. This awareness can help to liberate us from the grip of any one hegemonic account of those values and how they should be interpreted and understood. Equipped with a broader sense of possibility, we can stand back from the intellec tual commitments that we have inherited and ask ourselves in a new spirit of enquiry what we should think of them.[30]

My description of the two types of historical survey can be brief because they proceed in much the same pragmatic way as the two contemporary surveys. In the survey of the hegemonic forms of political thinking about the problems and solutions, the history of their emergence and development is approached in the same manner as contemporary political theories, as responses to problems in practice at the time. Political theorists in the past are seen as questioning, testing and challenging some of the accepted conventions of *their* age in various ways; arguing for different ways of looking at the problem and of employing the criteria of the concepts in question; showing how a concept can be extended in an unconventional yet reasonable way to solve the problem; and, in response, defending and restating the prevailing conventions in question, perhaps in novel ways. This kind of survey of the history of political thought shows how the mainstream system of judgments today was gradually put in place, often over centuries, as the stage-setting of reflective disputes and debates, the reasons that were given for and against it, and the alternatives it displaced.

Next, these historical studies of the languages and theories of political thought are related to historical surveys of the corresponding changes in the four main, non-discursive features of the problematic practices of governance, thereby providing a history of the practices that are the site of struggle in the present. What happens when humans are led to recognise

[30] *Ibid*., pp. 116–17. The classic example of this first type of historical survey is Quentin Skinner, *The Foundations of Modern Political Thought*, 2 Vols. (Cambridge: Cambridge University Press, 1978).

themselves and coordinate their interaction under a new and now conventional sense of, say, 'liberty', 'discipline' or 'identity'?[31] What new institutions and relations of power are employed to induce people to acquire the appropriate modes of conduct and forms of subjectivity, and what new practices of freedom emerge and become institutionalised in response? What older practices of governance are displaced, and how are the new ones rendered legitimate, routine and self-evident?

These philosophical studies in the history of political thought and practice have two distinct roles. They are contributions to the contextual understanding of texts in the history of political philosophy in their own right; addressed to historians of political thought and practice broadly conceived; and judged by the standards of the field. In addition, these surveys can be offered to the theorists and citizens in the disputes from which we began as further horizon-expanding reasons and redescriptions for their consideration and response. In this dialogical role they can be employed to acquire and exercise a critical orientation to the background conventions of the contemporary problematisation and practices that were set out in the first surveys. The acquisition and exercise of this critical attitude consists in two steps.[32]

Firstly, on the basis of the critical understanding acquired by the two contemporary surveys, a political philosopher constructs a plausible interpretation, in a related yet novel vocabulary, of the specific *form* of problematisation and practice of governance, namely, of the specific linguistic and non-linguistic conditions of possibility of both. This transformative step, or series of intermediate steps, provides a critical distance from the problematisation and practice by providing a new language of self-understanding, one which enables us to move, to some limited and partial extent, beyond the forms of self-understanding we have as participants within the practices and their modes of argumentation.[33]

Secondly, the historical surveys disclose the formation and historical contingency of this specific form of problematisation and practice and the

[31] See, respectively, Skinner, *Liberty Before Liberalism*; Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon, 1977); and Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989).

[32] For a careful analysis of these steps, see David Owen, 'Genealogy as Perspicuous Representation', in *The Grammar of Politics*.

[33] For example, Foucault's characterisation of classical debates on ethics in terms of a problematisation consisting of four main dimensions enables us to achieve a certain distance from the debates as a whole: *The History of Sexuality*, Vol. II, *The Use of Pleasure* (New York: Pantheon Books, 1985), pp. 14–25. For his invention and careful development of the concept of a problematisation and its relation to practices, see Michel Foucault, *Foucault Live: Interviews, 1961–1984* (Los Angeles: Semiotext(e), 1996), pp. 413–14, 421–2, 462–3; and Foucault, *Fearless Speech*, pp. 74, 171–3.

different potential ways of organising this general kind of practice of governance that were not actualised. These histories of the present thus provide the means to criticise and evaluate the practices and ways of thinking to which we are subject by comparing and contrasting them with possible alternatives.[34] They thereby place the current struggles in a much broader field of possible responses, enabling participants to determine if some constitutive feature is the source of their oppression. This is not a critique from the vantage point of a transcendental standard or procedure of judgment, for as we have seen such standards are internally related to the language games they purport to transcend. Rather, it is a non-transcendental yet transcending critique of the horizons of our practices and forms of thought by means of reciprocal comparison and contrast with other possible ways of being in the world. It is the general type of critique Gadamer called 'the fusion of horizons' – the difficult game of putting one's horizons of thought and action into play relative to others in a question-and-answer dialogue.[35] Contemporary disputes and negotiations are thereby transformed from the limited exchange of practical reasons over reforms within a practice of governance and its modes of argumentation to a broader exchange of practical reasons over the comparative values of a range of possible practices and the relations of governance, forms of subjectivity and practices of freedom they institutionalise.

A few examples will illustrate these two steps. Marx's *Capital* enables subjects struggling over various solutions to the problems of the conditions of work to see these struggles and debates *as* the problematisation of a specific practice of governance, a capitalist mode of production. His historical surveys then enable them to see its contingency and to compare and evaluate its features with other possible ways of governing productive activities (such as feudalism and socialism). Foucault, by recharacterising the dominant practices and traditions of interpretation of representative constitutional democracy as juridical-discursive institutions and the sovereignty model of problematisation, enables us to see many of our current political struggles and theoretical debates as moves within a historically particular set of practices of governance and mode of problematisation. Then, he contrasts this with another way of describing contemporary

[34] The technique of comparative critique rather than transcendental critique, while familiar to this entire tradition, is reformulated in a novel way by Wittgenstein, *Philosophical Investigations*, §§122, 130–1. For its genesis, see Raymond Monk, *Ludwig Wittgenstein: The Duty of Genius* (London: Jonathan Cape, 1990), pp. 298–327.

[35] Gadamer, *Truth and Method*, pp. 306–7, 374–5. See Richard Rorty, 'Being that Can be Understood is Language', *London Review of Books* 22(6), 16 March 2000: 23–5; and Taylor, *Philosophical Arguments*, pp. 165–81.

practices of governance (in the broad sense), as norm-governed relations of biopower that are obscured by the language of sovereignty. This survey discloses different aspects of our practices and different possible and perhaps more effective practices of freedom for consideration.[36]

Taylor's *Sources of the Self* recasts our understanding of seemingly comprehensive and mutually exclusive theories of moral and political selfhood as disclosing different aspects of a complex modern organisation of identity that moderns have come to acquire historically through participation in different practices of governance. Skinner's *Liberty Before Liberalism* leads us to see the dominant way of thinking about and practising freedom as either negative non-interference or positive freedom, as historically contingent and partial; to compare and contrast the relative value of ways of life these promote with another form of freedom, as non-domination, that was marginalised by the ascendancy of liberalism; and to reconsider the reasons for its near eclipse.

As Mary Wollstonecraft illustrates in *A Vindication of the Rights of Woman*, this genre of philosophical study of Nora's and Thorvold's practice of marriage and its limited practices of freedom would disclose the constitutive features of this specific doll's house form of marriage, investigate its historical formation and situate it in a broader field of other possible forms of marriage. We would thus be in the position to secure uptake of what Nora is trying to say, to enter into a practical dialogue over the injustices of its relations of domination and forms of subjectivity, and to consider the concrete practices of freedom by which it could be transformed.[37] These examples, and the ones listed at the end of the introductory section, are designed to illustrate that the engaged form of public philosophy I have presented is much more commonplace than one might think from reading the more theoretical accounts of what political theorists and philosophers are doing.

[36] Foucault, *Discipline and Punish* and *The History of Sexuality*, Vol. I, *An Introduction* (London: Penguin, 1978). See Dean, *Governmentality*, pp. 98–113; and Owen, 'Genealogy as Perspicuous Representation'. For an extension of this kind of contrast of sovereignty and biopower to the problematisation of globalisation, see Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000). Edward Said's critical studies, especially *Culture and Imperialism*, bring to light the imperial horizons of the literature that has shaped Western sensibilities for two centuries and what has been and is being said and done in response.

[37] Mary Wollstonecraft, *The Vindications: The Rights of Men and the Rights of Women*, eds. D. L. Macdonald and Kathleen Scherf (Peterborough, ON: Broadview Press, 1997).

4 PUBLIC PHILOSOPHY AND PUBLIC AFFAIRS

Public philosophy as a critical activity starts from the present struggles and problems of politics and seeks to clarify and transform the normal understanding of them so as to open up the field of possible ways of thinking and acting freely in response. These investigations are addressed to political philosophers, theorists and researchers in related disciplines, and they are tested in the multidisciplinary discussions that follow. However, in so far as they do throw critical light on contemporary struggles over oppressive practices of governance, they are addressed to the wider audience of citizens who are engaged in the struggles and seek assistance from university research. This is a communicative relationship of reciprocal elucidation and mutual benefit between public philosophy and public affairs.

On the one hand, such studies elucidate the features of the practice in which a problem arises and becomes the site of struggle and negotiation, enabling the participants to become more self-aware of the conditions of their situation and the range of actions available to them. On the other, the experiments of the participants in negotiating, implementing and reviewing concrete changes in practice provide a pragmatic, concrete test of the studies and their limitations. By studying the unanticipated blockages, difficulties and new problems that arise in the cycle of practices of freedom – of negotiations, implementation and review – public philosophers can detect the limitations and faults of their initial account, make improvements and exercise again, on the basis of the new problems, this permanent critical *ethos* of testing the practices in which we are governed.[38]

To conclude, let me present one final difference it makes to study politics in this way. If political philosophy is approached as the activity of developing comprehensive theories, the questions of politics tend to be taken up as problems of justice, of the just way to recognise free and equal citizens and for them to govern their stable institutions of constitutional, representative democracy. This has been the dominant answer to the question 'what is

[38] Compare Foucault, 'What is Enlightenment?', in *Essential Works*, Vol. I, pp. 316, 319; 'The Masked Philosopher', *ibid.*, pp. 321–8. The evolving reciprocal relationships between many schools of political theory and philosophy (both historical-critical and neo-Kantian) and concrete struggles constitutes a complex global network of research and communication. The six types of multidisciplinary critical study mentioned earlier have spearheaded this renaissance of a Socratic relation to the public good broadly conceived. For example, the historical and theoretical knowledge of these scholars has enabled them to throw a broader and more critical light on the forms of oppression in an era of globalisation – inequality, exploitation, domination, racism, deliberative democratic deficits, and rights abuses – and on the practices of freedom that might be effective in response.

political theory?' over the last two centuries. The subaltern school I have outlined is respectfully sceptical of this orientation and of the presupposition that there are definitive practices of free governance and theoretical solutions to their problems.

Consequently, this alternative answer to our question is oriented to freedom before justice. The questions of politics are approached as questions of freedom. What are the specific practices of governance in which the problems arise and the practices of freedom by which they are raised? And, what are the possible practices of freedom in which free and equal subjects could speak and exchange reasons more freely over how to criticise, negotiate and modify their always imperfect practices? This is a permanent task of making sure that the multiplicity of practices of governance in which we act together do not become closed structures of domination under settled forms of justice but are always open to practices of freedom by which those subject to them have a say over and hand in them.

CHAPTER 2

Situated creatively: Wittgenstein and political philosophy

INTRODUCTION

My aim in this chapter is to show the importance of Wittgenstein for the kind of non-transcendental and non-foundational critical public philosophy and freedom of citizens situated *in the world* of practices and relationships that I sketched in Chapter 1. I do this by using Wittgenstein's work to draw our attention to, and so enable us to free ourselves from, a widespread but mistaken convention of much of contemporary political thought. This is the assumption that our way of political life is free and rational only if it is founded on some form of critical reflection on the background conditions of possibility of human action that transcend the situated world of everyday activities of citizens and public philosophers. I do this by means of a survey of two well-known practices of critical reflection that have been presented as candidates for this foundational role: the justificational or validational form advanced by Jürgen Habermas and the interpretative or hermeneutical form advanced by Charles Taylor.[1] It is our engagement in the discussion itself – the discussion in the philosophy of social science between critical theory and

An early version of this chapter was first published in *Political Theory* in 1989. I then rewrote parts of it for its republication in Heyes, ed., *The Grammar of Politics* (2003). I made several changes while retaining the main line of argument, which is to show how Wittgenstein's philosophical methods can be used to clarify the role of concepts and practices of critical reflection in political philosophy. The sections on Habermas' form of critical reflection, 'practical discourses of validation', have been rewritten to take into account the considerable changes he has made over the last decade in response to objections similar to the ones I raised in 1989. I discuss these changes in Chapter 3, this volume. Notwithstanding these improvements and the concession that his arguments are fallible, I argue that he continues to assign a foundational and quasi-transcendental role to his three forms of argumentation to redeem validity claims – his 'decentered understanding of the world' – that cannot be sustained. The section on interpretation has been rewritten to acknowledge that Taylor and I are now in agreement on Wittgenstein's distinction between interpretation and understanding, which I initially took to be a point of disagreement. I am greatly indebted to Seyla Benhabib, Peta Bowden, Natalie Brender, William Connolly, Jonathan Havercroft, Cressida Heyes, Susan James, Chantal Mouffe, David Owen, Quentin Skinner, Charles Taylor, Dale Turner and Linda Zerilli for discussions of the themes of this chapter and of the importance of Wittgenstein for political philosophy.

[1] As we will see, Taylor himself does not attribute this foundational role to interpretation.

hermeneutics, among others, about which form of critical reflection is essential to political freedom and reason – that tends to hold in place, beyond question, and thereby render conventional, the rule that *some* form must be foundational. In surveying and clarifying language games of critical reflection, we can see that *no* form of critical reflection can (or need) play the foundational role presupposed for it in this discussion.

Before proceeding to the types of critical reflection presented by Habermas and Taylor, consider two other examples just to recollect the widespread acceptance of this convention and its concurrent discussion. One fashionable example is what might be called representational critical reflection. This is the view – the ethos – that our political way of life is free and rational in so far as it is based on a form of critical reflection that aims at objective representations. Such a 'Cartesian' type of reflexivity has come in for sustained criticism in recent years and there is no need to rehearse the arguments here.[2] A second formulation of the sovereignty of some form of critical reflection is Heidegger's proposal that humans are beings whose being is in question.[3] Here the general activity of posing reflexive questions about our being is suggested to be our fundamental way of being in the world. Again, there have been many criticisms of, for example, the voluntaristic way Sartre took this in *Being and Nothingness*, where, by a critically reflective activity of calling into question one's customary way of life, a person could be able to disengage from it and, in a godlike fashion, found a free and rational life in an 'autonomous choice' or free act of will.[4] Nonetheless, the more modest and situated versions of critical reflection that have followed in the wake of these criticisms still tend to be based on the prevailing custom that the only free and rational way of thought and action is one governed by a canonical type of critical reflection.

The ubiquity of these and other examples illustrates the irony of our situation: a misunderstanding of the very activity that is supposed to free us from the blind adherence to convention (critical reflection) has itself become conventional. Therefore, if we wish to conserve the traditions of critical democratic political thought, it is necessary to call into question this captivating and Faustian convention and, at the same time, avoid the equally dangerous error of embracing the abdication of critical thought that various schools of conservatism claim follows from abandoning the convention.

[2] See Charles Taylor, 'Overcoming Epistemology', in *Philosophical Arguments*.
[3] Martin Heidegger, *Being and Time* (Albany, NY: State University of New York, 1996), pp. 7–12.
[4] Jean-Paul Sartre, *Being and Nothingness* (New York: Washington Square, 1966), p. 76.

The way I will pursue this double strategy is to use the methods developed by Ludwig Wittgenstein in the *Philosophical Investigations* to free us from captivity in mistaken ways of thinking.[5] That is, to 'survey' the language games of critical freedom proffered by Habermas and Taylor and to show by means of 'objects of comparisons' that neither validation nor interpretation ground our motley of free, critical and reasonable ways of being *in* the world.[6] The key here is to realise that validation and interpretation are activities or *practices* of thought and they therefore share features common to other practices. As participants in various practices of validation and interpretation, we take it as a matter of course that they are foundational to our freedom and reason. This is precisely the convention that playing the language games holds in place. The survey thus frees us from the convention and accounts for its hold. This enables us to set it aside and, with a clearer understanding of the non-foundational roles of critical reflection in the world of politics, to get on with the common task of using our various techniques of critical reflection to address and help to work on the pressing political issues of our age.

1 HABERMAS' PICTURE OF CRITICAL REFLECTION

A *picture* held us captive. And we could not get outside it, for it lay in our language and language seemed to repeat it to us inexorably. (Wittgenstein, *Philosophical Investigations* §115)

Habermas' attempt to work out a satisfactory form of critical reflection seems to be guided by the following picture. We live a free and rational way of political life in so far as the rules in accordance with which we act are based on our agreement. The activity of 'coming to an agreement' must be

[5] Wittgenstein, *Philosophical Investigations*, §§122–33. All references in brackets to the *Philosophical Investigations* are to sections in this edition. According to Wittgenstein, it will be in my use and applications of his techniques and conceptual tools that I will show I understand or misunderstand them, and not in (another) interpretation of or commentary on them (§§199–201). It is a remarkable fact that Wittgenstein's interpreters have not reflected on this, his central teaching.

[6] A 'Survey' or 'perspicuous representation' (*übersehen*), 'objects of comparison' (*Vergleichsobjekte*) and philosophical 'methods' (*Methoden*), like 'different therapies', are terms of art Wittgenstein uses (§§122, 130, 133). The importance of his discovery of these methods in 1930 for his later philosophy is discussed by Monk, *Ludwig Wittgenstein*, pp. 298–327. The best introductions are Gordon P. Baker and Peter M. S. Hacker, *An Analytical Commentary on the Philosophical Investigations*, Vol. I, *Wittgenstein, Understanding, and Meaning* (Oxford: Blackwell, 1980); and Gordon P. Baker, '*Philosophical Investigations* Section 122: Neglected Aspects', in *Wittgenstein's Philosophical Investigations: Text and Context*, eds. Robert L. Arrington and Hans-Johann Glock (London and New York: Routledge, 1991).

some form of critical reflection that ensures that the agreement is free and rational. I think it is fair to say that this general picture informs much of our political thinking, from theories of contract, consent and civic participation to theories of rational choice.

The importance of Habermas' solution to this problem is the thought-provoking way he has attempted to work out the requirements of the activity of 'coming to an agreement'. For him, the activity must combine two types of critical reflection. In the first, transcendental and reconstructive in form, reason must turn back on itself and determine the conditions of possibility of a rational agreement. In the second, emancipatory in form, everyone affected by the agreement must in principle engage together in an activity of critical discussion to justify the rules governing their political life. The critical discussion – 'practical discourse' or 'discourse ethics' – must conform to the conditions of possibility discovered by the transcendental reflection and usher in an agreement based on the force of the better argument. This ideal model is used to evaluate the legitimacy of actual processes of deliberation and agreement. It thus represents a powerful expression of the demands of reason and freedom that underlie the activity of 'reaching agreement' in our public rhetoric about the legitimacy of constitutional democracy in some of our most cherished political institutions, such as parliament and the public sphere, and in many political theories, such as recent theories of deliberative democracy. Moreover, Habermas claims that his specific form of critical discussion is inherent in the very activity of communication these institutions and theories presuppose.[7]

I now want to lay out the steps Habermas takes in constructing the activity of 'coming to an agreement' so we will be in a position to see a misunderstanding it involves. His move from the earlier Critical Theory assumption that relations of production are basic to the view that relations of communication are as basic is put in the following way:

> If we assume that the human species maintains itself through the socially coordi nated activities of its members and that this coordination has to be established through communication and in central spheres through communication aimed at

[7] For Habermas' distinction between these two types of critical reflection, see Richard J. Bernstein, 'Introduction', in *Habermas and Modernity*, ed. Richard J. Bernstein (Cambridge, MA: MIT Press, 1985), pp. 12–13. Habermas accepts this clarification by Bernstein in Peter Dews, ed., *Habermas: Autonomy and Solidarity* (London: Verso, 1986), p. 153. For his development of these two types of critical reflection since 1989, see especially Jürgen Habermas, 'Discourse Ethics: Notes on a Program of Philosophical Justification', in *Moral Consciousness and Communicative Action* (Cambridge, MA: MIT Press, 1995). For the application of his discourse ethics to democratic theory, see his *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, MA: MIT Press, 1996).

reaching agreement then the reproduction of the species also requires satisfying the conditions of a rationality that is inherent in communicative action.[8]

'These conditions', he continues, 'have become perceptible in the modern period with the decentration of our understanding of the world and the differentiation of various universal validity claims.' Thus we should study communicative action, and the form of rationality inherent in it, because it is 'fundamental' relative to other types of action: for example, teleological, strategic-instrumental, dramaturgical and norm-regulative.[9]

In 'communicative action' actors seek 'to reach understanding' about their 'action situation' and 'plans of action' with the aim of coordinating their actions by way of 'agreement'.[10] Why is communication 'oriented to reaching understanding' the 'paradigm' or 'standard' form of communication, and others, such as conflict, deception, manipulation, irony and so on, 'derivative'? He says that it is the 'original mode' of using language because 'the telos of reaching understanding is inherent in the concept of speech'.[11] The phrase 'reaching understanding' translates the German word *Verständigung*, which also can be, and often is, translated as 'reaching agreement'. It can be translated as 'reaching *an* understanding' or '*an* agreement'. So we should really say, 'reaching [an] understanding/agreement'.

Given that reaching understanding/agreement is fundamental, Habermas goes on to engage in the first form of critical reflection: to reconstruct the conditions under which reaching understanding/agreement is achieved. 'We can reconstruct', he writes, 'the normative content of possible understanding by stating which universal presuppositions have to be met for understanding to be achieved in an actual case.'[12] This reconstructive turn assumes that the multiplicity of activities of 'reaching understanding' must rest on some underlying structure or set of 'conditions of possibility' that is repeated (inexorably) in every instance. For Habermas, the conditions of reaching understanding are those that make a speech-act acceptable. 'We understand/agree to a speech act', he states, 'when we know what makes it

[8] Jürgen Habermas, *The Theory of Communicative Action*, Vol. I, *Reason and the Rationalization of Society* (Boston: Beacon Press, 1984), p. 397. (*TCAI* hereafter.)

[9] Jürgen Habermas, 'What is Universal Pragmatics?', in *Communication and the Evolution of Society* (Boston: Beacon Press, 1979), pp. 2, 208–10, fn2.

[10] Habermas, *TCAI*, p. 86.

[11] Habermas' contribution to Willi Oelmuller, ed., *Transzendentalphilophische Normenbegrundungen* (Paderborn: Schoingh, 1978), p. 156, cited in Thomas McCarthy, 'Rationality and Relativism: Habermas's Overcoming of Hermeneutics', in *Habermas: Critical Debates*, eds. John Thompson and David Held (Cambridge, MA: MIT Press, 1982), p. 63. Compare *TCAI*, pp. 115–16 and 'A Reply to My Critics', in *Habermas: Critical Debates*, pp. 270–1.

[12] Habermas, cited in McCarthy, 'Rationality and Relativism', p. 63.

acceptable.'[13] Again, it is difficult for an English reader to believe that he means to say that we understand a speech-act only when we know what would make it acceptable as opposed to simply intelligible; and so we must bear in mind his polysemic phrase 'reaching understanding/agreement' and the different uses of it.

The final step is his claim that the conditions of possibility of a comprehensible speech-act oriented to reaching understanding/agreement are 'precisely' three criticisable claims of validity. These are claims that the speech-act is 'right', that its propositional content is 'true' and that the speaker is 'sincere' or 'truthful'. As he sums up:

> It belongs to the communicative intent of the speaker (a) that he perform a speech act that is *right* in respect to the given normative context, so that between him and the hearer an intersubjective relation will come about which is recognized as legitimate; (b) that he make a *true* statement (or correct existential presupposi tions), so that the hearer will accept and share the knowledge of the speaker; and (c) that he express *truthfully* his beliefs, intentions, feelings, desires, and the like, so that the hearer will give credence to what is said.[14]

The three validity claims relate to three 'world-relations': the claim of rightness to interpersonal relations and a norm-conformative attitude (the world of morality and law), the claim of truth to representations of states of affairs and events and an 'objectivating' attitude (the world of science), and the claim of sincerity to one's own subjective world and expressive attitude (the world of art and ethics). He concludes:

> Communicatively achieved agreement is measured against exactly three criticizable validity claims; in coming to an understanding about something with one another and thus making themselves understandable, actors cannot avoid embedding their speech acts in precisely three world relations and claiming validity for them under these three aspects.[15]

Habermas draws a sharp distinction between our everyday, customary activities of thinking and acting and the practice of critical reflection. In our everyday communications we do not normally question the validity of speech-acts along the three axes. Our agreement in judgments is based in the force of (pre-reflexive) custom or habit; in the 'taken for granted'. This is the 'lifeworld':

[13] Habermas, *TCAI*, p. 297. [14] *Ibid*., pp. 307–8, and 'A Reply to My Critics', pp. 271–2.
[15] Habermas, *TCAI*, p. 308. Compare *ibid*., p. 329, and Jürgen Habermas, 'Philosophy as Stand-in and Interpreter', in *Moral Consciousness and Communicative Action*.

The communicative practice of everyday life is immersed in a sea of cultural 'taken for grantedness', that is, of consensual certainties. To this lifeworld background of actual processes of reaching understanding, there also belong normative convic tions and empathetic identifications with the feeling of others.[16]

However, our customary agreements are reasonable only if the participants could give reasons that justify them; that is, if they could redeem, through argument aimed at validation, the three claims of validity implicit in their speech-acts. And, the way agents disengage from their customary practices, suspend their assent and engage in the activity of reaching an agreement – based not on custom but on the force of the better argument – is to question what is taken for granted: to ask for the reasons that justify or validate the rightness, truth or sincerity of the speech-act. That is, they move, or could move, to a critically reflective language game of validation of their customary agreements by means of argumentation.

The rationality inherent in this [everyday communicative] practice is seen in the fact that a communicatively achieved agreement must be based *in the end* on reasons. And the rationality of those who participate in this communicative practice is determined by whether, if necessary, they could, *under suitable conditions*, provide reasons for their expressions.[17]

The rationality of communication thus rests on the implicit possibility of reflective justification and, he continues, can be assessed by means of actual justification by argumentation as a 'court of appeal'.

In a practical discourse of validation by argumentation, the participants suspend their customary assent to a speech-act and exchange reasons pro and contra its normative rightness, propositional truth and/or the sincerity of the speaker with the *telos* of reaching agreement (*Verständigung*) or consensus (*Einverständnis*). The universal rules by which they proceed are of two kinds. The three conventional rules of logical-semantic consistency, mutual recognition and reciprocity, and the three post-conventional rules that every subject with the competence to speak and act is allowed to take part in discourse (the principle of universal moral respect); everyone is allowed to question and introduce any assertion whatever and express his or her attitudes, desires and needs (the principle of egalitarian reciprocity); and no speaker may be prevented, by internal or external coercion, from exercising these rights (the principle of non-coercion). Two further

[16] Habermas, 'A Reply to My Critics', p. 272. Compare Jürgen Habermas, *The Theory of Communicative Action*, Vol. II, *Lifeworld and System: A Critique of Functionalist Reason* (Boston: Beacon Press, 1987), pp. 119–52. (*TCAII* hereafter.)

[17] Habermas, *TCAI*, p. 17; see p. 317.

principles of argumentation, principles D and U, are derived from the two types of rule respectively. The conjunction of the conventional and post-conventional rules and principles D and U 'burst asunder' and 'transcend' any taken-for-granted consensus and ensure the 'double' universal validity of a norm or proposition agreed upon through argumentation: that is, everyone in the practical discourse should agree that the proposition or norm is valid for everyone. In contrast, argumentation to redeem the third validity claim in the third sphere of aesthetics and ethics is oriented to goodness rather than rightness and so is always context-dependent and non-universal. Thus, a universal norm of action coordination agreed to through the demanding form of argumentation he sets out would not be conditioned by anything but would be grounded in the unforced conviction of a rationally motivated agreement.[18] As he concludes:

> Every agreement … is based on (convertible) grounds or reasons. Grounds have a special property: they force us into yes or no positions. Thus, built into the structure of action oriented toward reaching understanding is an element of unconditionality. And it is this unconditional element that makes the validity (*Gültigkeit*) we claim for our views different from the mere de facto acceptance (*Geltung*) of habitual practices. From the perspective of first persons, what we consider justified is not a function of custom but a question of justification or grounding.[19]

There are two final points in this difficult quotation. Firstly, it is precisely the calling into question of the validity claims of truth and rightness that enables the ensuing, reflective agreement to transcend the taken-for-granted horizons of the lifeworld and so be unconditional and universal: 'The validity claims that we raise in conversation – that is, when we say something with conviction – transcend this specific conversational context, pointing to something beyond the spatiotemporal ambit of the occasion.'[20] Secondly, the practice of argumentation then serves to validate unconditionally, or invalidate, the 'certainties' that are taken for granted and so customarily function as grounds in our everyday communicative practices. This agreement is 'unconditional' because, so to speak, the grounds of

[18] This paragraph incorporates the changes he has made since *TCAI* to the rules governing the three forms of argumentation. See especially Habermas, 'Discourse Ethics'. For an introduction to these developments, see Maeve Cooke, *Language and Reason: A Study of Habermas's Pragmatics* (Cambridge, MA: MIT Press, 1994), especially pp. 29–51; and William Rehg, *Insight and Solidarity: The Discourse Ethics of Jürgen Habermas* (Berkeley: University of California Press, 1994), pp. 1–88. This paragraph draws on my discussion of discourse ethics in Chapter 3, this volume.

[19] Habermas, 'Philosophy as Stand-In and Interpreter', pp. 19–20. Compare *TCAI*, p. 42 and Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics* (Cambridge, MA: MIT Press, 1993), p. 29.

[20] Habermas, 'Philosophy as Stand-In and Interpreter', p. 19. Compare *TCAI*, p. 95.

justifications are themselves justified. Finally, this form of agreement/understanding is distinguished, on the one hand, from the forms of activity in the lifeworld, where agreement is based on the de facto acceptance of habitual practice and, on the other, from the rationalised forms of activity colonised from the lifeworld by processes of modernisation, where action-coordination is the product of the functional integration of the consequences of actions in self-regulating systems (such as the market).[21]

Clearly, a very powerful picture of rationality and freedom informs this project. It is not a picture of standing back from our lifeworld and functionally integrated systems as a whole and justifying them once and for all. Rather, it is a picture of making explicit the implicit universal rules for reaching mutual understanding and agreements over disputed norms of cooperation, propositions and claims of truthfulness in communicative action, and using this ideal set of rules as a standard to judge the degree of validity and legitimacy of actual procedures of understanding and agreement in practice.[22] We would thereby tend to become the self-validating animals we are disposed to become in virtue of being language communicators.

2 UNDERSTANDING HABERMAS' PRACTICE OF VALIDATION

Let us first notice the specialised nature of the activity of reaching understanding/agreement. We can think of many examples of 'understanding' and even of 'coming to an understanding' that involve 'disagreement' rather than 'agreement'. There are also many forms of agreement that involve 'reasonable disagreement'. The toleration of dissent, the right of free speech, the right of review and the principle of *audi alteram partem* (always listen to the other side), for example, are often justified by reference to the irreducibility of reasonable disagreement.[23] We can also think of many examples of agreement where rightness, truth and sincerity are not relevant considerations. It is also possible to raise these validity claims in circumstances in which understanding/agreement is not the *telos*, or to raise other validity claims (goodness, concern, respect) where reaching understanding/agreement is the *telos*. These are, as we have seen, 'derivative' forms of

[21] Habermas, *TCAII*, pp. 150–1, and further, pp. 283–94, 396–403.

[22] Habermas, 'A Reply to My Critics', p. 262; *TCAII*, pp. 396–403; Habermas, *Justification and Application*, pp. 51, 151; also see McCarthy's Introduction to *TCAI*, pp. xxiii–xxiv; and Cooke, *Language and Reason*, p. 1.

[23] Compare Jeremy Waldron, *Law and Disagreement* (Cambridge: Cambridge University Press, 1999), pp. 102–6.

standard speech activity. For Habermas, we call an activity 'reaching understanding/agreement' (*Verständigung*) only when the speakers are oriented to an 'agreement' (*Einverständnis*) based on redeeming his three validity claims. Critics have been quick to point out how difficult it would be to establish this as the basic form of speech and how his project looks similar to the old Platonic attempt to legislate 'rhetorical' speech to a derivative position in order to found politics on 'serious' speech.[24]

I would like to accept Habermas' practice of reaching understanding/agreement as one form of justification and ask if it could ground our everyday speech-acts in reflectively validating reasons unconditionally (rather than conditionally).

Suppose Habermas says, 'I am Jürgen Habermas and I believe that the workplace ought to be organised democratically.' Instead of questioning the second part of this speech-act someone raises the issue of sincerity. 'I think you are being insincere and untruthful and deceiving us about your name. You are not really Jürgen Habermas.' We move into our reflective practice of justification either to redeem this validity claim or to get the respondent to understand/agree that this is an illegitimate use of 'sincerity'. Let us take up the first option.

2.i Three features of giving grounds

Habermas replies that he really is Habermas. How do we justify this claim to sincerity (and truth)? One possibility is that we could check his birth certificate, but why should we take this as authoritative? We could then check with government officials, police and so on, but we could also ask what justifies our taking their statements as authoritative. Or, someone impressed by first-person avowals might suggest that the avowal, 'I know I am Jürgen Habermas', accompanied with a lie-detector test, is a good reason. But what justifies our confidence in *this* ground? Another speaker who has read some popular commentaries on Wittgenstein might say that the speaker who says he is Habermas is Habermas because the members of the community agree in calling him Habermas. Another speaker would surely respond that we should read Wittgenstein's own refutation of this kind of theory and so ask what

[24] Habermas, *TCAI*, p. 307. For doubts about 'reaching understanding/agreement' as the standard form, see John Thompson, 'Universal Pragmatics', in *Habermas: Critical Debates*, pp. 125–6. The attempt to eliminate 'non-serious' forms of speech is questioned by Rudiger Bubner, 'Habermas's Concept of Critical Theory', in *Habermas: Critical Debates*, pp. 42–57. The works of Hannah Arendt and Jacques Derrida contain well-known criticisms of this Platonic tendency in political philosophy.

justifies taking the community as authoritative.[25] And, if justifications were advanced for any of these three warrants, we could in turn ask what reason we have for accepting them, and so on.

You will say this is a trivial example that barely counts as a question of sincerity at all. This is precisely my point. It would be *unreasonable* in these circumstances to raise recursive doubts that Habermas is being insincere about his name. It would be reasonable to take it for granted, and as a matter of course, that Habermas is being sincere about his name at some point. That is, it is reasonable to accept without further question and justification that Habermas is sincere about his name.

Three distinct features of 'reaching agreement' are brought to light by this example. Firstly, it is reasonable to take something for granted, take it as a matter of course without further justification, even in circumstances of critical reflection. According to Habermas, we are rational only in so far as we could give reasons for what we take for granted in these special conditions. This is a mistaken view that identifies 'reasonable' with being able to provide reasons 'in the end' (quotation at note 17). As we have seen, it is perfectly reasonable not to ask for reasons in some circumstances; and it would be unreasonable to do so. And, the circumstances in which this can be the case are not always in the 'lifeworld' but also in our most critically reflective activities.

This misunderstanding about raising doubts and providing justifications is just the sort of 'disguised nonsense' that Wittgenstein is concerned to bring into clear view, and show to be 'patent nonsense', as he puts it, in many examples in the *Philosophical Investigations*. A classic example of this is given in section 87 in response to an interlocutor who says she cannot 'understand' a claim until she has *the* 'final' – non-circumstantial and unconditional – explanation:

> As though an explanation as it were hung in the air unless supported by another one. Whereas an explanation may indeed rest on another one that has been given, but none stands in need of another unless *we* require it to prevent a misunderstanding. One might say: an explanation serves to remove or to avert a misunderstanding one, that is, that would occur but for the explanation; not every one that I can imagine.

[25] For Wittgenstein's dissent from the community-agreement theory of justification see, Ludwig Wittgenstein, *Zettel*, 2nd edition (Oxford: Blackwell, 1981), §§428–31. All references in brackets to Zettel are to sections in this edition. See Gordon P. Baker and Peter M. S. Hacker, *An Analytical Commentary on the Philosophical Investigations*, Vol. II, *Wittgenstein: Rules, Grammar, and Necessity* (Oxford: Blackwell, 1985), pp. 228–51, and their *Scepticism, Rules and Language* (Oxford: Blackwell, 1984), pp. 71–80.

So, if we raise some doubts about Habermas' sincerity, then a reason is needed to clear it up, but we are not necessarily unreasonable or irrational in not raising the doubt. And, if we raise the doubt and accept his birth certificate as the justification, we are not in turn unreasonable or unreflective for not raising further doubts, for it is precisely our reflection on the role of giving reasons that is our reason for not raising further doubts. As Wittgenstein puts it in his succinctly anti-Cartesian continuation of section 87:

> It may easily look as if every doubt merely *revealed* an existing gap in the foundations; so that secure understanding is only possible if we first doubt every thing that *can* be doubted, and then remove all these doubts.
>
> The sign post is in order if, under normal circumstances, it fulfills its purpose.

In section 211 Wittgenstein asks how is someone to instruct another about how to obey a rule, to continue a pattern or use a word (for example, to predicate 'sincere' of Habermas' speech-act)? He answers, 'If that means "Have I reasons?" the answer is: my reasons will soon give out. And then I shall act, without reasons.' In section 217 he says: 'If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: "This is simply what I do."'

He is also at pains to show that the exhaustion of reasons – the inability of reasons to justify the justifications unconditionally – is not in any way irrational or epistemically defective; not in any way an opening for the philosophic sceptic. 'To use a word without a justification (*Rechtfertigung*) does not mean to use it without right (*Unrecht*)' (§289). The spatial and temporal phenomenon of using signs reasonably, reflectively and critically is not ultimately based on, and thus cannot be equated with, the giving of validational reasons. As he puts it in *Zettel*, 'He must go on like this *without a reason*. Not, however, because he cannot yet grasp the reason but because – in *this* system – there is no reason. (The chain of reasons comes to an end)' (§301).

The second of the three features of 'reaching agreement' is simply another aspect of the first. For the activity of reaching understanding/agreement to get under way, something must be taken for granted and as a matter of course for us, and so, in these circumstances, to be a ground: namely, that Habermas is sincere about his name, or that one of three justifications (offered above) is authoritative for us, and so on. That we are already in agreement in taking birth certificates as authoritative is the ground for redeeming the claim that Habermas is sincere when he presents his birth certificate as validation. In these circumstances this is where the chain of reasons comes to an end. That is, activities (language games) of justification, of giving reasons, are themselves

grounded in customary or conventional uses of words; in what is not called into question in the course of our activity of asking and answering questions, of offering, rejecting and accepting reasons. A critical activity that frees us from a customary usage itself rests on other customary uses and cannot justify these in turn, on pain of infinite regress. The critically reflective speakers and hearers are not, as Habermas claims, 'out of the context of their pre-interpreted world'.[26] Therefore, the view that reaching understanding/agreement is based on reasons or validation (expressed in quotations at notes 17 and 19 above) is also a mistake. The activity of reaching understanding/agreement involves the giving of reasons in the search for mutual understanding and/or agreements. However, this critical and reflective argumentation is based in a more fundamental form of speech activity in which we are always already in tacit agreement and understand one another in our thoughtful, confident, rational yet unreflective uses of words which *eo ipso* act as grounds in these circumstances.

This is why it is correct to call Habermas' validational form of critical reflection a 'practice'. He calls everyday communications in the lifeworld 'practices' but his critically reflective language game of argumentation an 'activity', 'practical discourse' or 'discourse ethics'.[27] However, as I have sought to bring to light, our most sophisticated forms of reflection, including reflection on language games of reflection, are practices in the sense that participation in them presupposes customary, intersubjective ways of acting with words.

Throughout the *Philosophical Investigations*, Wittgenstein is concerned to draw our attention to this feature – 'the fact that', as he puts it in section 23, 'the *speaking* of language is part of an activity, or of a form of life'. He goes on to explicate language games ('consisting of language and the actions into which it is woven'), such as asking and answering questions and forming and testing a hypothesis, in the terms of regular use, custom and practice, and these in the terms of the abilities of 'being able to' and 'mastery of a technique'.[28] In *On Certainty* he crisply sums up this second feature of practices of justification: 'If the true is what is grounded, then the ground is not true, nor yet false.'[29] The ground is neither the activity of validation nor

[26] Habermas, *TCAI*, p. 95, and 'Philosophy as Stand-In and Interpreter', p. 19 (quotation at note 20 above).
[27] Habermas, *TCAI*, pp. 18–25, 96.
[28] Wittgenstein, *Philosophical Investigations*, §§7, 23, 150, 182, 198, 199, 202. See section 3.i below and Baker and Hacker, *Rules, Grammar, and Necessity*, pp. 159–65.
[29] Wittgenstein, *On Certainty*, §205. All references in brackets to *On Certainty* are to sections in this edition.

what is validated but the practice, language game or system in which validation takes place:

> All testing, all confirmation, and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. This system is not so much the point of departure, as the element in which arguments have their life (§105).

It is clear from all his later writings that the 'system' or 'language game' is nothing more (or less) than the 'loci of linguistic practices' – the congeries of uses of abilities employed as a matter of course in our activities of confirming and disconfirming, of using words in a multiplicity of ways.[30] No matter how deep philosophical questioning goes, it will always rest on uses of language that cannot in the circumstances be in question, and so, as he famously concludes, 'philosophy cannot give it [language use] any foundation' (§124).

We can say, then, that our activities of justification are less discontinuous with everyday conversation than Habermas allows. One reason for his misunderstanding is the overly sharp distinction he draws between the reflective grounding of speech-acts in argumentation and the mere de facto acceptance of habitual practices. It is precisely this false dichotomy between the demands of autonomous reason and the force of conditioning that keeps the debate going between the radical defenders of Enlightenment reason and the conservative defenders of the authority of custom. For once we free ourselves from the convention that we are free and rational only if we can justify the grounds of any uses we follow, we can see that there is a multiplicity of ways of being rationally (and thoughtfully) guided by rules of use, short of self-grounding validation, that is not reducible to the behaviourist's causal compulsion of habit. Between the Charybdis of unconditional reflection and the Scylla of the dead weight of custom lies the vast landscape where our critically reflective games of freedom have their home, which Wittgenstein opens up and explores.

Wittgenstein strikingly illustrates how vast and diversified this landscape of rule-following (being guided) is in section 172.[31] In the following section he warns against being guided by one picture of 'being guided', such as the reduction of all forms of rational thought short of the chimera of

[30] S. Stephen Hilmy, *The Later Wittgenstein: The Emergence of a New Philosophical Method* (Oxford: Blackwell, 1987), pp. 98–137.

[31] Wittgenstein states that his aim is to survey and clarify these non-reflective uses of words because they tend to lead us astray and give rise to philosophical problems (§§90, 107, 109–11, 116, 122, 125).

self-grounding critical reflection to the mechanical compulsion of habit: 'But being guided is surely a particular experience!', his interlocutor replies. 'The answer to this is: you are now *thinking* of a particular experience of being guided.' (Just as in politics, where there is a diverse world of political thought and action between total revolution and unthinking conformity.)

The third and final feature of 'reaching agreement' illuminated by the sincerity example is the role of 'the force of the better argument'. Let us suppose that someone responds in the following way to the person who doubted Habermas' truthfulness. 'No, he really is Habermas. He signed up for this discussion in the proper way last night and I just forgot to give him his name tag and this has caused the confusion.' Suppose we come to agree this answers the doubt for us. If it does, it is not the 'force' of this better argument alone that brings about our assent. Rather, it is our being in tacit agreement on the trustworthiness of the conference organisers that gives sufficient 'force' to it as a better argument. Our unwillingness to raise doubts about their trustworthiness, our having no reason to doubt, and so taking their word on trust and acting on it in the course of raising other doubts is a circumstantial and conditional ground of the force of the better argument. In *On Certainty* Wittgenstein makes just this sort of point: 'Giving grounds, justifying the evidence, comes to an end; – but the end is not certain propositions' striking us immediately as true, i.e. it is not a kind of *seeing* on our part; it is our *acting*, which lies at the bottom of the language-game' (§204).[32] He puts this even more forcefully in response to the query as to what counts as an 'adequate test' of a proposition: 'As if giving grounds did not come to an end sometime. But the end is not an ungrounded proposition: it is an ungrounded way of acting' (§110).

To guard against the conservative interpretation of this point, which is often mistakenly attributed to Wittgenstein, we need only recall that what holds the conventions of a language game in place is just our continuing to speak and act in conventional ways. Furthermore, what constitutes 'continuing in the conventional way' is itself questioned and interpreted variously and creatively in the course of a language game.[33] In our example, one is free to question the trustworthiness of the organisers. A rumour could spread that the conference had been rigged in some way. Our confidence in the organisers' word would correspondingly dissolve and, consequently, the force of the argument would diminish. One could argue that it is reasonable

[32] Compare: 'I really want to say that a language-game is only possible if one trusts something (I did not say 'can trust something') (§509).

[33] Wittgenstein, *Philosophical Investigations*, §§83–4, and *Zettel*, §135.

to raise doubts in the light of these circumstances. Another could reply that it is unreasonable to raise doubts on such flimsy evidence. Here, then, we would be calling into question our usages of the word 'reasonable' itself: the criteria for its application, its reference, whether there is 'reasonable disagreement' over 'reasonable' or whether it is always appropriate to act reasonably – whether it may be appropriate to act 'non-reasonably' or 'unreasonably' in some circumstances in the name of some other value, and so on. When it is reasonable to raise doubts and when it is not is itself not fixed beyond question. Of course, as our questioning moves in this way, it does so in the context of a whole repertoire of varying speech-acts that are not themselves in question. What is taken for granted and what is explicitly called into question and reflected on are therefore provisional and subject to change and reversal over time – in the historical course of our activities of critical reflection (§23).[34]

2.ii Questioning the validity claim of rightness

Leaving aside the difficulties of coming to an agreement on the use of the word 'sincerity' (which Habermas uses interchangeably with 'truthfulness' and 'authenticity'), let us turn to the second part of the speech-act example – 'that the workplace ought to be organised democratically' – and question its validity claim to rightness. I think everyone will appreciate that there are several competing and contested uses of the terms 'democracy' and 'workplace' and no obvious self-justifying reason that could justify one use over the others, or even justify one description of the complex range of uses of these two terms.[35] However, suppose we all came to agree on the use of these terms. Of course, it would have to be agreement in use and not simply agreement on definitions. For, if it were only agreement on definitions we would have the problem of how to apply the definitions in the same way, and so on.

Even if we agreed in use, this would not ensure that each one of us continued to use these terms in the same way, or that some future uses could be shown, beyond reasonable doubt, to be correct and others incorrect. As Wittgenstein's examples show, it is not only novitiates being inducted into a language game who reasonably 'go on differently' in continuing a series and so on. Seasoned practitioners, who are all masters of techniques in using these two words, continue to use the words in slightly different ways and

[34] Compare with Wittgenstein, *On Certainty*, §§96–9.
[35] William E. Connolly, *The Terms of Political Discourse* (Toronto: Heath Publications, 1974).

there is no sharp demarcation between normal and abnormal uses or between 'same' and 'different' (§§224–5). Indeed, the examples seem set up to show how it is always possible, due to the indeterminacy of use, to unsettle in a reasonable way our most settled and convention-ridden ways of thought. His aim is to expose the mistaken view he once held that, 'if anyone utters a sentence and *means* or *understands* it he is operating a calculus according to definite rules' (§81). Rather, the reasonable use and extension of a concept exhibits an element of freedom and indeterminacy precisely because its use is 'not everywhere circumscribed by rules' (§68).[36] Moreover, it is always possible to attempt to justify a deviant use of, say, 'democracy', by appeal to an intersubjective warrant that is not, in that context, in doubt and so can function as a ground. Quentin Skinner (and Richard Rorty) has shown how much of critically reflective political theory actually proceeds by exploiting this indeterminacy in criteria and application through novel 'redescription'.[37] Yet, determinacy of use and meaning is laid down as a condition of validational argumentation for Habermas.[38]

If we are to assess Habermas' speech-act in the terms of rightness, then we must somehow overcome these disagreements and bring about, by agreement, stable conformity in our use of 'democracy' and 'workplace' (as well as 'ought', 'organise' and so on). If we do not have this basic agreement in meaning to constrain us, then the validation activity (where the speakers are restricted to a stance of either yes or no with respect to its rightness) will move to these other disagreements in the course of the free play of questions and answers. Therefore, I do not see how Habermas could achieve the degree of conformity (in judgments) required to get his form of critical reflection going, short of presupposing widespread acceptance of the very type of sedimented practice he claims to oppose.

Let us now survey the validity claim of rightness. Surely it would not be unreasonable – on the face of it – to ask why rightness is the claim of validity. A civic humanist or an ecologist would surely want to argue that

[36] For the freedom and indeterminacy of language use, see Wittgenstein, *Philosophical Investigations*, §§65–84, and section 3.ii below; Henry Staten, *Wittgenstein and Derrida*, pp. 64–110; and Hilmy, *The Later Wittgenstein*, pp. 180–9.

[37] Skinner, *Regarding Method*, pp. 103–87. For the history of the critical reflection on the indeterminacy of political concepts and Hobbes' attempt to transcend it, see Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, especially pp. 138–80. Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989), pp. 3–22.

[38] Habermas, 'Discourse Ethics', p. 87. He presents R. Alexy's rules as examples of the kind of logical and semantic rules he has in mind. Rules 1.2 and 1.3 require determinacy of criteria and application. For a discussion of this limitation, see Chapter 3, this volume.

goodness has priority over rightness in politics and morality.[39] It seems reasonable to discuss this important disagreement and to try to come to an agreement, yet it is impossible to do so within the constraints of Habermas' validational activity because a condition of our being modern, rational agents engaged in reflection is that we take it as beyond question that rightness has priority over goodness in politics and morality and that questions of the good belong in a separate 'ethical' sphere with a distinct, non-universal form of argumentation. Rightness is one of the bounds of justificatory argumentation laid down by the transcendental and reconstructive critique (quotations at notes 14 and 15). Despite Habermas' complex arguments to identify the priority of rightness with modernity, and this with the development of reason into three spheres, it would surely be reasonable to exercise our right to raise a question about these inconclusive arguments from *within* a practical discourse, and thus reasonably subvert the bounds of reason he has set for us. A practice of critical reflection designed to ground our world of politics, morality and law that excludes the discussion of these two great claims, as well as others, is a constraint on, rather than a defence of, a free and rational society. It would constrain us to assess our moral and political norms in a deontological or juridical manner and to subordinate other ways of thinking and acting politically. Habermas is thus in a line of political thinkers who have sought to promote juridical institutions and forms of thought – based on the priority of right – to a position of sovereignty in our political life.[40] The initial plausibility of the exclusive sway of the rightness claim rests on our being accustomed to assessing our morals and politics predominantly in the juridical terms of 'right', 'rights', 'law' and 'universal', and being unused to other political and moral language games. All the more reason, then, that we should be able to challenge, rather than to reinforce, this convention *in* practical discourses designed to guard our freedom.[41]

[39] For the civic humanist priority of the good, see Taylor, *Sources of the Self*, pp. 3–110. For the ecologist's objection to the priority of rightness, see *Volume II*, Chapters 3 and 9.

[40] For the limits of the juridical tradition, see John Pocock, 'Virtues, Rights and Manners: A Model for Historians of Political Thought', in *Virtue, Commerce and History*; Quentin Skinner, 'The Idea of Negative Liberty: Philosophical and Historical Perspectives', in *Philosophy in History*; Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982); and Chapter 3, this volume.

[41] Seyla Benhabib and Simone Chambers, for example, argue, contrary to Habermas, that the framework of argumentation around three validity claims is not transcendental and thus that participants in a practical discourse should be free to question it. Seyla Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (London: Routledge, 1992), pp. 29–38; Simone Chambers, *Reasonable Democracy: Jürgen Habermas and the Politics of Discourse* (Ithaca, NY: Cornell University Press, 1996), pp. 158–9.

Let us look at this limitation on free thought in Habermas' theory from another perspective. He writes from within a Kantian tradition in which it is conventional to employ transcendental arguments to legislate the boundary conditions of discursive rationality (the three validity claims), and to assert that rational speech and action is what takes place within this stage-setting, as we have seen (quotation at note 12).[42] Even if we did not have the humanist and ecological traditions available to us, we could still show that his universal validity claims do not constitute a universal framework for free and rational argument. We could simply ask for the reason why 'rightness' is the validity claim. This is reasonable according to Habermas, since the ability to give reasons is the mark of rationality, yet it is a question that goes beyond the bounds of discursive rationality because it inaugurates a discussion that cannot take place on the ground of the validity claim of rightness (for we cannot justify rightness on the basis of rightness). Habermas will reply that rightness is laid down outside the activity of validation, by the transcendental argument, as the condition of the activity of validation and so does not come up in the activity of validation itself. It would constitute a performative contradiction to question it.[43]

The reader will now be aware that Habermas' theory of communicative action is strikingly similar in this aspect to Hegel's *Philosophy of Right*. Hegel's argument against those who wished to preserve freedom of thought by questioning the limitations of the juridical institutions of free speech, equality before the law and the universality of its application is that if they reflected on these constitutional arrangements of right, they would see that they are the conditions of possibility of free and rational thought, and therefore are not themselves to be questioned. This argument, just as Habermas' theory of communicative action, is backed up by a long historical story about the development and institutionalisation of reason and freedom in the various spheres of modernity. Like some of the young Hegelians, we can afford to be a little sceptical of Habermas' argument and so reassert our right to question the claim of rightness as the ground of political reflection from within the language game of critical reflection itself. After all, we continually dispute his boundary conditions in our broader current reflective republic of letters and remain untroubled about the lack of fixed boundaries, while drawing conditional (non-transcendental) boundaries

[42] See Owen, 'Orientation and Enlightenment'. [43] Habermas, 'Discourse Ethics', p. 80.

for particular purposes.[44] This republic is a federation of language games of critical reflection that embodies our freedom and rationality and in which we dissent from and call into question the hegemony of juridical regimes of thought and action among others. Habermas invites us to subordinate and translate our multiplicity of language games to his comprehensive framework of precisely three forms of argumentation.

However, this kind of argument is self-defeating, since our right to call the priority of the claim of rightness (or sincerity) into question is itself grounded in a convention of the language game: namely, the right in appropriate circumstances to ask for reasons (quotation at note 17). And, it is no response to say now that these circumstances are inappropriate or that questioning the priority of rightness involves a performative contradiction, for these circumstances are by definition the ones in which we radically reflect on and call into question what is taken for granted or presented to us as universal and necessary. Habermas' mistake at this point is thus one political theorists are occupationally prone to fall into, yet that he was trying to avoid. He has proffered a form of critical reflection in which we are free to call into question and dissent from the conventions governing our political and legal practices, but we are not free in turn to call into question and to dissent from the conventions governing the practice of critical reflection itself. Habermas' theory thus excludes the very freedom – to question the boundaries of our questioning practices – it is supposed to embody.

This was Michel Foucault's main concern about the direction of Habermas' theory. It tends to freeze certain juridical ways of thought and action at the expense of an ethic of critical enquiry into the limits of and alternatives to these arrangements.[45] For Foucault, it is an important convention of the practice of freedom that we are able to call into question what is given as a bound of reason. What holds a rule of use or boundary in place and gives it the appearance of a transcendental standard is engagement in, and subjectification to, the on-going activity of questioning and arguing in accordance with it. 'The foundation walls are carried by the whole house', as Wittgenstein laconically puts it.[46] We can thus learn from this investigation a crucial feature of freedom in our continuing political language games of critical reflection. We question and alter a subset of the rules of the games,

[44] Wittgenstein discusses the drawing of conditional and non-transcendental boundaries for particular purposes with an interlocutor who believes we require unconditional and transcendental boundaries at *Philosophical Investigations*, §68. For the implications of this line of argument for feminist political philosophy, see Heyes, *Line Drawings*.

[45] Foucault, 'What is Enlightenment?', in *The Essential Works*, Vol. I.

[46] Wittgenstein, *On Certainty*, §248.

and sometimes even make up the rules as we go along. In our complex language games of freedom, we provisionally follow the conventional boundaries in trying to reach understanding/agreement on some issue, and we also play Foucault's game of calling into question one conventional boundary at a time (by means of a genealogy of its historical role as a boundary) and of seeking to go beyond it. As Wittgenstein puts it, a boundary of sense may be used by the conservative to keep someone in or out, but it may also be used by the radical as something to jump over (§499).[47]

2.iii Questioning with the validity claim of rightness

Let us consider one final example. We have seen that Habermas' validational argumentation is not unconditional. It rests on the acceptance of juridical ways of thought and action as hegemonic. Assume now that we have restored juridical practices of reflection to their proper place in our polity – as one important and reasonable type of assessment among many – and shown that the practice itself mistakenly appears to be universal as a consequence of the roles the claim of universality plays *within* the practice of trumping other forms of argument. We then enter into such a practice, taking rightness as the validity claim as a matter of course, and begin to validate the rightness of the claim that the workplace ought to be organised democratically. We soon find – perhaps not to our surprise – that there is widespread historical and contemporary disagreement *in* our uses of the word 'rightness'. Sometimes 'rightness' is used in the sense of universal principles of right or justice by the modern participants in the tradition of natural law stemming from Aquinas and Kant to Leo Strauss and John Finnis. At other times 'rightness' is used in the sense of 'all right', or of having 'a right', by modern heirs of the subjective rights traditions from William of Ockham and Hugo Grotius to Kant (again) and John Rawls. A third way of using it is in the sense of 'appropriate for us', 'prudent' or 'right with respect to the interests of the state' by modern practitioners in the reason of state tradition, from Giovanni Botero and Justus Lipsius onward. Others, following in the well-worn footsteps of Locke and Hegel, try to show how these seemingly discordant traditions can be brought into accord. In addition, even those who are in agreement on limiting the use of 'rightness' to one of these traditions disagree among themselves. For instance, there are disagreements within the subjective rights traditions even among

[47] For the role of this section in Wittgenstein's philosophy, see James C. Edwards, *Ethics Without Philosophy: Wittgenstein and the Moral Life* (Tampa: University Presses of Florida, 1985), pp. 103–60.

theorists from the same country and intellectual background, such as Robert Nozick, Ronald Dworkin and John Rawls.[48]

For the reasons we have discussed, there is no reason to expect that our generation, or any generation, will hit on a justification of the use of 'rightness' that is 'unconditional' and 'beyond the spatial-temporal ambit of the occasion' (quotations at notes 19 and 20) and, therefore, would bring agreement among these three traditions of right. Yet this consensus is necessary before the activity of reaching understanding/agreement on the rightness of Habermas' initial speech-act can begin. If the conversation turned to the question of the use of 'rightness', then it would not be argumentation on the basis of the validity claim, but of the use of the validity claim and so it would not fall within the canonical form of critical reflection. This free play of democratic voices within our juridical traditions cannot be silenced except by excluding the questions of members of two of the three schools of thought and of the dissenters within the victorious school. Short of calling in the police and imposing uniformity in use by fiat, as Hobbes famously recommended, critically reflective political argument in an open society (and more courageously in a closed one), even when it does not involve the refusal of the terms of the argument, folds back on itself and calls into question the acceptable uses of the agreed-upon terms of the debate.[49]

Historical surveys of the ways in which members of these three schools of right have always agreed and disagreed over the criteria and application of rightness and its cognates and so have woven, and continue to weave, a multiplicity of old and new ways of using their shared vocabulary into our juridical institutions over the centuries bring this point home and free us from the sirens of the ideal of consensus in political argumentation.[50] Wittgenstein makes the general point with his exemplary survey of the various uses of the term 'game'. Rather than discovering a set of necessary and sufficient conditions for the application of such terms in every case, 'we see a complicated network of similarities overlapping and criss-crossing: sometimes overall similarities, sometimes similarities of details', and this

[48] For the complex history of 'rightness' and its cognates, see Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979); Tuck, *Philosophy and Government: 1572–1651* (Cambridge: Cambridge University Press, 1993); T. J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: Cambridge University Press, 2000).

[49] For an analysis, see Skinner, *Regarding Method*, pp. 145–57.

[50] For the way historical genealogies can be used as 'objects of comparison' to free us from conventional consensus, see Owen, 'Genealogy as Perspicuous Representation'; and Skinner, *Liberty Before Liberalism*, pp. 101–20.

complicated network is not fixed but changes over time as speakers innovate and introduce unpredictable uses *en passant* (§§66–75).

Of course, we often find ourselves in understanding/agreement in our uses of 'rightness' in the given spatial and temporal circumstances of trying to reach understanding/agreement on other problematised speech-acts. These are provisional agreements in what Wittgenstein calls 'forms of life' in the course of reflecting on and seeking to give reasons for problematic 'opinions' (§241). A relatively stable use of rightness, *as*, say, individual and culturally neutral rights, becomes a ground, woven into practice, in virtue of our confident abilities in using it as the unmoving 'hinge' around which our reflective questioning provisionally turns, not in virtue of a transcendental property of the concept nor of an explicit process of reaching agreement on it, although we are able to present all sorts of reasons for doing so when the circumstances require.[51] As a result of its hinge role it appears transcendental (§104). Yet, like any hinge proposition, we can also call this particular use of 'rightness' into question, extend it in new ways, propose additional validity claims and different modes of argumentation, and give reasons for and against these proposals, as we have seen over the last twenty years.

Habermas wants something more than the historical, conditional, ongoing and changing plurality of language games of critical reflection in which we are participants. He seeks to establish a framework of argument that is itself beyond argumentation: the 'decentered understanding of the world' that will fix his three validity claims and three world relations as the independent determinants of the legitimate form of critical reflection unconditionally. For the reasons I have given, we should be sceptical of this aim. However, if it is given up, the alleged threat is that we will be left with the uncritical acceptance of the status quo and so extinguish our hard-won traditions of critical reflection. This inference, as we have seen, is equally false. Far from ending critical reflection, our new understanding of the non-foundational and conditional role of practices of critical reflection gives a clearer view of the diverse forms they take and the boundary-challenging ways free critical reflection both rests on and questions its own conditionality.

Furthermore, if the reasonable use of words, the free exchange of reasons in agreeing and disagreeing, is, as these examples are meant to suggest, *not*

[51] For the role of 'hinge' propositions, see Wittgenstein, *On Certainty*, §341: 'That is to say, the *questions* that we raise and our *doubts* depend on the fact that some propositions are exempt from doubt, are as it were like hinges on which those turn' (compare §§342–3). See Linda Zerilli, 'Doing Without Knowing: Feminism's Politics of the Ordinary', in *The Grammar of Politics*.

'operating a calculus according to definite rules', then there is no unconditional set of implicit rules by which we ought to proceed in the first place (§§81–2). Consequently, an idealisation of a set of rules of validation cannot play the quasi-transcendental role assigned to it in this theory. The (conditional) roles of ideals and norms of judgment should be reconceived in light of what we learn about reasoning together, mutual understanding and agreement from working through these and other examples.[52]

This is not a rejection of Habermas' immensely important clarification of the procedures for the intersubjective validation of deontological norms of cooperation among free and equal individuals by testing the norms' universality. It is to do for his model what he and the Frankfurt school have done for instrumental reason: to temper its comprehensive aspirations, point out its limits and restore it to its proper place in our diverse polity, as one conditional form of critical reflection among many. This clarification should, I hope, make us less imperious in our claims for one type, which we are perhaps most often engaged in and thus accustomed to, and more open to the plurality of perspectives provided by the congeries of types available to us as participants in our complex modern political practices. I also take this to be the *spirit* of Wittgenstein's method. He begins his investigations with Augustine's 'particular picture of the essence of language' (§1). By means of his many examples he shows that, while this picture describes one 'system of communication' which is appropriate and useful for a number of cases, it nevertheless is not a comprehensive description: 'not everything we call language is this system' (§§1–3).

3 INTERPRETATION AS A PRACTICE OF CRITICAL REFLECTION

If the clarification of the practice of validation in the previous section is correct, it would seem to lend support to the hermeneutic tradition, especially as it has been reworked and updated in our era by Charles Taylor. Taylor has always stressed the extent to which we are always already practitioners in practices, the conditioning role of conventions and horizons, and our situated and dialogical intersubjectivity. In these respects and others, Taylor and the tradition of critical hermeneutics is in agreement

[52] This re-conception is set out by Wittgenstein in the *Philosophical Investigations*, §§65–84. I have illustrated one way it might be employed in political philosophy in Tully, *Strange Multiplicity*, pp. 103–16.

with Wittgenstein.[53] Nevertheless, one important difference exists between Wittgenstein and some of Taylor's earlier formulations of the role of interpretation (but not in his more recent work).[54] Having successfully criticised the foundational role of representation as a form of critical reflection, Taylor occasionally transferred this elevated status to interpretation in some of his earlier writings. He writes, 'human beings are self-interpreting animals'.[55] He sometimes suggests by this that interpretation is not simply a method, procedure or one activity among many, but that being engaged in the activity of interpretation is our basic way of being in the world.[56]

The proposition that human beings are self-interpreting animals is often taken to advance two theses. Firstly, the most basic ways in which humans understand themselves in the world are interpretations: 'We can therefore say', Taylor writes, 'that the human animal not only finds himself impelled from time to time to interpret himself and his goals, but that he is always already in some interpretation, constituted as human by this fact.'[57] The second and closely related thesis is that the essential feature of personhood is participation in the reflective activity of interpretation. 'We must speak of man as a self-interpreting being, because this kind of interpretation is not an optional extra, but is an essential part of our existence.'[58] Philosophy is said to be a continuation of this essential activity.[59]

Just as Habermas posits that conventional speech-acts always implicitly raise validity claims, in order to give his form of critical reflection universal foundations, so the first thesis suggests that even the most conventional ways we understand ourselves and our situation are themselves interpretations. Hence, the popular expression, humans are interpretations all the way down. Consequently, if this were true, we would always (essentially) be involved, at least implicitly, in interpretation. This thesis is based on the widespread conflation of understanding with interpretation: that is, of treating understanding as the same as interpretation or assuming that understanding involves interpretation in some essential way. This conflation, in either of its

[53] For his relationship to Wittgenstein, see Taylor, *Philosophical Arguments*, pp. 1–20, 61–79, 165–80; and Richard Eldridge, *Leading a Human Life: Wittgenstein, Intentionality and Romanticism* (Chicago: University of Chicago Press, 1997). For Taylor's defence of this tradition, see Tully, ed., *Philosophy in an Age of Pluralism*.

[54] His account of understanding in 'Overcoming Epistemology' and 'To Follow a Rule' in *Philosophical Arguments* is in accord with the account given by Wittgenstein. See note 2 above.

[55] Charles Taylor, *Philosophical Papers*, Vol. I, *Human Agency and Language* (Cambridge: Cambridge University Press, 1985), p. 45.

[56] Taylor, *Philosophical Papers*, Vol. I, p. 15; and Taylor, *Philosophical Papers*, Vol. II, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985), pp. 15–45.

[57] Taylor, *Philosophical Papers*, Vol. I, p. 72. [58] *Ibid.*, p. 75.

[59] Charles Taylor, 'Philosophy and its History', in *Philosophy in History*, p. 18.

two forms, is indispensable to the claim that interpretation is the foundational way of being in the world and, consequently, that hermeneutics is the sovereign discipline of the human sciences.[60] I wish to show that interpretation can no more play this foundational role than validation or any other practice of reflection by showing that understanding is prior to and distinct from interpretation.

3.i Interpretation and understanding

To understand the differences between understanding and interpretation, let us return to the *Philosophical Investigations*. One of Wittgenstein's aims is to show that understanding a sign is not, in any way, interpreting it. He says that we have an 'inclination' to treat understanding as some kind of interpretation, that is, to say that 'every action according to the rule is an interpretation [*Deuten*]' (§201).[61] However, applying his method again, if we test this thesis through examples we discover that it cannot account for the phenomenon of understanding.

The interpretation of a sign is another sign and the activity of interpretation involves the translation or substitution of one sign or expression of a rule for another (§201). If interpretation were able to account for the phenomenon of understanding, an interpretation would determine the correct use of the sign or rule it interprets, since 'understanding' obviously involves being able to use the sign or rule in question. An interpretation on this account would have to be 'a rule determining the application of a rule' (§84). However, as Wittgenstein shows by his many examples, the giving of interpretations does not determine correct use and so does not account for understanding. The application of the interpretation always can be interpreted in various ways and, therefore, we would require another interpretation to determine the application of the first interpretation, and so on. This problem with the 'understanding as interpretation' thesis is illustrated in section 85:

> A rule stands there like a sign post. Does the sign post leave no doubt open about the way I have to go? Does it shew which direction I am to take when I have passed it; whether along the road or footpath or cross country? But where is it said which

[60] For example, Taylor, 'Interpretation and the Sciences of Man', in *Philosophical Papers*, Vol. II; and Hans-Georg Gadamer, *Truth and Method*, 2nd edition (London: Sheed and Ward, 1979), p. 433.

[61] Wittgenstein himself succumbed to this widespread inclination to take understanding to be a kind of interpretation and is correcting his own misunderstanding in these sections. See Desmond Lee, ed., *Wittgenstein's Lectures, Cambridge 1930–1932: From the Notes of John King and Desmond Lee* (Oxford: Blackwell, 1974), p. 24; and Baker and Hacker, *Rules, Grammar and Necessity*, p. 150.

way I am to follow it; whether in the direction of its finger or (e.g.) in the opposite one? And if there were, not a single sign post, but a chain of adjacent ones or of chalk marks on the ground is there only *one* way of interpreting them? So I can say, the sign post does after all leave no room for doubt.

Rather than clarify understanding, the interpretational explanation just displaces the problem of understanding one step back, to the proffered interpretation. How is it in turn to be understood, and so on? *Any* way a person follows the (endless) series of signposts will be in accord with the sign on some interpretation and so count as understanding. This anarchic and paradoxical consequence shows that there is some mistake in the initial inclination to assimilate understanding a rule to some kind of interpretation of it: [62]

'But how can a rule show me what I have to do at *this* point? Whatever I do is, on some interpretation, in accord with the rule.' That is not what we ought to say, but rather: any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine mean ing (§198).

Wittgenstein then asks what can account for exactly that feature of understanding that interpretation fails to illuminate: namely, the connection between a sign or rule and its use. He answers with the explication of understanding in the terms of practice and abilities, unmediated by interpretations or explanations, to use a sign and follow a rule that we saw in the section on Habermas. Understanding a rule, and thus being guided by it, involves 'training' – the acquisition through practice of a repertoire of normative linguistic abilities to use a sign and challenge conventional use in various contexts. Next, the acquisition and employment of abilities and techniques (of language use) presuppose an on-going practice, 'a regular use of sign-posts, a custom'. To 'obey a rule, to make a report, to give an order, to play a game of chess, are *customs* (uses, institutions)'. The regular uses of signs over time sustain and are sustained by participation in practices or language games and thus pre-empt the anarchy of use and meaning threatened by the interpretational account. As he sums up, to 'understand a sentence means to understand a language. To understand a language means to be master of a technique' (§§198–9).

Having reminded his interlocutor of these two mundane features of understanding, Wittgenstein restates the 'paradox' to which the interpretational

[62] For a succinct commentary on these sections 198–201, see Baker and Hacker, *Rules, Grammar, and Necessity*, pp. 132–50.

account gives rise: 'no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here' (§201). The misunderstanding here can be seen simply by asking what would happen if understanding involved interpretation in an essential way, for we would give one interpretation after another and never arrive at use (i.e. understanding). The paradox is dissolved by realising that understanding must consist in the unmediated ability to 'grasp' a sign manifested in actual *praxis*:

> It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation (*Deutung*) after another: as if each one contended us at least for a moment, until we thought of yet another standing behind it. What this shows is that there is a way of grasping (*Auffassung*) a rule which is *not* an *interpretation* (*nicht* eine *Deutung*), but which is exhibited in what we call 'obeying the rule' and 'going against it' (*'ihr entgegenhandeln'*) in actual cases (§201).

Once understanding is seen in this correct way, there is no initial, problematic gap between understanding and use that needs to be filled in by a mediator – interpretation, representation, community agreement or whatever. Understanding is like an immediate grasp of something. In his notebook, Wittgenstein wrote the following synoptic remark: 'It is not interpretation which builds the bridge between the sign and what is signified //meant//. Only practice does that.'[63] There are, as we have seen, not one but various ways ('customs') of grasping a sign and following a signpost – of 'obeying a rule' or 'going against it' in practice.

Of course, understanding is accompanied by interpretation in some circumstances, but it cannot always be so, on pain of infinite regress and anything goes. (Interpretations come to an end somewhere.) Interpretation is a reflective activity that we engage in when we are in doubt about how to grasp or to understand a sign that is in question. But if we are in doubt about how to understand the sign, then it is manifest that we do not understand it. Far from being equivalent or essential to understanding, interpretation begins when our conventional self-understandings break down and we do not know how to go on. This is why Wittgenstein concludes section 201 by cautioning against the 'inclination' to say 'every

[63] Cited in Baker and Hacker, *Rules, Grammar, and Necessity*, p. 136. For his idea of understanding as analogous to an immediate grasp, compare *On Certainty*: 'It is just like directly taking hold of something, as I take hold of my towel without having doubts' (§510).

action according to the rule is an interpretation' and recommends that 'we ought to restrict the term "interpretation" to the substitution of one expression of the rule for another'.

Therefore, the first thesis that the most fundamental ways humans understand themselves are interpretations is mistaken. Moreover, interpretation is conditional on understanding. Like practices of justification, it is a practice we engage in when our understanding and use of some subset of signs is in some way rendered problematic and thrown in doubt. Here we attempt to 'come to an understanding' of the sign in question by offering various interpretations, discussing and adjudicating rival interpretations and rival accounts of the indeterminate criteria of a sign, in some cases calling the accepted criteria of adjudication of incompatible interpretations into question in turn, and so on. However, the condition for engaging in interpretation is always that a wide range of ways of acting with words is understood, is not in doubt at all, but is followed as a matter of course in the activity of interpretation. These ways of acting that lie at the bottom of any reflective language game of interpretation are not the stimulus and response of blind compulsion but the multiplicity of techniques of thoughtfully being guided – of 'obeying the rule and going against it in actual cases' – short of explicit disengagement and reflective questioning. Understanding grounds interpretation. Interpretation should thus be seen as one important practice of critical reflection among many, resting comfortably in more basic ways of acting with words (self-understandings) that cannot themselves be interpretations.

It is important not to infer from this that there must be a stock of conventional uses that are permanently beyond interpretative dispute. For the circumstances of any particular activity of interpreting a problematic sign involve the unmediated grasp of other signs which, *eo ipso*, places them provisionally beyond interpretation. Moreover, it is always possible to 'step back': to call into question the regular use and understanding of any of these other signs and take it up as an object of interpretation.[64] As we have seen (in section 2), calling a background use into question and placing it in the reflective context of interpretative disputation (or validational argumentation) can and does occur in everyday conversation in the lifeworld. Wittgenstein himself celebrates this intrinsic freedom of language use: the unpredictable emergence of interpretative disagreements over the most settled uses of signs and, as a result of participation in practices of interpretation, the acquisition

[64] Wittgenstein, *On Certainty*, §204; *Zettel*, §§234–5.

of the ability to see the various 'aspects' (uses) of the problematic sign under different descriptions.[65]

3.ii Understanding is not an implicit interpretation

If self-understandings can be called into question and taken up in interpretative exercises, then it is tempting to defend the first thesis by replying that they are implicit or proto-interpretations that we take for granted because they have become sedimented and internalised. Nietzsche often professed this view and it has gained a certain vogue with the slogan, 'humans are interpretation all the way down'.[66] While one and the same sign can function as an interpretation in one language game (where it is the object of reflection) and a sign understood in another (where it is the background of reflection), it does not carry over some intrinsic properties of dispositional interpretability from one role to another. The attempt to construe conventional understanding as implicit interpretation misses the revolutionary point Wittgenstein is concerned to make – that the role of a sign in a language game is the '*primary* thing', not something lying hidden behind it (§656).

An interpretation is a reflection on a sign; an opinion or belief about how it should be taken. To interpret a sign is to take it *as* one expression rather than another.[67] In contrast, to understand a sign is not to possess a sedimented opinion about it or to take it *as* something, but to be able to grasp it; that is, to act with it, using it in agreement and disagreement with customary ways (§241). If conventional understandings were implicit interpretations or beliefs about practice, rather than the actual abilities manifested in practice, they would not be conventional understandings, for all the reasons given above. The intersubjective speech-acts that manifest understanding ('grasp') in language games do not raise implicit interpretation claims that need to be made explicit and adjudicated before we can go on reasonably. We have to raise the claims of reason ourselves, by performing and exchanging the wide range of illocutionary acts that bring them into question and demand reflection.

It follows that the second thesis survives in the modest and non-foundational sense that, as Taylor puts it, interpretation is 'not an optional extra'.[68]

[65] This is the primary ability the reader is meant to acquire by working through the examples in the *Philosophical Investigations* (§71). See Baker, '*Philosophical Investigations* Section 122'; and Jonathan Havercroft, 'On Seeing Liberty As', in *The Grammar of Politics*.

[66] Friedrich Nietzsche, *The Will to Power* (New York: Vintage, 1968), §§283, 522.

[67] See Wittgenstein's remarks on the analogous phenomenon of 'seeing as' (visual interpretation), *Philosophical Investigations*, §§377–81, and pp. 183–208.

[68] Taylor, *Philosophical Papers*, Vol. I, p. 75, quoted above at note 58.

Interpretation is a practice we engage in whenever we are confronted by something we do not understand and do not know how to go on, or, as initiators, when we strive to unsettle a settled understanding and show that it can be treated as one contestable interpretation among others.[69] Like 'commanding, questioning, recounting, chatting', interpretation is thus as 'much a part of' what Wittgenstein calls 'our natural history' as are 'walking, eating, drinking, playing' (§25).

However, this non-optional aspect of interpretation is often over-extended by an 'inclination' analogous to the one Wittgenstein diagnosed above. This is the inclination to say that 'every reflection on a sign is an interpretation'. We can clarify the meaning and limits of interpretation by, as Wittgenstein recommends (§§90–2), carefully surveying and discriminating among the grammar (uses) of the family of concepts we use to reflect on signs and the activities into which they are woven: interpretation, deconstruction, evaluation, explanation, examination, interrogation, inquisition, justification, validation, verification, genealogy, problematisation and so on. Each has distinct grammars and complex historical genealogies as practices of critical reflection in our natural history as language users, and none of these, as we have seen, is 'closed by a frontier' (§68) once and for all. Even the activities 'moderns' engage in of interpreting what they call their 'selves' and their 'identities' is itself a recent and historically contingent way of constituting a practice of experience and reflection.[70] Our language games of critical reflection, like our language as a whole, 'can be seen as an ancient city: a maze of little streets and squares of old and new houses, and of houses with additions from various periods; and this surrounded by a multitude of new boroughs with straight regular streets and uniform houses' (§18). The contemporary *and* historical study of these practices of critical reflection in Western and non-Western societies might be called 'a genealogy of the critical attitude'.[71]

[69] This human, all too human *tension* between understanding and interpretation is explored in the works of Stanley Cavell; and Eldridge, *Leading a Human Life*.

[70] The history of this form of self-interpretation is the theme of Taylor, *Sources of the Self* and Foucault, *The History of Sexuality*, Vol. I.

[71] Foucault, *Fearless Speech*, pp. 170–1. Foucault started this kind of historical 'survey' of practices of the 'critical attitude' in the last years of his life. *Fearless Speech* is a collection of student notes of his lectures at Berkeley in 1983 on this theme in Greek and early Roman thought. The first outline of this form of historical survey is 'Qu'est-ce que la critique?', a lecture given to the French Society of Philosophy (27 May 1978), *Bulletin de la Société française de philosophie* 84, 1990: 35–63, translated as 'What is Critique?', in *The Politics of Truth*. As Cressida Heyes mentions in her Introduction to *The Grammar of Politics*, I believe that Wittgenstein's methods can be extended and deepened by adding historical

CONCLUSION

In virtue of being a participant in one practice of reflection most of the time, as, for example, a student or teacher in the interpretative disciplines in the humanities, we tend to take it for granted that our customary form of reflection is foundational and comprehensive. Accordingly, we equally tend to comprehend and assess other types of critical reflection in terms of the language of our customary type of critical reflection when we engage in the debate over which one is the archetype (and so arrive at the predictable answer). By disengaging from the debate and engaging in this practice of reflecting on two well-known language games of critical reflection, we have come to understand that no type of critical reflection can play the mythical role of founding patriarch of our political life presumed of it in the debate, because any practice of critical reflection is itself already founded in the popular sovereignty of our multiplicity of humdrum ways of acting with words. This conclusion, far from leading to uncritical acceptance of the status quo, enables us to realise that submission to one regime of critical reflection, as the alleged self-certifying guarantor of our freedom, would itself mark the end of our free and critical life.

Having thus freed ourselves from this captivating misunderstanding of the use of critical reflection, we are now able to see the enlightening multiplicity of conceptions of critical reflection available to us. We can henceforth go on to use these reflective concepts as their grammar manifestly guides us in innumerable ways to do: not to provide foundations for, but to reflect critically *on* our well-trodden ways of thought and action, rendering them less indubitably foundational, and thereby disclosing possibilities of thinking and acting differently.[72] However, since it is 'our forms of language' themselves which lead us into the sorts of misunderstandings we surveyed in this chapter, it always will be necessary to bring along Wittgenstein's distinctive philosophical practice of critical reflection to test our use and abuse of these languages of critical reflection. For philosophy as Wittgenstein practised it *is* just this critical attitude – 'a battle against the bewitchment of our intelligence by means of language' (§109).[73]

applications to them, such as this work of Foucault and the historical approaches of Quentin Skinner and Charles Taylor, and, as Edward Said has always insisted, establishing a dialogue with similar scholars and studies in non-Western societies.

[72] For a complementary analysis by the leading Wittgensteinian philosopher of the human sciences, see Toulmin, *Return to Reason*.

[73] For a comparison of Wittgenstein's philosophical methods with Nietzsche and Foucault, see Owen 'Genealogy as Perspicuous Representation'.

CHAPTER 3

To think and act differently: comparing critical ethos and critical theory

INTRODUCTION

In this chapter I turn from Wittgenstein to Foucault and show the contribution his work has made to the approach I set out in Chapter 1. I do this by comparing and contrasting his work with the work of Habermas, just as I did with Wittgenstein. I do this for three main reasons. Firstly, like Wittgenstein, I think we come to understand some complex work best by comparing its similarities and dissimilarities with another closely related work. The works of Habermas and Foucault are closely related forms of historical and critical reflection on the present and thus are ideal for comparison. Secondly, Habermas and others raised four sorts of objection to Foucault's work and Foucault reworked his approach in ways that can be seen as responses. This thus enables me to put them in a dialogue by drawing out his responses and showing their cogency. Thirdly, this comparison is ideal for my purposes, for Foucault's responses are exactly the features of his work that I adapt in my public philosophy and its applications. The comparison thus provides, along with Chapter 2, the groundwork of the two volumes. I should add that I use Habermas' work comparatively because I take it to be exemplary of the major alternative tradition of political philosophy (Critical Theory) to the one I am explicating. I hold it in the highest regard. Although I have serious objections to it, I also see the possibility of these two traditions being complementary and mutually beneficial, as testing the claims of each other in the way I indicate in the course of the chapter (see section 4 for the complementarity thesis).

Habermas and other critics raised four objections to Foucault's work up to 1977. Foucault studies underlying practices rather than what agents say and do and thereby generates a kind of presentism. His approach is unreasonable because it violates universal validity claims, it is context-bound rather than context-transcending, and he does not account for the

normative dimension of his analysis. Foucault reformulated his philosophy and reinterpreted his earlier work in response to these sorts of objections from 1978 to 1984. He replied that practices are to be understood as the way agents themselves problematise the forms of knowledge, power and ethics in accordance with which they are constituted and constitute themselves as subjects. A genealogy is reasonable because it tests the universality of a given, specific validity claim; it transgresses rather than transcends limits in the present; and the normative dimension of his work is a novel conception of freedom within relations of power.[1]

While Foucault was reformulating his approach, he was also working on the classic humanist authors of the Greek and Roman world. He came to see the status of his own philosophy as akin to theirs, not as a theory to be elaborated and defended against its critics but as a practical activity, a permanent and critical exercise of thought on thought. Thus, he saw his own reformulation as an on-going critical dialogue or 'reciprocal elucidation' of his current research relative to rethinking his earlier work and responding to his best critics.[2] He writes that his philosophy is 'a long and tentative exercise that needed to be revised and corrected again and again' and, in the light of later studies and objections, he needed 'to go back through what I was already thinking, to think it differently, and to see what I had done from a new vantage point and in a clearer light'.[3] In this reflection on his activity of reformulation, Foucault applies his philosophical approach to his own philosophy. His philosophy aims to free us from habitual forms of thought and action in the present, enabling us to experiment with thinking and acting differently. He is now saying that his own philosophy is subject to this kind of critique by means of permanent reciprocal elucidation and reworking of it in relation to his new research and to the objections of his critics.

Since this dialogical elucidation and reformulation is always reciprocal, it cannot but throw critical light on the thought it works against: his early work (in reinterpreting it) and the work of the critics to whom he is responding (Habermas' philosophy). Foucault's elucidation of his philosophy in critical comparison to Habermas' objections gave rise to four

[1] Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (Cambridge, MA: MIT Press, 1987), p. 276; David Owen, 'Foucault, Habermas and the Claims of Reason', *History of the Human Sciences* 9(2), 1996: 119–38; Michael Kelly, ed., *Critique and Power*.

[2] Foucault, *The Use of Pleasure*, pp. 9–14; Foucault, 'Preface to the History of Sexuality Volume II', in *The Foucault Reader*, p. 336; Foucault, 'Polemic, Politics, and Problematizations: An Interview', in *The Foucault Reader*, pp. 381–3; Pierre Hadot, *Philosophy as a Way of Life: Spiritual Exercises from Socrates to Foucault* (Oxford: Blackwell, 1995).

[3] Foucault, *The Use of Pleasure*, pp. 9, 11.

reciprocal objections to Habermas' work and reasons for preferring his own. These are: (1) Habermas' approach is less critical: it is uncritical of its own form of reflection and it is a less effective critique of limits in the present, (2) Foucault's historical approach is not unreasonable and it is questionable whether Habermas' universalisation of the decentred understanding of the world is reasonable, (3) Habermas' decentred subject is a historically contingent juridical form of the subject that, when taken as a regulative idea, tends to hinder the analyses of other ways we are constituted and constitute ourselves as subjects, and (4) Habermas' normative analysis is utopian whereas Foucault's is not.

The aim of this chapter is to present these four reciprocal objections to Habermas' approach and reasons for preferring Foucault's, in hopes that a defender of Habermas will reply and thus keep the work of reciprocal elucidation going. I lay out what the two philosophies have in common in section 1 and the specifics of Foucault's in section 2 and Habermas' in section 3. These descriptive sections provide the basis for the comparison that follows. Section 4 is a brief transition to the analysis of Foucault's four objections in sections 5 to 8. The conclusion is that the four objections are sound. Foucault's philosophy is not only defensible, it provides a critical and effective test of limits in the present, including the limits that Habermas claims are universal.

1 TWO PHILOSOPHIES OF CRITICAL REFLECTION ON LIMITS IN THE PRESENT: WHAT THEY HAVE IN COMMON

According to Foucault, he and Habermas work within a general problematisation of the present comprising, firstly, philosophical reflection on and analysis of the apparent limits of thought and action in the present and, secondly, reflection on and analysis of the forms of reflection one practices and their relation to the present. This type of modern philosophy can be seen to derive from the Enlightenment and to have one of its clearest formulations in the work of Kant. Although they share this common problem space, in which the specific aspects of experience that are brought to reflection and called into question in this distinctive way are limits in the present, they engage in two sharply contrasting forms of philosophical reflection on these limits. This comparison and contrast is presented in 'What is Critique?', 'What is Enlightenment?' and 'The Art of Telling the Truth'.

Foucault's form of reflection can be seen to derive from Kant's formulation of an Enlightenment 'attitude' or *ethos* in *What is Enlightenment?*,

an attitude that is 'at the heart of the historical consciousness that the Enlightenment has of itself'.[4] It has been practised by Hegel, Nietzsche, Weber, Canguilhem and several members of the Frankfurt school. Foucault has made an original contribution to this critical tradition by clarifying its distinctive features, applying it in unique ways and differentiating it from the closely related yet distinct form of philosophical reflection derived from the Enlightenment and practised by Habermas.

Whereas Foucault's approach is associated with Kant's Enlightenment attitude, Habermas' is derived from Kant's concept of 'critique' in his more formal philosophy. It is a critical 'theory' or 'analytics of truth' rather than a critical 'attitude'.[5] Habermas has made an equally original contribution to this neo-Kantian tradition of modern philosophy and clarified its distinctive features by defending it against Foucault, Nietzsche, earlier members of the Frankfurt school, Hans-Georg Gadamer, Richard Rorty, Charles Taylor and other more contextual and historical philosophers whom he sees as working within the other orientation to the present.[6]

For both authors a 'limit' is any given 'form of the subject' or 'form of subjectivity': that is, any of the multiplicity of ways of speaking, thinking and acting, of being conscious of ourselves as human subjects. A form of the subject is, in the terms of North American philosophy, similar to a 'practical identity'.[7] Like many twentieth-century philosophers such as Judith Butler, Rorty and Wittgenstein, Habermas and Foucault agree that there is no a priori form of the human subject and, as a result, any form of the subject, including the autonomous subject, must be analysed by reference to processes of constitution or socialisation. 'I had to reject', Foucault explains in a manner similar to Habermas, 'a certain *a priori* theory of the subject in order to make this analysis of the relationships that can exist between the constitution of the subject or different forms of the subject and games of truth, practices of power, and so forth.'[8] Foucault came to this view through criticism of subject-centred phenomenology and existentialism, dissatisfaction with his earlier recourse to structuralism and his reading of Nietzsche.[9] The lecture 'What is Enlightenment?' is the most polished synopsis of his

[4] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 44.
[5] Michel Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984*, ed. Lawrence D. Kritzman (New York: Routledge, 1988), p. 95.
[6] Habermas, *Justification and Application*, pp. 19–113.
[7] Christine Korsgaard, *The Sources of Normativity*, ed. Onora O'Neill (Cambridge: Cambridge University Press, 1996), pp. 6–7.
[8] Michel Foucault, *The Final Foucault*, eds. James Bernauer and David Rasmussen (Cambridge, MA: MIT Press, 1988), p. 10.
[9] Foucault, *Politics, Philosophy, Culture*, pp. 49–50.

type of analysis of the constitution of the subject. Habermas developed his view through a somewhat similar criticism of subject-centred philosophies and dissatisfaction with his earlier work based on an a priori subject of knowledge-constitutive interests. In 'An Alternative Way out of the Philosophy of the Subject: Communicative versus Subject-Centred Reason', he situates his analysis of the constitution of the subject in processes of communication in relation to other non-subject-centred philosophies from Kant to the present, and he refers with approval to Foucault's 'What is Enlightenment?' as a complementary genealogy.[10]

It follows that the study of limits consists in the analysis of the procedures through which we are constituted as subjects; processes of subjectivisation (*assujettissement*) or, in Habermas' terms, the practices of 'socialisation' through which 'subjects are constituted as individuals' in the 'lifeworld'.[11] 'Subjectivisation', Foucault clarifies in his last interview, is 'the procedure by which one obtains the constitution of a subject, or more precisely, of a subjectivity, which is of course only one of the given possibilities of organisation of a self-consciousness'.[12] They also agree that a form of the subject comes to be recognised as a 'limit' through processes of subjectivisation, and so the object of reflection and analysis, in two distinct ways.

A 'limit' can mean either the characteristic forms of thought and action which are taken for granted and not questioned or contested by participants in a practice of subjectivity, thereby functioning as the implicit background or horizon of their questions and contests, or it can mean that a form of subjectivity (its form of reason, norms of conduct and so forth) is explicitly claimed to be a limit that cannot be otherwise because it is universal, necessary or obligatory (the standard form of legitimation since the Enlightenment). Both philosophers believe that humans can develop the capacities of thought and action to call into question and contest both types of limit, albeit in different ways, as, for example, in their two different philosophies. Yet, neither claims to hold that such capacities constitute a third-order or transcendental subject, for, as we have seen above, the second requirement of their shared type of modern philosophy is to explain this form of reflection on present forms of subjectivity and *their* types of reflexivity just as it explains any other – as a '*historical result*' as Habermas puts it[13] – just as, say, an orthographer explains 'orthography' like any other

[10] Habermas, *The Philosophical Discourse of Modernity*, pp. 294–327.
[11] Habermas, *Moral Consciousness and Communicative Action*, pp. 199–200.
[12] Michel Foucault, 'Final Interview', *Raritan* 1, 1985: 1–13, 12.
[13] Habermas, *Moral Consciousness and Communicative Action*, p. 208.

word. Finally, both associate freedom and autonomy with the development and exercise of these capacities in practice, yet they advance sharply contrasting conceptions of freedom and autonomy.

As recent commentators have stressed, once the two approaches are seen as two forms of rendering problematic and reflecting on limits in the present since the Enlightenment, their similarities become clear.[14] However, their dissimilarities are just as important and it is these I wish to examine. The dissimilarities are not those of humanism and anti-humanism. This influential misinterpretation of the Habermas–Foucault debate has obscured rather than clarified the differences and similarities between them, as Foucault's interpretation of his and Habermas' philosophies in relation to the Enlightenment is designed to expose. Humanism is neither a critical *ethos* nor a critical theory derived from the Enlightenment but, rather, a 'set of themes' tied to 'value judgments' that have reappeared over time in European societies. It stands, and was understood in the eighteenth and nineteenth centuries to stand, in 'a state of tension' with the Enlightenment and the critical traditions derived from it.[15] The relations between their two forms of modern critical philosophy and the older themes and values of humanism can be understood by keeping them separate and noting specific connections in the course of our independent comparison of the two philosophies.

2 FOUCAULT'S APPROACH

Although both approaches reflect on and analyse limits in the present, they do so with sharply contrasting aims and techniques. The *telos* of questioning a limit of our thought and action in the present – a form of our subjectivity – in Foucault's philosophy is to open up the possibility of thinking and acting differently. It comprises two distinct exercises. Historical studies are undertaken to bring to light the two kinds of limit: to show that what is taken for granted in the form of the subject in question has a history and has been otherwise; and to show 'in what is given to us as universal, necessary and obligatory, what place is occupied by whatever is singular, contingent and the product of arbitrary constraints'.[16] These studies thus enable us 'to free ourselves from ourselves', from this form of subjectivity, by coming to see

[14] David Ingram, 'Foucault and Habermas on the Subject of Reason', in *The Cambridge Companion to Foucault*, ed. Gary Gutting (Cambridge: Cambridge University Press, 1994).
[15] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, pp. 43–5. [16] *Ibid.*, p. 45.

that 'that-which-is has not always been',[17] that it could be otherwise, by showing how in Western cultures people have recognised themselves differently, and so to 'alter one's way of looking at things'. 'The object', Foucault underscores, is 'to learn to what extent the effort to think one's own history can free thought from what it silently thinks, and so enable it to think differently'. The role of philosophy today for Foucault as for Wittgenstein is 'the endeavour to know how and to what extent it might be possible to think differently.'[18]

These historical studies begin with a form of subjectivity that the philosopher bears, or with which he or she is closely associated, and which has become problematic in practice and the focus of reflection.[19] It is analysed or 'reproblematised' under three aspects: practical systems, three axes of subjectivisation and the generality of a problematisation.[20] The abilities or competencies that constitute a form of subjectivity are acquired and exercised in practice, in 'practical systems'. In response to Habermas' objection, these systems are not 'conditions that determine' subjects 'without their knowledge' but, like Wittgenstein's 'language-games' and Habermas' 'forms of communicatively mediated interaction' in the 'lifeworld', 'what they do and the way they do it'. Practical systems should be analysed from two different perspectives: 'the forms of rationality that organise their ways of doings things' and 'the freedom with which they act within these practical systems, reacting to what others do, modifying the rules of the game, up to a certain point'.

The 'forms of rationality' include Habermas' 'relations of communication', the dimension of 'signs, communication, reciprocity, and the production of meaning'.[21] In general there are four matrices of practical rationalities: the organisation of the production of things, the use of sign systems in communication, relations of power which govern the conduct of subjects, and the means by which individuals or groups work on their bodies, souls, thoughts, conduct and way of being to transform themselves ethically.[22] Turning to the second perspective, Foucault calls the freedom with which subjects act in a form of practical rationality definitive of a subjectivity ('citizen' say) 'strategic games of liberty'. He does not mean

[17] Foucault, *Politics, Philosophy, Culture*, p. 37. [18] Foucault, *The Use of Pleasure*, p. 9.
[19] Michel Foucault, 'The Subject and Power', in *Michel Foucault: Beyond Structuralism and Hermeneutics*, eds. Hubert L. Dreyfus and Paul Rabinow (London: Harvester Wheatsheaf, 1982), pp. 211–13.
[20] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, pp. 48–9.
[21] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 218.
[22] Michel Foucault, 'Technologies of the Self', in *Technologies of the Self: A Seminar with Michel Foucault*, eds. Luther H. Martin, Huck Gutman and Patrick H. Hutton (Amherst: University of Massachusetts Press, 1988), p. 18.

'strategic' in the contrastive sense in which Habermas uses it (as opposed to 'communicative') but in the various ways in which subjects act self-consciously in accord with, or in contestation of, their form of rationality, whether these ways are communicative or strategic.[23]

Next, and famously, the forms of rationality and strategic games of freedom in which a form of the subject is constituted can be analysed along the three axes of knowledge, power and ethics, and, most importantly, the relations among them. These 'ontologies of ourselves' are analyses of the forms of knowledge in accordance with which we recognise ourselves and are recognised by others, constitute and are constituted and question and are questioned as a specific subject of knowledge ('games of truth'); the relations of power or governance in which we are guided by others and guide ourselves by various means to recognise and conduct ourselves in accord with or in contestation of a specific subject of governance; and the practices of self-formation we use to recognise, constitute and transform ourselves in accord with a specific ideal of the ethical subject. The phrases 'constitute and are constituted' and the like in the descriptions of the three axes are meant to bring into prominence Foucault's presumption that forms of subjectivity are not imposed on passive subjects, but (even in the extreme case of the 'mad subject') on free subjects who take a self-conscious part (of varying degrees) in the acquisition, learning, exercise and modification of the subject-specific competencies. 'I believe', Foucault clarifies, 'that the subject is constituted through practices of subjection, or, in a more autonomous way, through practices of liberation.'[24] Practices of liberation refer either to the strategic games of liberty agents play together in a practical system or to the more individual 'practices of the self' an agent applies to himself or herself. Yet, even here, a subject does not invent the arts of self-fashioning he or she employs. They are 'proposed, suggested and imposed on him by his culture, his society and his social group'.[25]

The analysis of the knowledge in which we identify ourselves and are identified by others as subjects of a certain kind was originally conceived by Foucault along quasi-structuralist lines with a largely determined role for the speaking subject.[26] He abandoned this flawed approach and reconceived analysis in terms of a historical pragmatics of the rules – conditions of

[23] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, pp. 224–6.
[24] Foucault, *Politics, Philosophy, Culture*, p. 50. [25] Foucault, *The Final Foucault*, p. 11.
[26] Gary Gutting, *Michel Foucault's Archaeology of Scientific Reason* (Cambridge: Cambridge University Press, 1989).

'acceptability'[27] or 'validity'[28] – in accordance with which the subjects themselves problematise an aspect of their identity and propose solutions (what he calls 'games of truth'). He explains in 'The Subject and Power' that the formation, stability and transformability of the relations of power that govern our conduct in accord with a specific knowledge of the subject, and against which strategic games of liberty are played, can be analysed along five principal dimensions.[29] *Discipline and Punish* is the classic example of this form of analysis. Practices of the self are the multiplicity of ethical practices in Western culture in which one takes up a reflective 'relationship to oneself'. This involves not only an awareness or recognition of oneself as an ethical agent under some strong evaluation, but also the practical formation of oneself under this ideal through exercises (*askeses*), such as self-interpretation, consciousness raising, dialogue, dieting, memorisation, working out, confessing, disciplining oneself to act in accord with natural law and so forth. To illustrate with an example that anticipates Foucault's third objection to Habermas (that his form of reflection overlooks ethical practices of subjectivisation), Foucault interprets Kantian ethics as enjoining that, 'I must recognize myself as universal subject, that is, I must constitute myself in each of my actions as a universal subject by conforming to universal rules.' So, even in the case of Kant 'the self is not merely given but is constituted in relationship to itself as subject'.[30] Ethical practices can be analysed along four main lines.[31]

The axes of knowledge, power and ethics form a 'practical system' in the sense that they cannot be reduced to one another (neither knowledge nor ethics is, for example, constituted by power as many critics and followers have erroneously suggested) or treated in isolation (knowledge and ethics are never entirely free of connections to relations of power). They always

[27] Michel Foucault, 'What is Critique?', in *What is Enlightenment?: Eighteenth-Century Answers to Twentieth-Century Questions*, ed. James Schmidt (Berkeley: University of California Press, 1996), p. 394.

[28] Foucault, *The Final Foucault*, p. 17.

[29] The five principal dimensions of the analytics of relations of power are: (1) the systems of differentiations that permit one to act on the actions of others; (2) the types of objectives pursued by those who act on the actions of others; (3) the means of bringing power relations into being: by arms, words, economic disparities, complex means of control, surveillance, customs, consent and so on; (4) the forms of institutionalisation; and (5) the degrees of rationalisation. See Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, pp. 223–4. For an excellent exposition and explanation see Dean, *Governmentality*.

[30] Michel Foucault, 'On the Genealogy of Ethics: An Overview of a Work in Progress', in *The Foucault Reader*, p. 372.

[31] The four main lines of analysis of ethics are the determination of the ethical substance, the mode of subjection, the form of ethical work, and the telos of the ethical life. See Foucault, *The Use of Pleasure*, pp. 25–30.

exist in complex relations to one another. It is the objective of the historical study to clarify the complex relations among the three axes, because these reveal what in our mode of being is 'the product of arbitrary constraints' and so is capable of being otherwise.[32]

Finally, since a form of the subject is not a priori but historical, Foucault suggests that we analyse its 'generality' rather than its 'universality', as Habermas does. To do this, we need to come at forms of the subject from yet another perspective, as 'forms of problematisation'. Recall that a form of subjectivity is not a limit outside the experience of the subjects themselves; it is the limit of their experience as thinking subjects from the inside, the characteristic way they think through the forms of knowledge, relations of power and practices of the self through which an aspect of their experience is brought to self-consciousness (their 'sexuality' say). 'Thinking', in this remarkably reflective sense, is 'freedom in relation to what one does, the motion by which one detaches oneself from it, establishes it as an object, and reflects on it as a problem'.[33] The activity of reflective thought is not found only in philosophy and science. It 'inhabits' every practical system of subjectivity; 'every manner of speaking, doing, or behaving in which the individual appears and acts as a subject of learning, as ethical or juridical subject, as subject conscious of himself and others'.[34] Practical systems of subjectivity are studied *only* 'in so far as they are inhabited by thought' in this sense.[35]

This account responds to Habermas' claim that Foucault studies the structures that underlie thought, and it challenges Habermas' assumption that there is a fairly clear distinction between relatively unreflective everyday thought and the reflective activity of questioning a limit (practical discourse). A form of subjectivity can be seen, therefore, as a 'form of problematisation': a general manner in which subjects render an aspect of their experience problematic, in response to difficulties and obstacles in practice, reflect on it along the three axes and present diverse responses to it over a period of time. Accordingly, Foucault locates his studies of 'the history of systems of thought' on the narrow path between the economic and social processes studied by social historians on one side, and the universal categories and formal structures of thought and action studied by Habermas on the other.[36]

[32] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, pp. 217–19.
[33] Foucault, 'Polemic, Politics, and Problematizations', p. 389. [34] *Ibid*., pp. 334–5.
[35] *Ibid*., p. 335. [36] Foucault, 'Technologies of the Self', p. 10.

Given, then, that a form of subjectivity is grounded in the actual practices of self-understanding or, more precisely, 'self-problematising' of the subjects themselves, one can ask the empirical and comparative question of how general, historically or cross-culturally, this way of being in the world is or has been. It is not a transcendental limit against which practice is analysed but a practical limit against which subjects analyse themselves. Most of the forms of subjectivity or problematisations Foucault studied, solely in 'the Western societies from which we derive', are quite general. They have 'continued up to our time: for example, the problem of the relationship between sanity and insanity [*Madness and Civilization*], or sickness and health [*The Birth of the Clinic*], the problem of sexual roles [the three volumes on the history of sexuality]; and so on'.[37] To mention another example, the philosophical reflection on limits in the present that Foucault and Habermas both share is seen by Foucault as a general problematisation deriving from the Enlightenment (whose genealogy he sketched in 'What is Critique?' and 'The Art of Telling the Truth').

The second exercise of Foucault's approach is for the specific intellectual as a citizen to circulate his or her genealogical knowledge in the public and local discussions of and struggles around the form of subjectivity from which the historical study began, and to participate in democratic will formation:

> The work of an intellectual is … through the analyses that he carries out in his own field, to question over and over again what is postulated as self evident, to disturb people's mental habits, the way they do and think things, to dissipate what is familiar and accepted, to reexamine rules and institutions, and on the basis of this repro blematization (in which he carries out his specific task as an intellectual) to participate in the formation of a political will (in which he has his role as citizen to play).[38]

The aim of this civic responsibility is not only to help to enlighten us with respect to the horizon and historical contingency or arbitrary constraints of our way of thinking and acting and to imagine how life might go on differently. It is also to see if there are citizens who can develop the reasons and will to form a 'community of action' to experiment with the 'transgression' of this specific limit in practice, by challenging the perhaps universal claims to truth or rightness which legitimate it, by contesting the relations of power that guide us to act in accord with it or to change the ethical practices involved.[39] In short, not only to think differently but to act

[37] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 49.
[38] Foucault, *Politics, Philosophy, Culture*, p. 265.
[39] Foucault, 'Polemic, Politics, and Problematizations', p. 385.

differently as well. By 'transgression' he does not mean a total revolution or another view of the world but the cautious experimental modifications of our specific forms of subjectivity. As examples he mentions the 'specific transformations that have proved to be possible in the last twenty years that concern our ways of being and thinking, relations to authority, relations between the sexes, the way in which we perceive insanity or illness'.[40]

Although the reasons for engaging in this activity of 'concrete freedom'[41] are as various as the limits in the present, and even those engaged in any given struggle will have, for Foucault as for Rawls, a plurality of reasons, a general second-order reason for any specific transgression will be to enable the participants to engage in the specific game or practice of subjectivity with 'a minimum of domination': that is, where this agonistic activity in relation to knowledge, power and ethics is not unnecessarily or arbitrarily constrained.[42] Thus, the discovery that a form of the subject is not universal, necessary or obligatory certainly enables and encourages us to think differently, but it does not by itself constitute a reason for modifying it in practice. Citizens may decide to affirm it. Further reasons are required for change, such as arbitrary or unnecessary constraints.

In summary, the two activities of intellectual and citizen comprise an 'attitude, an ethos, a philosophical life in which the critique of what we are is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them'.[43]

In reply to Habermas' objection that Foucault's approach is 'context-bound', we can say that it is 'context-transgressing' in two ways without being 'context-transcending' (as Habermas claims his approach is). Firstly, the historical studies cause us to transgress the context-bound ways of thinking about a form of subjectivity. Take his historical study of prisons, *Discipline and Punish*, for example. He wrote it in the context of his involvement in prisoners' reform activities in the early 1970s. The study brings prisons and reform activity into critical reflection; it reproblematises them. The prison was shown to be a much more recent phenomenon than was commonly supposed. The unexamined assumptions about its normative legitimacy were thrown into question by arresting contrasts with prior forms of punishment and alternative forms that lost out and were forgotten in the establishment of modern prisons as we know them. Even more striking, the practices of knowledge and power employed to

[40] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, pp. 46–7.
[41] Foucault, *Politics, Philosophy, Culture*, p. 36. [42] Foucault, *The Final Foucault*, p. 18.
[43] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 50.

surveil, discipline and reform prisoners were shown to be dispersed throughout many other processes of subjectivisation in modern societies, such as schools, universities, bureaucracies, factories and armies, in which our subjectivity is shaped without our being fully aware of it. Furthermore, the human sciences were shown to be more closely involved in these practices of discipline and surveillance than most practitioners were previously aware. These effects did not 'transcend' the context in the sense of presenting a higher or more comprehensive ideal against which the prison could be judged, but, rather, transgressed the context by causing us to look at practices of discipline and surveillance in the prison and in other practical systems in different ways and from different perspectives, from the inside.

The second way the historical studies transgress the context is how they are taken up by citizens and used in contemporary struggles to modify existing relations of power or ethics. Here they do not provide a normative ideal in accordance with which citizens measure their practices and act. Although a genealogy certainly frees citizens from false legitimating beliefs about their practices, they are left to develop the reasons and shared will to act themselves. Rather, a genealogy provides a toolkit for understanding the relations of knowledge, power and ethics in which they think and act, the contingent and arbitrary aspects of these arrangements, the possibilities of modifying them and the effects of modification in practice. The modification in practice provides in turn a test against which the original conceptual tools are assessed and reformulated and put into practice again, thereby forming a 'permanent critique'. This non-transcendent and non-dialectical but nevertheless scarcely context-bound view of the reciprocal relation between critique and practical activity embodies an 'experimental attitude'. It links together 'as tightly as possible the historical and theoretical analysis of power relations, institutions and knowledge, to the movements, critiques, and experiences that call them into question in reality'.[44]

3 HABERMAS' APPROACH

In contrast, the aim of Habermas' approach is just the opposite: to determine in that which is given to us as a limit what is really a limit – necessary, universal and obligatory. Such a limit is legitimate because it cannot be otherwise. To try to transgress it is to think irrationally, to act immorally or in general to commit a contradiction in the very performance of the violation of the conditions of knowledge or normative conduct (an

[44] Foucault, 'Politics and Ethics: An Interview', in *The Foucault Reader*, p. 374.

objection Habermas raises against Foucault). Habermas' objective is, as Foucault puts it, to reconstruct the universal conditions of knowledge and action.[45] However, in order to elaborate and defend his research project against the objections raised to this kind of Kantian philosophy from Hegel down to contemporary contextualists and neo-Aristotelians (as he calls them) such as Foucault, Taylor and Rorty, who have emphasised the contextual, historical and contingent character of human understanding and action, he has reconceived Kant's approach in a number of fundamental ways. Once these legitimate criticisms of Kant's philosophy are taken into account, it is still possible to generate a universal theory of action, reason, truth and morality, albeit one that is dialogical rather than monological, grounded in actual intersubjective practices of communication and socialisation rather than in a metaphysical philosophy of individual consciousness, context-dependent in a number of ways rather than independent, quasi-transcendental rather than transcendental, fallible rather than foundational, dependent on hypotheses generated in the empirical and reconstructive social sciences rather than free-standing, and open to revision rather than certain.[46] I will now summarise the major features of his universal theory of communicative action, communicative rationality and morality (discourse ethics) in turn and then his three main types of argument for them.

Habermas' form of critical reflection begins with a type of universal pragmatics: a reconstruction of the universal communicative competencies that make possible practical processes of reaching mutual understanding and agreement (*Verstandigung*). The German word '*Verstandigung*' is polysemic: it means 'understanding' and 'agreement' as well as the process of reaching understanding or agreement, and Habermas uses it in these different senses in different contexts. Although his aim is to reconstruct the universal conditions of knowledge and action of any form of subject, as Foucault notes[47] he too must begin from within the forms of intersubjectivity moderns bear – 'what they do and the way they do it'.[48] For Habermas this hermeneutic starting point is 'the community of those who speak and act with one another'.[49] Everyday communication among any form or forms of subjects involves two ways of coordinating communicatively mediated interaction: by consensus (*Einverstandnis*) or by influence (*EinfluBnahme*).

[45] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 46.
[46] Habermas, *Moral Consciousness and Communicative Action*; Habermas, *Justification and Application*.
[47] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 47. [48] *Ibid*., p. 48.
[49] Habermas, *Moral Consciousness and Communicative Action*, p. 19.

The former, communicative action, is claimed to be fundamental and primary relative to the latter (strategic action) and the 'only real alternative to exerting influence on one another in more or less coercive ways'.[50]

'Communicative action' is a universal form of interaction in which humans coordinate their plans of action through the exchange of communicative speech-acts oriented towards reaching mutual understanding and agreement (*Verstandigung*) or (interchangeably) consensus (*Einverstandnis*). This mode of linguistic action (communicative action) is oriented to understanding and agreement by the validity claims reciprocally raised and acknowledged or declined. The successful uptake of a speech-act of communicative action turns on the ability of the hearer to respond to the claim by answering 'yes' or 'no'. To put this in a slightly different way (for purposes of comparison below), there is always the possibility that an utterance of communicatively mediated interaction will be contested as to its validity. Speaker and hearer are placed in a reflective relation of reciprocal obligation: the speaker to support his or her claim with reasons if challenged and the hearer either to accept the claim, to say yes, or to prepare to give reasons if he or she says no and so questions the claim. The communicators are accordingly obligated, if challenged, to enter an intersubjective and dialogical game of exchanging reasons to (re)gain intersubjective recognition of the contested validity claim, or, put differently, they are oriented to reaching understanding and agreement with respect to the validity claim in question by the exchange of reasons or 'argumentation'. Communicative action is therefore internally related to reason-giving through the unavoidable raising of validity claims.

According to Habermas, communicative speech-acts raise three types of claims concerning their validity: propositional truth, normative rightness (justice) and truthfulness of the speaker. The three validity claims are universal and correspond to three attitudes (objectivating, norm-conformative and expressive), three worlds (objective, social and subjective) and three areas of modern societies (science, law and morality, and aesthetics and ethics). Although every communicative speech-act in any society raises these three validity claims, they are separated in this way only in 'modern' societies (or areas of modern societies). Following Piaget, Habermas calls the process of separation 'decentring' and, following Weber, he associates it with modernisation. Participants in communication who develop this form of subjectivity, in which they take up these three attitudes towards the world

[50] *Ibid*.

and exchange reasons in the way appropriate to each of the three validity claims, are said to have a 'decentred' consciousness or understanding of the world. I will refer to this as the 'decentred form of the subject' or the 'decentred subject'.

'Communicative rationality' refers to the 'forms of argumentation' by which the three types of validity claim contested in communicative action are reflectively redeemed through the intersubjective exchange of reasons aimed at reaching understanding and agreement. Practices of communicatively mediated interaction will be rational just in so far as the norms of coordination have been or could be agreed to by the communicators themselves through the appropriate forms of argumentation or 'practical discourses'. Each validity claim is internally related to a corresponding form of argumentation or rationality oriented to agreement. However, only the validity claims to propositional truth and normative rightness are internally related to the idea of universal agreement on the universal validity of what is agreed. That is, the test of truth and rightness is doubly universal: everyone in the discourse should agree that the proposition or norm is valid for everyone.[51]

Conversely, rational ethical argumentation, associated with the third validity claim, is always context dependent and non-universal. It is a form of argumentation around the good rather than the right, evaluation rather than oughtness, and always takes place against a background structure of strong evaluators shared by the participants. So, for example, Taylor's and Nietzsche's philosophies, in which there is always a horizon of strong evaluation behind any critical reflection (including Habermas' reflection on normative rightness according to Taylor), or John Rawls' philosophy, where citizens reach overlapping agreement on norms of justice from within, rather than apart from, their different background conceptions of the good, are ethical not moral, and non-universal.[52]

The rational form of argumentation to redeem a validity claim is based on the universal and idealised presuppositions rooted in the structures of all communicative action. These presuppositions can be reconstructed as the rules that constitute the universal, necessary and obligatory procedures of rational communication and action. The idealised presuppositions that Habermas has reconstructed as argumentation rules to date can be divided

[51] Cooke, *Language and Reason*, p. 10.

[52] Habermas, *Justification and Application*, pp. 26–30, 69–76; Jürgen Habermas, 'Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism', *Journal of Philosophy* 92(3), 1995: 109–31, 119–22.

into two kinds: conventional and post-conventional.[53] The conventional rules include logical-semantic rules of consistency, such as every speaker who applies predicate F to object A must be prepared to apply F to all other objects resembling A in all relevant respects, and different speakers may not use the same expression with different meanings; rules of mutual recognition among participants, such as every speaker must assert only what he or she really believes and a person who disputes a proposition or norm not under discussion must provide a reason for wanting to do so; and rules of reciprocity, such as no relevant argument is suppressed or excluded, no force except of the better argument is applied and the participants are motivated by concern for the better argument.

Communicative action, as we have seen, is a form of interaction coordinated consensually by the participants who are under an obligation to suspend the play of power or influence and give reasons, if necessary, for and against the validity of a norm of coordination. In normal circumstances of communicative action, validity claims are not questioned in an open-ended way. A background horizon or consensus on facts, shared norms and values provides the conventional grounds against which intersubjective reflection and exchange of reasons in the course of action coordination take place. That is, this conventional consensus provides the two types of limit (what is taken for granted or seen as universal, necessary and self-evident).[54] The first or conventional kind of argumentation is undemanding enough (with the qualifications discussed below) to be a rough idealisation of a wide variety of human forms of conventional communicative action and rationality across most known cultures, since what counts as a 'relevant argument' is, in the context, given by the conventional consensus. It is generalisable, one might say, in Foucault's sense of being a fairly general feature of forms of human organisation.

The second or 'post-conventional' kind of idealised presuppositions of communicative action are more demanding and more specific. They define three further procedures of argumentation that 'burst asunder' and 'transcend' any conventional consensus by opening all validity claims to critical evaluation by all involved.[55] Only these fully operationalise the 'element of unconditionality' that is 'built into the structure of action oriented toward reaching understanding'. It is this 'unconditional element that makes the

[53] Mira Johri, 'On the Universality of Habermas's Discourse Ethics', (Ph.D. dissertation, McGill University, Montreal, 1996) pp. 71–82; Cooke, *Language and Reason*, pp. 29–51.
[54] Habermas, *Moral Consciousness and Communicative Action*, pp. 58–9.
[55] Habermas, *The Philosophical Discourse of Modernity*, p. 322.

validity that we claim for our views different from the mere de facto acceptance of habitual practices'.[56] Although they are universally implicit in all forms of communicative action,[57] they are acted on only at the stage of post-conventional communicative action where validity is explicitly related to universality. These stronger idealised presuppositions include the following: every subject with the competence to speak and act is allowed to take part in discourse (the principle of universal moral respect); everyone is allowed to question and introduce any assertion whatever and express his or her attitudes, desires and needs (the principle of egalitarian reciprocity); and no speaker may be prevented, by internal or external coercion, from exercising these rights (the principle of non-coercion). They entail that no claim is immune from critical evaluation in principle by anyone in accordance with the conventional and post-conventional procedures, whereas in a conventional discussion what count as a relevant argument and a relevant participant constrain the discussion. Accordingly, communicative rationality, as Cooke concludes, 'gains its critical thrust only in' the 'practices of modern lifeworlds in which all ultimate sources of validity external to human argumentation [of the post-conventional kind] have been called into question'.[58]

Finally, Habermas derives two principles of argumentation from the two types of universal presuppositions of communicative action that complete communicative rationality with respect to claims of normative rightness. Principle D is a dialogical reformulation of the Roman law maxim that what affects all must be approved by all: 'Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as *participants in a practical discourse*.' Principle U is more specific and is derived from the post-conventional presuppositions. It states that a norm is valid only if '*all* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation)'.[59] Principle U is a reformulation of Kant's categorical imperative in terms of dialogical argumentation plus the addition of (non-Kantian) interests and consequences:

> the categorical imperative needs to be reformulated as follows: 'Rather than ascribing as valid to all others any maxim that I can will to be a universal law, I must submit my maxim to all others for purposes of discursively testing its claim to

[56] Habermas, *Moral Consciousness and Communicative Action*, p. 19.
[57] *Ibid.*, p. 100. [58] Cooke, *Language and Reason*, p. 34.
[59] Habermas, *Moral Consciousness and Communicative Action*, p. 67.

universality. The emphasis shifts from what each can will without contradiction to be a general law, to what all can will in agreement to be a universal norm.'[60]

Principle U, in conjunction with the other rules of argumentation, ensures impartiality by compelling each participant to think about the given situation and anticipated consequences from the perspective of every other participant, a process of ideal role taking Habermas calls 'reversibility'. As the discussion proceeds, the participants gradually criticise partial descriptions of the situation and work up to a 'we perspective' in terms of the core of 'generalisable interests' acceptable to all.[61]

The form of argumentation (communicative rationality) over the rightness of a contested norm defined by the conventional and post-conventional rules and principles U and D is called 'discourse ethics' (or, more correctly, a 'discourse theory of morality'). It is a universal procedural theory of morality or 'justice', for a norm agreed to under these conditions is 'just':

> That a norm is just or in the general interest means nothing more than that it is worthy of recognition or is valid. Justice is not something material, not a determi nate 'value', but a dimension of validity. Just as descriptive statements can be true, and thus express what is the case, so too normative statements can be right and express what has to be done.[62]

It is a narrow theory of morality since it deals only with questions of justice (rightness) in the Kantian sense: that is, questions of the justification, not the application, of norms of justice that are capable of being formulated in ought propositions (normative) without reference to any conception of the good and agreed to by the procedures of open-ended questioning. Moreover, unlike conventional argumentation over a norm, discourse ethics requires that all the participants accept the decentred world-view over all others and so conduct themselves in accord with this decentred form of subjectivity.

Habermas is aware, of course, that the vast majority of dialogues over norms of coordination in morality and politics fall outside this narrow range, into the spheres of ethics, pragmatics, application and, especially, dialogues in which issues of morality, ethics and pragmatics are inseparable. Nevertheless, it is necessary to restrict universal morality to this narrow range for only questions of this kind can be answered in an impartial manner:

[60] *Ibid.*, pp. 65–7. [61] Habermas, 'Reconciliation Through the Public Use of Reason', p. 118.
[62] Habermas, *Justification and Application*, p. 29.

If we do not want to settle questions concerning the normative regulation of our everyday coexistence by open or covert force – by coercion, influence, or the power of the stronger interest – but by the unforced conviction of a rationally motivated agreement, then we must concentrate on those questions that are amenable to impartial judgment. We can't expect to find a generally binding answer when we ask what is good for me or for us or for them; instead, we must ask what is *equally good for all*. This 'moral point of view' throws a sharp, but narrow, spotlight that picks out from the mass of evaluative questions practical conflicts that can be *resolved* by appeal to a generalizable interest; in other words, questions of justice.[63]

This form of philosophy is critically related to practice in the following ways. As we have seen, the validation of contested norms is performed by the agents affected. Moreover, Habermas realises that only a very few, highly abstract norms could meet the demanding conditions of discourse ethics, perhaps some propositions phrased in terms of universal human rights and duties. Nevertheless, there is a need for such a universal and procedurally neutral morality given the increasing demand to coordinate action by consensus among humans with diverse value orientations. Finally, the universally valid forms of argumentation of the decentred understanding of the world can also be used as a 'regulative idea' in morality and politics to guide the evaluation of existing practical systems of communicative action or forms of subjectivity and so bring to critical light degrees of irrationality, disrespect, inequality, coercion and lack of autonomy in the present – the traditional aim of critical theory.[64]

Now I want to sketch briefly the three arguments Habermas advances to lend plausibility to the universality of this form of communicative action, rationality and morality: a transcendental-pragmatic argument and two logic-of-development arguments, one relating to individuals and the other to societies. Recall that his theory is not based on a Kantian transcendental deduction and it is not certain. It is fallible and finds support in various kinds of philosophical arguments and research in the social sciences. The first line of defence is a form of transcendental-pragmatic argument, developed by Karl-Otto Apel, which aims to show that any competent communicative actor entering into communication already presupposes the validity of all the rules and principles of communicative rationality. An actor who rejects any of them (the 'sceptic') can be shown to perform a contradiction. 'A "performative contradiction" occurs when a constative speech act k(p)

[63] *Ibid*., p. 151. [64] *Ibid*., p. 51; Cooke, *Language and Reason*, p. 1.

rests on noncontingent presuppositions whose propositional content contradicts the asserted proposition.'[65] I will discuss this further in section 6.

Habermas recognises that his transcendental pragmatic argument is inconclusive. He buttresses it with two further lines of argument that the decentred view of the world is the highest stage of individual and social development (that is, to recall, the differentiation of the world into three domains of validity, corresponding to the external, social and subjective dimensions of reality, with their own standards of validation, and the recognition that no claim is in principle immune from criticism within the appropriate forms of argumentation). The first is a reconstruction of Lawrence Kohlberg's stages theory of individual moral development and Piaget's stages theory of cognitive development that purports to show that the stages are internally linked by a logic of development with the post-conventional rules and principles of discourse ethics at the apex. Kohlberg's transition from adolescence to adulthood, for example, is interpreted as the transition from conventional (ethics) to post-conventional argumentation (morality). 'Viewed in terms of a *progressively decentred understanding of the world*, the stages of interaction express a development that is directed and cumulative.'[66] The second is a parallel set of arguments about the internal logic of world-historical development of societies or 'world-views' from primitive or neolithic through traditional and developed to modern societies with a decentred world-view.[67]

These ambitious logic-of-development arguments aim to show that individual and social evolution occur through progressive stages of development; the stages can be ranked hierarchically by neutral criteria and the decentred world-view he associates with modernity represents the highest stage. These kinds of developmental argument have been used since the late seventeenth century to try to establish the superiority and universal significance of European ways, and they have often been employed to legitimate European imperialism.[68] They have come under sustained criticism in this century on two main counts. Do the data manifest a progressive development or are the data arranged in accord with a developmental framework that is only one among many possible interpretations of the data? Wittgenstein famously raised this objection to Frazer's *Golden Bough* early in the century. 'The historical explanation, the explanation as an

[65] Habermas, *Moral Consciousness and Communicative Action*, p. 80.
[66] *Ibid*., p. 168; Johri, *On the Universality of Habermas's Discourse Ethics*, p. 119.
[67] Habermas, *Moral Consciousness and Communicative Action*, p. 127.
[68] See Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); and *Volume II*, Chapters 5 and 7.

hypothesis of development', Wittgenstein writes, 'is only one way of assembling the data.'[69] Carol Gilligan has raised a similar objection to Kohlberg and Habermas, pointing out that the empirical evidence suggests that the post-conventional procedures are not impartial but exhibit a male partiality.[70]

This debate cannot be settled by recourse to the evidence, for the evidence is gathered and assembled partly in the light of the hypothesis. Accordingly, Habermas and defenders of developmental logics have sought to establish analytically neutral criteria for objectively assessing different stages (forms of consciousness or world-views), and this has given rise to a large literature on rationality and cross-cultural understanding. The problem with this line of defence, as Rorty and Foucault have pointed out, is that it is prone to circularity, to Eurocentrism or, to use Habermas' own term, 'presentism': the stages are described and ranked by criteria that are not neutral but partial in some way to the purported highest stage.[71] Habermas is well aware of this problem: 'An ethics is termed universalist when it alleges that this (or a similar) moral principle, far from reflecting the intuitions of a particular culture or epoch, is valid universally. As long as the moral principle is not justified … the ethnocentric fallacy looms large. This is the most difficult part of ethics.'[72]

In response to this second well-known objection to developmental logics, Habermas argues, on the basis of a lengthy analysis of articles in the rationality debate in cross-cultural anthropology, that world-views can be compared neutrally in terms of their capacity to solve similar problems reflexively and that the greater 'openness' and 'capacity for learning' of the decentred world-view show it to be cognitively superior to and the rational development out of other world-views.[73] The line of argument that these criteria are hypothesis-neutral, like his earlier arguments, is 'suggestive' but far from conclusive. As Mira Johri concludes in her careful analysis of Habermas' developmental arguments, the problem of presentism remains unresolved. Habermas 'extracts from the articles studied certain elements that *could* be construed as supporting' his position. 'However, they certainly need not be construed as so doing, and were not in fact so construed by their

[69] Ludwig Wittgenstein, 'Remarks on Frazer's Golden Bough', in *Philosophical Occasions, 1912–1951*, eds. James C. Klage and Alfred Nordmann (Indianapolis: Hackett Publishing Company, 1993), p. 131.

[70] Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, MA: Harvard University Press, 1982); Benhabib, *Situating the Self*, pp. 148–78.

[71] Michael Schmid, 'Habermas's Theory of Social Evolution', in *Habermas: Critical Debates*.

[72] Habermas, *Moral Consciousness and Communicative Action*, p. 210.

[73] Habermas, *TCAI*, pp. 62–8.

authors.'[74] In short, the claims to universal validity of his theory remain, as he readily acknowledges, suggestive, inconclusive and fallible.

4 TRANSITION TO FOUCAULT'S FOUR RECIPROCAL OBJECTIONS

Although both approaches work within the general problem of limits that has characterised two schools of European philosophy since the eighteenth century, they take up very different orientations towards limits. Foucault's approach aims to enable us to think and act differently by means of critical histories that exhibit the singularity, contingency and arbitrary constraints of our forms of subjectivity. Habermas' approach aims to discover a universal form of the subject, the decentred subject, implicit in our forms of subjectivity by means of universal pragmatics and developmental logic, and to use it as a regulative idea to evaluate existing practices. These two philosophical orientations are not necessarily opposed. They could complement one another; one clearing away the contingent and the other explicating the universal so that, as Foucault puts it, obedience would be 'founded on autonomy itself'. On Foucault's interpretation, Kant saw the two critiques in this complementary way. 'It would be, I believe, easy to show that for Kant himself, this true courage of knowing that was invoked by the *Aufklarung* [the Enlightenment *ethos*], this same courage of knowing consists in recognising the limits of knowledge [the Kantian theory]; and it would be easy to show that for him autonomy is far from being opposed to obedience to sovereigns.'[75]

Things have fallen out rather differently over the last two hundred years. As Foucault illustrates in 'What is Critique?', the relations between these two types of critical reflection have taken a variety of forms. In the posthumously published draft introduction to the second volume of the history of sexuality, he entertained the possibility that they could coexist as two different and more or less disengaged research orientations. However, this would occur only if they agreed on which limits are historical and which are universal. No such consensus exists. Each claims the same limits as either universal or historical. Consequently, in the published introduction he takes the view that we see in 'What is Enlightenment?'. There is a relation of critical engagement between them over the character of limits in the present that is unavoidable and should be elucidated reciprocally.

[74] Johri, *On the Universality of Habermas's Discourse Ethics*, p. 214.
[75] Foucault, 'What is Critique?', in *What is Enlightenment?*, p. 387.

This relation of critical engagement is manifested in the comments of Habermas and Foucault on each other's work, and it runs throughout the humanities and social sciences in the tension between general and universal approaches. Foucault seeks to show that the limits Habermas puts forward as universal, necessary and obligatory are singular, contingent and the product of arbitrary constraints, and hence can and should be transgressed in the name of freedom. Habermas seeks to show that, in transgressing them, Foucault is caught in 'a self-referential denial of universal validity claims'.[76] As David Owen states, it is not enough to say on the one hand that Habermas fails to demonstrate the universality of his theory of communicative action, rationality and morality, and so we can carry on our genealogical studies, or on the other hand that Foucault fails because he violates universal rules of rationality in his studies, so we can carry on our universal pragmatics, for neither denies these claims.[77] Habermas' approach is a fallible research project that exists in a space of serious objections and the very aim of Foucault's approach is to transgress rules that are claimed to be untransgressable. On either Foucault's or Habermas' conception of reason, we have an obligation to respond to the challenges each approach raises to the claims of the other. Several commentators have either elaborated on Habermas' criticisms of Foucault or defended Foucault against them. I would now like to examine the strength of Foucault's four objections to Habermas' approach and the reasons for preferring his approach.

5 Objection one: Habermas' approach is less critical

Foucault's first objection is that Habermas' sharply contrasting aim and technique render his approach less 'critical' than the Enlightenment attitude. This is not an objection to the search for universal structures of thought and action by means of transcendental-pragmatic arguments and the reconstructive sciences, but only to the claim that this tradition of philosophy furnishes an effective critique of limits in the present. He has two different reasons for this objection.

To see Foucault's first reason, recall that Habermas' philosophy aims to clarify and substantiate a universal form of the subject, the decentred subject. A person who recognises him- or herself as a decentred subject has accepted and internalised the decentred view of the world, the view that

[76] Habermas, *The Philosophical Discourse of Modernity*, p. 98.
[77] Owen, 'Foucault, Habermas and the Claims of Reason', p. 32.

'reason has split into three moments'. He or she understands the world to be differentiating into a 'totality' of three domains of validity corresponding to the external, social and subjective dimensions of reality, and these to the three moments of 'modern science, positive law and posttraditional morality, and autonomous art and institutionalised art criticism'.[78] He or she sorts questions into one of these three compartments, corresponding to claims of truth, justice and truthfulness, and validates or invalidates them in accord with the forms of rationality uniquely appropriate to each. These are procedures of intersubjective argumentation within which the exchange of reasons for and against proceed until agreement is reached, except in the third, subjective dimension where a horizon of shared values is not questioned. He or she sees this organisation of consciousness as the apex of individual and historical development. It is both the standard against which other forms of self-consciousness and cultures are judged as less developed and the three categories of 'cognitive-instrumental, moral-practical, and aesthetic-expressive' against which trends in modernity are judged as pathological or emancipatory.[79]

The decentred form of subjectivity is accepted as universal without certain proof, which is unobtainable, or philosophical justification. The 'eminent trends towards compartmentalization' into the three worlds, 'constituting as they do the hallmark of modernity, can do very well without philosophical justification'. The roles of the philosopher are, rather, to provide 'description and analysis' of their defining features; to act as a 'mediating interpreter' who guards against the 'isolation' of 'science, morals and art and their respective expert cultures' and the 'colonisation' of the moral-practical and artistic-aesthetic by the cognitive-instrumental, and who works towards 'a new balance between the separated moments of reason … in communicative everyday life'.[80]

Habermas' approach is 'critical' in the sense that it describes and analyses a 'regulative idea'[81] – the decentred subject – against which limits in the present can be judged as to their level of freedom and autonomy. However, Foucault's objection is that it is not critical towards its own standard, the decentred form of the subject, and so fails to meet the second condition of a modern critical philosophy, that it reflect critically on its own favoured form of reflection. One of the more provocative ways he put this is the following:

> In what does it [philosophy today] consist, if not in the endeavour to know how and to what extent it might be possible to think differently, *instead of legitimating*

[78] Habermas, *Moral Consciousness and Communicative Action*, p. 17. [79] *Ibid*., pp. 17–20.
[80] *Ibid*., pp. 17–19. [81] Habermas, *Justification and Application*, p. 51.

what is already known? There is always something ludicrous in philosophical discourse when it tries, from the outside, to dictate to others, *to tell them where their truth is and how to find it*, or when it works up a case against them in the language of naïve positivity.[82]

This is the sort of objection that Habermas raises against conventional theories: they presuppose a conventional horizon and so legitimate what is already known. He tries to avoid it by advancing a dialogical and procedural theory in which subjects themselves reach agreement on what is true, just and good. Nevertheless, his approach legitimates 'what is already known' by accepting the processes of decentred subjectivisation as given and self-evident, in Foucault's terms, what we 'silently think'.[83] 'Since the dawn of modernity in the eighteenth century', Habermas states, 'culture has generated those structures of rationality that Max Weber and Emil Lask conceptualised as cultural value spheres. Their existence calls for description and analysis, not philosophical justification.' The 'sons and daughters of modernity have progressively learned to differentiate their culture tradition in terms of these three aspects of rationality such that they deal with issues of truth, justice and taste discretely rather than simultaneously'.[84] Discourse ethics also legitimates what is already known in the sense that it will at best, according to Habermas, justify some 'basic human rights',[85] one of the most familiar features of the present. Moreover, Habermas' philosophy tells people 'where their truth is and how to find it'. It tells them to sort their questions into three types and to exchange reasons in accord with the three forms of argumentation, on the grounds that this is simply a description and analysis of the universal rationality implicit in how they already tend to think and act. In so doing, the approach starts from, rather than questions, modern processes of subjectivisation.

We have seen that this initial disposition to legitimate rather than question the decentred subject is further reinforced by the aim and techniques of Habermas' approach. He sets out to develop a genuinely critical form of philosophy, one that would not take any particular form of the subject for granted. Although he accounts for the decentred subject in terms of intersubjective processes of individual and societal development, and so avoids a 'subject-centred philosophy' in the sense of an ahistorical and monological philosophy of consciousness, the account is designed to describe and defend, rather than question, this form of the subject.

[82] Foucault, *The Use of Pleasure*, p. 9 [my italics]. [83] *Ibid*.
[84] Habermas, *Moral Consciousness and Communicative Action*, p. 17.
[85] Habermas, *Moral Consciousness and Communicative Action*, pp. 105, 208.

Arguments are presented for it being the common element implicit in any form of the subject, the highest stage of development of communicative action and rationality, and the regulative idea against which other forms of the subject are evaluated. The transcendental-pragmatic, developmental and reconstructive arguments are employed to support and defend its presumed universality.

As many commentators have noted, the arguments for the universality of the decentred subject are structured in a way that insulates it from criticism. An interlocutor who questions using the decentred world-view as the standard to judge forms of reasoning that anthropologists describe in other cultures, for example, is characterised as an irrational relativist (a position he ascribes to Winch). The reason for this appears to be Habermas' belief that only modern societies have developed 'second-order concepts' (forms of reflection on their own cultural practices), and this achievement leads to a 'decentred understanding of the world' that 'demands *similar* processes of learning and adaptation of *any* culture that crosses it'.[86] If these developmental and convergence hypotheses are true, then 'we must take account of an asymmetry that arises between the interpretive capacities of different cultures in virtue of the fact that some have introduced "second-order concepts" whereas others have not'.[87] As a result, he confesses that he cannot take seriously those contextual critics who remain unconvinced of the developmental hypotheses and so engage in more symmetrical forms of cross-cultural dialogue and reciprocal judgment:

> According to the contextualists, the transition to postmetaphysical concepts of nature and posttraditional conceptions of law and morality [the 'decentred under standing of the world'] is characteristic of just one tradition among others and by no means signifies that tradition as such becomes reflexive. I don't see how this thesis could be seriously defended. I think that Max Weber was fundamentally right, especially in the careful universalistic interpretation that Schluchter has given his thesis of the universal cultural significance of Occidental rationalism.[88]

The problem with this non-serious attitude to his critics is that it presupposes what should be open to testing, that the developmental hypotheses are 'fundamentally right', thereby shielding his preferred second-order concepts from criticism.[89]

Furthermore, participants in practical discourses cannot question the procedures of argumentation appropriate to the three validity claims because to do so would be to commit a performative contradiction. Simone

[86] Habermas, *Justification and Application*, p. 157. [87] *Ibid*.
[88] *Ibid*., pp. 157–8. [89] For the criticisms of this view, see *Volume II*, Chapters 5 and 7.

Chambers and Seyla Benhabib deny this last point. They suggest that the claim that reason has split into three moments may itself be challenged in practical discourses.[90] However, if the categories and procedures can be challenged from within, then by definition they are not universal. The 'performative' contradiction is just a good-old non-metaphysical contradiction of a rule of one type of argumentation or one set of categories among others. To concede this is to agree with Foucault, Toulmin, Taylor and other contextual rationalists. Benhabib acknowledges this (by abandoning U), and Chambers treats the decentred world-view as one 'interpretation' of modernity, thus implying that it can be compared to other interpretations rather than providing the standards of comparison.[91] If, conversely, the categories and procedures cannot be challenged without committing an irrationality, a performative contradiction, which is surely Habermas' own view, then there is no place within the theory to take up a critical stance towards this form of the subject.

In conclusion, at the centre of Habermas' form of reflection is a form of the subject that is taken for granted at the outset and protected from, rather than opened to, criticism by the forms of analyses characteristic of his philosophy. This is not only a failure to be critical in the sense above but also in Habermas' own terms. His philosophy remains 'context-bound'. The three categories and forms of argumentation of the decentred subject can be employed to 'burst asunder' the 'provinciality' of other forms of the subject.[92] Yet this decentred world-view is not transcended: it provides the taken-for-granted background against which questioning takes place in practical discourses as well as in Habermas' philosophy itself.

From Foucault's perspective, therefore, Habermas' theory is of the same general kind as other subject-centred philosophies, such as phenomenology and existentialism, even though the form of the subject is procedural rather than substantive. Foucault was highly critical of this kind of philosophy, especially when the form of the subject that is defended as universally valid and beyond the need for justification is the product of the very processes of European modernisation that are 'so universalizing, so dominating with respect to others'.[93] These are precisely the processes of subjectivisation that philosophy ought to take the most critical stance towards and enable us to free ourselves from, at least in thought:

[90] Chambers, *Reasonable Democracy*, pp. 158–9. [91] *Ibid.*, pp. 43–56.
[92] Habermas, *The Philosophical Discourse of Modernity*, p. 322.
[93] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 47.

The political and social processes by which the Western European societies were put in order are not very apparent, have been forgotten, or have become habitual. They are a part of our most familiar landscape, and we don't perceive them any more. But most of them once scandalized people. It is one of my targets to show people that a lot of things that are part of their landscape – that people think are universal – are the result of some very precise historical changes. All my analyses are against the idea of universal necessities in human existence. They show the arbitrariness of institutions and show which space of freedom we can still enjoy and how many changes can still be made.[94]

This line of argument would not be a sound objection to Habermas' philosophy and a good reason to prefer Foucault's *ethos* if the decentred subject could be shown to be universal. Habermas concedes that its universality cannot be proven with certainty. The arguments he marshals are, at best, suggestive, supportive and fallible. As we have seen, they are highly contentious and widely doubted hypotheses about the nature of truth, meaning, understanding, consensus, justice, modernisation, moral psychology, human cultures and much else. Be this as it may, it is not the tendentious status of Habermas' decentred hypothesis that constitutes the reason for Foucault's scepticism here, although it is a factor. It is not 'ludicrous' to defend a dubious hypothesis against many critics. Rather, it is the inability to think *against* what is given and defended as universal in this decentred 'game of truth'. After stating his objection to the legitimating kind of philosophy, Foucault explains what he thinks philosophy should do:

> [philosophy] is entitled to explore what might be changed in its own thought, through the practice of a knowledge that is foreign to it. The 'essay' – which should be understood as the assay or test by which, in the game of truth, one undergoes changes, and not as the simplistic appropriation of others for the purpose of communication – is the living substance of philosophy.[95]

The objection is that there is no means of testing the decentred subject – the 'most familiar landscape' of modern subjectivity – internal to Habermas' philosophy. This is what is uncritical about it. Foucault suggests that the way to test it is through 'a knowledge that is foreign to it'; for example, through the historical study of different forms of subjectivity, as Foucault and the Cambridge school do, or through inventing different forms of subjectivity as objects of comparison, as Wittgenstein and analytical philosophers do. Such a test would determine which features of decentred subjectivity are universal and which are contingent.

[94] Foucault, 'Technologies of the Self', p. 11. [95] Foucault, *The Use of Pleasure*, p. 9.

It is difficult to see how Habermas would build such a critical test into his approach. When a philosopher looks at different forms of the subject and their rationalities through his or her categories, the decentred form of representation of the data engenders a strong predisposition to disregard what is 'foreign' (different, historical, contingent) and to look for what is presumed to be universal (the three validity claims) implicit in the 'confused' practices. For example, Habermas illustrates this methodological disposition in his interpretation of Peter Strawson's famous analysis of 'Freedom and Resentment'. In contrast to the approach of Foucault, hermeneuticists and Strawson himself, when confronted with a moral or political struggle, Habermas tells us to look beneath the actual terms in which the conflict is problematised and has significance for the agents involved and discern 'the violation of an underlying *normative expectation* that is valid not only for ego and alter but also for all members of a social group or even, in the case of moral norms in the strict sense, for all competent actors. It is only their claim to *general* validity that gives an interest, a volition, or a norm the dignity of moral authority.'[96] Here, his deontological form of problematisation is not held provisionally as an initial way of interpreting the conflict, to be tested dialogically against how the participants themselves problematise it as a conflict with moral dignity, but presupposed as the universal form of problematisation that underlies their non-universal 'ethical' characterisation of the conflict and gives it whatever moral dignity it has.

Again, when presented with a form of rationality foreign to the three decentred forms (as, for example, Winch's understanding of a primitive society) or to one category of them (as, for example, Gilligan's different interpretation of moral development), Habermas does not distance himself from his own hypothesis, provisionally holding it as one among other forms of rationality and testing it by means of, say, Foucault's reciprocal elucidation, Taylor's perspicuous contrast, Rawls' reflective equilibrium or Putnam's internal realism. Rather, he judges the foreign rationality relative to the decentred hypothesis as a regulative idea, so the foreign rationality is, by hypothesis, irrational or in the wrong category. He replies that he cannot do otherwise without performing a contradiction.[97] This begs the critical question. To return the charge Habermas levelled at Foucault's earlier writings, there appears to be an uncritical 'presentism' in Habermas' philosophy. Ricardo Blaug, after a broad survey of the work of Habermas and his followers, corroborates Foucault's objection:

[96] Habermas, *Moral Consciousness and Communicative Action*, pp. 48–9. [97] *Ibid.*, p. 81.

We are thus redirected in our efforts towards an exploration of the sense in which our *existing* political order is legitimate. This is, of course, an entirely valid project, and is presently being fruitfully pursued by both Habermas and a number of his commentators. But the study of a political order's *extant* legitimacy is a far cry from using the theory in order to design legitimate democratic institutions which may be quite different than those we currently have.[98]

The second reason Foucault thinks that Habermas' approach is less critical than his own is if, for the sake of argument, we accept rather than test the decentred subject, we then find that its 'abstract' character renders it less effective as a critique than a specific and historical approach:

> experience has taught me that the history of various forms of rationality is some times more effective in unsettling our certitudes and dogmatism than is abstract criticism. For centuries, religion couldn't bear having its history told. Today, our schools of rationality balk at having their history written, which is no doubt significant.[99]

Many contextualists have raised objections to the abstractness of Habermas' philosophy as well as to the Kantian tradition in general, and Habermas has replied to some of them.[100] Foucault's objection is complementary yet distinct, since it gains its rational force through the reciprocal contrast with his own approach.

In Berkeley in 1983, Foucault recounted an earlier conversation with Habermas in Paris where Habermas mentioned how disappointed he was to find that one of his professors who was an illustrious Kantian nevertheless wrote articles in support of the Nazis in the 1930s. Foucault mentions a similar experience with Max Pohlenz, a great stoic who also supported the Nazis. What this illustrates, according to Foucault, is the 'tenuous "analytic" link between a philosophical conception and the concrete political attitude of someone who is appealing to it'. The '"best" theories do not constitute a very effective protection against disastrous political choices; certain great themes such as "humanism" can be used to any end whatever'.[101] The lesson to be drawn from this experience is, as we have seen, to make critical philosophy less abstract by tying it as closely as possible to specific struggles:

[98] Ricardo Blaug, 'Between Fear and Disappointment: Critical, Empirical and Political Uses of Habermas', *Political Studies* 45(1), 1997: 100–17, 109.
[99] Foucault, *Politics, Philosophy, Culture*, p. 83.
[100] Habermas, *Moral Consciousness and Communicative Action*, pp. 205–7.
[101] Foucault, 'Politics and Ethics', p. 374; 'Technologies of the Self', p. 15.

a demanding prudent, 'experimental' attitude is necessary; at every moment, step by step, one must confront what one is thinking and saying with what one is doing, with what one is … I have always been concerned with linking together as tightly as possible the historical and theoretical analysis of power relations, institutions, and knowledges, to the movements, critiques, and experiences that call them into question in reality.[102]

There is considerable evidence that Foucault's specific approach does provide an effective critique in a number of specific struggles in contemporary societies.[103] The price of this commitment to 'partial and local inquiry or test', Foucault acknowledges, is that 'we have to give up ever acceding to a point of view that could give us access to any complete and definitive knowledge of what may constitute our historical limits'.[104] Conversely, in Habermas' case, there is some evidence that the cost of elaborating a more abstract theory in order to provide a comprehensive sketch of our universal limits has been to lessen its critical effectiveness.

In their survey of the application of critical theory to empirical work, Ruane and Todd conclude, as Blaug summarises, that it takes place at 'a vertiginous level of abstraction' and 'tends to generate something that in fact yields yet more theory, rather than anything practical'.[105] In a more sympathetic survey, Blaug suggests that discourse ethics is more effective when used to interpret and evaluate deliberative democratic practices and the normative content of constitutional law, as Habermas suggests in *Between Facts and Norms* and as Benhabib, Chambers, Cohen and Ingram have each argued.[106] Yet, as Blaug comments, 'something rather strange is happening here. For all this talk of the public sphere never quite comes down to earth. Having spent many pages unpacking the nuances of his normative argument, a quite extraordinary number of books and articles on Habermasian

[102] Foucault, 'Politics and Ethics', p. 374.

[103] See Graham Burchell, 'Peculiar Interests: Civil Society and Governing "The System of Natural Liberty"', in *The Foucault Effect*; Andrew Barry, Nikolas Rose and Thomas Osborne, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (London: UCL Press, 1996); Monique Deveaux, 'Feminism and Empowerment: A Critical Reading of Foucault', in *Feminist Interpretations of Michel Foucault*, ed. Susan Hekman (University Park: Pennsylvania State University Press, 1996); Alan Peterson and Robin Bunton, eds., *Foucault, Health and Medicine* (London: Routledge, 1997).

[104] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 47.

[105] Joseph Ruane and Jennifer Todd, 'The Application of Critical Theory', *Political Studies* 36(3), 1988: 533–8. Quoted in Blaug, 'Between Fear and Disappointment', p. 105.

[106] Seyla Benhabib, *Critique, Norm and Utopia: A Study of the Foundations of Critical Theory* (New York: Columbia University Press, 1986); Chambers, *Reasonable Democracy*; Joshua Cohen, 'Deliberation and Democratic Legitimacy', in *The Good Polity*: *Normative Analysis of the State*, eds. Alan Hamlin and Philip Pettit (Oxford: Blackwell, 1991); and David Ingram, 'The Limits and Possibilities of Communicative Ethics for Democratic Theory', *Political Theory* 21(2), 1993: 294–321.

theory end with a somewhat nebulous benediction to its political promise.' He goes on to cite a number of examples of 'praise … heaped on the public sphere' and observes that there seems 'to be a kind of missing tier of theory – this being an account of what normatively grounded institutions might be like and how they might actually function'. He concludes, just as one might expect from Foucault's lesson above, that 'the limits placed on the theory, and its abstract and universal nature, combine to restrict its practical implications'.[107]

True to form, Foucault sketches a genealogy of this difference between them. He associates the drive towards abstract and universal theory with the 'universal intellectual' and the specific, practice-based critique with the 'specific intellectual'.[108] The universal intellectual seeks to speak about society as a whole and what is 'just and true for all' on the model of 'knowledge and legitimation', whereas the specific intellectual speaks about singular games of truth, relations of power and ethics of the practical systems in which he or she is engaged, their historical formation and possibilities of modification. The universal intellectual derives from the jurist and the juridical tradition in the West.[109] Specific intellectuals have become fairly prominent since the Second World War, with natural and social scientists speaking out against nuclear weapons, environmental destruction, medical abuse, cultural survival and the like.[110] Notwithstanding, as Foucault explains in 'What is Critique?', the specific intellectual derives from the early modern humanists and natural lawyers who wrote critical histories of specific oppressive institutions of governance, such as the Church, monarchies, unjust constitutions and the governance of women by men. Their aim was not so much to elaborate a universal theory of justice as it was to criticise the excesses and arbitrariness of specific forms of governance and so to practise an 'art of not being governed so much' or of 'not being governed in such and such a manner'.[111] This early modern humanist tradition of critique tied to the modification of specific forms of governance provided the background to Kant's Enlightenment attitude in 'What is Enlightenment?' and thus initiated the tradition in which Foucault places his own work.[112] The universal-juridical tradition furnished the background to Kant's formal critique of the limits of knowledge and so constitutes the basis of the tradition in which Habermas works.[113]

[107] Blaug, 'Between Fear and Disappointment', p. 112.
[108] Michel Foucault, 'Truth and Power', in *The Foucault Reader*.
[109] *Ibid*., p. 70. [110] *Ibid*., pp. 71–2.
[111] Foucault, 'What is Critique?', in *What is Enlightenment?*, p. 384.
[112] *Ibid*., pp. 385–98. [113] *Ibid*., p. 393.

The point of the genealogy is to provide a historical account of the constitution of himself and Habermas as philosopher-subjects and, secondly, to introduce another reason why Habermas' approach tends to be ineffective as a critique. The universal intellectual, in so far as he or she derives from the jurist and the juridical tradition, abstracts and universalises from specific juridical practices of morality and politics and their traditions of interpretation in the West, especially the natural law tradition. Habermas acknowledges this historical point. As a result, his or her language of description – the language of universal norms and procedures definitive of the decentred world-view – is ineffective not only because it is abstract but also because it tends to misrepresent other, non-juristic forms of knowledge, relations of power and practices of ethics in which we are constituted and governed as subjects (see section 7).

Finally, the genealogy also exposes and frees us from the conventional understanding of Habermas as a humanist and Foucault as an anti-humanist. If we follow the conventional meaning of 'humanism' today, namely a theory that takes a form of the subject in the present as a normative ideal to be defended against all comers, then, as we have seen, the conventional understanding is accurate. The decentred subject, although a juridical subject, plays exactly this role in Habermas' theory. This is what Foucault means by 'humanism' or the humanist 'Man' of the modern human sciences when he criticises it throughout his writings:

> Through these different practices psychological, medical, penitential, educational a certain idea or model of humanity was developed, and now this idea of man has become normative, self evident and is supposed to be universal. Humanism may not be universal but may be quite relative to a certain situation. This does not mean that we have to get rid of what we call human rights or freedom, but that we can't say that freedom or human rights has to be limited at certain frontiers … What I am afraid of about humanism is that it presents a certain form of our ethics as a universal model for any kind of freedom.[114]

If, alternatively, we look at 'humanism' historically and critically (as Quentin Skinner and John Pocock have done), it derives from the singular tradition of thought and practice called 'classical humanism' that was developed during the Renaissance by writer-activists and based on the classical authors of the Roman world, such as Seneca, Cicero and Quintilian. In relation to classical humanism, the conventional understanding of Habermas as a humanist and Foucault as an anti-humanist is the wrong way round. Classical humanism developed in opposition to the universal natural law

[114] Foucault, 'Technologies of the Self', p. 15; 'What is Enlightenment?', in *The Foucault Reader*, pp. 44–5.

tradition. The humanists criticised natural lawyers for their 'abstractness' and their inaccurate and anachronistic universalisations from the peculiarities of current juridical practices and traditions of Roman and Canon law. In opposition, they put historical, contextual and interpretative studies at the centre of their educational system, the 'humanities', and used them comparatively to gain a critical distance from their own legal and political institutions and traditions and to make generalisations. They derived this philosophical exercise of disengagement from the present by means of comparative historical and cultural studies from their interpretation of the classic authors, Seneca in particular, similar to the way Foucault derived his philosophical exercise of 'freeing oneself from oneself' and 'thinking differently' from the same authors.[115] Finally, they turned their humanist studies to the criticism of specific forms of governance and ethics in their Italian city-states and North European monarchies, in opposition to the abstract treatises on natural rights and duties of the natural law tradition, and developed a conception of concrete civic liberty in opposition to the abstract freedom of the natural lawyers.[116] These humanist studies are in their turn, according to Foucault himself, an early part of the tradition in which he writes, and they provided him with an alternative to the juridical conception of the subject and power (governmentality), just as the classical authors provided him with an alternative to the juridical conception of morality (ethics).

6 OBJECTION TWO: FOUCAULT'S APPROACH IS REASONABLE

Foucault's objection that Habermas' approach is uncritical of the decentred subject would be stronger if he could test it critically himself and show in what Habermas gives to us as 'universal, necessary, obligatory, what place is occupied by whatever is singular, contingent, and the product of arbitrary constraints'. This would not only enhance the criticism of Habermas' theory but also illustrate the effectiveness of Foucault's. He does this by using his approach to show that some allegedly non-contingent presuppositions of communicative rationality are historically contingent and the product of arbitrary constraints. To do so, he must first respond to Habermas' claim that it is irrational to challenge the presuppositions of communicative

[115] Foucault, *The Use of Pleasure*, pp. 9–10.

[116] Skinner, *The Foundations of Modern Political Thought*, Vol. I, *The Renaissance*; and Skinner, *Reason and Rhetoric in the Philosophy of Hobbes. Volume II*, Chapter 9 is a development of this tradition of the civic freedom of citizens and its application to global citizenship.

rationality by showing that it is reasonable to look on the three forms of rationality definitive of the decentred world-view, not as identical to reason itself, but as three forms of rationality among others.

Any form of communicative action involves presuppositions that are conditions of its possibility. A large part of research in the human sciences is concerned with making conditions of possibility explicit. Foucault's approach, for example, makes explicit the presuppositions of different problematisations (of Greek sexuality, nineteenth-century language, labour and life, madness in different periods, and so on). This kind of historical pragmatics consists in the analysis of the specific presuppositions of different modes of discourse in so far as they consist in solutions to a general problem. As he summarises,

> the work of a history of thought would be to rediscover at the root of these diverse solutions the general form of problemization that has made them possible even in their very opposition; or what has made possible the transformation of the difficulties and obstacles of a practice into a general problem for which one proposes diverse practical solutions. This development of a given into a question, this transformation of a group of obstacles and difficulties into problems to which the diverse solutions will attempt to produce a response, this is what constitutes the point of problemization and the specific work of thought.[117]

Now, Habermas associates this kind of analysis with R. G. Collingwood, Wittgenstein and their followers in England (such as Quentin Skinner and the Cambridge school), who, like Foucault and Canguilhem in France, developed a form of analysis of the presuppositions one is committed to in virtue of raising and answering a *specific* intersubjective range of questions.[118] Habermas' transcendental-pragmatic analysis of conditions of possibility differs from the family of historical forms of analysis of Foucault, Collingwood and others in two crucial respects. Firstly, he is concerned exclusively with the procedural presuppositions of forms of argumentation, rather than with whatever the presuppositions of a specific form of problematisation or language game might be and thus he is closer, as he notes, to Stephen Toulmin than to Collingwood or Foucault. Secondly, and more importantly, he is not concerned with the (contingent) presuppositions specific to *this or that* form of argumentation, as Toulmin, Collingwood, Foucault and the Cambridge school are, but with the non-contingent presuppositions common to all rational forms of argumentation. For the presuppositions to be 'non-contingent' and so universal, they must meet

[117] Foucault, 'Polemics, Politics, and Problematizations', p. 389.
[118] Habermas, *Moral Consciousness and Communicative Action*, p. 83.

two conditions: they must be such a general feature of human life that they cannot be replaced by a functional equivalent and they must be shown to be unavoidable. The transcendental-pragmatic reconstruction aims to show that the conventional and post-conventional rules and principles D and U are the non-contingent presuppositions of communicative rationality, in the sense of being 'irreplaceable' and 'unavoidable', and therefore the transgression of any of them would, by definition, constitute a 'performative contradiction'.[119]

The way in which the historical pragmatics of Foucault, Collingwood and Toulmin raises an objection to Habermas' type of transcendental pragmatics has been somewhat obscured by the manner in which Habermas sets up the debate between himself and his opponents. He advances his argument against a 'sceptic' who rejects all the rules, conventional and post-conventional, and principles U and D, and he appears to believe that Foucault is this kind of universal sceptic.[120] Foucault, he says, is caught in 'a self-referential denial of universal validity claims'.[121] However, as we have seen in the earlier exposition of Foucault's object of study – forms of problematisation – it is no part of his approach (or those of Toulmin and Collingwood) to deny that communicative speech-acts involving non-prudential 'ought' propositions commit the actors to some form or other of reason-giving and, *eo ipso*, of mutual recognition and reciprocity. Relations of communication involve 'reciprocity', Foucault states, in explicit agreement with Habermas.[122] In virtue of exchanging speech-acts of this kind, humans are willy-nilly under what Foucault calls an 'obligation of truth', to search for the truth by exchanging reasons fairly.[123] Historically, this obligation of truth 'has taken on a variety of different forms', and Foucault sees his entire work as a history of how the human subject enters into and plays these obligatory 'games of truth'.[124]

Foucault does not deny that there may be some non-contingent rules common to all games of truth. He writes, 'singular forms of experience', such as historically different practices of communication, 'may perfectly well harbour universal structures'. To study what is singular and historically contingent about a communicative practice 'does not mean that it is deprived of all universal form, but instead that the putting into play of these universal forms is itself historical'.[125] But, the innumerable attempts to

[119] *Ibid*., p. 85; Johri, *On the Universality of Habermas's Discourse Ethics*, p. 59.
[120] Habermas, *Moral Consciousness and Communicative Action*, pp. 76–109, 99.
[121] Habermas, *The Philosophical Discourse of Modernity*, p. 286.
[122] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 218.
[123] Foucault, *The Final Foucault*, p. 15. [124] *Ibid*., pp. 1–2; Foucault, *The Use of Pleasure*, p. 6.
[125] Foucault, 'Preface to the History of Sexuality Volume II', p. 335.

deduce or reconstruct these universal forms in a set of necessary and sufficient trans-historical rules have so far not succeeded: 'what has always characterised our society, since the time of the Greeks, is the fact that we do not have a complete and peremptory definition of the games of truth which would be allowed, to the exclusion of all others'. It follows from this obvious feature of our world that there 'is always a possibility, in a given game of truth, to discover something else and to more or less change such and such a rule and sometimes even the totality of the game of truth'.[126] Foucault's approach is simply a conceptual toolkit to test this 'possibility' in Habermas' or any other peremptory definition of the games of truth.

Consequently, Foucault's Enlightenment attitude is a 'specific' scepticism (against the claims of a specific limit), not the universal scepticism Habermas argues against in his mock dialogues. The obligation to pursue the truth by exchanging reasons under general conditions of reciprocity, which Foucault and other contextual rationalists do not doubt, possibly could be explicated in terms of rules something like Habermas' list of conventional rules. Recall that on Habermas' account these are provisional and exemplary, not definitive, and simply borrowed from R. Alexy for purposes of illustration.[127] However, these are compatible with a wide variety of historical and cultural forms of communication and rationality, as well as with a wide variety of accounts of rationality from Plato to Wittgenstein. Agreement on some such conventional procedures satisfies conditions of mutual recognition and reciprocity but does not entail agreement on the post-conventional procedures.[128]

The one objection Foucault would probably raise to Habermas' list of conventional rules is to rule 1.3, that different speakers may not use the same expression with different meanings. It is difficult to see how this is compatible with forms of argumentation that move us around to a different point of view, as a genealogy and Habermas' role taking are designed to do. This movement is achieved by showing that the meaning – the sense, reference or illocutionary force – of the shared evaluative vocabulary we use to characterise any form of the subject can be altered by argumentatively or redescriptively challenging the habitual criteria for the application of the terms in question.[129] *Discipline and Punish*, for example, modifies the sense, reference and illocutionary force of 'discipline'. If this is correct, then it seems

[126] Foucault, *The Final Foucault*, p. 17.
[127] Habermas, *Moral Consciousness and Communicative Action*, p. 87.
[128] This is the main theme of Cooke's *Language and Reason*.
[129] Quentin Skinner, 'Language and Social Change', in *Meaning and Context*; and Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, pp. 138–80.

that any exercise of challenging habitual forms of thought involves using the same expression with different meaning.

Apart from rule 1.3, the limit-specific scepticism of the 'Enlightenment attitude' raises an objection when Habermas makes the controversial claim that any communicative action presupposes as well the irreplaceability and unavoidability of the specific forms of argumentation defined by the post-conventional rules and principles U and D; that these are definitive of the three and only three moments of reason. Several of Foucault's historical studies aim to show that some of these rules and the centrality of the decentred game of truth itself are contingent. As a consequence, it is possible to think differently and experiment with acting differently without committing a performative contradiction: that is, without thinking and acting irrationally. In testing the non-contingency of the post-conventional rules of the decentred game of truth, therefore, Foucault is not engaging in an irrational activity, as Habermas would have it, but, rather, questioning them from within the context of the conventional rules of rationality – accepting one limit (conventional) in order to test another (post-conventional). This enables him to do within reason what Habermas himself does not do: break the circle of presentism surrounding the decentred subject and open it to critical enquiry.

All that Foucault does here to render his historical critique of forms of rationality reasonable is just to refuse to enter into the form in which Habermas structures the debate or (in Foucault's terms) 'problematises' reason; that is, by identifying reason with three contemporary forms of rationality (cognitive-instrumental, moral-practical, and aesthetic-expressive). If that problematic is accepted, it becomes, as we have seen in the previous section, a debate between the 'guardian of rationality' and the irrational sceptics and relativists. As Foucault explains in a discussion of Habermas, 'that is not my problem, in so far as I am not prepared to identify reason with the totality of rational forms which have come to dominate'.[130] This first step of de-identifying 'reason' with the dominant forms of rationality – in order to avoid being forced into an either/or debate and to get himself in a position to reflect on and analyse those forms – is, Foucault further explains, neither a new technique nor one derived exclusively from Nietzsche's perspectivism. It is the continuation of the critical task of the broad Enlightenment tradition in which he works:

[130] Foucault, *Politics, Philosophy, Culture*, p. 35.

I think that the blackmail which has very often been at work in every critique of reason or every critical inquiry into the history of rationality (either you accept rationality or you fall prey to the irrational) operates as though a rational critique of rationality were impossible, or as though a rational history of all the ramifications and all the bifurcations, a contingent history of reason, were impossible … I think that, since Max Weber, in the Frankfurt School and anyhow for many historians of science such as Canguilhem, it was a question of isolating the form of rationality presented as dominant, and endowed with the status of the one and only reason, in order to show that it is only *one* possible form among others.[131]

I have presented this defence of the reasonableness of Foucault's critical approach to forms of rationality as if the burden of proof lies with him, because the quotations suggest that Foucault saw the engagement with Habermas in this way. Perhaps the rhetorical influence of Habermas' claim that he is the guardian of rationality and defender of cognitivism against the irrational Foucault forced this defensive stance on him. Whatever the cause, this timid response leaves Habermas' approach in a non-reciprocal position of dominance, as if anyone who is not prepared to enter the debate on Habermas' terms needs to justify the reasonableness of his or her approach, whereas the reasonableness of Habermas' identification of reason with three contemporary forms of rationality does not require validation, only description, analysis, reconstruction and mediating interpretation. We can put Foucault's argument that his approach is reasonable on equal footing if we go on the offensive by reversing the burden of proof and asking if Habermas' approach is reasonable. The analogous question would be, is it reasonable to argue that reasonable people engaged in communicative action should come to accept the procedures of rationality definitive of the decentred view of the world? As we have seen, Foucault always politely accepted the legitimacy of Habermas' project, denying only that such universal forms of rationality have yet been discovered and universally agreed to. However, John Rawls raises this bolder question and answers in the negative.

Like Foucault, Rawls understands Habermas as putting forward a comprehensive and metaphysical philosophy of the nature of human reason. In contrast to his own non-metaphysical philosophy of justice:

Habermas' position, on the other hand, is a comprehensive doctrine and covers many things far beyond political philosophy. Indeed, the aim of his theory of communi cative action is to give a general account of meaning, reference and truth or validity both for theoretical reason and for several forms of practical reason … Habermas'

[131] *Ibid.*, p. 27.

own doctrine, I believe, is one of logic in the broad Hegelian sense: a philosophical analysis of the presuppositions of rational discourse (of theoretical and practical reason) … His logic is metaphysical in the following sense: it presents an account of what there is. And what there is are human beings engaged in communicative action in their lifeworld.[132]

Like Foucault, Rawls believes that it is perfectly reasonable for philosophers to work on theories of this comprehensive kind, to derive theories of justice from them and to try to convince others of their validity. It is also reasonable for individual citizens and moral agents, when they have given public reasons for or against a proposed norm of coordination or individual action, also to embed these public reasons in their own background comprehensive theories. But, the presupposition of Habermas' approach is, in addition, that it is reasonable to expect and argue that all citizens and moral agents in a fair system of social cooperation, in so far as they are reasonable, will come to accept the decentred view of the world as their comprehensive theory and reason in accord with its three forms of argumentation. This, on Rawls' account, is unreasonable.

Habermas' presupposition that reasonable communicators will come to agree on the decentred world-view is 'unreasonable' because there will always be reasonable disagreement over highly complex and abstract doctrines of this general kind. Rawls carefully lists six 'sources of the difficulties in arriving at agreement in judgment, sources that are compatible with those judgments being fully reasonable'.[133] These sources are not 'prejudice and bias, self- and group-interest, blindness and willfulness' but features

[132] John Rawls, 'Political Liberalism: Reply to Habermas', *Journal of Philosophy* 92(3), 1995: 132–80, 135–7.

[133] The six sources of difficulty in practical and theoretical reason are: (1) evidence – empirical and scientific – bearing on a case that is conflicting and complex, and hard to assess and evaluate; (2) even where we fully agree about the kinds of considerations that are relevant, we may disagree about their weight, and so arrive at different judgments; (3) to some extent all our concepts, and not only moral and political concepts, are vague and subject to hard cases, and this indeterminacy means that we must rely on judgment(s) and interpretation(s) within some range not sharply specifiable, where reasonable persons may differ; (4) to some extent the way we assess evidence and weight moral and political values is shaped by our total experience, our whole course of life up to now, and our total experience may always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labour, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity; (5) often there are different kinds of normative considerations of different force on both sides of an issue and it is difficult to make an overall assessment; and (6) any system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that might be realised. In being forced to select among cherished values, or when we hold several and must restrict each in view of the requirements of the others, we face great difficulties in setting priorities and making adjustments. Many hard decisions may seem to have no clear answer. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), pp. 56–7.

intrinsic to reasoning over highly complex and comprehensive matters. It follows from these sources that it will always be unreasonable to expect agreement on a comprehensive doctrine like Habermas'. Rather, it will be reasonable to accept that there always will be a plurality of reasonable comprehensive doctrines in any free society, just as there will be a plurality of reasonable value orientations, and for similar reasons.[134] Therefore, it is reasonable to accept the 'burdens of judgment': to recognise that fully reasonable agents seeking to coordinate their interaction by the force of the better argument alone will always embrace an irreducible plurality of background comprehensive doctrines (one of which may reasonably be the decentred doctrine) and so relate to each other on this understanding, not on the understanding that one comprehensive doctrine can ever provide the grounds of their deliberations.

If Rawls is correct, Habermas is unreasonable. He has failed to accept the burdens of judgment that follow from the six sources of difficulties in reaching agreement that are intrinsic to reason itself. Foucault, on the other hand, is fully reasonable in taking Habermas' comprehensive theory as one among others. Moreover, both Rawls and Foucault draw a similar kind of lesson from the 'tenuous' character of complex and abstract reasoning. As we have seen, Foucault turned to a more specific analysis, tied closely to practice, and Rawls turned towards a political philosophy tied to the way citizens themselves problematise their communicative interaction in existing constitutional democracies: namely, as free and equal subjects engaged in a system of social cooperation and willing to accept the burdens of judgment that a plurality of both comprehensive doctrines and value orientations entails.[135]

In conclusion, it is not unreasonable to see the decentred understanding of the world as one (peremptory definition of a) limit in the present among many, to free ourselves from it and to analyse its alleged universality critically and historically, either in whole or in part, as long as this critical attitude is specific rather than the universal scepticism against which Habermas defends it. Moreover, Habermas should approve since it provides a test of the claims he advances concerning the decentred subject, something he has so far not done himself.

[134] Rawls, *Political Liberalism*, p. 58.

[135] For an excellent comparison of Rawls and Foucault, see Anthony Laden, 'Constructing Shared Wills: Deliberative Liberalism and the Politics of Identity', (Ph.D. dissertation, Harvard University, Cambridge, MA, 1997).

7 OBJECTION THREE: A GENEALOGY OF THE DECENTRED SUBJECT

We are now in a position to see how Foucault's historical method might be used to bring out what is singular, contingent and the product of arbitrary constraints in the decentred limit. It enables us to see it as one form of the subject among many and not as the regulative idea against which all forms are to be described and categorised. Foucault did not write a genealogy of Habermas' conception of the decentred subject. Rather, he wrote a number of genealogies of the juridical form of the subject, several of these before he read Habermas' work. However, Habermas' conception of the decentred subject is clearly a major reinterpretation and defence of the juridical form of the subject, one of the greatest in a long line from Hugo Grotius and Samuel Pufendorf through Kant to late twentieth-century juridical moral and political philosophies. Theories of the juridical subject are standardly, as Habermas says of his own theory, deontological, formal, cognitive and universal. Foucault's genealogies of the juridical subject run through his major writings: *Discipline and Punish*, *Power/Knowledge*, *The History of Sexuality*, 'What is Critique?', 'The Subject and Power', 'Governmentality' and 'Politics and Reason'.

From the beginning Foucault was concerned to show that this way of organising moral and political action in practice and reflecting on and analysing it in theory, which seems so self-evidently universal and legitimate to we moderns who are the subjects of it, is in reality much more limited than it appears. While its characteristic forms of knowledge are partially accurate representations of juridical practices (since the forms of knowledge are historically woven into the exercise and contest of power in these practices), they tend to be taken as a normative representation of moral and political practices in general and, as a result, misrepresent and occlude other non-juridical processes of subjectivisation. The aim of his historical studies is not to do away with this important and valuable form of subjectivity in the present, but to show its limitations.

The juridical subject is the individual or collective subject of rights and duties. Juridical subjects coordinate their moral and political action by means of laws or norms. The laws are legitimate or just in so far as they are universal and based on the agreement or consent of those who subject themselves to them. The juridical practical systems are the legal and political institutions of European societies in which power is exercised through the law in a primarily prohibitive manner by and over agents who are constituted as law-governed bearers of rights and duties. Juridical forms of

knowledge are the law-centred theoretical, jurisprudential and legislative codes and their traditions of interpretation, modes of application, systems of punishment and theories of revolution against unjust constitutions.[136]

This 'juridical ensemble' of discursive and non-discursive elements began to be pieced together in Europe in the twelfth century with the revival of Roman law and the development of Canon law in practice and the schools of natural-law political and moral philosophy in theory (Thomist and Conciliarist). It has come to be such a major form of the subject in European societies as the result of four roles. Initially it represented fairly accurately a mechanism of power that was effective under feudal monarchy: that is, the exercise of power through the law by a sovereign who stood more or less above the law. Also, the claim to universality has been its method of legitimation since the beginning, first against the particularity of local customs and ways, and later to justify the construction of large centralised administrative states against the crazy quilt of feudal, confessional, regional and manorial particularity during the wars of religion. Then it was used in theory and practice throughout the early modern period to justify resistance to royal power and establish limited constitutional rule. Lastly, in the form of popular sovereignty, it served to justify resistance to administrative monarchies in the eighteenth century, the constitutional revolutions of the nineteenth century and the construction and operation of parliamentary democracies and constitutional republics.[137]

At the centre of this system has been the problematisation of the 'mode of subjection': the conditions of legitimate obedience and disobedience. In general, the people are understood to subject themselves to this system of action-coordination by means of laws under two conditions of legitimacy: the laws are universal or impartial (in accordance with universal or natural principles of justice), and they are based on the agreement of the people. Although the consent condition was always present in the form of the Roman legal maxim that 'what touches all must be approved by all', it is only since the late sixteenth century that it has taken the procedural form so familiar today. When the locus of sovereignty shifted from the monarch to the people and confessional pluralism was resolved by granting the right priority over the good, the test of agreement was reconceived as some form of procedure, either hypothetical or real, which the sovereign people go through themselves, individually (Locke) or collectively (Rousseau) in order

[136] I discuss the juridical or civil subject further in *Volume II*, Chapter 9.

[137] Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings, 1972–1977*, ed. Colin Gordon (Brighton, Sussex: Harvester Press, 1980), p. 103.

to reach agreement on a constitution and subject themselves to it. From the early modern 'state of nature' theories of Grotius, Hobbes, Pufendorf and Locke to the influential social contract theories of Rousseau, Paine and Kant and down to the more recent deliberative theories of popular sovereignty, such as Habermas' discourse ethics and discourse theory of law and democracy, diverse solutions have been offered to this remarkably constant problematisation of legitimacy and obedience.

This can just as well be seen as a problem of 'sovereignty', as Foucault often describes it, for the central concern is that the people are, like the monarch before them, sovereign – free of power – in the procedures that give rise to and legitimate the juridical system and are protected in their individual or collective sovereignty by the rights (of the ancients and moderns) they acquire by subjection.[138] As he famously wrote in 1975, 'what we need … is a political philosophy that isn't erected around the problem of sovereignty, nor therefore around the problems of law and prohibition. We need to cut off the King's head: in political theory this still has to be done.'[139]

Several philosophers have cut off the king's head. Charles Taylor has shown that the juridical tradition hides its own prior good from itself (autonomy) and so is really one 'ethical' orientation among others, not a 'morality' categorically separate from and more universal than ethical systems.[140] Rawls has made a similar point with respect to Habermas, arguing that any procedural account of justice will contain substantive elements.[141] In a historical and analytical manner, Quentin Skinner, Richard Tuck and John Pocock have shown how juridical thought and practice developed in competition with civic humanism, reason of state, utilitarianism and so on, how the juridical subject gained a certain prominence in Protestant countries in the early modern period and again after the Second World War, but the multiplicity of forms of legal, political and moral subjects remains. In showing that the decentred world-view is (one interpretation of) one singular and historically contingent form of the subject among many and reconstructing the historical struggles around its recent rise to relative prominence, these genealogies loosen its hold on our moral and political self-consciousness and enable us to think and act differently. Here Foucault joins hands with Skinner, Pocock and Taylor.[142] Foucault's contribution to the quiet subversion of the universal pretensions of the juridical is distinct in the following respects.

[138] *Ibid.*, p. 105. [139] *Ibid.*, p. 121. [140] Taylor, *Sources of the Self.*
[141] Rawls, 'Political Liberalism: Reply to Habermas', p. 170.
[142] Skinner, 'Language and Social Change'; Burchell, 'Peculiar Interests'.

Foucault's central argument is that the juridical, by focusing our attention on the problem of the mode of subjection and the elaboration of a universal code, causes us, as both theorists and participants in juridical games, to overlook processes of subjectivisation in politics and, in an analogous fashion, practices of ethical self-formation in morality, precisely what a 'critical' philosophy should concentrate on. It is not too much to say that his elaborate approach to processes of subjectivisation is designed to bring us around to see our politics and ethics from non-juridical points of view.

The first example is *Discipline and Punish*. Foucault argues that juridical practices and the juridical representations of coordinated forms of human interaction have, *inter alia*, served historically, and continue to serve, to hide and legitimate a specific process of subjectivisation called 'discipline'. 'Discipline' is a form of knowledge organised around a statistical norm of individual and collective behaviour (the objectifying disciplines of the social sciences) and a form of power relations (disciplining techniques of developing capacities to think and behave in accord with a statistical norm immanent in any activity and of continuously monitoring and reforming such processes of normalisation). Here communicatively mediated interaction is coordinated by means of norms of behavioural regularity that, as he explains in the central passages of *Discipline and Punish*, are 'completely heterogeneous' in relation to the universal norms of juridification. That is, we will misunderstand these practical systems, their specific rationality and what subjects are struggling for in contesting them in the present, if we approach them through a deontological framework or through the ready-made categories of cognitive-instrumental, moral-practical, aesthetic-ethical, pragmatic and strategic. We need rather to reconstruct 'what they do and the way they do it'.

Following Marx, Weber and Oestreich, Foucault shows that since the Dutch army reforms of the sixteenth century, normalising processes of subjectivisation have spread throughout the communicative practices of European societies and, in particular, within juridical practices. The abilities to think and behave in the ways presupposed by complex procedures of reflection (such as Habermas' forms of argumentation) and to exercise the rights and duties of juridical subjects are acquired and mastered through processes of discipline at school, work, prison, court, legislature and so forth:

> the theory of sovereignty, and the organisation of a legal code centered upon it, have allowed a system of right to be superimposed upon the mechanisms of

discipline in such a way as to conceal its actual procedures, the element of domination in its techniques, and to guarantee to everyone … the exercise of his proper sovereign rights. The juridical systems and this applies to both their codification and to their theorisation have enabled sovereignty to be democratised through the constitution of a public right articulated upon collective sovereignty, while at the same time this democratisation of sovereignty was fundamentally determined by and grounded in mechanisms of disciplinary coercion.[143]

In the *History of Sexuality*, Foucault wrote a genealogy of a second process of subjectivisation misrepresented by juridical theorists. Here the subjectifying social sciences, such as psychiatry, interpretation, counselling and the caring professions, treat us as subjects with an inner meaning or truth that can be revealed through practices of confession, dialogue and consciousness raising (such as Habermas' practice of reaching mutual understanding). These 'confessing' practices of knowledge and power are also dispersed throughout modern European societies and juridical institutions:

> Confession plays a part in justice, medicine, education, family relations, and love relations, in the most ordinary affairs of everyday life, and in the most solemn of rites one confesses one's crimes, one's sins, one's thoughts, and one's desires, one's illnesses and troubles; one goes about telling, with the greatest precision, whatever is most difficult to tell.[144]

In the later volumes, he expanded these studies by showing the astonishing variety of techniques of ethical self-fashioning by which we impose on ourselves objectifying and subjectifying practices of discipline, confession and so forth.

Once Foucault had freed himself from the juridical form of reflection with these first two studies, he went on to write various genealogies of forms of the subject, especially those organised around problems of the reproduction of 'life' (biopower) rather than 'right', which he came to see as far more important, in which we are constituted and led to recognise ourselves as both individuals and as members of communities, nations and populations. As he puts it in 'What is Enlightenment?', these enquiries 'may be multiplied and specified as much as we like' but they will all address the three axes of knowledge, power and ethics and the relations among them that this form of reflection brings to light.[145]

The reason why these genealogies are effective according to Foucault is not only that they show the wide variety of specific forms of subjectivity we bear at the level of a history of ideas but, more critically, because they

[143] Foucault, *Power/Knowledge*, p. 105. [144] Foucault, *The History of Sexuality*, Vol. I, p. 59.
[145] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 49.

describe the actual processes of subjectivisation through which we acquire and exercise the capacities to communicate, act and contest the norms in each. They analyse the training through which we become masters of the techniques definitive of games of subjectivity. Juridically derived forms of reflection, by focusing on the mode of subjection and questions of legitimation, disregard or downplay these practical systems. For example, while juridical theories focus on the justification and universalisation of rights, they fail to describe the systems of knowledge, power and ethics through which we acquire, exercise and contest the validity of rights through strategies of freedom.[146] In the cryptic 'stakes' argument in 'What is Enlightenment?', he presents this as the central justification for the Enlightenment attitude in contrast to the Kantian tradition in which Habermas writes.

During the Enlightenment, or at least on one interpretation of it, Foucault writes, the 'great hope' lay 'in the simultaneous and proportional growth of individuals with respect to one another'. That is, the historical development of human capabilities to communicate, coordinate activities, control things and to reflect on them was hoped to coincide with the growth of autonomy and freedom. However, the relationship between the mastery of techniques and autonomy has not been 'as simple as the eighteenth century might have believed'. If we examine the historical development of capacities (here he refers to his historical studies of the development of capacities through processes of subjectivisation), we see not the parallel growth of freedom and autonomy but, rather, a 'paradox of the relations of capacity and power'. The paradox is that the growth of capabilities has led to the 'intensification of power relations'. As a result, the question for the Enlightenment attitude today has to be quite different from that of the eighteenth century: how can the growth of capabilities be disconnected from the intensification of power relations?[147]

One could imagine Habermas replying that it is his question as well. But Foucault's point is that Habermas' approach fails to address this question. It continues the tradition of Enlightenment philosophy that studies capacities and autonomy in abstraction from underlying and concurrent processes of subjectivisation and the resulting intensification of power relations. As we have seen in objections one and two, it predisposes the theorist to look beneath these practical systems and the way subjects act in them for underlying validity claims and idealised forms of argumentation that are free of power, or to characterise them in abstract

[146] Foucault, *The Final Foucault*, pp. 19–20.
[147] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, pp. 47–8.

terms. This is why Foucault refers to his own work on processes of subjectivisation in the centre of the argument – only it has been able to bring the relations between the actual development of capabilities and power relations into critical view. If we continue to work within Habermas' approach, therefore, we will continue to be determined by the intensification of power relations behind our critical gaze. Alternatively, if we pursue Foucault's approach, we will be able to analyse the power relations and processes of subjectivisation connected to the growth of capabilities in any form of the subject, experiment with disconnecting them, and so answer the question our present asks of us. Consequently, the stakes are extremely high, and anyone with a general interest in freedom and autonomy will choose Foucault's approach over that of Habermas.

There is no doubt that Foucault meant the 'stakes' paragraph to be read in this way, as advancing a principal justification for his approach relative to Habermas'. The preceding paragraphs elucidate the two approaches and state that we should pursue his, but no reason is given. The stakes between them are then laid out. The paragraph that follows the 'stakes' argument begins with the connecting phrase, 'This [referring back to the question that ends the previous paragraph] *leads to* the study of … [my italics]' and goes on to lay out his entire approach in three parts with emphasis on the analysis of relations between capacities and powers (as in section 2 above). The clear implication is: if one wishes to address the new Enlightenment question of the present, one should choose his approach.

8 OBJECTION FOUR: UTOPIA VERSUS COMMUNICATION–POWER–FREEDOM

The final objection is that Habermas' approach is utopian whereas Foucault's is not. This critical contrast explains the rather enigmatic references to freedom and autonomy in the 'stakes' argument and so the normative dimension of his work. My discussion of this contrast is indebted to and builds on the fine analysis by Hindess in *Discourses of Power*.[148]

In an interview conducted shortly after he wrote 'What is Enlightenment?', Foucault commented:

> I am interested in what Habermas is doing. I know that he does not agree with what I say I am a little more in agreement with him but there is always something which causes me a problem. It is when he assigns a very important place to relations of communication and also a function that I would call 'utopian'. The thought that

[148] Barry Hindess, *Discourses on Power: From Hobbes to Foucault* (Oxford: Blackwell, 1996), pp. 30–40.

there could be a state of communication which would be such that the games of truth could circulate freely, without obstacles, without constraint and without coercive effects, seems to me to be Utopia. It is being blind to the fact that relations of power are not something bad in themselves, from which one must free oneself. I don't believe there can be a society without relations of power, if you understand them as means by which individuals try to conduct, to determine the behaviour of others.[149]

Foucault is wrong to imply that Habermas believes in a society without relations of power. Practices of communicative action coordinated by discourses of communicative rationality are rooted in and surrounded by strategic struggles around the prevailing form of recognition of the subjects involved. As he puts it in a passage that could have been written by Foucault and illustrates just how much agreement there is between them on this point:

> Practical discourses cannot be relieved of the burden of social conflicts to the degree that theoretical and explicative discourses can. They are less free of the burden of action because contested norms tend to upset the balance of relations of intersub jective recognition. Even if it is conducted with discursive means, a dispute about norms is still rooted in the struggle for recognition.[150]

However, instead of developing a form of analysis that can explicate the practical system in which the struggle takes place (the processes by which the actors recognise themselves under the contested form of the subject) and the strategies of freedom to think and act differently available to them, Habermas takes a 'utopian' turn. Even though practical discourses are rooted in strategic relations, they can nevertheless be thought of as separable from them, like islands in a sea: 'practical discourses resemble islands threatened with inundation in a sea of practice where the pattern of consensual conflict resolution is by no means the dominant one. The means of reaching agreement are repeatedly thrust aside by the instruments of force.'[151] From this distinction he goes on to conceptualise the practices of coordinating communicative action by processes of argumentation as games in which claims to truth and rightness 'circulate freely, without obstacles, without constraint and without coercive effects'.

Habermas' defence would surely be that it is not utopian but a strongly idealised regulative idea against which actual games inundated by relations of power can be evaluated in the name of freedom. The lesson Foucault drew from his genealogies was that this regulative idea is yet another

[149] Foucault, *The Final Foucault*, p. 18.
[150] Habermas, *Moral Consciousness and Communicative Action*, p. 106. [151] *Ibid*.

instance of the juridical presupposition that there is some place or procedure in which subjects are 'sovereign': free of power and autonomous, and in which they agree on the conditions of their subjection. It is 'utopian', according to Foucault, firstly in the strict sense that there is 'no place' where humans communicate and dispute norms without putting into play relations of power. His genealogies provide example after example. Even islands, one might note, are shaped and formed by the surrounding sea. Secondly, it is 'utopian' in the sense of the first objection above, the abstract and ineffective objection. To approach communicative games in accord with such a utopian regulative idea is to abstract oneself from what is really going on and the possibilities of concrete freedom *within them*, the only kind of freedom available to humans. In contrast, Foucault claims that his approach does the opposite:

> The problem is not of trying to dissolve them [relations of power] in the utopia of a perfectly transparent communication, but to give oneself the rules of law, the techniques of management, and also the ethics, the *ethos*, the practice of the self, which would allow these games of power to be played with a minimum of domination.[152]

Foucault conjectures that what drives Habermas to build his theory on such a utopian foundation is the assumption that power is bad in itself and one must free oneself from it. This is a fair conjecture. It is difficult to imagine a more widely held assumption of contemporary moral and political thought than that freedom consists in either the freedom from power or the freedom to act in accord with power exercised through norms validated in conditions free from power (the two conceptions of freedom in Habermas' theory). Of all the criticisms Foucault's work has incited, the first and foremost is that he challenged this orthodoxy and turned it around, claiming scandalously that we could be free and rational within the relations of power that constitute us. He says that we can make sense of this radically different way of thinking about knowledge, communication and freedom always in the context of relations of power, if we understand relations of power as the 'means by which individuals try to conduct, to determine the behaviour of others'. And he adds by way of illustration an example of the acquisition and transmission of communicative competencies: 'I don't see where evil is in the practice of someone who, in a given game of truth, knowing more than another, tells him what he must do, teaches him, transmits knowledge to him, communicates skills to him.' Power 'cannot

[152] Foucault, *The Final Foucault*, p. 18.

not play' a role here and 'it is not evil in itself'. The problem is not to free oneself from the pedagogical relation of power, as the orthodox conception of autonomy would demand, but only to discover what is 'arbitrary' and 'useless' in it.[153]

Foucault is certainly correct to say that the plausibility of his argument turns on this understanding of power. When he discovered that the forms of knowledge he was studying were always related in some way or another to relations of power in the mid-1970s, he had difficulty developing a satisfactory language of description. He realised that the forms of power were not juridical (derived from a sovereign, exercised through the law, prohibitive in effect and based on consent) since they were dispersed throughout social relations, exercised apart from the law or used law as a means, productive and constitutive in effect, and distantly related to consent. His first hypothesis was that forms of knowledge were internalised and relations of power operated directly on the body without the mediation of the subject. The subject was seen primarily as passive, almost as a *tabula rasa*, and power was barely distinguishable from violence and force in what he called the 'war' or strategic model in *The History of Sexuality*. This formulation disposed him to conceive of practical systems as overall strategies without a strategist that determined subjects behind their backs.

However, this description made no sense of the other side of what he was studying; the ability of subjects to resist forms of knowledge and relations of power and to think and act differently. Critics such as Habermas pointed out the irresolvable difficulties, and Foucault criticised his own work for taking the perspective of power almost to the exclusion of the side of strategies of resistance. He reformulated his approach and earlier works in response (see introductory section and section 2). He began to see that he could make sense of both power and resistance only if human subjects were active. The acquisition and acceptance of a form of knowledge under which we are recognised as subjects presupposes subjects who 'think': that is, as we have seen, who play an active and reflective role in learning and questioning. The exercise of power in turn presupposes active subjects who act in accord with or go against any relation of power, even in the most tightly regulated practical systems such as military training.

This entailed shifting the characterisation of what he was studying (practical systems) from the background to the foreground, 'not the conditions that determine them without their knowledge, but rather what they do and the way they do it'. The relations of knowledge and power in which

[153] *Ibid*.

subjects are engaged are understood in the terms in which they themselves 'problematise' their experience. The consequent hermeneutic 'risk of letting ourselves be determined by more general structures of which we may well not be conscious, and over which we may have no control', which his Marxist and structuralist critics immediately pointed out, is accepted without regret.[154] The focus of analysis consequently shifted from the background 'strategy without a strategist' to the foreground of those who exercise power and those over whom power is exercised.

Foucault quietly announced this profound shift in 1980 in 'The Subject and Power': 'let us not deceive ourselves; if we speak of the structures or mechanisms of power, it is only in so far as we suppose that certain persons exercise power over others'.[155] The problem was to introduce these aspects of agency without introducing a subject that transcends constitutive relations of power: that is, without undermining his central insight that subjects always act in relations of power just as they think in relations of knowledge.[156] His solution is a revolutionary conception of power in relation to freedom.

Power, he explains, is not juridical in nature. It is not 'a renunciation of freedom, a transference of rights, the power of each and all delegated to a few'. Power is not 'a function of consent' or 'the manifestation of a consensus'.[157] This is not new. However, he immediately goes on to reject his earlier hypothesis of power as a strategic 'relationship of violence' that directly 'acts on a body or upon things'. The 'relationship proper to power would not be sought on the side of violence or struggle'. It is 'neither warlike nor juridical'. The bringing into play of power relations often involves the use of violence and the obtaining of consent, but violence and consent are the 'instruments and results' of power, 'they do not constitute the principle or basic nature of power'.[158]

Rather, the exercise of power is 'a mode of action upon the actions of others', the 'way in which certain actions modify others'.[159] Unlike violence, two features of agency must be present. The '"other" (the one over whom power is exercised) must be thoroughly recognised and maintained to the very end as a person who acts; and that, faced with a relationship of power, a whole field of responses, reactions, results, and possible inventions may open up'.[160] The exercise of power, then, 'consists in guiding the possibility

[154] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 47.
[155] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 217.
[156] Paul Patton, 'Foucault's Subject of Power', *Political Theory Newsletter* 6(1), 1994: 60–71.
[157] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 220.
[158] *Ibid.*, pp. 220–1. [159] *Ibid.*, pp. 219–21. [160] *Ibid.*, p. 220.

of conduct' of others by various means, which can be strict or relaxed, imposed by others or exercised on ourselves by ourselves, in order to constitute relatively regular and predictable forms of 'conduct' (forms of the subject).

As we might well expect, Foucault presents a genealogy of this concept of power. A relation of power is best understood in terms of the early modern concept of 'government' developed by humanists such as Guillaume de la Perrier in France and Thomas Elliott in England.[161] 'Government' did not refer only to the ways in which the conduct of subjects is governed in political relationships ('government' in the narrow sense) but in any relationship among partners. It 'designated the way in which the conduct of individuals or groups might be directed: the government of children, of souls, of communities, of families, of the sick', in all 'modes of action, more or less considered and calculated, which were destined to act upon the possibilities of action of other people'.[162] As he explains in 'Governmentality', these practical systems of government have continued to develop and spread throughout European societies up to the present (as his genealogies show), but the concept of government has come to be applied almost exclusively to 'government' in the modern, narrow sense of the juridical institutions of the state. Thus, in construing relations of power in the broad terms of governmentality and seeing these as 'co-extensive with every social relationship' that involves 'the possibility of action upon the action of others',[163] he not only transgresses contemporary assumptions about power and freedom and distinctions between public and private so he can study a broad range of contemporary struggles.[164] He also revives and adapts the specific language that has been used historically to describe and problematise these processes of subjectivisation. He underscores this genealogical point in 'What is Critique?' by locating one origin of his critique in early modern practices of governmentality and the forms of critique that developed in contestation of them. He then redescribes his study of discipline, pastoral power, biopower and so forth in the language of 'forms of government'.[165]

Turning now to the two features of agency in any relation of power, freedom is defined in relation to power as the range of possible actions available to those over whom power is exercised: 'Power is exercised only over free subjects, and only in so far as they are free. By this we mean

[161] Foucault, 'Governmentality', in *The Foucault Effect*, p. 91.
[162] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 221.
[163] *Ibid*., p. 224. [164] *Ibid*., pp. 211–12.
[165] Foucault, 'Preface to the History of Sexuality Volume II', p. 338.

individual or collective subjects who are faced with a field of possibilities in which several ways of behaving, several reactions and diverse comportments may be realized.'[166] Just as in any game of truth there is always the possibility of raising a question and thinking differently to some extent, so too in games of power there is always the possibility of contesting a rule and acting differently. If there is no possibility of action, as when a person is in chains, then there is no freedom and also no power. It is a physical relationship of constraint. Power and freedom, then, are correlative on this modified Nietzschean account. Freedom is the precondition of power, 'since freedom must exist for power to be exerted, and also its permanent support, since without the possibility of recalcitrance, power would be equivalent to a physical determination'. He characterises the relationship between power and freedom as 'agonistic':

> At the very heart of the power relationship, and constantly provoking it, are the recalcitrance of the will and the intransigence of freedom … an 'agonism' … a relationship which is at the same time reciprocal incitation and struggle; less a face to face confrontation which paralyzes both sides than a permanent provocation.[167]

What he means is that in any relationship of power one is able through various mechanisms to guide the conduct of others or to guide others to conduct themselves in a fairly constant manner and with reasonable predictability. There is a range of possible ways in which the subjects can act yet still be governed. For instance, in educational institutions students and teachers can learn, study, attend classes, raise questions, seek the truth, modify the curriculum or strike in a wide variety of ways and still 'conduct' themselves as this form of the subject, as 'students' and 'teachers'. Given that power acts on the mental and physical 'actions' of agents, there will always be some range of free play even in the most tightly regulated regimen. Accompanying the agonistic free play in any game of power, by which the rules of the game are continuously modified, is always the possibility of insubordination, of challenging the relation of power itself by escape or confrontation. This more radical possibility is the condition of 'permanent provocation'.

When a direct confrontation does occur, as in a revolt, one side is unable to guide the conduct of others, and the relation of power and freedom between governors and governed is transformed into a face-to-face 'relation of confrontation' between 'adversaries'.[168] A relation of confrontation continues

[166] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 221.
[167] *Ibid*., pp. 221–2. [168] *Ibid*., pp. 223–5.

until a new or restored relation of power is established. Accordingly, the 'intensification of power relations to make the insubordinate submit can only result in the limits of power'. Either the intensification is successful and the insubordinate is reduced to inaction (then 'victory over the adversary replaces the exercise of power'), or the intensification causes a 'confrontation with those whom one governs and their transformation into adversaries'. The more free play is restricted and the more the radical possibility of insubordination is a distant one, the more the relation of power and its means of support approximate a 'structure of domination'.[169] The agonistic interplay between power and strategies of freedom exists, therefore, in the range of possible thought and action between these two extremes of 'domination' and adversarial confrontation.[170]

With this understanding of power and freedom, Foucault returned to Habermas' concentration on relations of communication. Although communicating is 'always a certain way of acting upon another person or persons', this is not what he means when he claims that Habermas is wrong in holding that games of truth could circulate free of power. Relations of communication, which 'transmit information by means of a language, a system of signs, or any other symbolic medium', are distinguishable from relations of power that guide the conduct of others. Nevertheless, relations of communication always overlap in complex ways with relations of power and with the acquisition and exercise of human capacities or techniques in any practical system. The application, for example, of technical capacities in work implies both relations of communication and of governance among the workers, managers, owners and so forth. Relations of communications in turn imply the exercise of capacities (at least the linguistic competencies to use signs) and, 'by modifying the field of information between partners', to 'produce effects of power'. They 'can scarcely be dissociated' from training techniques, processes of domination or the means by which obedience is obtained. To illustrate the relations between communication, power and capacities, Foucault presents a remarkable sketch of an educational institution that we can use as an exemplar of a genealogy of the relations among communication, power and abilities in a practical system:

there are also 'blocks' in which the adjustment of abilities, the resources of communication, and power relations constitute regulated and concerted systems.

[169] *Ibid*., p. 226; Foucault, *The Final Foucault*, p. 12.
[170] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 225; Foucault, *The Final Foucault*, p. 12.

> Take, for example, an education institution: the disposal of its space, the meticulous regulations which govern its internal life, the different activities which are organised there, the diverse persons who live there or meet one another, each with his own function, his well defined character — all these constitute a block of capacity–communication–power. The activity which ensures apprenticeship and the acquisition of aptitudes or types of behavior is developed there by means of a whole ensemble of regulated communication (lessons, questions and answers, orders, exhortations, coded signs of obedience, differentiation marks of the value of each person and of the levels of knowledge) and by the means of a whole series of power processes (enclosure, surveillance, reward and punishment, the pyramidal hierarchy).[171]

Any real or imaginable island of communication and dispute resolution will involve a sea of relations of these and similar kinds. To acknowledge, analyse and call into question these sorts of relations among knowledge, communication and power is not to conflate them or to invalidate the knowledge acquired and tested in the practical system:

> We can show, for example, that the medicalisation of madness, i.e. the organisation of medical knowledge around individuals labeled as 'mad' has been linked, at some time or another … to institutions and practices of power. This fact in no way impairs the scientific validity or the therapeutic efficacy of psychiatry. It does not guarantee it but it does not cancel it out either.[172]

'The Subject and Power' and its elaboration in later writings constitutes an adequate and effective account of freedom in relation to power without positing a utopian position, procedure or subject free of power. It is the normative dimension of Foucault's approach. To illustrate, let us imagine and analyse from Foucault's agonistic perspective specific subjects who contest a rule by which their conduct is governed and enter into negotiations over its validity. Let us further imagine that you and I are members of the plural 'we' who have constituted themselves as a community of discussion and action in the course of the contestation, as Foucault describes democratic will-formation.[173] First, as Foucault puts it and as David Owen has gone on to explore in great depth, calling the rule into question in dialogue and contesting it in practice will not be the prolegomenon to freedom but the practice of freedom, the Enlightenment *ethos*, itself: 'the analysis, elaboration, and bringing into question of power relations and the

[171] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, pp. 218–19.
[172] Foucault, *The Final Foucault*, p. 16.
[173] Foucault, 'Polemic, Politics, and Problematizations', p. 385.

"agonism" between power relations and the intransitivity of freedom is a permanent political task inherent in all social existence'.[174]

We will not look immediately for an underlying deontological norm of expectation that has been violated but always for the way we subjects problematise the rule, for this will be the language in which we are led to recognise and conduct ourselves as this specific form of subject, the form of recognition and subjectivity that we are in fact contesting. We will be aware that a great deal of alteration in our thought takes place in virtue of the modification of the rules within a specific language of the subject rather than by translating it into one of the three decentred forms. For example, the great changes brought about by the ecology movement have been brought about by challenges within dominant scientific language 'concerning nature, the equilibrium of processes of living things, and so forth'. It was 'not by playing a game that was a complete stranger to the game of truth [in the natural sciences today] but in playing it otherwise'.[175]

We will take the same attitude when examining the forms of argumentation used to resolve the dispute. We will not evaluate them relative to the peremptory definition of the conventional and post-conventional rules and principles D and U in order to find the truth. The processes of argumentation we use and the questions we raise both within them and about the processes themselves will be our focus, recognising again that there is always a possibility in any game of negotiation to alter the rules of the game. Moreover, we will compare these forms of argumentation with others, as Foucault and Toulmin have done, to free ourselves from their seeming unavoidability and irreplaceability. That is, we will analyse them just as in this chapter we have analysed the ways Owen, Taylor, Rawls, Gilligan and others have questioned Habermas' decentred understanding of the world as the meta-norm with which we ought to govern our conduct: by questioning rules and principles and the arguments employed to legitimate them. We will take this as a reasonable procedure.

If the disputed rule is claimed by one of us to be a norm of the kind stipulated by discourse ethics, we will treat this form of argumentation as any other, looking for the possibility of questioning some or all of the procedures, as we have done in the previous sections. Fashioning ourselves into subjects capable of testing and acting in accord with universal laws will of course be one recommendation, and we will treat this interlocutor with

[174] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 223; David Owen, *Nietzsche, Politics and Modernity: A Critique of Liberal Reason* (London: Sage, 1995).
[175] Foucault, *The Final Foucault*, p. 15.

equality and reciprocity in our obligation to the truth. The questioning this proposal receives will be a good critical test of its claim to be universal. We will also listen to and learn from the reasons of those who wish to submit to a spiritual tradition, have cultural or gender differences recognised, or speak from other modes of subjection, ethical orientations and comprehensive doctrines. We will not seek consensus at this abstract level of what Foucault and Rawls call a comprehensive 'vision of the world'. We will look on such an idea as unreasonable and 'dangerous'.[176] In so doing we accept the post-modern burdens of judgment.[177]

Reaching an overlapping consensus in light of our background differences will be an important consideration but, as Foucault explained to Taylor in a discussion of Habermas, even this kind of agreement cannot function as a regulative idea or 'regulatory principle': that is, the unquestioned form of reflection on processes of argumentation and coordination of communicative action.[178] Consensus can function only as a 'critical idea', as one heuristic form of reflection among others whose limitations must always be open to question. Consensus is 'a critical idea to maintain at all times: to ask oneself what portion of non-consensuality is implied in such a power relation, and whether that degree of non-consensuality is necessary or not, and then one may question every power relation to that extent'.[179]

There are, as we have seen, two reasons for this critical stance to consensus-centred analyses of politics. Firstly, there is the possibility in any game of truth to challenge the consensus and think differently, so there is always the possibility of reasonable disagreement. Any consensus will be a negotiated or agonistic consensus all the way down, recognising and accommodating reasonable disagreement or failing to do so. Secondly, consensus is not the basis of a power relation, but, at best, its instrument or result, so it cannot itself guarantee our freedom from arbitrary power. The only 'guarantee of freedom is freedom itself'.[180] Foucault means that there will be a tenuous connection between any agreement and its application in practice. Hence, we must be just as concerned with the second half of his *ethos*; to tie the negotiated agreement as tightly as possible 'to the test of concrete practices', to the practice of freedom.[181] Implementation, then, will not be seen as a separate and secondary category but part and parcel of the permanent critique.

[176] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 46.
[177] See William E. Connolly, *Why I am not a Secularist* (Minneapolis: University of Minnesota Press, 1999).
[178] Foucault, 'Politics and Ethics', p. 379. [179] *Ibid.*, p. 379. [180] *Ibid.*, p. 245.
[181] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 50.

Most importantly, we will analyse historically the relations between the contested rule, the forms of negotiation and relations of power. Genealogies of the processes of subjectivisation under the contested description of the subject and of historical strategies of freedom in relation to it will be written and circulated in the discussions, as Foucault did in relation to struggles around the rules of psychiatry, prisons, medicine and sexuality. The same will be done for the relations of power involved in the games of negotiation and implementation, exposing the obstacles, arbitrary constraints and unnecessary coercive effects, and designing mechanisms to modify or compensate for them. We might, to take one among many examples, explore the extent to which the procedures of yes/no positions, reversibility and universalisation in Habermas' forms of negotiation are related to male power and elite forms of argument that silence and intimidate culturally and class-different others, aim at victory over the adversary rather than mutual understanding and exclude more conciliatory genres of reaching understanding and agreement. These sorts of connections to relations of power in Habermas' model are suggested by Iris Marion Young in her sketch of a genealogy:

> The deliberative model of communication derives from specific institutional con texts of the modern West scientific debate, modern parliaments, and courts (each with progenitors in ancient Greek and Roman philosophy and politics, and in the medieval academy). These were some of the aspiring institutions of the bourgeois revolution that succeeded in becoming ruling institutions. Their institutional forms, rules, and rhetorical and cultural styles have defined the meaning of reason itself in the modern world. As ruling institutions, however, they have been elitist and exclusive, and these exclusions mark their very conceptions of reason and deliberation, both in the institutions and in the rhetorical styles they represent. Since their Enlightenment beginnings, they have been male dominated institu tions, and in class and race differentiated societies they have been white and upper class dominated. Despite the claim of deliberative forms of orderly meetings to express pure universal reason, the norms of deliberation are culturally specific and often operate as forms of power that silence or devalue the speech of some people.[182]

These studies will enable us to see our island of disputation and negotiation as it is, in the rough and agonistic sea of relations of power, rather than from the point of view of a utopia free of power. With this toolkit in hand we will be in a position not only to think differently but to begin the

[182] Iris Marion Young, 'Communication and the Other: Beyond Deliberative Democracy', in *Democracy and Difference: Contesting the Boundaries of the Political*, ed. Seyla Benhabib (Princeton: Princeton University Press, 1996), p. 123.

cautious experiments in acting differently, in modifying our rules of interaction and practices of self-formation in such a way that the specific game in question can now be played with 'a minimum of domination'. In so doing we may overlook something universal beneath what we are thinking and doing, and we will always find that we have to begin again. This is a risk Foucault recommends we take in exchange for this 'patient labor' on actual existing limits in the present by means of an approach that gives 'form to our impatience for liberty'.[183]

[183] Foucault, 'What is Enlightenment?', in *The Foucault Reader*, p. 50.

PART 2

Democracy and recognition

CHAPTER 4

The agonistic freedom of citizens

There is something happening here. What it is ain't exactly clear.
It might feel good, it might sound a little sumpun', but damn the game if it don't mean nothin'.
What is game? Who got game? Where's the game in life behind the game behind the game? I got game.
She's got game. We got game. They got game. He got game.
It might feel good, Or sound a little sumpun', But f the game if it ain't saying nothin'. Public Enemy and Stephen Stills, *He Got Game*

1 'WHAT IS GAME? WHO GOT GAME?'

In the 1950s Hannah Arendt began to focus on a specific aspect of politics. Instead of looking at the institutions, routines and policies of governance on the one hand, or on the great political theories on the other, she aimed to concentrate on or 'confront' the activity of politics itself. In doing this, she drew attention to a specific kind of game-like activity that occasionally emerges in the broader field of politics and government. She associated it with the Greeks and certain moments in the history of Western politics, especially but not exclusively revolutionary times, and claimed that it is the very '*raison d'être* of politics'.[1]

This is a revised version of the Hannah Arendt Memorial Lecture presented at the University of Southampton, 9 June 1998. I would like to thank the members and students of the Department of Politics and especially Dr David Owen for inviting me to give this distinguished lecture and for their hospitality during my stay. I also wish to express my debt to the outstanding scholarship of Dr David Owen. See David Owen, *Maturity and Modernity: Nietzsche, Weber, Foucault and the Ambivalence of Reason* (London: Routledge, 1994); Owen, *Nietzsche, Politics and Modernity*; Owen, 'Orientation and Enlightenment'.

[1] Hannah Arendt, 'What is Freedom?', in *Between Past and Future: Eight Exercises in Political Thought* (Harmondsworth: Penguin, 1977), p. 146. Also see Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958) and Arendt, *On Revolution* (New York: Viking, 1963).

For Arendt, four characteristics of this unique political game are of paramount importance. Firstly, the activity consists in interaction among equal citizens with different viewpoints on their common world and who engage in agonistic activities for recognition and rule in public space. Secondly, like players in most games, humans take on their identities *as* citizens and peoples due to participation in this intersubjective activity and, *eo ipso*, bring into being and sustain the 'field of action' of the game, the 'public realm' in which they interact.[2] Thirdly, this activity is political freedom. Political freedom is not a matter of the will or the intellect, nor of background constitutions, laws and rights, but a form of activity with others in public that is liberated from the 'automatic processes' to which humans are subject and 'within and against which' free citizens 'assert' themselves. Freedom is the practice of freedom. It is neither the motive nor the goal of this kind of activity that renders it free but its spirit or character: the 'principles', 'virtuosity' or *ethos* (such as love of equality) the action manifests.[3] Fourthly, this unique form of speaking and acting together is free because it embodies two aspects of 'action': '*agere*', to begin, lead and rule, and '*gerere*', to carry something through together, a *task*. It is 'a beginning' because the participants always bring something 'miraculous' – new, contingent, singular and unpredictable – into the world, breaking with routine and changing the game to some extent, and they seek to carry it through, to sustain the practice over time. In virtue of the miraculous appearance of practices of freedom, the time of humans is not completely in the realm of necessity or universality but partakes of the unpredictable 'deeds and events we call historical'.[4]

Modern political theorists tend to overlook this realm of free action, according to Arendt, because they associate freedom with sovereignty: either the sovereign individual will in the Kantian tradition or the sovereign general will of a group in the Rousseauian tradition. 'If men wish to be free', she famously concluded two decades before Michel Foucault came to a similar conclusion, 'it is precisely sovereignty they must renounce'.[5]

Arendt's turn away from the routines, institutions, conditions, explanations and theories of politics to the activity or game of politics itself – what citizens do and the way they do it – seems to me to be part of a general reorientation in Western thinking in the twentieth century. It might be described as a move away from the search for an essence hidden behind

[2] Arendt, 'What is Freedom?', pp. 145, 148–9. [3] *Ibid.*, pp. 152, 163, 168. [4] *Ibid.*, pp. 165, 169.
[5] *Ibid.*, p. 165. See Foucault, *Power/Knowledge*, p. 171. He first sketched his non-sovereign account of freedom in 'The Subject and Power', in *Beyond Structuralism and Hermeneutics* (1982).

human activities to the surface aspects that give them meaning and significance. In Nietzsche's famous formulation, the more profound attitude is 'to stop courageously at the surface, the fold, the skin, to adore appearance, to believe in forms, tones and words, in the whole Olympus of appearance'.[6] Recall as well that in the 1930s Wittgenstein rejected theories and explanations of language as a formal system of representation and began to look on it as a multiplicity of activities, of 'language-games'. As he put it, 'look on the language-game as the *primary* thing'. Do not look for an 'explanation' but simply investigate how the '*language-game is played*'.[7] I think he meant by this roughly what Arendt meant: concentrate on the ways language-users use words and the activities in which the uses of words are woven.[8] What is needed is neither a theory of the game in question (which is another game with signs) nor an explanation of an underlying structure that determines the play, but a perspicuous representation of the physiognomy of the game itself: what the players do and how they do it (just as Arendt does in her characterisation of free political activity).[9] Also like Arendt, he saw this '*Weltanschauung*' as immensely important, as heralding, he occasionally hoped, a general change in Western cultural outlook.[10]

Another example of this change in perspective is the influential historical study of the play element of cultures by the great historian Johan Huizinga, *Homo Ludens* (humans the game-playing animals), published in 1938. Do not look on human activity through the lens of 'homo faber', as the Marxists do, Huizinga enjoined, nor through the lens of 'homo sapiens', as the rationalists and system-builders do, but, rather, under the aspect of game playing.[11] Like Arendt he was concerned to argue that game playing 'is free, is in fact freedom'. It is a form of human activity that liberates us from the routines of everyday life. Playing games is primordial and shared by every civilisation. It is the activity associated with and often equated with fun. Moreover, following Burkhardt and Nietzsche, game playing usually involves an 'agonal' or contestatory element.[12] Indeed, many of the themes in Arendt's work are present in Huizinga's classic study, including the general cultural pessimism they share with Wittgenstein that the play

[6] Friedrich Nietzsche, *The Gay Science: With a Prelude in Rhymes and an Appendix in Songs* (New York: Vantage Books, 1974), p. 38.

[7] Wittgenstein, *Philosophical Investigations*, §§654, 656. See Chapter 2, this volume, for a fuller discussion of Wittgenstein.

[8] *Ibid.*, §10; Wittgenstein, *On Certainty*, §204. [9] Monk, *Ludwig Wittgenstein*, pp. 302–8.

[10] Hilmy, *The Later Wittgenstein*, pp. 190–226.

[11] Johan Huizinga, *Homo Ludens: A Study of the Play Element in Culture* (Boston: Beacon Press, 1955), foreword.

[12] *Ibid.*, pp. 3, 8, 28, 71–4, 152.

element in Western culture is declining in the face of scientism, administration, routine, mass warfare and the professionalisation of sports and politics.[13]

Perhaps the writer who has done the most in the latter half of the twentieth century to disseminate and defend a broad cultural reorientation towards practice and away from theory and structure is Richard Rorty. He has encouraged us to dispense with the great metaphysical and post-metaphysical theories associated with different forms of human organisation and value spheres, as well as with post-modern critiques, and to abandon the attempts to discover large-scale underlying processes or conditions of possibility that determine our thought and action behind our backs. Look instead on forms of human organisation, from science to politics, as intersubjective activities of exchanging reasons and redescriptions among the players involved.[14] The significance of this change, he writes, is 'on a par with the shift from a Christian and Aristotelian outlook to an atheist and Galilean outlook'.[15] In short, activity is prior to theory.[16] Rorty also suggests that several others have taken this general turn to some extent: for example, Habermas' shift from 'subject-centred' reason to 'communicative' reason and Rawls' focus on the 'political not metaphysical' games of exchanging public reasons among free and equal citizens.[17]

I would like to draw distinctions within the broad picture Rorty sketches, for it is possible 'to look on the language game as the *primary* thing' in a variety of ways. One approach is to focus on the implicit or explicit rules of the game in question and develop an ideal set of rules. Habermas and other neo-Kantians exemplify this approach.[18] Another is to study the motives and goals that are said to determine the strategies of the players, as, for example, in the proliferation of game-theoretic approaches in the last thirty years. As Arendt cautioned, although these approaches start from practice, they end in theory or explanation, thereby bypassing the spatial-temporal forms of activity she and Wittgenstein sought to elucidate. One of the main reasons these approaches fail to understand the phenomena they purport to study, according to both Arendt and Wittgenstein, is that they disregard

[13] *Ibid*., pp. 195–213. [14] Rorty, *Contingency, Irony, and Solidarity*.
[15] Richard Rorty, 'The Contingency of Philosophical Problems: Michael Ayers on Locke', in *Philosophical Papers*, Vol. III, *Truth and Progress* (Cambridge: Cambridge University Press, 1998), p. 289.
[16] Richard Rorty, 'The Priority of Democracy to Philosophy', in *Philosophical Papers*, Vol. I, *Objectivity, Relativism and Truth* (Cambridge: Cambridge University Press, 1991).
[17] Rorty, *Contingency, Irony, and Solidarity*, p. 289.
[18] Habermas, *Moral Consciousness and Communicative Action*; Andrew Linklater, *The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era* (Cambridge: Polity Press, 1998).

one of its central characteristics, one which always exceeds the grasp of theory and explanation: the freedom of speaking and acting differently in the course of the game and so modifying the rules or even transforming the game itself.

For Arendt, as we have seen, this sense of freedom is associated with new players and new ways of playing coming into being, so political activity is never closed by a frontier. It is never 'rule governed' in the normative or causal sense required by theory or explanation. Indeed, if it were so rule-governed, then, by definition, it would be unfree, an 'automatic process' in the realm of labour or work, not action. Now, this is often taken as a highly idiosyncratic view, rendering her account of politics largely irrelevant to the great concerns of modern politics. But this line of criticism misses the broad significance and application of her insight. To see this, let us return to Wittgenstein for a moment.

Although Arendt and Wittgenstein share an orientation to activity, the obvious difference is that Arendt concentrated on one specific kind of game-like activity, whereas Wittgenstein stressed their multiplicity and investigated the most routine of language games, such as counting, naming and giving and taking orders, which Arendt would categorise as labour or work. Wittgenstein discovered that Arendt's 'freedom to call something into being, which did not exist before, which was not given, not even as a cognition or imagination, and which therefore, strictly speaking, could not be known'[19] can irrupt in almost any organised form of human activity, no matter how routine. The reason for this freedom of speaking and acting differently is twofold according to Wittgenstein: the games humans play with concepts are not everywhere bounded by rules, and the rules themselves are not fixed unconditionally. As a result, the condition of being 'rule-bound', the requirement for normative and predictive theory being *about* actual games over time, is constantly subverted in practice.

Wittgenstein explains these two features of language use by starting with what appears to be one of the hardest cases, the concept of number:

> I *can* give the concept 'number' rigid limits …, use the word 'number' for a rigidly limited concept, but I can also use it so that the extension of the concept is *not* closed by a frontier. And this is how we do use the word 'game'. For how is the concept of a game bounded? What still counts as a game and what no longer does? Can you give the boundary? No. You can *draw* one; for none has so far been drawn. (But that never troubled you before when you used the word 'game'.)[20]

[19] Arendt, 'What is Freedom?', p. 151. [20] Wittgenstein, *Philosophical Investigations*, §68.

His interlocutor replies in the same section, 'then the use of the word is unregulated, the "game" we play with it is unregulated'. Wittgenstein responds no, not at all. 'It is not everywhere circumscribed by rules; but no more are there any rules for how high one throws the ball in tennis, or how hard; yet tennis is a game for all that and has rules too.'

We 'cannot say', Wittgenstein roundly concludes, 'that someone who is using language must be … operating a calculus according to definite rules'.[21] He then immediately criticises those philosophers who not only '*compare* the use of words with games and calculi which have fixed rules', but who also assume that 'using language *must* be playing such a game' and search for an ideal set of rules. Consequently, they 'predicate' on the game what lies in their 'method of representation' (a theoretical drawing of the rules at any given time or for a limited set of cases) and thus misrepresent the actual activity they are trying to understand, for it may always involve the extension of the rules in unpredictable ways.[22] The following dialogue summarises the difference between the two orientations to practice:

> 'But still, it isn't a game, if there is some vagueness *in the rules*' But *does* this prevent its being a game? 'Perhaps you'll call it a game, but at any rate it certainly isn't a perfect game.' This means: it has impurities, and what I am interested in at present is the pure article. But I want to say: we misunderstand the role of the ideal in our language. That is to say: we too should call it a game, only we are dazzled by the ideal and therefore fail to see the actual use of the word 'game' clearly.[23]

When one examines how a concept such as 'game' is used (or 'freedom', 'equality', etc.), it is not by applying the same rule in every case, for, although a rule can be drawn for a limited purpose, there is no unconditional rule. Rather, a concept such as 'game' is used in the present case and justified to others by pointing out its similarity or dissimilarity to other cases, 'by describing examples of various kinds of games; shewing how all sorts of other games can be constructed on the analogy of these; saying that I should scarcely include this or this among games; and so on'.[24] Through such exchanges of reasons and redescriptions pro and con from different points of view, drawing attention to different aspects of the uses in question relative to others, agreement or disagreement is negotiated on how to go on. This will often reasonably involve extending the concept in a way that modifies a rule which may well have been drawn around a limited number of cases or from a particular perspective before, and often presented as a comprehensive rule in some theory or other.[25]

[21] *Ibid.*, §81. [22] *Ibid.*, §§81, 104. [23] *Ibid.*, §100. [24] *Ibid.*, §75. [25] *Ibid.*, §§66–7, 71, 83.

Two writers who have extended this understanding of rules and of freedom in relation to them to the study of politics are Quentin Skinner and Michel Foucault. Drawing on Wittgenstein, Skinner has brought about a revolution in the history of political thought. Somewhat like traditional historians of ideologies, he is concerned to map as carefully as possible the intersubjective conventions that normally govern political thought in a particular period and in relation to a shared set of political problems in practice. However, for Skinner, this is only the stage-setting in order to go on to his primary task: to investigate how individual political theorists in the past have freed themselves from, challenged and sought to modify the reigning conventions from within, thereby changing the dominant political vocabulary. As he underscores in *Liberty Before Liberalism*, one of the primary reasons for engaging in such a historical exercise is to enable his readers to exercise the same intellectual freedom today: to free themselves from and modify the conventions governing political thought and action in the present. Furthermore, the freedom to modify the conventions of political games through the exchange of arguments and redescriptions is not a discovery of the twentieth century but a rediscovery of a major theme of classical humanism.[26]

In a complementary manner, Michel Foucault came to describe his work as studies of the multiplicity of human activities or practices – 'what they do and the way they do it' – rather than 'the conditions that determine them without their knowledge' or the 'representations [theories] that men give of themselves'.[27] He described these practices as 'games', including, like Wittgenstein, the languages and forms of action in which they are woven and, unlike Wittgenstein, including the relations of power that govern to some extent the conduct of the participants. 'I have tried to find out', he explains, 'how the human subject fits into certain games of truth, whether they were truth games that take the form of a science or refer to a scientific model, or truth games such as those one may encounter in institutions or practices of control.'[28]

Like Arendt, Wittgenstein and Skinner, he argues that the games in which moderns are participants are '*not* closed by a frontier'. Yet, the prevailing modern theories of politics (*modern* 'humanism') disregard this feature, universalise a certain state of play and so obscure rather than

[26] See Tully, ed., *Meaning and Context*; Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, pp. 15–16, 138–80; Skinner, *Liberty Before Liberalism*, pp. 101–20.

[27] Foucault, 'What is Enlightenment?', in *The Essential Works*, Vol. I, p. 317. For a fuller discussion of Foucault, see Chapter 3, this volume.

[28] Foucault, 'The Ethics of the Concern for Self', p. 281.

illuminate how we constitute and are constituted by the games or practices in which we think and act:

> Through these different practices [such as] psychological, medical, penitential, educational a certain idea or model of humanity was developed, and now this idea of man has become normative, self evident and is supposed to be universal. Humanism may not be universal but may be quite relative to a certain situation. This does not mean that we have to get rid of what we call human rights or freedom, but that we can't say that freedom or human rights have to be limited at certain frontiers … What I am afraid of about humanism is that it presents a certain form of our ethics as a universal model for any kind of freedom.[29]

Moreover, he went on to affirm the freedom to negotiate the rules of the game made possible by this understanding of limits:

> With regard to these multiple games of truth, one can see that ever since the age of the Greeks our society has been marked by the lack of a precise and imperative definition of the games of truth which are permitted to the exclusion of all others. In a given game of truth, it is always possible to discover something different and to more or less modify this or that rule, and sometimes even the game of truth.[30]

According to Foucault, the study of any game will involve the analysis of the rules in accordance with which the game is routinely played and the techniques of government or relations of power that hold them in place. Simultaneously, it will involve the 'strategies of freedom' in which some participants refuse to be governed in this way, dispute and seek to modify the rules, and thus think and act differently to some extent. 'That is', he summarises, 'the forms of rationality that organize their way of doing things … and the freedom with which they act in these practical systems [games], reacting to what others do, modifying the rules of the game, up to a certain point.'[31]

Foucault, like Arendt, calls this activity 'freedom'.[32] The difference from Arendt, and the similarity to Skinner, is that it can emerge in any form of organised human activity, even the most sedimented and rule-governed, such as a prison, mental institution, government ministry or university. It is potentially an aspect of any practice of governance. Finally, Foucault, like Nietzsche, sees this freedom of problematising the rules of any game by raising objections to them in the field of knowledge or dissenting from them

[29] Michel Foucault, 'Truth, Power, Self: An Interview with Michel Foucault', in *Technologies of the Self: A Seminar with Michel Foucault*, eds. Luther H. Martin, Huck Gutman and Patrick H. Hutton (Amherst: University of Massachusetts Press, 1988), p. 15.

[30] Foucault, 'The Ethics of the Concern for Self', p. 297.

[31] Foucault, 'What is Enlightenment?', in *The Essential Works*, Vol. I, p. 317.

[32] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*.

in the realm of conduct as an 'agonistic' game: 'Rather than speaking of an essential freedom, it would be better to speak of an "*agonism*" – of a relationship which is at the same time reciprocal incitation and struggle; less of a face-to-face confrontation which paralyzes both sides than a permanent provocation.'[33]

This agonistic dimension of games separates Foucault, Arendt, Huizinga and Wittgenstein from theorists such as Habermas who look on the games of politics under the ideal of consensus. For Arendt, Wittgenstein and Foucault, no agreement will be closed at a frontier; it will always be open to question, to an element of non-consensus, and so to reciprocal question and answer, demand and response, and negotiation. However, the way Foucault conceives the agonistic element is slightly different from Arendt and Huizinga. For Arendt and Huizinga, political activity involves contests for recognition and rule, but the agonistic element of the game has nothing to do with modifying the rules. It has to do with challenging an opponent and gaining recognition in accord with the rules. Neither Arendt nor Huizinga associates a change in the rules with agonism. Although Arendt suggests that free political action as a whole is 'against' the habitual routines of everyday life, the struggles among equals for recognition and rule, which bring something new into the world, appear to take place within the rules of this unique political game. Or, at the least, her interest appears to be the principles the interaction manifests, not whether these constitute a challenge to the prevailing rules.

Foucault's unique contribution to this reorientation in the twentieth century is to link together the following three elements: the practice of freedom, the modification of the rules governing the relationships among players in the course of a game and agonistic activity. He sees the modification of the rules of any game as itself an agonistic game of freedom: precisely the freedom of speaking and acting differently. He asks us to regard human activities as games with rules and techniques of governance to be sure, and these are often agonistic games, but also, and more importantly, to look on the ways the players modify the rules by what they say and do as they carry on, and, in so doing, modify their identities *as* players: that is, the games of freedom within and against the rules of the games of governance.[34]

Foucault brings these three elements together by broadening considerably the concept of agonism. Rather than restricting 'agonism' to formal games and face-to-face contests, he extends its application to any form of activity or language game in which the coordination of action is *potentially*

[33] *Ibid.*, pp. 222–3. [34] Foucault, 'The Ethics of the Concern for Self', pp. 291–3.

open to dispute, as a 'permanent provocation'. Within these manifold games, agonism refers to any form of reciprocal interplay or interaction that disputation takes, from sedimented games of domination where free play is reduced to a minimum at one end, through all the forms of negotiation and provisional agreements and disagreements, acting together, incitation and struggle, and up to (but not including) direct 'confrontations' that break up the game at the other end.[35]

The reason for this focus is obvious enough. If Foucault, Wittgenstein and Skinner are correct in believing that no game is completely circumscribed by rules, if it is always possible to go on differently, if a consensus on the rules has an element of 'non-consensuality', then an important aspect of concrete human freedom will be 'testing' the rules and purported meta-rules of the current game, ensuring that they are open to question and challenge with as little rigidity or domination as possible, and experimenting with their modification in practice, so humans are able to think and act differently. In an interview, Foucault explained this element of non-consensuality in apparent contrast to Arendt's conception of the consensus of citizens as presented by the interviewer (Charles Taylor), but I am not convinced that Arendt would disagree with Foucault.[36]

Let this stand as a brief and no doubt provocative account of an orientation to politics opened up by a redescription of Arendt's conception of freedom in comparison with the similar work of others. I would now like to test its usefulness by applying it to two current political games of great importance: struggles for recognition and new, dispute-specific sites of citizen activity. Rather than approaching from the side of the motives of the citizens or groups involved, the authentic or autonomous identities they aim to have recognised, the rules that should determine which demands are worthy of recognition and those that should govern new sites of 'post-Westphalian' democracy, or the changes in sovereignty that these bring about, I would like to examine the ways in which the citizens engaged in these struggles call into question and modify the rules of the game in which they are engaged, the game of citizen participation in constitutional and federal democracies.[37]

[35] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, pp. 221–2, 224–6. The literature on 'agonistic democracy' after Foucault tends to use the term in a much narrower way, referring to more or less direct struggles. I use it in this broad sense.

[36] Foucault, 'Politics and Ethics', pp. 374–8.

[37] For the alternative approaches mentioned in this paragraph see Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford:

Of course, these two forms of current politics have modified the 'rules' in the sense of the principles that ought to govern citizen participation: freedom, equality, mutual respect, due process and consent. In accepting and appealing to these principles in contests to legitimate and delegitimate demands for recognition and for new sites of democratic practice, citizens, legislators and courts have modified their use and application in unexpected ways, thereby lending credence to the orientation I have laid out above.[38]

What is less widely recognised is the way another type of rule is questioned and modified in the course of these games. This type of rule is closer to what Arendt, following Montesquieu, means by 'principles' and 'virtuosity'. These are the immanent norms that characterise the ethos of the activity or way of being citizens and peoples. This distinction between democratic, constitutional principles (the mainstay of political theory) and political ethos (modes of civic conduct) is analogous to the distinction between moral principles and ethics, or ethos.[39] By examining these two kinds of political struggle from the orientation of the free activity of citizen participation (section 2), it is possible to see what other approaches tend to notice only obliquely; that these struggles modify the ethos of citizen participation: the *form* of citizen participation (section 3) and the *practices* of governance in which participation takes place (section 4).

2 CITIZEN PARTICIPATION AS THE PRACTICE OF FREEDOM

Citizenship in a democracy consists in the participation of citizens in the ways in which their conduct is governed by the exercise of political power in any system or practice of governance. Citizens participate by 'having a say' and 'negotiating' how power is exercised and who exercises it. This kind of government is 'democratic' just because it involves a 'dialogue' between those who exercise power and those over whom it is exercised, as opposed to non-democratic forms of governance that coordinate human action without the say of those affected, 'behind their backs', as in market and bureaucratic organisations. A dialogue is any form of reciprocal to-and-fro encounter in webs of relationships with others whose perspectives,

Stanford University Press, 1995); Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: Polity Press, 1995); Seyla Benhabib, ed., *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996).

[38] Tully, *Strange Multiplicity*.

[39] Foucault, *The Use of Pleasure*, pp. 25–30; Michel Foucault, 'On the Genealogy of Ethics: An Overview of Work in Progress', in *The Essential Works*, Vol. I; William E. Connolly, *The Ethos of Pluralization* (Minneapolis: University of Minnesota Press, 1995).

from their specific positions on the issue at hand to their most general background understandings, are not completely reducible to one's own. Their opinions, judgments, reasons or understandings evince some contentious element of otherness, and so of resistance. In virtue of this feature, political dialogues are agonistic in the broad sense employed by Foucault.[40] The interplay of reasons and redescriptions in political dialogues can take any of the six basic types of reasoning together: persuasion dialogue, the inquiry, negotiation, information-seeking dialogue, deliberation and eristic dialogue.[41]

Participation in dialogues and negotiations over how and by whom power is exercised over us constitutes our identities as 'citizens' and generates bonds of solidarity and a sense of belonging to the political association (the 'people') that comes into being and is sustained by this (game-like) activity. As in games more generally, the abilities to think and act in the ways definitive of the identity or 'form of subjectivity' of a player are acquired through their exercise with others in the game itself. Citizen identity is not generated by the possession of rights and duties, or by agreement on substantive or comprehensive common goods, fundamental principles of justice, constitutional essentials, shared values, understandings or national, multicultural or cosmopolitan identities, or, finally, by consensus on a set of universal procedures of validation.

It is not that these conditions and constituents of constitutional democracy are unimportant or that they are not illuminated by the theories that reflect on them. Quite the contrary. But these rules are, as Arendt puts it, the 'elaborate framework', not the activity, of citizenship, of being a free people.[42] To concentrate on them is to mistake the stage-setting for the play. More importantly, citizens (and theorists) disagree about them. They are always open to question, disagreement, contestation, deliberation, negotiation and change over time in the course of citizen participation, from discussing a municipal by-law to revolution. Principles, rights, goods and identities are thus constituents of the 'framework' in a special sense. Politics is the type of game in which the framework – the rules of the game – can come up for deliberation and amendment in the course of the game. At any one time, some constituents are held firm and provide the ground for questioning others, but which elements constitute the shared 'background'

[40] Christopher Falzon, *Foucault and Social Dialogue: Beyond Fragmentation* (London: Routledge, 1998), pp. 36–56.

[41] David Walton, *The New Dialectic: Conversational Contexts of Argument* (Toronto: University of Toronto Press, 1998).

[42] Arendt, 'What is Freedom?', p. 164.

sufficient for politics to emerge and which constitute the disputed 'foreground' vary. There is not a distinction between the two that stands outside the game, beyond question for all time. Consequently, what citizens share is nothing more or less than being in on the dialogues over how and by whom power is exercised, which take place both within and over the rules of the dialogues.

Agreement, when it occurs, is always non-consensual to some extent. At its best, free individuals and groups establish a certain provisional overlapping consensus as the result of a critical dialogue within and on the spatial-temporal field of power and norms in which they find themselves. But, for any number of reasons, the best of agreements remains potentially open to reasonable disagreement and dissent.[43] Hence, participation is a strategic-communicative game. Citizens struggle for recognition and rule, negotiate within and sometimes over the rules, bargain, compromise, take two steps back, reach a provisional agreement or agree to disagree, and start over again. They learn to govern and be governed in the context of relatively stable irresolution where the possibility of dissent is an implicit 'permanent provocation' that effects the negotiations. What shapes and holds individuals and groups together as 'citizens' and 'peoples' is not this or that agreement but the free agonistic activities of participation themselves.

When these activities are unavailable or arbitrarily restricted, the members of a political association remain 'subjects' rather than 'citizens' because power is exercised over them without their say, non-democratically. As a result, the political association is experienced as alien and imposed, as a structure of domination that is 'unfree' and 'illegitimate'. Subjects turn to other *loci* of democratic participation that are available to them, and in these forums they debate how they can reform the larger political association so they can 'get in' or how they can secede from it. The larger political association tends to instability and disintegration, and it is held together by force and fraud.

In a well-ordered constitutional democracy, many *ways* of participation are readily available. Citizens can participate both directly and indirectly in political dialogues: directly in public spheres, local initiatives, referendums, consultative meetings, political parties, elections, public service, interest groups, dissent, protest, civil disobedience and the occasional rebellion; and indirectly, through relations of critical trust with their elected representatives, public servants, courts, 'intermediary' organisations and, especially,

[43] Foucault mentions two reasons in 'Politics and Ethics', pp. 374–80. Rawls mentions six in *Political Liberalism*, pp. 54–8.

media-facilitated discussions. In constitutional democratic federations such as the United Kingdom and the European Union, citizen participation is even more multifaceted. Citizens can participate in these direct and indirect ways in a *range* of overlapping structures of governance through which political power is exercised: in supranational, federal, national, provincial, regional and municipal governments, as well as occasionally indirectly in constitutional negotiations. Furthermore, over the last two decades, citizens of constitutional democracies have been encouraged to some extent to see themselves as the bearers of popular sovereignty and their governments as citizen-centred, and to exercise their rights of citizen participation.

In seeking to engage in the seeming plenitude of ways and broad range of institutions, citizens have come up against two quite different kinds of arbitrary constraints or blockages in the very practices of governance in which they have been encouraged to participate directly and indirectly. These constraints subject them to a form of citizen identity or self-knowledge and a mode of citizen conduct or control, with regard to both the form and *loci* of participation, without their say. They find themselves unfree in the very activities in which they are supposed to constitute themselves as free citizens and peoples. It is these two types of non-democratic constraints or 'forms of subjection' that have been called into question by struggles for recognition and the search for new political space.[44]

3 DIVERSE FORMS OF CITIZEN PARTICIPATION

In any game of governance, there are what Habermas calls 'relations of intersubjective recognition' under which the actors involved recognise each other as citizens and governors and in accordance with which they are constrained to conduct themselves in order to be counted as players. These rules of recognition as participants include types of knowledge, standard forms of conduct and relations of power that govern the negotiations between citizens and governors. These involve such things as who is included and excluded, the language used, cultural ways affirmed or disregarded, religious holidays and practices taken into account and those ignored, genres of argumentation, times and places of political activity, overt and covert behaviour, and so on.[45] In many cases, as Habermas puts it,

[44] In 'The Subject and Power', Foucault argues that these general sorts of struggles against imposed forms of subjectivity are 'becoming more and more important' in our time but they are not new. They can be traced back to the Reformation and the emergence of pastoral power. See *Beyond Structuralism and Hermeneutics*, p. 213.

[45] Young, 'Communication and the Other'.

political dialogues and negotiations cannot avoid upsetting, either intentionally or not, the prevailing relations of recognition:

> Practical discourses [political dialogues] cannot be relieved of the burden of social conflicts to the degree that theoretical and explicative discourses can. They are less free of the burdens of action because contested norms tend to upset the balance of relations of intersubjective recognition. Even if it is conducted with discursive means, a dispute about norms is still rooted in the struggle for recognition.[46]

When the multicultural citizens of contemporary democracies came forward to participate in the direct and indirect *ways* and in the *range* of structures of governance, they found that the forms of recognition under which they had to act in order to be acknowledged as 'citizens' place arbitrary constraints on the diverse, identity-related forms of thought and action that matter to them and by which they engage in citizen activities. The prevailing forms of recognition that block these diverse modes of being citizens are experienced as 'structures of domination' because they are not readily open to question and the free exchange of reasons. They are presented as the background conditions of free and equal participation. Moreover, they are 'arbitrary' in the sense that, while they are often put forward as neutral or universal, they favour the forms of participation appropriate to the practical identities of those groups who have dominated the public institutions for decades: the well-to-do, the able, heterosexuals, males, members of the dominant linguistic, cultural, ethnic, national and religious groups, and so on; and they discriminate against and often exclude others.[47] If citizens wish to participate and so *become* citizens, they have a strategic choice between two options: either to participate within and assimilate to the given structures of recognition, and so perpetuate the biased system, or to challenge and negotiate the prevailing forms of recognition so they can participate on a par with the others: that is, to negotiate the rules of intersubjective recognition.

In the struggles for 'mutual' recognition that follow from the clash of these two strategies, women, gays and lesbians, linguistic minorities, immigrants and refugees, religious and cultural groups, suppressed nations within larger multinational associations, and Indigenous peoples have demanded that they be able to participate in ways that recognise and respect, rather than assimilate and demean, their diverse forms of identity-related conduct (including their practices of reflecting on and changing their identity-related conduct), such as gender-related differences, sexual orientation,

[46] Habermas, *Moral Consciousness and Communicative Action*, p. 106.
[47] Charles Taylor, 'The Politics of Recognition', in *Multiculturalism*.

languages, cultures, religions, nationalities and indigeneity. These struggles to negotiate the dominant forms of citizen participation so they accommodate those practical identities that withstand the test of the critical exchange of public reasons pro and con can be classified into three main types, according to the demands they make on the direct and indirect ways of democratic participation and the range of forms of governance in which citizens can participate. The three types of demand are for the recognition and accommodation of cultural diversity, participatory diversity and federal diversity.

(1) *Cultural diversity*. All these struggles for recognition involve demands to negotiate the ways in which some citizens are currently disrespected and misrecognised or not recognised in the broad sphere of cultures and values where citizens first learn their dialogue attitudes. The aim is to expose and overcome racism, sexism, ableism, ethnocentrism, sexual harassment, linguistic and cultural stereotypes and other forms of overt and covert diversity-blind speech and behaviour, and to foster an awareness of and respect for cultural diversity in all areas of society, so all citizens can participate in accord with the constitutional democratic principle of mutual respect.

(2) *Participatory diversity*. Some demands are to participate in the existing public institutions of democratic societies in different ways from the members of the dominant groups. The women's movements, gays and lesbians, linguistic, and cultural and religious minorities wish to participate in the dominant practices of governance but to modify them so they can participate in ways that protect and respect their identity-related differences: to be able to speak and hear a minority language in schools, on media, in political institutions and elections, to have day-care facilities so women and single parents can participate on a par with heterosexual males, same-sex benefits, to have participation-enhancing facilities for the disabled and unemployed so their concerns can be heard, to observe a religious or cultural practice in public and public service without disadvantage, for Charters of rights to be interpreted in a diversity-sensitive manner, and so on, so they can participate equally, but not identically, with others.[48]

(3) *Federal diversity*. Some demands are not to participate in the same institutions in different ways, as in participatory diversity, but to participate in different democratic institutions. For example, provinces, regions and states within constitutional, democratic federations demand to take part in federal-provincial negotiations and policy formulation in ways that respect

[48] As with the principle of mutual respect in the first type of case, the principle of equality is not contested but interpreted in a way that permits changes in the political ethos: culturally diverse forms of participation. See Tully, *Strange Multiplicity*; and Chapter 5, this volume.

their provincial and regional differences and enable them to govern, or share governance, in areas that affect them in a distinct way. In Spain, Belgium, the United Kingdom, the European Union, Canada and Australia, for example, nationalists and Indigenous peoples argue that citizen participation in a way that protects and enhances their identity-related differences – their nationhood and Indigenous self-determination – requires that they exercise those powers of self-rule that affect these characteristics in their own democratic institutions, on their own territories, and in their own languages and ways. For, if they try to exercise them in the dominant institutions of the larger constitutional associations, they will be overwhelmed by the majority, and forced to participate and be governed in an assimilative and alien manner; that is, non-democratically, with the consequences noted above of disintegration and secession.

Throughout the world, this type of demand is met by the 'federalisation' of practices of governance: by forms of regional autonomy, subsidiarity, dispersed and shared sovereignty, and types of federal and confederal arrangements. Since federalisation is given in recognition of demands for one type of diverse form of citizen participation (federal), it follows from the reciprocal commitments immanent in political dialogues that the democratic federal institutions established to accommodate nations and Indigenous peoples should in turn be open to the consideration of demands for the recognition of the cultural and participatory diversity of their minorities within.[49]

I would like to point out four features of these three types of struggle for diverse forms of citizen participation. Firstly, although they have been extensively analysed in a number of descriptive and normative ways by liberals, communitarians, nationalists, feminists and post-moderns, these forms of interpretation have tended to overlook the rather obvious point that they are democratic struggles to negotiate the prevailing and biased ethos of citizen participation, and that they can be analysed, both descriptively and normatively, in these terms. As a result, the processes through which members of constitutional democracies are constituted and constitute themselves as citizens are shifting in ways that the standard theories have failed to illuminate.

Secondly, demands for diverse forms of citizen participation involve agonistic dialogues and negotiations in which *audi alteram partem* (always listen to the other side) is the immanent rule of reciprocity. They are struggles *against* the prevailing structures of recognition that subject some

[49] Alain-G. Gagnon and James Tully, eds., *Multinational Democracies* (Cambridge: Cambridge University Press, 2001).

citizens to a non-democratic form of identity and mode of governance, with the aim of modifying these; and they are demands *to* other citizens who defend the current forms of recognition or who also seek to modify them, yet in different ways, to whom one must listen and with whom one must negotiate. In any demand for recognition, citizens need to listen to other cultural, participatory or federal demands that may be silenced and ensure that they are empowered to participate in the negotiations if any kind of agreement is to be free and democratic: that is, where all those affected have a direct or indirect say. From this perspective, the demands are all of a piece. They are that the rules of intersubjective recognition be open to question and subject to the interplay of reasons and redescriptions among free and equal citizens. The identity politics of multicultural citizens and the struggles for recognition of suppressed nations and Indigenous peoples in multinational associations are not different in kind or necessarily incompatible, as is often assumed.

Thirdly, the struggles over diverse forms of citizen participation cannot be settled once and for all. It is not a game of politics that aims at an end-state or final goal but, rather, at the free activity of citizen dialogues on the conditions of citizenship over time and generations. It is unfortunate that the Hegelian term 'recognition' has been used to characterise and study them, for it suggests that there is an end-state: namely, getting the form of mutual recognition all those concerned demand. But this is a dangerous illusion, as Hegel himself realised. What these different struggles for recognition are about is not achieving an ideal consensus on some definitive recognition of an 'authentic' communitarian or 'autonomous' liberal identity, as the two standard approaches assume.[50] As Arendt and Wittgenstein would surely say, these approaches look for a goal beyond the game on the one hand or a sovereign will behind it on the other, and overlook the free concrete activity of the political game itself.

Identity politics and struggles for recognition are games in which the contestants seek to modify and often transform the rules of recognition and action coordination of the game, not once and for all, but as their identities and diverse ways of being themselves change over time and generations, often as the result of participation in dialogues with diverse others. Nothing has changed more, for example, than the identities of men and women, of diverse citizens, over the last twenty years as a result of their participation in the three types of negotiation for and against diverse forms of citizen

[50] Maeve Cooke, 'Authenticity and Autonomy: Taylor, Habermas, and the Politics of Recognition', *Political Theory* 25(2), 1997: 258–88.

participation.[51] The identities up for recognition are shaped and formed not only by the interplay of the dialogues in which they are presented to recalcitrant and equally demanding others, but also by the three types of institutional arrangements in which their mutual accommodation is experimented with, reviewed and contested again. The game is to ensure that the rules of recognition do not become sedimented but are themselves open to the practices of freedom, so citizens are able to amend them as they proceed, and, in so doing, modify their identities, with as little unnecessary domination as possible. They are paradigmatic struggles *for* and *of* democratic participation in their own right. This is to say that we can gain a better grasp of what is happening in these disputes if we approach them more from a modified Nietzschean than a Hegelian viewpoint, as Foucault suggests:

> I do not think that a society can exist without power relations, if by that one means the strategies by which individuals try to direct and control the conduct of others. The problem, then, is not to try to dissolve them in the utopia of completely transparent communication but to acquire the rules of law, the management techniques, and so the morality, the *ethos*, the practice of the self, that will allow us to play these games of power with as little domination as possible.[52]

Fourthly, struggles for recognition are not simply symbolic or restricted to the cultural sphere, as opposed to struggles for the redistribution of wealth, as critics attached to the model of a unified and uniform class struggle often charge.[53] As we have seen, the first kind of diversity of citizen participation, cultural diversity, comes closest to being a purely cultural phenomenon. However, even here, to rid democracies of racism, sexism and ethnocentrism and foster respect for cultural diversity would itself have substantive effects in redistributing education, jobs and income. Participatory diversity involves the redistribution of access to political power so that oppressed and excluded minorities and women may participate equally. If the proposed equity policies in the public and private sectors, the proposals for proportional representation, electoral reform and a host of other recommendations to modify the forms of participation in the institutions of contemporary societies were enacted, they would bring about an enormous shift in the present unjust concentration of and access to political and economic power. And the demands for federal diversity by

[51] These are precisely the sorts of changes in identity and conduct that Foucault suggests should be studied. See Foucault, 'What is Enlightenment?', in *The Essential Works*, Vol. I, p. 316.

[52] Foucault, 'The Ethics of the Concern for Self', p. 298.

[53] Iris Marion Young, 'The Complexities of Coalition', *Dissent* (Winter), 1997: 64–9; Anne Phillips, 'Why Worry about Multiculturalism?', *Dissent* (Winter), 1997: 57–63.

regions and nations within multinational associations effect not only symbolic change, but a more equitable distribution of political and economic power. Struggles for diversity of forms of citizen participation, therefore, should be analysed along three axes: their effects on cultural relations of intersubjective recognition, on relations of political power and on the distribution of economic power.[54]

4 DIVERSE PRACTICES OF GOVERNANCE IN WHICH CITIZENS PARTICIPATE

Let us now turn to the second aspect of the ethos of contemporary politics that is brought to light by the reorientation to the concrete practices of freedom: the diverse practices or sites where citizens demand to participate. These illustrate the point I attributed to Wittgenstein and Foucault: democratic games of modifying the rules of governance are not restricted to the formal institutions of constitutional democracy but can occur in any practice of governance.

The direct and indirect ways of participation and the range of formal practices of governance in which citizens can participate have been expanded in the last two decades, mostly under the pressure of the three types of struggle for diverse forms of participation. However, there is a different kind of diversification of practices of governance and citizenship that needs to be treated separately, even though the two are connected in various ways. Today, citizens assemble, provoke dialogue, negotiate and contest forms of governance outside the formal institutions of representative democracy. They participate directly at a multiplicity of sites: the local and international sites of resource industries to challenge the way the environment is governed, workplaces throughout the world, shareholders' meetings, gatherings of global regulatory agencies, the United Nations, struggles concerning human rights and cultural differences, through non-governmental and volunteer organisations, the delivery of public services and contracted-out daycare facilities, and at a host of other locations that were formerly said to be in the private sector or beyond democratic control. Citizens demand here and now that the stakeholders sit down and negotiate the way the game in dispute is being governed both locally and globally.[55]

[54] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, pp. 222–4; Dean, *Governmentality*.

[55] Warren Magnusson, *The Search for Political Space: Globalization, Social Movements, and the Urban Political Experience* (Toronto: University of Toronto Press, 1996).

These diverse informal practices of citizens thinking globally and acting locally to contest non-democratic forms of governance can be analysed, of course, as social movements or as proto-struggles for the eventual extension and establishment of formal institutions of 'cosmopolitan' or 'post-Westphalian' democracy in the very long run.[56] However, from the vantage point opened up by Arendt and Foucault, they can also be seen as novel and relatively enduring practices of free, democratic activity in the present, of what Richard Bellamy and Dario Castiglione call multiple *demoi*.[57] The proof of both their novelty and relative permanence is the proliferation of new disciplines of dispute resolution, mediation and negotiation, distinct from the traditional disciplines of the political sciences, to educate professionals to take part in these practices and to monitor and reform them.

To see this, recall that any form of human organisation is a practice of governance, involving relationships of intersubjective recognition, power, modes of interaction and strategies of freedom, whether it is an educational institution, bureaucracy, firm, a ministry, regulatory regime or government in the formal sense. As Foucault puts it: 'The forms and the specific situations of the government of men [and women] by one another in a given society are multiple: they are superimposed, they cross, impose their own limits, sometimes cancel one another out, sometimes reinforce one another.'[58]

Any practice of governance will be 'democratic' and involve freedom on our definition just in so far as the members of the organisation have some say and the opportunity to negotiate the way and by whom the power to govern their conduct is exercised in the organisation.

Although the term 'government' was used in this non-restricted sense in early modern Europe to refer to any practice of governance, in the development of European nation-states, 'government' came to be associated with and restricted to the formal institutions of representative constitutional democracies.[59] Additionally, the term 'democracy', which formerly stood for any ad hoc assembly of people in negotiation, came to be associated with 'representative democracy' in the late eighteenth century by 'ingrafting',

[56] Held, *Democracy and the Global Order*; Linklater, *The Transformation of Political Community*.

[57] Richard Bellamy and Dario Castiglione, 'Between Cosmopolis and Community: Three Models of Rights and Democracy within the European Union', in *Re-imagining Political Community: Studies in Cosmopolitan Democracy*, eds. Daniele Archibugi, David Held and Martin Köhler (Cambridge: Polity Press, 1998).

[58] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 224.

[59] *Ibid*., p. 221.

as Thomas Paine classically argued, 'representation upon democracy'.[60] Moreover, as modern nation-states have consolidated, the multiplicity of practices of governance throughout society has tended to come under the 'auspices' of the central formal governmental institutions of representative democracies in one way or another.[61] As long as this trend held, citizen participation tended to concentrate on the formal institutions of government and the public sphere, and political scientists and theorists tended to restrict their study of citizenship to these institutions of formal representative democracy.

What is now occurring under the historical processes of 'globalisation' is that the multiplicity of forms of governance no longer tends to be gathered together only or predominantly under the auspices of the formal governmental institutions. There is in addition a widely noted counter-tendency towards the dispersion or diversification of practices of government. Practices of governance without formal government are expanding, not only within constitutional democracies, as Foucault has shown in his historical studies, but also in the international realm, as James Rosenau has argued.[62] Effective political power can no longer be assumed to be located in representative governments alone. It is dispersed – shared, negotiated and contested by diverse agencies at the local, regional, national and international level. The systems of formal representative democratic government persist, of course, but they are crossed by complex economic, organisational, administrative, legal and cultural processes and structures that limit and escape their efficacy and grasp.[63]

Most of the dispersed practices of governance from local workplaces to global regulatory regimes are non-democratic. They coordinate the forms of self-consciousness and activities of those subject to them behind their backs, through unelected bureaucracies or market mechanisms. Nevertheless, as we have seen, it is always possible to contest and negotiate the form of governance of any organisation: to graft democratic practice on to it. If the terms 'democracy' and 'participation' are used to refer only to the formal institutions of representative government, then these local and global struggles to democratise decision-making in dispersed practices of governance will not be seen as democratic practices. However, the boundary

[60] Thomas Paine, 'The Rights of Man', in *The Thomas Paine Reader*, eds. Michael Foot and Isaac Kramnick (Harmondsworth: Penguin, 1987), p. 281.
[61] Foucault, 'The Subject and Power', in *Beyond Structuralism and Hermeneutics*, p. 224.
[62] James Rosenau, 'Governance and Democracy in a Globalizing World', in *Re-imagining Political Community*.
[63] David Held, 'Democracy and Globalization', in *Re-imagining Political Community*.

drawn around the use of 'democracy' in the eighteenth century can be contested, and its use can be extended (or re-extended) to refer to any activity in which people assemble and negotiate the way and by whom power is exercised over them, on the grounds that these too are games of 'governance' (in the non-restrictive sense). In this light, then, the struggles around dispersed practices of governance can be seen and analysed as the democratic forms of citizen participation that accompany globalisation.[64]

The trend to the dispersion of governance has increased during the current period of neo-liberalism. A number of regimes of governance that were under the auspices of representative institutions during the earlier period of welfare liberalism have been contracted out or devolved to quasi-public and private organisations. The regulatory regimes of the North American Free Trade Agreement (NAFTA), private arbitration in international law, the gutting of environmental regulation and monitoring, and the downsizing of public services are well-known examples. According to neo-liberal theorists, these would be shielded from democratic control and citizens would not be interested in participating in them. However, citizens have not been as apathetic as predicted. They have demanded to participate democratically in the exercise of these so-called 'privatised' regimes of governance in two distinct ways.

On the one hand, they have sought to democratise public services wherever they take place. In response to the downsizing of the public services, citizens have demanded engagement in the formulation and the delivery of public services, whether they are contracted out to quasi-public bodies or devolved to the volunteer sector. That is, they have demanded to be treated as 'agents' or 'citizens' rather than as 'subjects' or passive recipients of services, as under welfare liberalism, or as non-recipients, as under neo-liberalism. They have responded in novel ways to the contracting out and downsizing of public services, creating various kinds of partnerships and 'associative' democratic practices. The emergence of these so-called 'citizen-centred governments' around the determination and delivery of 'public services' is changing the face of the public service in Europe, Australia and Canada in a way that cannot be explained in terms of either the welfare liberal or the neo-liberal models.[65]

On the other hand, citizens have responded to the dispersion of practices of governance by participating directly at specific sites of struggle in order to democratise the global processes that the formal democratic institutions fail to govern. This has taken two forms. One is to try to reconnect

[64] This field of study is taken up in *Volume II*. [65] Dean, *Governmentality*.

decision-making over global processes to formal democratic institutions (partly through the three types of democratic reform discussed in section 2). This is not always possible, either because the economic elites who block democratic reform of the forms of participation are too powerful or because the global processes in question can escape even responsive formal representative institutions. In this case, citizens act directly on the site where the global processes affect them.

These ad hoc assemblies of democratic dialogue over the governance of the workplace, environment, gender roles, refugees and so on are strategic and communicative. They provoke dialogue, set up consultation procedures, bring in local and regional stakeholders, set up inquiries, connect electronically with a global network of similar sites and similar non-democratic practices, call on experts near and far, invent campaigns to hold their governors to the negotiating table. At the same time, they coordinate and negotiate across cultural, gender and class differences, use some aspects of globalisation (such as media and international law) to contest others, find ways to hold their adversaries to their agreements and implementations or bring them back to the table, try to interest municipal, regional and national governments in their struggle, bargain and compromise, and start all over again if necessary. Such games are surely democratic practices of citizen freedom in their own right. They have a validity on their own terms, whether or not they cross a boundary or two in the vocabulary of democracy drawn in the eighteenth century and placed in the framework, and whether or not they may lead to the establishment of more formal institutions in some cosmopolitan future. There is something happening *here* which is not exactly clear, but it will not be clarified by predicating of it what lies in these ideal forms of representation, for the activity takes precisely 'the form of a possible crossing-over (*franchissement*)' of one or other of these boundaries.[66] In so doing, the participants call 'something into being, which did not exist before, which was not given, not even as a cognition or imagination, and which therefore, strictly speaking, could not be known'.[67]

Consequently, the concrete practices of freedom are not only modifying the forms and *loci* of democratic citizenship in novel ways. They are also modifying the rules of political studies. These forms of governance and strategies of freedom require political research and analysis tied closely to the specific systems in which the disputes and resolutions occur: what the contestants do and how they do it. They require a form of analysis that

[66] Foucault, 'What is Enlightenment?', in *The Essential Works*, Vol. I, p. 315.
[67] Arendt, 'What is Freedom?', p. 151.

delineates the types of expert knowledge and relations of power employed locally and globally, the strategic possibilities of their modification, and the actual practices of negotiation and implementation that are brought into being and carried through by the citizens involved. As we have seen, both Arendt and Foucault hoped for this sort of change in political studies.

In summary, two types of political struggle are changing in fundamental ways the ethos of citizenship and democracy. These changes are poorly understood when they are viewed from the formal institutions of constitutional democracy and the theoretical approaches that have developed around them since the eighteenth century. The changes in citizenship and democracy can be understood and analysed more perspicuously if they are viewed from the perspective of the free activities of the citizens engaged in them, as struggles *of* and *for* more democratic forms and practices of participation in the games in which we are governed. And these struggles can be seen in turn as manifestations of an impatience for what Arendt and many other citizens call freedom.

CHAPTER 5

Reimagining belonging in diverse societies

INTRODUCTION

In *Strange Multiplicity: Constitutionalism in an Age of Diversity*, I suggested one way in which a sense of belonging could be reimagined for diverse societies.[1] This involves, firstly, seeing the diverse cultural and national identities of citizens as overlapping, interacting and negotiated over time. Drawing on Wittgenstein, we can say that identities are 'aspectival'. Secondly, reimagining belonging involves realising that the cultural and national identities that are worthy of respect often require some form of acknowledgment or recognition in the public life and institutions of a society in order to secure a sense of belonging. The actual forms of acknowledgment or recognition are various and mutable, and they must be worked out by citizens and their representatives by means of democratic discussions, agreements and periodic reviews.

I would now like to approach this field of study from the perspective of civic freedom introduced in Chapter 4. I wish to discuss the role that the democratic freedom of citizen participation plays in engendering a sense of belonging and the complex forms this freedom takes in multicultural and multinational societies, not only the freedom to participate in accord with one's cultural and national identities when they are publicly recognised (as I stressed in *Strange Multiplicity*), but also to participate in the on-going contests over how these are to be acknowledged, recognised and accommodated. I do this in the following steps: (1) the traditional republican or democratic freedom of participation of citizens, (2) three characteristics of identity politics, (3) three types of demands for recognition, (4) who decides which identities are worthy of recognition and by what procedures in multicultural and multinational societies? and (5) the sense of belonging and identity-related security that is engendered by participation in the

[1] Tully, *Strange Multiplicity*, pp. 198–209.

public discussions over forms of public recognition and participation in institutions that accord recognition.

1 FREEDOM AND CITIZENSHIP

Let us recall the main features of the freedom of citizens before employing it as a form of critical reflection on our contemporary problem of belonging in multicultural and multinational societies. Citizenship is defined in terms of two concepts: 'free peoples' and 'free citizens'. A collection of humans becomes, or takes on the identity of, a 'free people' in virtue of governing themselves by their own laws over time. This activity of self-rule is described by Quentin Skinner in the following manner: '[it is] a system in which the sole power of making laws remains with the people or their accredited representatives, and in which all individual members of the body politic – rulers and citizens alike – remain equally subject to whatever laws they choose to impose on themselves'.[2] As we can see, there are two, co-equal principles involved in being a 'free people': the rule of law (rulers and citizens alike remain equally subject to the law) and self-rule (rulers and citizens impose the laws on themselves). These two co-equal republican principles of 'constitutionalism' and 'popular sovereignty' have been accepted by liberals such as John Rawls and Jürgen Habermas as the basic principles of 'democratic legitimacy' in the contemporary age.[3]

This characterisation of a 'free people' is internally related to the second concept, that of 'free citizens'. A 'free people' subject themselves to the law through their own participation. That is, they are 'free citizens' to the extent that they have a voice in their form of self-government. In Skinner's phrase, they 'impose the laws on themselves'. To be a 'free citizen', it is not sufficient simply to be a member of a free people. It is necessary to participate in some direct or indirect way in the exercise of political power: to be an 'active' citizen. If members do not have a voice in the way in which political power is exercised, and thus power is exercised over them without their say, 'behind their backs', as in the market or bureaucratic organisations, then they are, by definition, 'subjects' rather than 'free citizens'.

The ideal of 'free citizens' is, in its most utopian formulation, as Skinner explains, 'that all acts of legislation duly reflect the explicit consent of every

[2] Skinner, *Liberty Before Liberalism*, p. 74.

[3] Rawls, 'Political Liberalism: Reply to Habermas'; Habermas, 'Reconciliation Through the Public Use of Reason'. See *Volume II*, Chapter 4, for my analysis of these two approaches.

member of the body politic as a whole'.[4] For well-known reasons, this ideal is unrealisable in practice, especially in the large and complex political associations of today, where participation is mediated, represented and indirect. Nevertheless, the underlying point remains valid. A member of a free people only becomes a 'free citizen' to the extent that they not only have the opportunity to participate in some way or another, but that they actually participate. This is not to equate 'individual freedom' with the activity of political participation, as Skinner warns.[5] Rather, it is to say that there is another aspect or dimension of freedom which consists precisely in the activity of participation itself. This is, as Hannah Arendt put it, 'civic freedom' or the 'freedom of citizens'.[6]

The freedom of citizen participation is certainly the means of 'maintaining' and 'protecting' 'individual liberty', as Skinner argues, but it is also, and just as importantly, the way we become, or take on the identity of, citizens.[7] That is, just as a 'free people' is a collective achievement (the bringing into being and sustaining of a self-governing people over time) so too is citizenship an achievement; something that is brought into being through its exercise. For republicans and democrats, citizenship is not equated with a set of rights and duties, as is often the case for liberals, nor is it sharing in a national identity, as is often the case for nationalists. It is an achievement acquired through engaging in the multitude of activities of imposing the laws on ourselves. Citizenship, therefore, is an identity that we come to acquire by being 'free citizens', by engagement in the institutions of self-rule of a free people.

Recall now the three main features of our identity as citizens. It is a form of self-awareness and self-formation that one comes to acquire through engagement with others in the public spheres where the exercise of political power is discussed and negotiated. Next, a specific form of self-consciousness is acquired through participation: the awareness of oneself as a member of,

[4] Skinner, *Liberty Before Liberalism*, p. 30. [5] *Ibid*., p. 74, note 38.

[6] Arendt, 'What is Freedom?'; and Chapter 4, this volume. Civic freedom is also the form of freedom John Pocock has placed at the forefront of his historical studies over the last four decades. See John Pocock, 'Afterword', in *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition with a New Afterword* (Princeton: Princeton University Press, 2003). For a discussion of the differences between these two forms of freedom, negative and civic, see John Pocock, 'Foundations and Moments', in *Rethinking the Foundations of Modern Political Thought*, eds. Annabel Brett and James Tully (Cambridge: Cambridge University Press, 2006); and Quentin Skinner, 'Surveying *The Foundations*: A Retrospect and Reassessment', in *Rethinking the Foundations*.

[7] Skinner, *Liberty Before Liberalism*, p. 74, note 38; Skinner, 'The Idea of Negative Liberty'. While Skinner usually describes civic freedom as 'civic duty', to distinguish it from the negative or neo-Roman concept of freedom he is concerned to highlight, it is just as central a feature of civic humanism for him as it is for Arendt and Pocock.

and as belonging to, the political association. Now, this sense of belonging to the political association is, as Habermas puts it, not only the awareness of ourselves as equal subjects of the constitutional rule of law. This alone, he stresses, is insufficient to generate solidarity and loyalty among the members of modern political associations. It is necessary also to foster the awareness of ourselves as, in some sense, the agents or authors or editors of those laws. This is what we mean by self-rule or popular sovereignty.[8] But, this condition of 'democratic legitimacy' can be made good only if the members of the association have some sort of say in the way political power is exercised over them through the laws, because it is precisely this activity of civic freedom that does in fact create, or make good, the awareness of the laws as 'self-imposed', rather than as imposed 'non-democratically', 'behind our backs'.

Finally, the form of participation that is necessary for the constitution of citizen identity is 'having a say' or being 'in on' the public dialogues and negotiations over how and by whom political power is exercised. We can put this by saying that citizenship is intersubjective and dialogical (a form of identity we achieve in public dialogues with others). According to the civic humanist heritage, the public dialogues and negotiations over the public good in which we become free citizens and free peoples exhibit the following three features: (1) Public dialogues are the exercise of practical, not theoretical, reason. They involve persuasion, inquiry, negotiation, information-seeking, deliberation, rhetoric and eristic.[9] (2) They are 'agonistic' in character: citizens and rulers compete for, and endlessly dispute over, forms of mutual recognition and rule in accordance with the shared principles of freedom, equality and distinctness. (3) Political dialogues are always 'negotiations', not 'consensus'. Any agreement is partial or conditional to some extent; open to reasonable redescription and challenge. Elements of reasonable disagreement, of non-consensus, and so of dissent, contestation, renegotiation and compromise attend any agreement as a kind of 'permanent provocation'. An openness always to listen to the other side, *audi alteram partem*, and to negotiate a revisable accommodation, rather than to aim at an unconditional consensus, is at the heart of the exercise of public reason.[10]

In sum, citizenship is an identity that members acquire through exchanging reasons in public dialogues and negotiations over how and by whom political power is exercised. 'Having a voice' in these activities of discussion

[8] Habermas, *Between Facts and Norms*, pp. 463–90. [9] Walton, *The New Dialectic*.
[10] Quentin Skinner, 'Moral Ambiguity and the Renaissance Art of Eloquence', *Essays in Criticism* 44(4), 1998: 267–92; Skinner, *Reason and Rhetoric in the Philosophy of Hobbes*, pp. 19–214.

and negotiation generates bonds of solidarity and a sense of belonging to the political association. The self-governing association one identifies with, due to becoming a citizen through such participation, is what we call a 'free people' or 'free peoples' in multinational associations. Since the public discussions are marked by competition and disagreement – by 'negotiation' in the classic sense – it cannot be anything they agree on that gives citizens an identity and holds them together. Rather, it is nothing more, nor less, than participation in the activities of public dialogue and negotiation themselves.

It follows from this account that citizen identity and belonging are not acquired by the mere possession of constitutional rights and duties, nor by agreements on comprehensive goods or values, a shared national identity, fundamental principles of justice, nor by agreements on a set of universal procedures of validation. It is not that some of these conditions of constitutional democracy in a nation-state are not necessary or important. Liberals and nationalists are right about this. Nevertheless, there are two reasons why these principles, procedures, shared goods and so on cannot adequately account for citizenship. As Hannah Arendt famously argued, they are the background conditions of citizenship, not the activity of citizenship.[11] These conditions derive from one principle of a 'free people', the 'rule of law'. They need to be complemented by the other principle, self-rule: that free citizens are subject only to those conditions that 'they choose to impose on themselves'.

The other reason these conditions are insufficient is that citizens, rulers and theorists disagree over them. They are always open to question, reasonable disagreement, contestation, deliberation, negotiation and amendment over time, in the course of a free people imposing them on themselves. They are not only the conditions of free political dialogue and negotiation but also what those negotiations are often *about*. This is what classical democrats mean when they say politics is in the realm of '*negotium*' not '*otium*'. As a result, the conditions of citizenship are not fixed but are open to discussion and debate by free citizens in the course of imposing them on themselves. This is the only way that the two principles of a 'free people' – constitutionalism and popular sovereignty – can be treated as co-equal.[12]

So, engaging in the agonistic and interminable public discussions and negotiations, both *within* and *over* the conditions of citizenship, constitutes and sustains our identities as 'free citizens' and generates the sense of belonging to a 'free people'. In the public discussions, citizens 'disclose'

[11] Arendt, 'What is Freedom?', p. 169. [12] Laden, *Reasonably Radical*.

the identities they wish to see recognised and others 'acknowledge' these and respond, either by agreeing or disagreeing, or by advancing demands for recognition of their own. Conversely, when these activities of '*citizenisation*' are unavailable or arbitrarily restricted, the members of a political association remain 'subjects' rather than 'citizens' because the laws are imposed on them without their 'say'. The association is then experienced as 'alien and imposed', as a structure of domination that is both 'unfree' and 'illegitimate'. Subjects turn to other communities of democratic discussion and dialogue available to them, centred on their language, culture, ethnicity, nationality, gender, sexual orientation and the like. As a result of being in on *these* local discussions, they identify with *this* community rather than the larger political association. In these forums, they debate how they can reform the larger political association so they can 'get in' or how they can 'secede' from it. The larger political association tends to instability and disintegration. It is then held together, if at all, by force, fraud and the management of interests rather than the bonds of solidarity created by free citizenship.

Now, in a well-ordered constitutional democracy, many avenues of participation are readily available. Citizens can participate both directly and indirectly in political dialogues: directly in a variety of public spheres, local initiatives, referendums, consultative meetings, the manifold local and global struggles for the establishment of public norms across the private sector, political parties, elections to local, regional, federal, national and supranational representative bodies, public service, interest groups, dissent, protest and civil disobedience; and indirectly, through relations of critical trust with their elected representatives, public servants, courts, 'intermediary' organisations and, especially, in public discussions facilitated by radio, television, print media and the Internet.

Nevertheless, in seeking to engage in the public dialogues and negotiations in these ways, the identity-diverse members of contemporary societies claim to experience arbitrary constraints that block their free participation, and thereby disable them from becoming free citizens. These constraints are the prevailing 'norms of intersubjective public recognition' they must follow in order to participate and be recognised *as* citizens. The prevailing norms of public recognition define the identity of citizens. Multicultural and multinational citizens claim that the prevailing norms unjustly constrain participation in two different ways. They misrecognise or exclude the linguistic, cultural, gender-related and other identities of some of the members, and they impose, and assimilate them to, an alien identity (the identity of the dominant culture, gender, etc., under the guise of

being a neutral liberal identity or a shared uninational identity). These members experience the norms of citizenship as alien and imposed, rather than self-imposed. They are treated as 'subjects' rather than 'citizens'; unfree in the very activities in which they are supposed to constitute themselves as free citizens and free peoples. These challenges to dominant norms of citizen-identity are what we call 'identity politics' and 'struggles for recognition'.

Now that I have sketched out a democratic conception of citizenship, I would like to describe briefly what I take to be the three relevant characteristics of identity politics and the three main types of struggle over recognition in the next two sections. Then we will be in a position to see how these demands can be approached and negotiated from our perspective of citizenship and belonging.

2 THREE CHARACTERISTICS OF IDENTITY POLITICS

'Identity politics' or the 'politics of recognition' is a concept that has come into common use to describe a wide range of political struggles that occur with increasing frequency and constitute one of the most pressing political problems of the present age. 'Identity politics' refers to struggles for the appropriate forms of political recognition and accommodation of the following kinds: the freedom of expression of individuals, immigrants and refugees, women, gays and lesbians, linguistic, ethnic, cultural and religious minorities, nations within and across existing nation-states, Indigenous peoples, and Islamic and other non-European cultures and religions against Western imperialism and Eurocentrism.[13]

The forms of recognition and accommodation sought are as various as the struggles. Feminists and gays and lesbians demand formal equality and equal respect for their identity-related differences in opposition to dominant patriarchal and heterosexist norms of private and public conduct. Minorities seek different forms of public recognition, representation and protection of their languages, cultures, ethnicities and religions. Immigrants and refugees struggle for the rights of citizenship but also for freedom from assimilation to a dominant culture and language. Various models of regional, federal, confederal and independent forms of self-government and self-determination are advanced by suppressed nations and Indigenous peoples. Nation-states in the Arab and Third Worlds aim to overcome the continuing Western cultural imperialism of the international system of

[13] Jürgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State', in *Multiculturalism*.

nation-states and the processes of economic globalisation. Many of these demands are for legal and political recognition not only within existing nation-states, but also in supranational associations such as the European Union (EU), international law, at the United Nations and by the creation of novel 'subnational' and 'transnational' institutions.[14]

As these examples illustrate, these types of struggle are very different (to say nothing of the individual cases of each type), and they are not always or exclusively concerned with identity. Moreover, these types of struggle for recognition all have histories which predate by centuries the emergence of the concept of 'identity politics'. Nevertheless, they are referred to as 'identity politics' because they often exhibit three characteristics in the present which render them significantly similar to each other and significantly different from their past forms. Firstly, what makes these struggles so volatile and intractable is their 'diversity'. Identity politics is not a politics of many separate, bounded and internally uniform nations, cultures or other forms of identity, each seeking separate and compatible recognition and political associations, even though leaders often portray them in this manner and employ powerful processes of assimilation to eliminate internal differences. Rather, demands are articulated around criss-crossing and overlapping allegiances: Indigenousness, nationality, culture, region, religion, ethnicity, language, sexual orientation, gender, immigration and individual expression. A minority nation or language group demanding recognition from the larger political association often finds minorities, Indigenous peoples, multicultural citizens or immigrants within who also demand recognition and protection. Feminists find that their identity-related demands are crossed by national, linguistic, cultural, religious, immigrant and sexual-orientation differences among women; and nationalist and culturalist movements find in turn that women do not always agree with men. Members of a minority seeking recognition against an intransigent majority along one identity-related difference will have cross-cutting allegiances due to other aspects of their identity they share with members of the other side.[15]

It does not follow from the absence of separate, bounded and internally uniform identities that identity politics is dissolving through its own fragmentation, or that, as a result, humans can now relegate identity to the 'sub-political' realm and agree on principles, rights and institutions, unmediated by identity-related differences. Quite the contrary. The

[14] Tully, *Strange Multiplicity*; and Chapter 6, this volume.
[15] Homi K. Bhabha, *The Location of Culture* (London: Routledge, 1994).

increasing diversity and insecurity of identity-related differences fuel the demands for their political recognition and protection. What does follow is the now commonplace observation that any identity is never quite identical to itself: it always contains an irreducible element of alterity. Identity is multiplex or aspectival. Accordingly, 'diversity' or the multiplicity of overlapping identities and their corresponding allegiances is the first characteristic of identity politics.[16]

Nevertheless, this 'hybridisation' should not be treated as if it were *the* fundamental characteristic, even though it is the fundamental *experience* for some people, especially those living in exile or multicultural cities. It is certainly possible to bring a group of people to agree together in defence and promotion of one aspect of their identity, such as language, nationality or Indigenousness, across their other identity-related differences; and this identification can be sustained for generations (as, for example, ranking one's Scottish identity prior to British, Sami prior to Norwegian, Catalonian prior to Spanish). What the multiplicity of overlapping identities entails is a second characteristic of identity politics: the priority granted to one identity, the way and by whom it is articulated, and the form of public recognition and accommodation demanded are always open to question, reinterpretation, deliberation and negotiation by the bearers of that identity.

An identity negotiated in these human-all-too-human circumstances will not be fixed or authentic, but it can still be plausible rather than implausible, well supported rather than imposed, reasonable rather than unreasonable, empowering rather than disabling, liberating rather than oppressive. That is, it will be a mutable and on-going construct of practical and intersubjective dialogue, not of theoretical reason on one side or unmediated ascription on the other. Consequently, identity politics consists of three processes of negotiation which interact in complex ways: (1) among the diverse members of a group struggling for recognition, (2) between them and the group(s) to whom their demand for recognition is made, and (3) among the members of the latter group(s) (whose identity comes into question as a result of the struggle, whether they like it or not, as, for example, men, heterosexuals and members of dominant cultures and language groups discover).

The third and most elusive feature of identity politics is the concept of 'identity' itself. It is not one's theoretical identity, what one is as a matter of scientific fact or theoretical reason. It is one's practical identity, a mode

[16] Linklater, *The Transformation of Political Community*.

of being in the world with others. A practical identity is a form of both self-awareness and of self-formation. It is a structure of strong evaluations in accord with which humans value themselves, find their lives worth living and their actions worth undertaking, and the description under which they require, as a condition of self-worth, that others recognise and respect them. A practical identity is also relational and intersubjective in a double sense. It is acquired and sustained in relation with those who share it and those who do not. Any practical identity projects onto those who do not share it another identity, the non-X, who, in reciprocity, seek mutual recognition and respect for their identity, which is seldom the one others project on them. This is why negotiation and agonistic contestation are so fundamental to identity politics.[17]

As we have seen from the first characteristic, for most people there will be several overlapping practical identities. They will be a member of the human race, a man or a woman, a member of a religion and an ethnic group, a member of one or more language and cultural groups, a national of one or more nations, and so on. In so far as these identities are valued, they are not a matter of third-person ascription or projection but of first-person normative practices of self-consciousness and ethical formation, such as consciousness raising in feminist movements, the acquisition, use and care for a language, culture, religion, community or nationality with others, and so on, *and* of third-person recognition, respect and, at its best, affirmation and celebration.

The injustice and unfreedom distinctive of identity politics follow from these three characteristics. Individuals and groups are thwarted in their attempts to negotiate and gain reciprocal public recognition and accommodation of their practical identities as part of their citizen-identity. Their identities are misrecognised or not recognised at all in the dominant norms of public recognition. Instead, an alien identity is imposed upon them, without their say, through processes of subjectification, either assimilating them to the dominant identity or constructing them as marginal and expendable others. While ethnic cleansing and genocide are the most extreme and horrendous cases,[18] there is a multiplicity of types of misrecognition and corresponding injuries, and of appropriate forms of recognition.

It is now widely acknowledged that participation in the intersubjective negotiation of identity, the security of these processes of identity formation,

[17] Connolly, *The Ethos of Pluralization*.

[18] David E. Stannard, *American Holocaust: Columbus and the Conquest of the New World* (Oxford: Oxford University Press, 1992).

and the acknowledgment, recognition and respect of these by others are the prerequisites of the sense of self-worth of individuals and groups which empowers them to become free, equal and autonomous agents in both private and public life. As a result, the demeaning and disrespect of their identities through sexism, heterosexism, racism, nationalist, linguistic and culturalist chauvinism, the pseudo-scientific ranking of cultures, languages and polities in stages of development with Europe and the United States at the apex, and the imposition of dominant cultures through processes that destroy identities and assimilate or marginalise individuals and groups are not only unjust. They also undermine the self-respect and hence the very abilities of the people concerned to resist these injustices and to act effectively even if they opt to assimilate. This causes the well-known pathologies of oppression, marginalisation and assimilation: lack of self-respect and self-esteem, alienation, trans-generational poverty, substance abuse, unemployment, the destruction of communities, high levels of suicide and the like.[19]

3 THREE TYPES OF DEMAND FOR RECOGNITION

Struggles to overcome an imposed identity and to gain public recognition of a non-imposed identity through the three processes of negotiation mentioned above are not normally direct challenges to the principles of twentieth-century democratic politics: freedom, equality, respect for diversity, due process, the rule of law, federalism, mutual respect, consent, self-determination, and political, civic, social and minority rights. These principles are appealed to by both sides in identity politics: to condemn the imposed identity and to justify the recognition of an identity-related difference on one side and to defend the established norms of citizen-identity on the other. Of course, these principles are interpreted and applied in different ways, but it is seldom the principles themselves that are in dispute. For example, gay and lesbian couples often demand to be treated equally to heterosexual couples, women to men, Indigenous peoples to other peoples of the world who enjoy rights of self-determination, a suppressed nation to other nations, a suppressed language group to dominant language groups, immigrants to other citizens, Muslims to Christians.

[19] For these effects on Aboriginal peoples in Canada, see Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples*, 5 Vols. (Ottawa: Canada Communication Group Publishing, 1996); and Chapters 7 and 8, this volume.

The objection is that these principles are not interpreted, applied and acted on either in a difference-blind manner, as liberals often claim, or in accordance with a national identity which all citizens share equally, as nationalists often claim. Rather, they are employed in a manner that is partial to the identity-related differences of the well-to-do, the able, heterosexuals, males and members of the dominant linguistic, cultural, ethnic, national and religious groups; and, conversely, in a manner that is biased against the practical identities of others. The solution is not to try to apply the principles in an impartial manner or in accordance with a common national identity in all cases, for in many cases this is not possible. Politics and public life have to be conducted in some language or other, in accord with some modes of overt and covert conduct or other, statutory holidays, elections and the like will fall on some religious holidays, some versions of history will be taught in the educational systems and embodied in the public narratives and iconography, and so on. The suggestion is rather to interpret and apply these principles in a *difference-aware* manner: one which is not partial to any particular identity at the expense of others but is based on mutual respect for the diversity of identities of the sovereign citizens of the association, so there is a genuine 'parity of participation'.

This suggestion has been controversial because it introduces a second aspect of equality. One standard aspect of equality is that all citizens should be treated equally in the sense of 'impartial' or 'indifferent' to any and all identity-related differences. Members of a political association may cultivate their practical identities in private and voluntary associations but the government remains impartial with respect to them. While accepting this aspect of equality as legitimate, defenders of identity politics have often challenged its applicability. As we have just seen, in many cases it is impossible to be impartial in this sense. When this is so, it is necessary to take into account another aspect of equality: that is, to treat the reasonable identity-related differences involved with equal respect. To take a simple example, one person one vote, yet hold the campaign and voting in different languages where numbers warrant. Or, in the example of the EU, publicly recognise eleven languages of participation, yet also give due recognition of other 'lesser-used', but support-worthy, languages. It is now fairly widely accepted that there are these two senses of the concept of equality that need to be taken into account.[20]

Many liberals have agreed and reconceived liberalism along these lines.[21] Several nationalists have reconceived national identity along the lines of

[20] Taylor, 'The Politics of Recognition'. [21] Laden, *Reasonably Radical*.

diversity and public negotiation.[22] In so doing they have made liberalism and nationalism more sensitive to the complex conditions of belonging in culturally diverse societies. This does not mean that each and every identity-related difference gains equal recognition and accommodation. This would be impossible. It means that demands for recognition should be accorded equal *consideration* in order to determine if they are worthy of respect, and those that should be, given *due* recognition and accommodation. The assurance that demands for recognition will be given public consideration, even where the struggle for due recognition fails, is itself a powerful condition of engendering a sense of belonging, as I will argue below.

Before examining this maxim of identity politics in the following section, it is necessary to mention briefly the three types of demand to which it is designed to apply.

The first type of demand is for 'cultural diversity': the mutual recognition and respect for identity-related differences in the cultural sphere. All types of identity politics involve demands to negotiate the ways some members of a political association are currently disrespected and misrecognised in the broad sphere of cultures and values where they first learn and internalise their attitudes towards others. One aim is to expose and overcome racism, sexism, ableism, ethnocentrism and Eurocentrism, sexual harassment, linguistic, cultural and national stereotypes and other forms of overt and covert diversity-blind and diversity-partial speech and behaviour. Another aim is to foster awareness of and respect for diversity in all areas of society so all members can participate on the basis of *mutual respect*. This type of demand standardly calls for curriculum reform, training in cultural diversity at work and, most important, the democratic negotiation of diversity-sensitive equity policies and standards in the public, private and voluntary sectors.[23]

The second type of demand is for multicultural and multiethnic citizenship. These are demands to participate in the public institutions and practices of contemporary societies in ways that recognise and affirm, rather than misrecognise and exclude, the diverse identities of citizens. Women's movements, gays and lesbians, and linguistic, cultural, ethnic and religious minorities wish to participate in the same institutions as the dominant groups but in ways that protect and respect their identity-related differences. For example, they may wish to have some schooling in their minority

[22] Charles Taylor, 'Shared and Divergent Values', in *Reconciling the Solitudes: Essays in Canadian Federalism and Nationalism*, ed. Guy Laforest (Montreal and Toronto: McGill-Queen's University Press, 1993).

[23] Benhabib, ed., *Democracy and Difference*.

languages and cultures, access to media, to be able to use their languages and cultural ways in legal and political institutions and at work (whether one is Muslim in France or Surinamese in the Netherlands), to reform representative institutions so they fairly represent the identity diversity of the population, to have day-care facilities so women and single parents can participate on a par with heterosexual males, to speak, deliberate and act in public in a different voice, to have same-sex benefits, to observe a religious or cultural practice in public without discrimination, for constitutional charters of rights to be interpreted and applied in a diversity-sensitive manner, and to establish minority and group rights where necessary. In these ways, citizens and minorities can participate equally, but not identically, with others.[24]

The third type of demand is for 'multinational' constitutional associations, or what might be called constitutional associations of more than one 'free people'. These are demands to establish autonomous political and legal institutions separate in varying degrees from the larger political association. Here, suppressed nations within multinational societies and Indigenous peoples argue that the proper recognition of their identity *as* nations and *as* peoples entails that they have a right of self-determination: a right to govern themselves by their own laws. They may exercise this right either by determining a new federal or confederal relation within the existing constitutional association of which they are a part or, if this meaningful exercise of self-government is blocked, by secession and the establishment of an independent nation-state. It is only by these means of self-government, they argue, that they are able to protect and live in accordance with their identity – their nationality and their Indigenousness – and be 'free peoples'. If they are constrained to participate in the institutions of the dominant society, then they are misrecognised (as minorities within the dominant society rather than as nations or peoples) and their identity-related differences will be overwhelmed and assimilated by the majority.

This sort of demand has become increasingly familiar in the latter twentieth century. The response is often the suppression of the demand and assimilation or an armed conflict that ends in secession. However, the struggles have also given rise to experiments in the 'federalisation' of multinational political associations: that is, regional autonomy, subsidiarity, dispersed and shared sovereignty, and flexible federal and confederal arrangements. Spain, Belgium, the United Kingdom, Canada-Quebec

[24] Will Kymlicka, ed., *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) and Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995).

and the EU itself are all examples of this kind of experimentation.[25] And, in Norway, Canada, the United States, Australia, New Zealand and South America, the struggles of Indigenous peoples to overcome internal colonisation and gain recognition as 'free peoples' are giving rise to experiments in new forms of Indigenous self-government and federalism with the larger, surrounding non-Indigenous governments.[26]

A struggle of this last kind is the most complex because it brings into play the full diversity of overlapping identities and three processes of negotiation characteristic of identity politics. Those making the demand must persuade their own internally diverse members through public dialogue and consultation that they are not a province, region or minority of some kind, as the current form of recognition has it, but a distinct nation or people. They must also persuade the majority society, with all its internal diversity, to enter into negotiations to change the current constitutional relation to some form of greater autonomy and lesser association. As these negotiations take place, they almost always provoke the two types of demand for the recognition of cultural diversity and multicultural citizenship within and often across the nation or people demanding recognition. The diverse citizens within, such as linguistic minorities and multicultural immigrants, wish to ensure that their identity-related differences will not be effaced in the new institutions of self-government by a policy of either impartial liberalism or uniform nationalism. Yet, cultural diversity and multicultural citizenship have to be recognised and accommodated in a form that does not infringe too deeply, or undermine, the identity of the nation or people, for this is the reason self-governing institutions of nationhood are demanded in the first place.

Given these conditions of identity politics in multicultural and multinational societies, let us now ask who decides and by what procedures in order that a sense of belonging can be generated and sustained.

4 WHO DECIDES AND BY WHAT PROCEDURES SO THAT A SENSE OF BELONGING IS NURTURED?

The central questions of identity politics are who decides which identities of the members of a political association are unjustly imposed and which are worthy of recognition and accommodation? And by what procedures do they decide and review their decisions? The response to the first question marks a democratic revolution in political thought in the twentieth century.

[25] See Chapter 6, this volume. [26] See Chapter 7, this volume.

It is no longer assumed that the identities worthy of recognition, and so constitutive of citizen-identity, can be determined outside of the political process itself, by theoretical reason. It is now widely assumed that the identities worthy of recognition must be worked out by the citizens themselves, through the exercise of practical reason in negotiations and agreements. In John Rawls' famous phrase, the question is 'political not metaphysical'.[27]

There are several reasons for this. The first is that there has been a significant emphasis on democracy or the sovereignty of the people in both theory and practice in the latter half of the twentieth century: that is, on our first principle of self-rule. In theory, *quod omnes tangit* (what touches all must be agreed to by all), one of the oldest principles of Western constitutionalism, has been revived and given dialogical reformulation as the principle of democratic legitimacy: 'only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse'.[28] As I mentioned at the outset, the sovereignty of the people to reach agreements among themselves on the basic norms of citizenship of their political association through deliberation is said to be a principle equal in status to the constitutional rule of law.

In practice, there has been a proliferation of practices of democratic negotiation of the conditions of membership of a vast and increasing range of associations, from private and public sector bargaining to democratic constitutional change, international agreements and evolving institutions of cosmopolitan democracy.[29] In virtually every organisation of human interaction and coordination, disputes over the prevailing relations of intersubjective recognition are referred to democratic practices of polling, listening, consultation, negotiation, mediation, ratification, referendums and dispute resolution. Moreover, new disciplines of negotiation, mediation and dispute resolution have developed in universities to train experts in 'getting to yes' and to reflect critically on the burgeoning practices of democratic participation and negotiation.[30]

The second reason stems from the negotiated character of identity politics. It is the people themselves who must experience an identity as imposed and unjust; they must come to support a demand for the recognition of another identity from a first-person perspective; and they must gain the mutual

[27] Rawls, *Political Liberalism*. [28] Habermas, 'Discourse Ethics', p. 66.

[29] Paul Hirst, *Associative Democracy: New Forms of Economic and Social Governance* (Cambridge: Polity Press, 1994); Archibugi, Held and Köhler, eds., *Re-imagining Political Community*.

[30] John Ury, *Promoting Deliberative Democracy: Listening Within Limits* (Cambridge: Cambridge University Press, 1998).

recognition, respect and support of others who do not share the identity. All this requires discussion and negotiation by the people involved in the three processes of negotiation mentioned in the first section; not of elites and representatives alone. On this account, a proposed identity counts as an identity only if it has come to be embraced in this democratic and dialogical manner, and it is recognised only if it has come to be affirmed by others in the same fashion. If an identity is advanced by a political elite without popular deliberation and support, and if it is recognised by another elite or an unelected court without passing through democratic will-formation in the broader society, then it is not likely to be supported on either side. That is, it is not likely to be seen as an identity on one side or as worthy of respect in practice on the other. It will tend to be experienced as imposed and the struggle for recognition will be intensified rather than resolved.

The third reason follows from the diversity of overlapping identities in any political association. When a demand for the recognition of an identity-related difference is advanced, it is necessary to ensure that this demand has the support of those for whom it is presented and that it does not silence or suppress another identity-related difference equally worthy of recognition. The only way this can be ensured is that the people affected have a voice in the proceedings. People must be able to advance alternative formulations of the demand, which take into account the diversity of the people demanding recognition; others must be able to raise their objections to it and defend the status quo or respond with counter-proposals; and others must be able to advance demands of their own that would otherwise be overridden. As a result of considerations of this kind, another principle of classic accounts of public dialogue has been reintroduced into late twentieth-century politics: *audi alteram partem* (always listen to the other side).[31] The democratic negotiations of identity politics, accordingly, are not the dyadic dialogues of traditional theories of recognition, but, in Rawls' phrase, 'multilogues'.[32]

The fourth reason is that such popular-based negotiations provide stability and a *sense of belonging* for the right reasons. A struggle for recognition signals that a norm of public recognition by which citizens coordinate their interaction has been disrupted somewhere in the system of social cooperation comprising the society as a whole. If the dispute is not resolved, it can lead to anything from disaffection to secession. Negotiations open to citizens and trusted representatives provide a new or renewed norm of recognition that is stable because the people who must bear it have had a say in its formulation and have come to see that it is well supported (even

[31] Skinner, *Liberty Before Liberalism*, pp. 15–16. [32] Tully, *Strange Multiplicity*, pp. 99–116.

when they do not all agree with it). They identify with it. This is the sense of belonging appropriate to a democracy.

There is one important limitation to the maxim that struggles for recognition must be worked out through negotiations among the people affected. In many cases of identity politics, those demanding the recognition of their identity-related differences are minorities. If their demands are put not only to the discussion of all but also to the decision-making of all, their fate is placed in the hands of the majority. Yet this is precisely the injustice they are trying to overcome with their demand. Democratic discussion and negotiation are necessary for the four reasons given above. However, it is not necessary for the final decision on a question concerning a minority to be made by a majority or by a consensus of all affected. The former is unfair to the minority and the latter is utopian.

Democratic discussions need to be placed in the broader reflective equilibrium of the institutions of the rule of law: representative governments, courts and the protection of human rights in domestic, constitutional and international law. If a demand for recognition is fully and openly discussed, supported and agreed to by the majority of the minority making the demand (applying *audi alteram partem* within); if it is well discussed and well supported by the other people affected and to whom it is addressed; if it accords with or can be shown plausibly to be an improvement on existing legislation, minority rights and international covenants; if it gains approval in representative institutions and their committees of inquiry; or if the courts rule in its favour, then any of these institutions of the rule of law, depending on the particular case, can and should make the decision, even if there is an organised and vocal opposition to it by a segment of the majority affected. However, they should make the decision only on the condition that it is open to review and reconsideration in the future. Prejudices against different identities run deep within the dominant identities of contemporary individuals and groups, and they are supported by sedimented structures of political and economic domination. Discussion and deliberation can bring people around to see their own prejudices to some extent, but in the real time and context of politics the force of argument needs to be supplemented by the force of law in cases where the majority has a political or economic interest in upholding the biased form of recognition in dispute.

The second question is, what are the procedures by which the people, in conjunction with their legal and political institutions, negotiate and reach agreements over disputed identities? The widely proposed answer is again 'democratic' – the correct procedures are the exchange of reasons pro and contra in public negotiations. The basic idea is that an identity will be

worthy of recognition and respect just in so far as it can be made good to, or find widespread support among, those affected through the fair exchange of reasons. A fair exchange of reasons will determine which identities are reasonable, and so worthy of recognition, and which are unreasonable, and so either prohibited or at least not publicly supportable.

The conditions for the fair exchange of reasons are themselves contested by theorists and negotiators, but the following are commonly included. A member (individual or group) of a political association has the right to present demands to modify the forms of public recognition, and the others have a duty to acknowledge the demand and enter into negotiations pro and con if the demand is well supported by those for whom it is presented, the reasons for it seem plausible and the demand takes into account the concerns of others affected by the norm in question; the interlocutors in the negotiations treat each other as free and equal and accept that they are bearers of other practical identities which deserve to be treated with due respect; and any resolution should rest as much as possible on the agreement of those affected and should be open to periodic review. If the dominant members refuse to enter into negotiations, or drag their feet endlessly in the negotiations and implementation, then those making the demand have the right to engage in civil disobedience to bring them to negotiate in good faith.

These are roughly the minimum conditions of mutual recognition and reciprocity which ensure that a discussion is not biased towards any particular cultural identity from the outset. Muslim, atheist, Indigenous, male and female interlocutors will interpret 'free and equal' in dissimilar yet reasonable ways (ways which the others will see initially as unfreedom and inequality) but, since this sort of disagreement is precisely what identity politics is about, it is not possible to filter out these differences at the outset without prejudging which identities are worthy of recognition. Of course, in the actual context of particular cases, further conditions are usually accepted by the interlocutors.[33]

The exchange of reasons over the recognition of identities can be classified in two types: those that aim at mutual understanding of, and those that aim at mutual agreement on, the identities in dispute. In the first type of exchange the interlocutors aim to understand the identities in

[33] For an attempt to specify the conditions in a case of negotiating secession, see Supreme Court of Canada, *Reference re Secession of Quebec* [1998] 2 SCR 217, reprinted in *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, ed. David Schneiderman (Toronto: James Lorimer, 1999); and James Tully, *The Unattained yet Attainable Democracy: Canada and Quebec Face the New Century* (Montreal: McGill University, Programme d'études sur le Québec, 2000).

question from the point of view of those who bear them and seek recognition. To gain mutual understanding, it is necessary to listen to the reasons why a particular identity is important to the group advancing it, even if these are not reasons for others. An ethnic, religious, cultural or linguistic minority, a nation or an Indigenous people, will have reasons for embracing their identity that derive from that identity. These internal reasons will not be reasons for supporting their demand as far as the other members of society are concerned. However, they will be important to the other members in understanding why the identity is so important to them; why the members of the minority can agree to pledge allegiance to the political association only if this identity is secure.

Misunderstanding, stereotyping and deep cleavages will prevail in multicultural and multinational societies as long as these internal reasons are not exchanged in public as a basis for mutual understanding among identity-diverse citizens. Citizens not only need to know that there are culturally different others in the association, or wanting to get in, as a matter of fact. They also need to gain some understanding of those different cultural identities, the narratives in terms of which they have meaning and worth for their bearers and so on.

As we know from classical accounts of dialogue, through these exchanges citizens are able to move around and see to some extent their shared political association from the identity of other cultures, nations, sexual orientations and so on. In the course of this movement, they become aware on reflection of their own identities as partial and limited like the others. Moreover, the interplay of internal reasons unsettles the prejudices and stereotypes internal to their own practical identities. That is, these practical conversations foster a new, shared citizen-identity among the interlocutors: an identity that consists in the awareness of and respect for the diversity of respect-worthy identities of their fellow citizens and of the place of one's own identity among the diversity of overlapping identities. This shared identity of diversity awareness is precisely the citizen-identity appropriate to, and capable of holding together, multicultural and multinational political associations.

The second type of exchange of reasons aims at reaching agreement on which identities are worthy of recognition and how they are to be accommodated, as well as which should be prohibited. These reasons cannot appeal to particular identities, for they need to convince other interlocutors who do not share that identity and its internal reasons, even if they understand and respect it. Exchanges aimed at reaching agreement, therefore, search for reasons that identity-diverse citizens can share. These 'shared' reasons are various.

Mutual respect for individuals and minorities, toleration, freedom, equality, autonomy, community, human rights, and so on are reasons shared by most. The basic conditions of the discussions themselves rule out certain identities: those that are incompatible with respect for others. Reaching agreement, then, is a process that involves searching for these sorts of shared reasons, interpreting and applying them pro and con to the identities in dispute, and working towards an agreeable form of mutual recognition and institutional accommodation of the identities, or aspects of identities, that are shown to be justifiable and supportable.

The forms of recognition and accommodation of identities they negotiate from time to time will constitute their shared multicultural and multinational identity as citizens of the same association. This is an identity they will all have reasons for supporting, not despite their identity-related differences, but rather because it gives due recognition to their diverse identities and it is always open to renegotiation. As I mentioned in the introduction to this chapter, it is their engagement in the continuing discussions over this complex shared identity that binds them together as an association and gives them a sense of belonging.

5 BELONGING AND ON-GOING STRUGGLES OVER RECOGNITION

I would like to conclude with one final point about this sense of citizen belonging. I believe that a sense of belonging is engendered more by engagement in struggles over recognition than by the actual end-state of gaining this or that form of recognition. A necessary feature of belonging is that the society is open to these kinds of struggles over recognition: that is, that citizens and representatives are free to make demands to amend the rules of recognition and other citizens and representatives acknowledge these demands and respond to them in various ways. This intersubjective and agonistic activity of demand and acknowledgment in itself, quite apart from the achievement of formal recognition, engenders a sense that one is acknowledged and respected by others, even those who disagree strongly, and so nurtures a sense of identification with the larger society. The aim is thus not to discover the definitive and just forms of recognition (which, given the mutable character of practical identities, is a chimera) but to ensure that the norms of public recognition are always open to question, discussion and amendment over time. There are several reasons for this.

The agreements on norms of recognition are 'overlapping' rather than transcendent.[34] The interlocutors do not transcend their practical identities and reach agreement on an identity-blind norm. They exchange internal and shared reasons from within their practical identities, moving around to some extent to the perspectives of others, and reach agreements on an identity-sensitive norm of recognition. One of the most important discoveries of identity politics is that people with very different cultural, religious, gender and linguistic identities can nevertheless reach overlapping agreements on norms of public recognition, such as charters of individual and group rights and obligations, as long as these are formulated, interpreted and applied in an identity-sensitive manner.

Evidently, overlapping agreements do not conform to the ideal of a consensus. They are negotiated, provisional and contextual settlements which involve compromise, an element of non-consensus, and hence require review and revision after implementation.[35] The reasons for this derive from the three characteristics of identity politics. Recall that in a struggle for recognition there are three simultaneous processes of negotiation, and they influence one another. As the interlocutors proceed, the rule of *audi alteram partem* is applied again and again by diverse individuals and groups whose identities are affected by the proposed form of recognition, demanding that their identities in turn are given due recognition and accommodation in the agreement. It is unreasonable to assume that each could receive the recognition they believe they deserve on the basis of their internal reasons alone. Such a recognition would be compossible in principle only if identities were separate, bounded and homogeneous. Since they are multiple, overlapping and contested, their due recognition involves a complex back-and-forth accommodation and mutual compromise. Therefore, the agreement will be an attempt to give each legitimate claim its due recognition, and this will always involve compromise. It will be a complex 'accommodation', like the Northern Ireland Accord. In an agreement of this complexity, there is always and unavoidably reasonable disagreement.[36]

Take the example of an Indigenous people (such as the Sami) demanding recognition and accommodation of their identity as a people. Once their demand is taken seriously and negotiations entered into, the non-Indigenous

[34] Rawls, *Political Liberalism*, pp. 133–73.

[35] Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London: Routledge, 1999); Hoy and McCarthy, *Critical Theory*, pp. 203–69.

[36] Rawls, *Political Liberalism*, pp. 56–8; Phillips, 'Why Worry About Multiculturalism?'; Young, 'The Complexities of Coalition'.

governments affected by their proposed recognition present their internal and shared reasons for modifying the form of recognition sought. Others raise demands that their rights and identity-related differences not be overlooked in the negotiations. These demands come from within the Indigenous community itself, by members who disagree with the negotiators, and in the non-Indigenous communities affected by recognition. Compromise is unavoidable. In a struggle for recognition in British Columbia, Canada, for example, negotiations among the Nisga'a Indigenous people, the provincial government and the federal government included presentations by over fifty third parties, took fifteen years to complete and the final document is over 200 pages long.[37]

Moreover, negotiations take place in real time and under real constraints. Not all voices will be heard and not all compromises will be acceptable to all. The identities of the participants in the discussions will be shaped by the unjust relations of power that are held in place and legitimated by the contested form of recognition. Therefore, they will exchange reasons in unequal and asymmetrical ways in the negotiations. Rhetoric too will play a role.[38] In some cases a court or representative body will not unreasonably bring the negotiations to a (provisional) close. The dissenters they override may turn out on reconsideration to have been right after all. Any agreement can be interpreted in different ways, and this gives rise to disagreements over the institutions that are supposed to implement the agreement and over the way those institutions operate. As they experiment with the implementation of the agreement over time, conflicts will develop in practice that they did not foresee in the negotiations. (For example, a group right established to protect a minority from domination and assimilation by the larger society may turn out to give the minority too much authority over the identity-related differences of their members.) In addition, the change in identities brought about by interacting in the new relations of recognition will itself alter their view of the agreement. By this time, a new generation will enter into the negotiations and bring generational differences with them. For these reasons, an agreement is always provisional and must be open to on-going review and revision in the light of experience with its institutionalisation.

Furthermore, a great deal of what is going on in struggles over recognition is not aiming at recognition so much as it is making public displays

[37] Government of Canada, Government of British Columbia and the Nisga'a Nation, *Nisga'a Final Agreement* (Victoria, BC: Ministry of Aboriginal Affairs, 1998).
[38] Young, 'Communication and the Other'.

of the intolerability of the present form of recognition and publicly displaying another form of recognition. The other members of the society acknowledge this and respond in kind. It is an 'agonistic' to-and-fro activity of mutual disclosure and mutual acknowledgment. Although this agonistic game of disclosure/acknowledgment falls short of formal recognition, it is far from trivial. It is a means of discharging *ressentiment* at the present structure of recognition: displaying how a member would like to be seen by and relative to the other members; and generating a sense of pride in the disclosed identity (as a minority or a nation). Even when the others respond by denying recognition and putting forward another form of recognition, or defending the status quo, this degree of acknowledgment makes the minority feel a part of the larger society. These contestatory exchanges generate levels of self-respect and self-esteem among the members demanding recognition (in contrast to the standard view that recognition alone generates self-respect and self-esteem). And, engagement in these games, although serious, involves a play element, like all competitive games, which helps to explain their persistence.[39]

Finally, the practical identities of the people engaged in struggles for recognition change in the course of the three processes of negotiation themselves. Nothing has changed more over thirty years of identity politics than the identities of men and women, immigrants and old-timers, Indigenous and non-Indigenous persons, Muslims and Christians, Arabs and Westerners, European and non-European, cultural minorities and majorities, heterosexuals and homosexuals, and so on. Part of this identity modification is the acquisition, through the interaction with others, of a shared identity based on the reflective awareness of the diversity of identities of others and of the partiality of one's own. This shared identity does nothing to lessen their attachment to their practical identities and to the great struggles for their recognition. But it puts these in a different light. Their practical identities are now seen as partial, somewhat mutable and overlapping with the similarly partial and somewhat mutable identities of others with whom they contend for forms of mutual recognition and accommodation.

Consequently, identity politics should not be seen as struggles for the definitive recognition of an authentic, autonomous or self-realising identity, for, as this survey has shown, no such fixed identity exists. Rather, because the identities in contention are modified in the course of the contests, the

[39] For the play element, see Chapter 4, this volume.

aim of identity politics is to ensure that *any* form of public recognition is not a fixed and unchangeable structure of domination but is open to question, contestation and change over time, as the identities of the participants change. Hence, identity politics is about the freedom of diverse people and peoples to modify the rules of recognition of their political associations as they modify themselves. Consequently, belonging is related to freedom and acknowledgment, more than to recognition.

CHAPTER 6

Multinational democracies: an introductory sketch

INTRODUCTION

This chapter is an attempt to apply and refine the approach introduced in Chapters 4 and 5 through the empirical and conceptual study of a particular type of contemporary constitutional democracy – multinational democracies. Multinational democracies are contemporary societies composed not only of many cultures (multicultural) but also of two or more nations (multinational). The Canadian Research Group on Multinational Societies brought together a team of experts from Europe and North America to clarify the complex physiognomy of multinational democracies by reflecting on four leading exemplars – Canada, the United Kingdom, Belgium and Spain – from the perspectives of history, comparative politics and political philosophy. The volume we published in 2001, *Multinational Democracies*, strives to offer a new approach and contribution to the study, understanding and governing of multinational societies and, in so doing, of culturally diverse societies more generally. This chapter was first published as the introduction to the volume. It represents what I learned from collaboration with this remarkable team. The chapter brings together three components: the democratic activities of struggles over a particular type of recognition (multinational); the responsiveness of a constitutional court to these democratic activities; and the understanding of constitutional law that is required to coordinate democratic freedom and constitutionalism in such cases.

The research team worked together to cast a new light on multinational societies by employing four methodological rules. Since multinational democracies are just coming into being in the present era, it is not possible to present a definitive or comprehensive account. Rather than the crystalline purity of a theory of multinational democracy, therefore, we sought first of all to offer many complementary, specific, theoretical and institutional sketches of the 'rough ground': that is, the activities, practices, dynamics,

tensions, institutions, administrative arrangements, policies, procedures, structures, movements, citizenship, parties, struggles for and against recognition, obstacles, disagreements, laws, constitutions, shared sovereignty, values and norms that characterise these emerging polities. Next, although there are separate literatures on culturally diverse societies by political scientists and political theorists, there is very little dialogue between them. This was the first collection to bring together leading scholars from these two disciplines and to focus attention on four exemplary democratic societies that have considerable experience with the complexities of struggles over the recognition and accommodation of both multinationalism and multiculturalism. While there are other multinational democracies in existence, and many more coming on line (such as the European Union),[1] we decided to concentrate on these four relatively mature cases for the sake of the coherence of the volume, the strength and testability of the comparisons and generalisations, and the broadly similar democratic cultures and institutions.

Furthermore, all the contributors organised their analyses of various aspects of multinational democracies around the two types of question that are central to the emergence and reconciliation of these deeply diverse political communities: the more normative or theoretical questions of justice and recognition on one side, and the more institutional and empirical questions of accommodation and stability on the other. These define, as Charles Taylor put it in the preface to the volume, the 'constitutive tensions' of multinational democracies. Our aim was neither to subordinate one type of question to the other nor to resolve them in a higher synthesis, but to map their intricate lines of interaction and techniques of possible conciliation on the rough ground of actual existing politics. Finally, the studies were organised by three broad themes that also combine and juxtapose theoretical and institutional concerns: the interrelations between considerations of justice and stability in theory and practice; the tensions between normative claims for and against recognition and institutional and procedural forms of accommodation; the normative and institutional dimensions of modes of reconciliation and conflict management.

What, then, is a multinational democracy? There is not one set of properties that uniquely defines multinational democracy, but rather, as

[1] For recent work on the European Union in the spirit of this volume, see Peter A. Kraus, 'Legitimacy, Democracy and Diversity in the European Union', *International Journal on Multicultural Societies* 8(2), 2006: 203–24; and Peter A. Kraus, *A Union of Diversity: Language, Identity and Polity-Building in Europe* (Cambridge: Cambridge University Press, 2008); and the references in *Volume II*, Chapters 4 and 8.

with most complex political phenomena, a complicated network of overlapping and criss-crossing similarities and dissimilarities. It was the work of the volume as a whole to map this complicated network and its intricate details from various vantage points. Nevertheless, it is possible to draw from the individual studies four similarities that can function as a provisional characterisation of multinational democracies and as a guide to the more detailed investigations which follow.

First and foremost, multinational democracies, in contrast to single-nation democracies (which are often presumed to be the norm), are constitutional associations that contain two or more nations or peoples.[2] The members of the nations are, or aspire to be, recognised as self-governing peoples with the right of self-determination as this is understood in international law and democratic theory. While some members of such a nation may seek to exercise their right of self-determination 'externally' – by secession and the formation of another independent, single-nation state – other members mobilise to exercise their right of self-determination 'internally' – by the reconfiguration of the existing constitutional association so its multinational character is recognised and accommodated. Since the nations of a multinational democracy *are* nations, their members aspire to recognition not only in the larger multinational association of which they are a unit, but also to some degree in international law and other, supranational legal regimes (as, for example, the four nations of the United Kingdom). Accordingly, multinational democracies are not traditional, single-nation democracies with internal, subnational 'minorities' seeking group rights within, but societies of two or more, often overlapping, nations that are more or less equal in status.

Secondly, multinational democracies are not confederations of independent nation-states, plural societies of separate peoples or multinational empires. The citizens and their representatives participate in the political institutions of their self-governing nations and the larger, self-governing multination. Hence, multinational democracies standardly exhibit both federal and confederal features. The jurisdictions, modes of participation and representation, and the national and multinational identities of citizens overlap and are subject to negotiation.

Thirdly, the nations and the composite multination are constitutional democracies. That is, the legitimacy of both the nations and the multinational association rests on their adherence to the legal and political values, principles and rights of constitutional democracy and international law.

[2] Michael Keating argues in Chapter 1 of *Multinational Democracies* that multinational democracies are the norm rather than the exception.

Hence the title 'multinational democracy'. This feature is difficult to grasp because multinational democracies often emerge out of the cocoon of societies in which the majority tends to understand itself as a single-nation democracy, even when this is historically inaccurate, and to equate democracy with single nationhood. Consequently, multinational democracy appears to run against the prevailing norms of legitimacy for a single-nation democracy, and it is condemned as unreasonable or abnormal by both the defenders of the status quo and the proponents of secession. But, a legitimate multinational democracy runs against the norms of single nationhood, not the norms of constitutional democracy, which are, fortunately for the future, contingently related to the old ideal of a single nation polity.

Fourthly, multinational democracies are also multicultural. Both the nations and the multinational association as a whole are composed of individuals and cultural, linguistic, religious, ethnic and civilisational minorities who struggle for and against distinctive forms of recognition and accommodation of their cultural diversity. In response, the nations and the multinational association develop procedures and institutions for the democratic discussion and reconciliation of these forms of diversity with the unity of their respective associations (one way or another), in addition to the reconciliation of their multinational diversity. The struggles over minority and multinational diversity overlap, compete and undergo democratic negotiation as well.

These family resemblances among multinational democracies are examined in the following sections. I seek to sketch the major constituents of multinational democracies (the main political actors, the political options available to them, the processes of mobilisation, negotiation and reconciliation, and the democratic values at issue). A sketch is not a theory but more akin to a provisional toolkit for understanding the growing number of multinational democracies in which we are trying to find ourselves and appropriate practices of cooperation as light dawns on the diversity and complexity of the new century.

1 FREEDOM IN MULTINATIONAL DEMOCRACIES

After fifty years of struggles over recognition and accommodation in multinational and multicultural societies, we now have sufficient experience and research to begin to understand the characteristic dynamics of this form of political association. I would like to draw on the experience of the last fifty years and the research in *Multinational Democracies* to present and defend the following reflection on an important transition that multinational (and multicultural) democracies are beginning to undergo.

The politics of recognition of multiple nations and cultures within a constitutional democracy has reached a historical limit and is passing through a transition to a new orientation; a new self-understanding of the citizens, politicians and civil servants involved. The limit is an impasse caused by the inability to resolve specific struggles definitively and permanently. The explanation of this inability is what I will call the 'plurality' of contests over recognition. This concept refers to two features of recognition politics: (1) that struggles over the mutual recognition of identities are too complex, unpredictable and mutable to admit of definitive solutions, and (2) that the intersubjective activity of striving for and responding to forms of mutual recognition is an intrinsic public good of modern politics that contributes to legitimacy and stability whether or not the form of recognition demanded is achieved. The intersubjective activity of competing over recognition (separate from the end-state of recognition at which it aims) is what I will call the activity of mutual disclosure and acknowledgment. Struggles *for* recognition are also struggles *of* disclosure and acknowledgment.

Recognition politics, understood as the activity of mutual disclosure, is an enduring feature of modern politics. As a result, the constitutive question is no longer the one that has defined these struggles since Kant and Hegel: what is *the* just and stable form of recognition that will end the struggle? As *Multinational Democracies* shows, the question of just and stable forms of recognition must now be reformulated for the twenty-first century as an open-ended series of questions addressed to specific struggles and experiments with institutional solutions to them within the broader horizon of recognition as a long-term activity of politics. It is no different in this regard from other types of political activity (such as, say, struggles over distribution). The constitutive question around which struggles and critical reflection are now becoming reoriented concerns the framework in which the games of disclosure and acknowledgment take place: that is, what form of democracy enables the politics of recognition to be played freely from generation to generation, with as little domination as possible?

The primary question is thus not recognition, identity or difference, but freedom; the freedom of the members of an open society to change the constitutional rules of mutual recognition and association from time to time as their identities change. This is an aspect of the freedom of self-determination of peoples, one of the most important principles of modern politics from the American and French revolutions to the Universal Declaration of Human Rights. However, in its classic form the freedom of self-determination was understood as the determination of a people into a specific constitutional formation that all could accept as the just

framework for politics – whether this was a uniform nation, a federation or some other form. Amendment would be required only in exceptional circumstances, it would be difficult to initiate and achieve, and it would not affect the constitutional essentials.[3]

This classic understanding of the freedom of self-determination has been called into question and discredited by the persistence of struggles for recognition in the very societies that were until recently legitimated by it, for the struggles demonstrate that the constitution is not acceptable to all. As a result, the question of the freedom of self-determination is raised anew. It is raised in the context of multinational societies whose members have passed through the experience of struggles over recognition and learned that these do not admit of a definitive solution (and so cannot be accommodated within the classic understanding of self-determination). Rather, these contests constitute an enduring dimension of modern politics: the public disclosure of misrecognised identities and the demand that the other members acknowledge these and respond. Accordingly, the new, second-order aim of these struggles is for a form of political association that takes this continual on-going activity into account in its basic structure. The answer is that a multinational society will be free and self-determining just in so far as the constitutional rules of recognition and association are open to challenge and amendment by the members. If they are not open, they constitute a structure of domination, the members are not self-determining and the society is unfree. Freedom *versus* domination is thus the emerging focus of politics in multinational societies at the dawn of the new millennium.

I present this argument in the following steps. Section 2 describes the relevant features of multinational democracies. Section 3 describes the relevant features of struggles over recognition and how they have reached a limit or impasse due to their plurality. The response to this impasse over the last two decades by means of democratic constitutional change is explored in section 4. This experience brings to light a second limit: current democratic constitutionalism is conceived under the same classic assumption that gave rise to the impasse in the first place; the assumption that under some considerations of justice and stability members will reach agreement on a definitive form of recognition for all affected. For reasons of 'plurality' this form of democratic constitutionalism is doomed to failure. The lesson to be learned from passing through this experience is taken up in section 5. The form of culturally diverse democracy that will be both free

[3] Tully, *Strange Multiplicity*, pp. 58–70; Bellamy and Castiglione, 'Building the Union'.

and stable in the twenty-first century is one in which the prevailing rules of recognition are always open to challenge and modification by the diverse members, on the grounds that any set of rules will harbour dimensions of injustice and non-recognition. This entails that the nations of multinational democracies should be treated as peoples with the right of internal self-determination.

The Supreme Court of Canada, in *Reference re Secession of Quebec* (1998), is the first Court of a multinational society to acknowledge this condition of freedom and to articulate an appropriate account of democratic constitutionalism in response.[4] The Supreme Court argues that the members of a diverse constitutional democracy have the right to initiate political and constitutional change (up to and including secession) and the correlative duty to enter into political and constitutional negotiations with the member who invokes this right by a legitimate procedure. The right and duty constitute the key democratic device for the reconciliation of multicultural and multinational diversity with the requirements of unity in culturally diverse societies over time, as a continual activity. If a constitutional democracy does not embody this right and duty in its political and constitutional practices, and so allow struggles for and against recognition to be played freely, it is a closed structure of domination and unfree with regard to self-determination. Since the Supreme Court of Canada clarifies the revolutionary transition in self-understanding of constitutional democracy that Canada and other multinational democracies are struggling with, in one way or another, I draw on the Court's exemplary reasoning in my own presentation.[5]

2 THE PROBLEMATISATION OF THE CONSTITUTIONAL IDENTITY OF A MULTINATIONAL SOCIETY BY STRUGGLES OVER RECOGNITION

2.i A multinational society

Canada is described as a 'free and democratic society' in Section 1 of The Canadian Charter of Rights and Freedoms. A 'multinational society' or

[4] All references to The Supreme Court of Canada [1998] *Reference re the Secession of Quebec* are to the numbered paragraphs of the text. For a more detailed defence of the interpretation I advance here, see Tully, *The Unattained yet Attainable Democracy*.

[5] For a broad historical account of this view of constitutional change, see Tully, *Strange Multiplicity*, and for Canada, see Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 1992).

'multinational democracy' is a type of 'free and democratic society' that includes more than one 'nation', or, more accurately, more than one 'member' of the society demands recognition as a nation or nations. In the case of Canada, the present government of Quebec and many of the citizens demand recognition as a nation, and the present leaders of the Indigenous or Aboriginal peoples and the majority of Aboriginal people demand recognition as 'First Nations' or 'Indigenous peoples'. For the sake of brevity, I will sometimes write simply that 'Quebec' and the 'Aboriginal peoples of Canada' demand recognition as a nation and as First Nations respectively. I mean by this shorthand that a majority of Quebecers and Aboriginal people support these demands. A member of a multinational society that demands recognition as a nation may itself be a multinational society. Quebec, with eleven Aboriginal peoples in and across its borders demanding recognition as First Nations, is a multinational democracy.

To investigate the features of a free, multinational democracy, let us start (not uncritically) from the classic liberal account of a reasonably plural, free and democratic society presented by John Rawls, in *Political Liberalism* (1996), and its innovative extension by Anthony Laden, in *Reasonably Radical: Deliberative Liberalism and the Politics of Identity* (2001), to free and democratic, multicultural and multinational societies. Rawls and Laden describe a free and democratic society as one that has a high degree of self-sufficiency and a place for all the main purposes of human life.[6] A multinational society, like all free and democratic societies, meets these conditions. Moreover, a multinational society, like all free and democratic societies, is a fair system of social, political and economic cooperation in the broad and thick sense given to this phrase by Rawls. It is the congeries of democratic practices in which we acquire, exercise, question and modify our identities as national and multinational citizens.[7]

'Cooperation' is more than socially coordinated action. 'Cooperation is guided by publicly recognised rules and procedures that those cooperating accept and regard as properly regulating their conduct.' Cooperation also involves the idea of 'fair terms of cooperation' – 'these are terms that every participant may reasonably accept, provided that everyone else likewise accepts them'.[8] The fair terms of cooperation apply to the basic structure of the society, to its political, economic and social institutions, and they are expressed in the constitutional principles of the society.[9] Accordingly, a demand for recognition as a nation or nations and its mode of institutional

[6] Rawls, *Political Liberalism*, pp. 40–3. [7] *Ibid*., pp. 15–22, 41, 222, 269. [8] *Ibid*., p. 16.
[9] *Ibid*., pp. 257–8, 269–71; Supreme Court of Canada, *Reference re the Secession of Quebec*, §§50, 54.

accommodation within a multinational society must be compatible with conditions of a fair system of social cooperation, or what the Supreme Court of Canada calls 'unity', to be acceptable. Conversely, a demand for recognition is often supported by the claim that the prevailing terms of cooperation or unity are unacceptable in some respect, for example in the case of both Quebec and Indigenous peoples.

A free and democratic society, whether multinational or uninational, is 'free' in two relevant senses. The members of the society are free and the society as a whole is free. That is, the members of the society not only act democratically within the rules and procedures of cooperation; they also impose the rules on themselves and alter the rules and procedures democratically *en passant*. Such a society is 'self-governing' or 'self-determining', not in the radical sense that its members will into being the conditions of association. Rather, the members are free either to accept the conditions of association or to enter into democratic negotiations to change the conditions that can be shown to be unjust; or, if the second of these options is blocked, to initiate the option to negotiate exit.[10] This is one of the most widely accepted principles of legitimacy in the modern world: for example, (1) of a liberal society as a fair system of social, political and economic cooperation, i.e. the rules are freely accepted and regarded as appropriate by the participants themselves;[11] (2) of 'self-determination' as it is predicated on free societies or 'peoples' in international law;[12] and (3) of a free and democratic society in which the sovereign people or peoples impose the rules of the association on themselves as they obey those rules.[13] The rules and procedures are neither imposed from the outside nor from an undemocratic element within. A member 'nation' seeking recognition within the larger society itself will be free and democratic in these two senses as well, on pain of a performative contradiction.

A 'nation' is a 'people' with the right of self-determination. A multinational society is a 'people' composed of peoples, a multi-peoples society or a multination. The multinational democracies studied in *Multinational Democracies* have been recognised as self-determining, single nations or peoples under modern international law for two centuries. The nations that demand recognition within these multinational societies also demand

[10] Supreme Court of Canada, *Reference re the Secession of Quebec*, §§83–105, 111–39.
[11] Rawls, *Political Liberalism*, p. 16.
[12] Supreme Court of Canada, *Reference re the Secession of Quebec*, §§111–39.
[13] Rawls, *Political Liberalism*, pp. 396–409; Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, eds. Ciaran Cronin and Pablo De Greiff (Cambridge, MA: MIT Press, 1998), pp. 49–74, 129–54, 253–64.

recognition as 'peoples'. The terms 'nations' and 'peoples' have been used in overlapping ways over the last two hundred years, and they are used interchangeably in discussions over, say, the Quebec 'people' or 'nation' and the 'First Nations' or 'Indigenous peoples'. Since I wish to focus on the conditions of freedom and recognition in multinational societies, the concept of a people with the right of self-determination is appropriate, rather than the concept of a nation, which is appropriate for issues of nationalism.

A multinational society is usually but not always a federation.[14] Israel and New Zealand, for example, are bi-national but not federal. I will concentrate on multinational federal societies because I wish to draw on Canada and because they are more complex than non-federal multinational societies. If we can clarify the main features of freedom and recognition in multinational federations, the non-federal cases should not be difficult. A federation is a society in which democratic self-government is distributed in such a way that citizens 'participate concurrently in different collectivities'.[15] They participate in the democratic institutions of the society as a whole and of the federated members, such as provinces, states, nations or First Nations. A 'confederation', in contrast, is an association, not a society, in which citizens participate only in their 'nation', not in the multinational confederation as a whole. The problem of multinational recognition in a confederation is correspondingly less complex and can be set aside for now.

2.ii Four dimensions of constitutional identity

When a demand for the recognition of one or more nations or peoples arises in a multinational democracy, it 'problematises' the constitutional identity of the society. That is, the demand renders problematic the current (single-nation) constitutional identity of the society and proposes a change. Various solutions are then proposed to the problem in theory and practice. Looking back over fifty years of experience, three conflicting types of solution are standardly proposed around which citizens and governments mobilise: (1) defence of the status quo, with or without a degree of sub-constitutional change, (2) various forms of recognition of the nation or nations by changing the current constitutional identity and (3) secession of the nation or nations and recognition as a new independent nation or nations, with or without some relation to the former society. Each of the three types of strategic solution is defined by an evolving structure of argument that

[14] See Gagnon and Tully, eds. *Multinational Democracies*, Chapters 4, 5, 7, 10, 13 and 14.
[15] Supreme Court of Canada, *Reference re the Secession of Quebec*, §66.

presents reasons for the justice and stability of its solution and the injustice and instability of the other two.[16] Call the whole – including the reasons and causes of the demand, the proposals and solutions, the public discussions and negotiations, or refusals to negotiate, the amendments of the constitution and institutional changes, and the demands for recognition that this amendment in turn provokes – the 'problematisation' of the constitutional identity of a multinational democracy.[17]

The 'constitutional identity' of a multinational society, as of any free and democratic society, is its 'basic constitutional structure', what I called above the publicly recognised and accepted rules and procedures by which the members of the society recognise each other and coordinate their cooperation. In the words of the Supreme Court of Canada, the Constitution 'embraces unwritten, as well as written rules', and includes 'the global system of rules and principles which govern the exercise of constitutional authority'.[18] The constitution is the present system of rules of mutual recognition that gives a society its constitutional identity.

There are four major dimensions of the constitutional identity of a democratic society. Firstly, a constitution recognises the *members* of a society under their respective identities and enumerates their rights, duties and powers. For example, the Canadian Constitution recognises 'citizens' with their rights, freedoms and duties, various types of 'minorities' (linguistic, cultural and individuals or groups disadvantaged because of race, ethnic origin, colour, religion, sex, age and mental or physical disability), 'territories', 'Aboriginal peoples' and their rights, 'provinces' with their legislative powers, the federation and its federal legislature, and the Canadian society as a whole. Secondly, a constitution stipulates the *relations of governance* among the members, the rules and procedures that guide their conduct as members of a fair system of social cooperation (the totality of laws and regulations). Thirdly, a constitution lays out a set of procedures and institutions of *discussion and alteration* of prevailing relations of governance over time. In Canada, these include the rights of public discussion, debate, assembly, voting, strike and dissent, courts, legislatures, procedures of federal-provincial renegotiation, the notwithstanding clause, treaty negotiations among First Nations and federal and provincial governments, and procedures for amending the constitution. Fourthly, a constitution includes the *principles, values and goods* that are brought to bear on the

[16] Gagnon and Tully, eds., *Multinational Democracies*, Chapters 3, 4, 8 and 13.
[17] For the concept of problematisation, see Chapter 3, this volume.
[18] Supreme Court of Canada, *Reference re the Secession of Quebec*, §32.

identification of members, the relations among them, and the discussion and alteration of their identities and relations over time. These principles, values and goods do not form a determinate and ordered set of principles of justice to which all the members agree. Rather, they are many, none is trump, different ones are brought to bear in different cases, and there is reasonable disagreement and contestation about which ones are relevant and how they should be applied in any case.[19] Indeed, part of what makes the society free and democratic is reasonable disagreement among the members and their political traditions of liberalism, conservatism, socialism, republicanism, feminism, nationalism, multiculturalism, environmentalism and so on.[20] These principles, values and goods comprise the public, normative warrants members appeal to in exchanging reasons over the justice and stability of their conflicting demands for and against recognition in any case.[21]

In cases of the recognition of nations in multinational societies, there are seven relevant principles. Following the Supreme Court, four principles are necessary (but not sufficient) to the 'reconciliation of diversity with unity' in cases of multinationalism: the principles of federalism, democracy, the rule of law and constitutionalism, and the protection of minorities.[22] In thin and non-diverse liberal democratic theories, two principles – democracy and rule of law – are said to be co-equal and jointly sufficient for legitimacy.[23] However, this would be sufficient only for a subset of modern societies, those that are non-federal and do not acknowledge the protection of minorities as an independent principle.

In addition, three basic principles are indispensable to any free and democratic society: freedom, equality and distinctness. Free and equal are widely endorsed principles. By 'freedom' I mean not only the freedoms associated with private autonomy (the freedom of the moderns), but also, and of primary concern in this case, the freedom associated with public autonomy, the democratic freedoms of members to participate in their society in the twofold sense explained above (2.i). 'Equality' includes not only the relatively uncontentious formal equality associated with thin liberal democracy, but also the substantive equality associated with thicker liberal theories (such as Rawls' 'difference principle') and with social democracy

[19] *Ibid.*, §§39–54.
[20] John Rawls, *The Law of Peoples with the Idea of Public Reason Revisited* (Cambridge, MA: Harvard University Press, 1999), pp. 140–3.
[21] *Ibid.*, pp. 129–80; Laden, *Reasonably Radical*, pp. 99–185.
[22] Supreme Court of Canada, *Reference re the Secession of Quebec*, §§32, 49, 55–82.
[23] Habermas, *The Inclusion of the Other*, pp. 253–64.

and socialism (for example, social and economic rights for citizens and groups, and equalisation transfers for provinces).[24] Lastly, the principle of equality encompasses the equality of peoples.[25] Members standardly disagree over the ranking, interpretation and application of these three aspects of equality.

Finally, members not only recognise each other as free and equal, in these contested senses, but also, thirdly, as the bearers of 'distinct' or, as the Supreme Court puts it, 'diverse identities'.[26] The freedom of expression of individual citizens, the principle of non-discrimination, equity policies, proportional representation, the protection of individual and group identities, languages and cultures, Aboriginal rights, self-government and some federal arrangements (such as the special provisions for Quebec) are often justified in part by the principle of diversity or distinctness. Again, support varies and is contested, but public recognition of some forms of diversity and of 'identity-related differences' is both unavoidable (language and culture being the most obvious examples) and good, either in itself or as a means to other goods, such as mutual respect.

2.iii The right to initiate constitutional change and the duty to acknowledge and answer

The constitution, therefore, is (1) the prevailing system of rules of mutual recognition of the identities of political actors, (2) the relations of cooperation among them, (3) the procedures for discussing, negotiating and altering the rules, and (4) the normative considerations that bear on the rules. However, we need in addition to see how these four dimensions of a constitution work together to compose and regulate a free, democratic and efficient system of social, economic and political cooperation over time. Recall that the members, in so far as they are 'free citizens', have rights and duties of democratic participation, as well as their civil and social rights of various kinds. These are democratic rights to enter into the processes and institutions of the third dimension of the constitution, either directly or indirectly through their representatives; to contest and seek to change any rule of recognition governing the members and the relations among them, by presenting arguments in terms of the principles, values and goods of the constitution. If the demand is reasonable, the other members of the

[24] Supreme Court of Canada, *Reference re the Secession of Quebec*, §64.
[25] Equality of peoples is discussed in section 5 below.
[26] Supreme Court of Canada, *Reference re the Secession of Quebec*, §§43, 58–9, 60, 74, 79–82.

society have a correlative duty to respond to the demand by means of the appropriate form and forum of discussion and negotiation.

These are the rights that peoples or nations invoke when they seek recognition in multinational societies by means of constitutional change. Although this is the type of case we are concerned with here, it is important to notice that these rights are a subset of the kind of rights that any member invokes whenever he or she enters into public debate, joins a political party, votes, demonstrates, introduces a bill in parliament, enters into litigation, initiates treaty negotiations, or any other form of participation, with the aim of changing any of the rules of the society. A member demanding recognition as a nation is an instance of the general right and duty of civic participation.[27]

The Supreme Court explains this crucial democratic right of any member to initiate negotiations over a rule of recognition and the correlative duty of the other members to enter into negotiations if the demand is reasonable, firstly by presenting the general right and duty of all members to dissent and be acknowledged and addressed, and secondly by defining the more specific right of certain members, such as provinces, to initiate constitutional change:[28]

> [W]e highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, 'resting ultimately on public opinion reached by discussion and the interplay of ideas'. At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on the truth, and our system is predicated on the faith that in the marketplace of ideas, the best solution to public problems will rise to the top. *Inevitably there will be dissenting voices* [my italics]. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.
>
> The Constitution Act, 1982, gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants of Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of government.

Each member must possess this right to initiate rule change and the correlative duty to acknowledge and answer if the society is free and

[27] See Chapters 4 and 5 of this volume for this right as the freedom of citizens.
[28] Supreme Court of Canada, *Reference re the Secession of Quebec*, §§68–9.

democratic. It follows from the 'democratic principle'. As a consequence, a free and democratic society is involved in 'a continuous process of discussion', a process which includes both the right to voice dissent and the duty to 'acknowledge and address those voices in the laws by which all in the community must live'. Any rule of recognition is thus in principle open to dissent, discussion, consideration and, if necessary, alteration, in accord with the totality of rules that are not in question in any particular case. As the Supreme Court summarises:[29]

> Our democratic institutions necessarily 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 right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order.

This crucial feature of a free and democratic society is difficult to grasp because the language of constitutionalism and struggles for recognition dispose us to presume that there is some definitive and permanent system of rules of mutual recognition, some definitive configuration of the first, second and fourth constitutional dimensions on which all agree (the present one, some renewed constitution, or secession and two new constitutional nations). But this is false. '[I]nevitably, there will be dissenting voices.'[30] What is definitive and permanent is the democratic discussion and alteration of the rules over time. The members accept and respect this or that system of rules of recognition not because they agree on the system in virtue of some shared conception of justice, but because the rules are open to dissent, fair consideration and amendment. This free and democratic feature is expressed in and guaranteed by the right to initiate rule change and the duty to acknowledge and address legitimate demands for change. Now we need to ask why 'dissent' – the free play of this right and duty – is 'inevitable'.

3 THE ACTIVITIES OF STRUGGLING FOR AND AGAINST RECOGNITION

3.i The main features of a struggle over the recognition of a people

When a participant demands recognition of its identity, whether this is an individual in the workplace claiming discrimination and demanding an

[29] *Ibid.*, §150. [30] *Ibid.*, §68.

equity policy supported by public power or a member claiming recognition as a nation, the demand standardly involves four claims. The demand involves the claim that, (1) the present form of constitutional recognition of its identity constitutes non-recognition or mis-recognition, (2) this state of affairs constitutes an injustice, (3) the proposed new form of recognition is just and well supported by public reasons (drawn from the fourth dimension), and finally (4) recognition (and institutional accommodation) by the other members would render the overall constitutional identity of the society a just and stable system of social cooperation. As we can see, a demand for recognition problematises not only the present identity of the member demanding recognition, but also the identities of all members and the relations among them. It calls into question the present arrangement of the first two dimensions of the constitution. (For example, the recognition of the province of Quebec as a nation and of Aboriginal 'bands' as 'Indigenous peoples' affects the identity and interrelations of minorities, provinces, territories, the federal government, and the rights, duties and freedoms of citizens in various ways.)

Hence, a demand for recognition is never 'merely symbolic'. Along the second dimension, it alters, in complex and often massive ways, the social, economic and political relations of power that constitute the present system of social cooperation, as has been noted, for example, in the analysis of proposals to add 'interpretative clauses' to the Canadian Constitution.[31] These four claims and the corresponding alterations in identities, in social, economic and political relations, and in related structures of interest, are taken up and struggled over by the three parties (status quo, constitutional change and secession) in discussions and negotiations. These take place in the processes and institutions of the third constitutional dimension and appeal to the principles, values and goods of the fourth.[32]

To support their preferred solutions, all three parties engaged in the struggles tend to simplify the situation by trying to eliminate from the discussion some of the other members that would be affected by the proposed change. Some defenders of the status quo either ignore Quebecers and Aboriginal people who demand fundamental change or claim to speak for them. Some Quebec and Aboriginal sovereignists ignore the members within their borders who disagree with their projects and reduce the other members

[31] Thomas Q. Riddell and F. L. Morton, 'Reasonable Limitations, Distinct Society, and the Canadian Charter: Interpretive Clauses and the Competition for Constitutional Advantage', *Canadian Journal of Political Science* 31(3), 1998: 467–94.

[32] See Gagnon and Tully, eds., *Multinational Democracies*, Chapters 4, 8, 10, 12 and 13.

of society to a homogeneous 'other'. By this tactic, they undermine the legitimacy of their own claim to recognition, for they misrecognise, or fail to recognise at all, the claims of others affected by their claim, precisely the injustice they are protesting in their own case. Such performative contradictions violate the first principle of recognition politics, the principle of reciprocity, mutual recognition, mutual acknowledgment or *audi alteram partem* (always listen to the other side). That is, every member affected by the proposed change should be acknowledged and have a say in the discussions and negotiations.[33] *Unilateral* defence of the status quo, unilateral constitutional change and unilateral secession are all unjust in the sense that they violate with respect to other members the very principle that is invoked to justify the act.[34] Moreover, such unilateral acts are unstable, for the disregarded members are seldom silenced for long. All the force of the existing society or of the secessionist state cannot stabilise effectively the unjust situation or gain the recognition they need from others, as we have seen in many tragic cases.

Consequently, there is no just and stable way to bypass the complex situation as I have outlined it. We must pass through it freely and democratically – by means of negotiations in which all members affected have a voice – and abandon strategies of defending the status quo by ignoring demands for recognition or passing through to independence by ignoring conflicting claims to recognition of those affected. Any such unjust and unstable unilateral demand (or defence of the status quo) should be ignored because it is illegitimate. This is the central argument of the Supreme Court,[35] and it was endorsed by all three parties (the Prime Minister speaking for the status quo, proponents of constitutional recognition of multinationalism and the sovereignist Premier of Quebec).

Taking this into account, let us examine the discursive space in which a demand for recognition is worked up, whether for constitutional change or independence. Any such demand ought to be acknowledged and addressed by the other members of the society. This is an obligation.[36] They will respond to the demand in various ways and these responses will involve the claim that they be properly recognised in return. The legitimacy of a demand for recognition will be in part a function of the cogency in which the legitimate responses of other members are acknowledged and taken into

[33] Tully, *Strange Multiplicity*, pp. 7–17, 115–16, 165–82.
[34] Supreme Court of Canada, *Reference re the Secession of Quebec*, §§86, 91, 95. [35] *Ibid.*, §§85–96.
[36] *Ibid.*, §§68–9, quoted above. The obligation of provincial and federal governments to enter into treaty negotiations with First Nations in Canada is an example of such an obligation. See Chapters 7 and 8, this volume.

account. Moreover, the demands for recognition will be of various kinds. A demand for recognition as a nation provokes responses from provinces, territories, Aboriginal peoples, minorities and individual citizens, each with recognised identities and relations they wish either to protect or modify in the light of the initial demand. Thus, the appropriate way to acknowledge and respond fairly to the reciprocal claim of others in the course of elaborating and defending a claim for nationhood will be complex. For example, the demands of Aboriginal peoples for recognition as First Nations are considerably different from the demands of Quebec and require different responses.[37] Finally, a demand for recognition as a nation in a free and democratic society must be generated and defended in a manner that takes into account the legitimate concerns, not only of other members in the larger multinational society, but also of individuals and minorities within the nation seeking recognition.

Accordingly, there are always three free and democratic *processes of identity discussion and formation* that occur simultaneously in the procedures and institutions of discussion (the third constitutional dimension). These are (predominantly) discursive practices in which citizens discuss, acquire and negotiate the very identities they put forward for recognition. Firstly, those mobilising for recognition must convince a clear majority of their own diverse members that they are misrecognised under the current constitution and should be recognised as a nation (under some description). These members will often include (as in the case of Quebec) Aboriginal peoples, linguistic and other types of minorities, and individual citizens with rights, duties and powers under the current constitution. Therefore, the discussion of a demand for recognition will involve public discussions and negotiations among these members in order to reach agreement on a clear formulation of what is meant by nationhood, one that shows responsiveness to the concerns of the dissenting minorities and citizens within (otherwise the demand fails the test of reciprocity and can be ignored). The Supreme Court suggests that these conditions will be met, and a demand will be recognised as legitimate if the demand for nationhood is formulated in a clear referendum question and receives a clear majority of votes.[38] This triggers the duty of other members to enter into negotiations on constitutional change.[39] These further negotiations will proceed in

[37] Roger Gibbins and Guy Laforest, eds., *Beyond the Impasse: Toward Reconciliation* (Montreal: Institute for Research on Public Policy, 1998); Will Kymlicka, *Finding Our Way: Rethinking Ethnocultural Relations in Canada* (Toronto: Oxford University Press, 1998).

[38] Supreme Court of Canada, *Reference re the Secession of Quebec*, §87. [39] *Ibid.*, §89.

accordance with the four principles and so will in turn take into account the concerns of all members, both within the nation demanding recognition and those concerned members in the larger society.[40]

In Quebec, for example, these processes of identity discussion and formation have been in operation since 1976.[41] Various consultations, commissions, public negotiations and public discussions have been held in an effort to come to terms with the numerous issues involved: whether Quebec is an ethnic or a civic nation, if Aboriginal peoples are to be considered equal nations, if linguistic minorities and multicultural citizens are to be recognised, if it is a neo-liberal or a social democratic nation, if French-speaking minorities outside Quebec are to be considered or ignored, whether the First Nations and their territories may remain part of Canada, whether ridings voting massively against secession may remain Canadian and so on.[42] No consensus has been reached and the majority has rejected three referendums on proposed definitions of the identity of the Quebec nation: in 1980, 1992, 1995. Analogous processes of identity discussion and formation take place among Aboriginal peoples. Disputations and negotiations exist between the national leadership and the native communities, among the over 600 native communities, between Aboriginal men and women, those living on reserve and off reserve, among Indians, Inuit and Metis, and between generations.[43]

As this internal process takes place, the member demanding recognition enters into discussions and negotiations with the other members of the multinational society in order to amend the identity of the society as a whole in accordance with the recognition of nationhood. This constitutes a second process of identity discussion and formation as the participants argue for and against one or more proposal after another for reconstituting the rules of recognition of their collective identity. These discussions occur before and after the referendum that triggers the duty to negotiate. In turn, they provoke an equally important, third process of identity discussion and formation exclusively among the other members of the larger society (the 'Rest of Canada' without Quebec and 'non-Aboriginal Canadians' in relation to Aboriginal peoples).

For example, the other provinces, which are currently recognised as roughly equal in status to Quebec (with some institutional asymmetries

[40] *Ibid.*, §§90–8, 103–4.
[41] Jocelyn Maclure, *Récrits Identitaires: Le Québec a l'épreuve de pluralisme* (Montreal: Québec-Amerique, 2000).
[42] See Gagnon and Tully, eds., *Multinational Democracies*, Chapters 1, 10 and 13.
[43] See Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission*.

justified on the basis of Quebec's linguistic and cultural distinctness), are asked by some Quebec nationalists to see themselves as one nation equal in status and power to the Quebec nation, thereby decreasing their status by a factor of ten and requiring a new 'fourth' order or superstructure of Quebec-Canada institutions. This proposed identity for the rest of Canada appears to be rejected by the majority of Canadians.[44] The former Reform Party of Canada (now merged into the Conservative Party) proposed in response that each province be recognised as equal in status to the Quebec nation, each taking from the federal government whatever powers Quebec takes (and so decentralising the federation), while others suggest that the other provinces only need to be *offered* these powers to meet the principle of equality. Still others propose some sort of asymmetrical relationship, based either on the principle of Quebec's distinctness (such as the proposed 'distinct society' and 'unique society' constitutional amendments) or on the principle of equality, such that whatever powers Quebec patriates from federal jurisdiction to its National Assembly, the federal members of parliament from Quebec abjure the right to vote on the exercise of these powers in the federal parliament. The other provinces also present specific demands for the recognition of their equality or distinctness. Citizens, minorities and Aboriginal peoples within the other provinces participate in these discussions, point out the adverse effects of these proposals on their constitutional identity and relations, and demand recognition.[45]

Finally, these three processes of identity discussion and formation interact in complex and unpredictable ways. Agreements or disagreements in the second process of the multinational democracy as a whole, for example, have enormous transformative effects on the self-understandings of the members engaged in the other two processes. In each of the three processes, the discussions tend to become structured around the three major strategic solutions (the status quo, constitutional renewal and secession) and this works against agreement. So, for example, even if a clear majority appears to converge on, say, a form of recognition by constitutional reform, as in the Charlottetown Accord of 1992, the defenders of the status quo and the secessionists will work from opposite sides to subvert it.

[44] Will Kymlicka, 'Multinational Federations in Canada: Rethinking the Partnership', in *Beyond the Impasse*, p. 40.

[45] See Gagnon and Tully, eds., *Multinational Democracies*, Chapters 1, 3, 10 and 13 and compare these demands with the demands in 4, 7 and 12.

3.ii Plurality and the game of mutual disclosure and acknowledgment

We can now highlight four characteristics of the free and democratic activity of struggling over the recognition of the national identity of a member of a multinational society. The activity is intersubjective, multilogical, continuous and agonistic. Firstly, the identities of the member seeking recognition and of those members who are affected and respond are intersubjective. Their identities as members are shaped, formed and reformed in the course of the activity itself. There is no pre-political or ascriptive identity as a nation that precedes the activity and passes unaltered through the activity. The identities of the members are articulated, acquired and supported by citizens from a first-person perspective, and defended, criticised and reformulated over the time of the life of the society and its members as the three processes of identity discussion and formation interact. Even a claim that there is an authentic, pre-existing identity based on ascriptive characteristics is itself a claim that must be made good to and supported by other members of the purported nation by means of public discussions and debates in the available institutions – from talk at the bingo hall and on the bus, to history lessons, public demonstrations, grand commissions, band council meetings and public consultations.

Secondly, the intersubjective activity of struggling for and against recognition is multilogical. These complex struggles are not the idealised struggles between two actors (self and other) in dialogue that have dominated their representation in theory and practice from Hegel and Fanon down to the current, post-9/11 binary constructions of 'we' and 'they' in the clash of civilisations debate. This form of representation misrepresents what is actually happening, as *Multinational Democracies* amply demonstrates, and in so doing violates the first principle of mutual reciprocity or *audi alteram partem*.[46] These are discussions among many members of various kinds – 'multilogues'. Multilogues involve not only deliberation but various forms of reason-giving, rhetoric, greetings and, especially, rival storytelling and narratives of nationhood and peoplehood by differently situated members. And these discursive activities are inseparable from visceral behaviour.[47] Moreover, the discussions, negotiations and contestations take place in a variety of practices and procedures, and the legitimacy of these is also unavoidably part of the discussion, since these arrangements and dominant modes of speaking will privilege some and silence and degrade other

[46] See *Volume II*, Chapter 8, for the clash of civilisations debate.
[47] Connolly, *Why I am not a Secularist*; Walton, *The New Dialectic*.

speakers. At the heart of fair discussions, therefore, is the most precious democratic duty to listen for the voices that are absent, silenced, misheard and rejected as unreasonable and to learn to hear them in their own register.[48]

Thirdly, the activity is 'continuous'.[49] A demand is presented, others respond, the demand is reformulated in response, others respond to this, an agreement is reached or not, and this in turn gives rise to dissent and a new demand. Unpredictability, complexity and mutability are irreducible. Any form of mutual recognition should be viewed as an *experiment*, open to review and reform in the future in response to legitimate demands for recognition against it, and so viewed as part of the continuous process rather than as the *telos* towards which the activity aims and at which it ends. This is true even in the case of secession and the aim of recognition as an independent nation-state by the international community. To achieve this form of recognition, Quebec would have to respond to the demands for mutual recognition of the eleven First Nations within Quebec (who would appeal not only to Canada's constitutional obligation to protect them but also to the international law of Indigenous peoples), the English-speaking ridings which would vote NO (who would campaign for partition or the continuation of their present minority rights under the new constitution), the French-speaking minorities within Canada (who require protection in the new Canada), the new economic and political relationship with an independent Canada, and the conditions it would have to meet to enter into NAFTA (over which Canada has a veto).

The fourth feature is the contestatory character of the activity. The multiple struggles are 'contests'. The Greek term for a contest, 'agonism', has been revived to describe this feature and I will adopt it.[50] A great deal of what is going on in struggles over recognition is not aiming at recognition so much as it is making public displays of the intolerability of the present form of recognition and displaying another form of identity (nationhood). The other members respond in kind. It is a to-and-fro activity of mutual 'disclosure' and mutual 'acknowledgment'.[51] The members say to each

[48] Young, 'Communication and the Other', pp. 120–36.

[49] Supreme Court of Canada, *Reference re the Secession of Quebec*, §150.

[50] For the concept of agonism, see Chapters 3 and 4, this volume.

[51] In using the more flexible concept of mutual acknowledgment rather than the more theoretically determined concept of recognition, I have been influenced by the work of Stanley Cavell. For an introduction, see Stephen Mulhall, *Stanley Cavell: Philosophy's Recounting of the Ordinary* (Oxford: Oxford University Press, 1998).

other with their words and deeds, 'don't see us under the present humiliating or degrading identity but under this or that respectful identity'.

The mutual disclosure and acknowledgment of the contests falls short of full constitutional recognition. What is disclosed in any given contest over recognition is partial and revisable, and the form of acknowledgment and response by other members is equally partial and revisable in the future. But this is far from trivial. It is a means of discharging *ressentiment* at the present structure of recognition (which might otherwise be channelled into anti-democratic ways); displaying how a member would like to be seen by the others; and generating pride in, solidarity with, and a sense of attachment to the disclosed identity. Both Quebec and the First Nations have been successful in this form of activity, taking on and displaying many of the attributes of nations in their self-presentation to their own citizens, to other members of the society and to the international community.

When this kind of disclosure is not recognised constitutionally by the other members, it is still acknowledged by others in the very act of accepting it and responding to it with public displays of their own. Holding referendums on renewed federalism and sovereignty, electing sovereignist parties provincially and federally, and accepting and answering these disclosures of nationhood by others are examples of this phenomenon. The 'struggle' itself is an intersubjective, multilogical game of disclosure/acknowledgment. Although it is not formal constitutional recognition and accommodation, it is an important achievement in its own right for all the actors involved. Mutual disclosure and acknowledgment are central, for example, to the decolonisation, rebuilding and revitalisation of Aboriginal communities after centuries of misrecognition, internal colonisation and marginalisation.[52] The public disclosure of Quebec's identity as a nation and the defiant acknowledgment of that by refusing to grant formal recognition by the other provinces have in themselves generated a healthy sense of self-respect and self-esteem among Quebecers. Nietzsche and other agonistic theorists suggest that disclosure and acknowledgment, even when the acknowledgment takes the form of a counter-challenge, can generate the levels of self-respect and self-esteem that recognition theorists claim can come only with formal recognition.[53] Conversely, forms of constitutional recognition that

[52] See Chapter 8, this volume.

[53] Even Axel Honneth, a leading proponent of the opposing view that there are three definitive and final forms of recognition for one and all, seems to agree that the contest over recognition may itself generate some degree of self-respect and self-esteem: *The Struggle for Recognition*, p. 164.

are taken as definitive and final, as the dominant theories of recognition presuppose, can and do function as structures of oppression, given the manifest mutability, negotiability and changeability of identities over generations in free and open societies.[54] If this is true, and there is considerable evidence for it in Canada, then the recognition theory of justice and psychological stability in terms of which these struggles are standardly analysed is mistaken. It is much better to think of these struggles in the less loaded and more open-ended language of acknowledgment.

These continuous contests of mutual disclosure and acknowledgment in the cases we have studied in *Multinational Democracies* are also ends in themselves. They are the activities of democratic freedom itself, of participation in accordance with the rules laid down by the last struggle for recognition and the challenging of these rules against the principles, values and goods of the fourth dimension of the constitution.[55] Moreover, although these games are serious, they contain an important play element, characteristic of most competitive games, which helps to explain their persistence generation after generation, even when the present structure of recognition appears to be reasonable from, say, the perspective of utility or of the majority nation (such as England in relation to Scottish nationalism).

Furthermore, a theoretical distinction between discursively given acknowledgment and 'definitive' recognition cannot be drawn outside the on-going negotiations themselves. For some, the acknowledgment of Quebec's distinctness under the present system of rules or the present acknowledgment of Aboriginal peoples' rights to land and self-government will be sufficient for recognition. For others it will be an intolerable humiliation. In 2006 the federal Parliament recognised Quebec as a nation within a united Canada, but not in the constitution. Some Quebecers applauded, others did not and others had mixed feelings. Even independence – with all the limits that would be placed on Quebec's sovereignty, the lack of positive acknowledgment by some members of the international community and the dissent within – will seem less than appropriate recognition to some. Where to draw the line is not a question of theoretical but of practical reason, by the participants from within the on-going processes of identity formation and discussion. In yet another respect, therefore, these are not struggles for some definitive recognition but struggles over what form of acknowledgment will count as

[54] The Supreme Court calls the dominant view that recognition is definitive and final the 'straightjacket' view: Supreme Court of Canada, *Reference re the Secession of Quebec*, §150 (see below).

[55] *Ibid.*, §§68–9.

recognition for a time in the course of the continual 'conversation' among the members of a constitutional association.[56]

Another example of the inability to distinguish between acknowledgment and recognition outside the democratic process is provided by the First Nations' quest for decolonisation and freedom. From 1982 to 1992, the Assembly of First Nations and many Aboriginal leaders argued that formal recognition as nations with title to their land and self-government should take the form of a constitutional amendment. When this strategy failed, they took the view that constitutional amendment, while desirable, was not necessary. They argued that the recognition of Aboriginal peoples as self-governing First Nations is already entrenched in the Constitution, in Sections 25 and 35 of the Constitution Act, 1982, and that this could be made explicit through litigation and treaty.[57] Since 1992, they have concentrated on bringing the courts and the federal and provincial governments to acknowledge that this form of recognition already exists. In 1997 the Supreme Court recognised Aboriginal title to land and a number of treaties have been negotiated that recognise land claims and self-government. The federal government and several provincial governments have responded by acknowledging the inherent right to self-government and Aboriginal title to land to some extent. This in turn has brought about a partial reconceptualisation of the constitutional identity of Canada as a whole, yet without any formal constitutional change.[58]

4 THE FAILURE TO REACH AGREEMENT ON THE FORMS OF RECOGNITION IN MULTINATIONAL SOCIETIES

4.i The turn to democratic constitutionalism in theory and practice

We now need to turn and ask how the two central questions of recognition politics apply in this type of multinational case: who decides if a demand for recognition as a nation or First Nation is legitimate? And what are the procedures by which the decision is made? The answers to these two

[56] This is also the way Charles Taylor interprets recognition: 'The Politics of Recognition', p. 34. For the public life of a diverse society as an on-going, negotiated conversation, see Jeremy Webber, *Reimagining Canada: Language, Culture and the Canadian Constitution* (Montreal: McGill-Queen's, 1995).

[57] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. II, pp. 202–12 and Vol. V, pp. 117–33.

[58] See Chapters 7 and 8, this volume; and for an overview, Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Books, 2003).

questions in multinational associations mark an important change in democratic thought and practice over the last twenty years. It is no longer assumed that the forms of recognition of members of a constitutional democracy can be determined outside the political process itself, by theoretical reason discovering the a priori forms of universal membership (individuals, nations, corporations, provinces and so on). Also, it is no longer assumed that a consociational elite is capable of making the determination by some form of accommodation behind the backs of citizens. It is now widely argued in theory and in the practice of the countries studied in *Multinational Democracies* and the European Union that the identities worthy of recognition must be worked out and decided on by the members of the association themselves, through the exercise of practical reason in negotiations and agreements.

The first reason for this is the significant deepening of the commitment to democracy in both theory and practice in the societies we are considering. In theory, *quod omnes tangit* (what touches all must be approved by all), one of the oldest principles of Western constitutionalism, has been revived and given a variety of multilogical reformulations as a principle of democratic legitimacy. Because a demand for recognition affects most if not all members of a society, it thus requires their approval, or the approval of representatives they trust, through actual discussion and agreement.[59] The second reason for the turn to democratic procedures of negotiation to resolve disputes over contested norms of action coordination is that this is the only way the legitimate concerns of those affected can be heard and taken into account. A demand for recognition as a nation affects members within the nation and other members of the larger society in complex and variegated ways. Only those inside the multilogue can develop an awareness of the diversity of concerns of the members and work by the exchange of reasons towards an acceptable compromise and accommodation.[60]

The third and most important reason for democratic dispute resolution follows from the nature of a legitimate collective identity such as a province, nation or First Nation. It is the people themselves who must experience the present system of recognition as imposed and unjust. A clear majority must come to support a demand for recognition as a nation from a first-person perspective. Moreover, they must respond to the concerns of other

[59] This is a central theme of Laden, *Reasonably Radical*; Kraus, 'Legitimacy, Democracy and Diversity in the European Union'; Stephen Tierney, *Constitutional Law and National Pluralism* (Oxford: Oxford University Press, 2004); and of the Supreme Court of Canada, *Reference re the Secession of Quebec*.

[60] Tully, *Strange Multiplicity*, pp. 99–116.

members and articulate a constitutional identity for the society as a whole that all the members can support from their first-person perspectives. All this requires discussion and negotiation across the three processes of identity formation by citizens and elected representatives. The demand for recognition as a nation and as a corresponding multinational society counts as a legitimate (and stable) demand by one member and as a form of recognition by others only if it can be embraced and supported in this free and democratic way. If a demand is advanced by a political elite without popular deliberation and support, and if it is recognised by another elite or unelected court without passing through democratic will-formation, then it is not likely to be supported on either side. It will be experienced as imposed, as misrecognition, and the struggle for recognition will be exacerbated rather than resolved.

This reason cannot be stressed enough. It is a basis of stability in multinational societies. The three processes of identity discussion and formation are processes of *citizenisation*. Individuals and minorities *become* citizens of the nation demanding recognition by participating in these processes. As a result of participating, either directly or indirectly through everyday discussions, they develop a sense of belonging to and identification with the proto-nation. They, and the members of the larger society, *become* citizens of the larger multinational society by participating in the processes of identity formation and discussion of the proposed identity of the multinational democracy. As a result, they develop a sense of belonging to and identification with this larger democracy in which they have a say over its constitutional forms of recognition. It is not a necessary condition of the development of a sense of belonging and identification with the nation and the multination that the citizens fully agree with the demand or that the demand be fully recognised. Rather, it is necessary, as the Supreme Court stresses, that the processes of identity discussion, formation and claims-making are open and fair to those who agree and disagree.[61]

Two examples will suffice. Alongside their strong sense of belonging to Canada, the members of the English-speaking minority of Quebec have developed a strong sense of belonging to and identification with Quebec society over the last forty years by virtue of their participation in the public debate over Quebec's future. This is because they have taken part in the discussions and have played a participatory role in demands for renewed federalism. The moment they are shut out of the discussions, however, as

[61] Supreme Court of Canada, *Reference re the Secession of Quebec*, §§68–9. For this argument, see Gagnon and Tully, eds., *Multinational Democracies*, Chapter 14; and Chapter 5, this volume.

during and after the referendum of 1995, and their demands for recognition as a minority fall on deaf ears, this sense of Quebec-citizen belonging and identification dissipates, many leave the province, and the hardline demands of those who remain increase, such as partition in the event of secession. In a similar manner, Quebecers develop a sense of belonging to and identification with Canada, alongside their strong sense of identification with Quebec, precisely when their demands are taken up in the processes of identity discussion and formation in Canada as a whole. The moment these processes of citizenisation are closed, Quebecers' sense of belonging to Canada tends to decrease and their exclusive identification with Quebec increases.

4.ii The procedures for reaching agreements

The procedures by which the members of a society reach agreement on a demand for recognition are free and democratic negotiations. There are two phases of negotiation. In the first a member works up a demand for recognition as a nation and for the corresponding change in the constitutional identity of the multinational society as a fair system of social cooperation. This demand is discussed by citizens and minorities within the member (province) and by listening to and taking into account the responses of other members of the society. At some point in this process of mutual disclosure and acknowledgment, the member or members come up with what they consider to be a clear and well-supported demand for recognition. This is then formulated as a clear question for a referendum.

It is fair to say that the question will be 'clear' if it meets the two conditions of informal practical reasoning with others who disagree. Firstly, the demand should be internally cogent. By drawing on the principles, values and goods of the society, it should present reasons why the current form of recognition is unacceptable, reasons for the proposed form of recognition as a nation, and reasons for the proposed amendments to the constitutional identity of the society as a whole so it functions as a fair system of social cooperation. Secondly, the demand should be formulated by taking into account and responding in some way to the legitimate concerns of other members. This second condition is required by considerations of reciprocity, and there is no reason to entertain a demand that does not meet it.[62]

[62] Claude Ryan, 'What if Quebecers Voted Clearly for Secession?', in *The Quebec Decision: Perspectives on the Supreme Court Ruling on Secession*, ed. David Schneiderman (Toronto: James Lorimer, 1999).

The first phase ends with a referendum. If the question gains a clear majority, it is clearly well supported and the other members are under an obligation to enter into the second phase of formal negotiations. The conditions of these negotiations are dependent on the specific question. However, as the Supreme Court argues, a number of conditions will apply in most cases.[63] The first four principles will apply to the negotiations: federalism, democracy, rule of law and constitutionalism, and the protection of minorities. The principle that 'what affects all must be approved by all' does not entail that the final arbiter is the will of the majority either within the province demanding recognition or within the society as a whole. The form and conduct of the negotiations should take into account the federal character of the society in some way (depending on the anticipated effects of the demand); the principle of democracy involves elected representatives and representative institutions as well as, or instead of, the majority will of individual citizens in referendums; the rules of law and principles that are not under dispute in the demand are relevant considerations (by means of court challenges, for example); and the minorities who may be adversely affected by the demand and who have not been properly heard in the first phase should be consulted and protected in the negotiations.

As the Supreme Court argues, none of these four principles is trump, and how they are brought to bear democratically and legally on particular cases of reconciling diversity with unity is case-specific. For example, the treaty negotiations for the recognition of land title and self-government of the Nisga'a First Nation took place for over twenty years with the chiefs of the Nisga'a Nation and negotiators for the federal government and the provincial government of British Columbia. Third parties were consulted during the negotiations, and a Parliamentary Standing Committee toured the province with a draft agreement to consult citizens over an eighteen-month period. The negotiators then went back to the table and reached agreement on a final draft of the treaty in 1998. The treaty was then put to a referendum within the Nisga'a Nation and received a majority vote of over 60 per cent. This triggered a ratification process that involved public discussion and debate in British Columbia and Canada, and then successful votes in the federal and provincial parliaments. During the ratification period two court challenges to the treaty were initiated, for the reason that it violates the rights of non-Aboriginal citizens, and a number of public protests by non-Aboriginal citizens were staged. The *Final Agreement* now

[63] Supreme Court of Canada, *Reference re the Secession of Quebec*, §§87–98, 103–4.

forms the constitutionally protected recognition of the Nisga'a Nation under Section 35 of the Constitution Act, 1982.[64]

One could reasonably argue that the Nisga'a treaty itself and the two phases of negotiation meet the conditions we have discussed. However, the opponents of the treaty argued that there should be a referendum of all the citizens of British Columbia at the end of the process, on the grounds that democracy consists in 'having a say'. However, this would put the rights of a tiny minority (the 6,000 Nisga'a) at the mercy of the will of the non-Aboriginal majority. Clearly in cases like these, where the demand for recognition involves a minority, the principle of democracy requires a referendum within the minority community (to ensure that the demand is well supported and internal dissent is expressed in the formulation of the demand), a process of public consultation, debate and lobbying of one's elected representatives, and a public debate in the parliaments followed by a vote by the elected representatives. To go further and put the treaty to a referendum would be to treat the principle of democracy as the only relevant principle, to interpret it solely as the will of the majority expressed in a referendum, to place no weight on the principle of the protection of minorities or the principle of democracy as applied to the Nisga'a First Nation, and to collapse the distinction between the inherent right of Indigenous peoples to self-government and the negotiated form the recognition of the right should take.

In addition to these factors, there are others which ensure that any 'agreement' is always less than definitive. There will always be 'reasonable disagreement' over any proposed norm of recognition or set of procedures.[65] Further, negotiations take place in real time and under real constraints. Not all members are heard and not all compromises are acceptable to all. The relations of power codified in the prevailing system of misrecognition structure the discussions and negotiations in unequal and unfair ways (this is one of the reasons for the demand in the first place). In some cases, a representative body will not unreasonably bring the negotiations to a close. At some point in these complex processes of democratic negotiation, as Chantal Mouffe argues, a *decision* has to be taken in the context of disagreement among democratic adversaries.[66] The dissenters may turn out on reconsideration to have been right after all. Moreover, any agreement can be interpreted in different ways, and this gives rise to disagreements over the

[64] See Chapter 8, this volume, for a brief analysis of the agreement.
[65] Rawls, *Political Liberalism*, pp. 54–8; and Bellamy, *Liberalism and Pluralism*.
[66] Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000), pp. 80–107.

institutions that are supposed to implement the agreement. As citizens experiment with the implementation of the agreement over time, conflicts will develop that were not foreseen in the agreement. In addition, the change in identities brought about by interacting in the new relations of mutual recognition will itself alter the participants' view of the agreement. By this time a new generation will enter into the three processes of identity formation and discussion and bring generational differences with them.

Taking all these factors of plurality into account, there is no definitive and permanent form of mutual recognition of a nation in a multinational society to which all the members could reasonably agree by these procedures or any others. Any form of mutual recognition, within the society or by secession, will always involve reasonable disagreement and varying degrees of the injustice of misrecognition. The rules of recognition will always be unacceptable for some and dissent will be 'inevitable', as the Supreme Court succinctly puts it. Consequently, it is not to consensus on forms of recognition that we should look to find justice and stability in multinational societies, as current theories and practices incline us to do. Instead we should aim to place free and self-determining activities of struggling over mutual disclosure and acknowledgment within democratic and constitutional processes of discussion. The way through the current impasse of failures to reach agreement on recognition in multinational societies is to realise that such societies will be reasonably just and stable to the extent that the present constitutional identity is well supported in the three free and democratic processes of identity discussion and formation (in which citizens develop a sense of identity and belonging to their federated unit and to the society as a whole) and, most important of all, as the present constitutional identity is open to the exercise of the democratic rights of the members to challenge, discuss and amend it over time.[67]

5 CONCLUSION: FREEDOM AS SELF-DETERMINATION IN MULTINATIONAL DEMOCRACIES

To summarise, one condition that renders a democracy free is that the rules by which the members recognise each other and govern their cooperation (dimensions 1 and 2) are negotiated, implemented and amended by the members themselves in accordance with procedures and values that are also

[67] For the application of this account to the European Union, see Jo Shaw, 'Relating Constitutionalism and Flexibility in the EU', in *Constitutional Change in the EU: From Uniformity to Flexibility?*, eds. Gráinne de Búrca and Joanne Scott (Oxford: Hart, 2000); and Chapter 4, this volume.

open to amendment (dimensions 3 and 4). In the words of the Supreme Court, a free and democratic society rests on continuous processes of discussion and evolution. Hence, the members are always free to enter into negotiations over the reconciliation of the recognition and accommodation of diversity with the requirements of unity and stability in various sorts of political, legal and constitutional practices. These struggles are understood as enduring and valuable features because, for reasons of plurality, there is no definitive recognition of the diverse members. The very suggestion that a particular reconciliation is definitive (in theory or practice) is viewed with suspicion, as the voice of anti-democratic domination.

Owing to reasonable disagreement, in any particular case of reconciliation there will be those who agree and those who disagree. Those who disagree will continue to identify with the democratic society, rather than become alienated and seek to secede, for two main reasons. In virtue of direct and indirect participation in the struggle of reciprocal disclosure and acknowledgment, they affect the outcome to some extent; they also come to appreciate the reasons on the other side and the limits of their own. That is, they realise that there is no absolutely decisive, knock-out argument on either side. Even justices of the Supreme Court disagree on fundamental questions.[68] Yet, decisions must be taken. Dissent is inevitable. In addition to the democratic *ethos* that the members acquire through engagement in such struggles, the dissenters remain attached to their democratic society because they know that the reconciliation they lost is in turn potentially open to contestation, negotiation and amendment in the future. While the dissenters do not see the reconciliation as 'just' from their point of view (this disagreement remains), for these two reasons they see it as 'legitimate' in the democratic sense. Like the players who, as the second day of contests opens, welcome the dawn and their good fortune to be still in the running, they too assess their gains and losses, and begin again.

In multinational democracies, this condition of freedom is met if the nations or peoples have the right to initiate constitutional change and the other members have the duty to enter into negotiations over how to reconcile a well-supported demand with the requirements of unity. If peoples in multinational democracies do not have this right and duty, they are unfree because the background constitution is not open to democratic discussion and amendment. It is a structure of domination, a 'straightjacket'.[69] Moreover, the right and duty must be institutionalised in fair procedures of amendment that are flexible and effective.

[68] Supreme Court of Canada, *Reference re the Secession of Quebec*, §57. [69] *Ibid*., §150.

The members are not free if they have the right and duty in the written constitution yet are unable to exercise it in practice due to arbitrary constraints or unfair amending procedures that are all but impossible to meet.[70] An effective right of a nation to initiate constitutional change concerning any powers of self-government (including secession) and the recognition of its distinct identity, correlated with the duty to negotiate, is equivalent to, or a domestic constitutional form of, the universal right of self-determination of a people in international law. Accordingly, a multinational democracy will be free and legitimate to the extent that it ensures that its constituent nations possess and can exercise the right of self-determination of peoples in some appropriate form or other. This is the final argument of the Supreme Court of Canada in the Reference case.

The Court does not find it necessary to determine if Quebec constitutes a 'people', or if there are other 'peoples' in Quebec and Canada (that is, Indigenous peoples) in order to address the question referred to it.[71] The Court goes on to argue that Quebec, whether or not it constitutes a people or peoples, enjoys the right of self-determination under the Canadian Constitution.[72] Canada and other multinational democracies are bound by the international law regarding the right of self-determination of peoples.[73] This applies to peoples within multi-peoples or multinational states, not just to single-nation states.[74] That is, if there are peoples in the constitutional association, then the constitution of multinational democracies must find a way to reconcile their exercise of the right of self-determination with the requirements of unity and with the other forms of diversity in the association. International law holds that the right of self-determination of people or peoples should be exercised normally within existing constitutional states. This is called the right of 'internal self-determination'. It consists in 'a people's pursuit of its political, economic, social and cultural development within the framework of an existing state'.[75] Apart from oppressed and colonial peoples, it is only if a people is blocked from the 'meaningful exercise' of their right of internal

[70] To meet this condition, the Supreme Court of Canada proposes a simplified procedure of negotiation between representatives of two majorities that bypasses the current amending procedures yet conforms to the four main principles: Supreme Court of Canada, *Reference re the Secession of Quebec*, §§84, 88, 93, 94.

[71] *Ibid.*, §§109–110, 125. The question referred to the Court is whether or not Quebec has the right to secede unilaterally. The Court answers that Quebec does not have the right to secede unilaterally because it can effectively exercise the right of self-determination internally or externally by bilateral negotiations.

[72] Supreme Court of Canada, *Reference re the Secession of Quebec*, §§109–139, and summary §154.

[73] *Ibid.*, §§113–21. [74] *Ibid.*, §124. [75] *Ibid.*, §126.

self-determination that they are said to have a right to 'external self-determination': that is, to activate their right to secede.[76]

The 'meaningful exercise' of the right of internal self-determination consists in exercising the powers of 'political, economic, social and cultural development'.[77] The meaningful exercise of the right of internal self-determination consists not only in the exercise of certain powers of political, economic, social and cultural development, by means of institutions of self-government, protection of distinctness and federalism, but also in having a democratic say over what those powers are, how they relate to and are recognised by the other members of the multinational association, and being able to amend them from time to time. If this were not the case, then the people would have a certain distribution of powers and recognition imposed on them by the constitution of the larger society, beyond their determination. The constitution would be a straightjacket and they would not be self-determining. They would be unfree according to the three democratic traditions mentioned earlier (2.i). The effective right to initiate constitutional negotiation is, therefore, an essential feature of the meaningful exercise of the right of internal self-determination. As we have seen, this feature of internal self-determination is the central thesis of the Supreme Court's judgment in the Reference case. The Court can conclude, then, that Quebec enjoys the meaningful exercise of the right of internal self-determination because the right and duty are shown to exist in the arrangements and principles of the Constitution, specifically in the Court's explication of the principles informing the Constitution, and thus applicable in principle to any peoples.[78]

The same analysis applies to Indigenous peoples. They understand themselves as peoples with the right of self-determination under international law, and there is a large body of scholarship that supports their claim.[79] After years of negotiation, the Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly of the United Nations on 13 September 2007.[80] However, Indigenous peoples are not recognised in the Canadian Constitution as peoples with the right of self-determination. Neither their right of self-government nor their right to

[76] *Ibid.*, §134. [77] *Ibid.*, §136. [78] *Ibid.*, §§69, 136, 137.

[79] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. II, pp. 163–244. For the effect of this judgment concerning the right of self-determination on Indigenous peoples, see John Borrows, 'Questioning Canada's Title to Land: The Rule of Law, Aboriginal Peoples and Colonialism', in *Speaking Truth to Power: A Treaty Forum* (Ottawa: Law Commission of Canada, 2001).

[80] See United Nations, *Declaration on the Rights of Indigenous Peoples*, Official Records of the General Assembly, 61st Session, Supp. No. 53 (A/61/53), part one, chap. II, sect. A.

initiate constitutional change is explicitly recognised in the written constitution. They are bound by a constitution that has been imposed on them and so are unfree as peoples. Their self-determination is blocked in two ways: they are constrained from the meaningful exercise of their right of internal self-determination and they are internally colonised by the Canadian state. Yet, if Aboriginal peoples are 'peoples', as the Royal Commission on Aboriginal Peoples concludes, then Canada is bound to recognise their right of self-determination internally and reconcile this with the requirements of unity. This would then enable the Indigenous peoples of Canada to exercise their right to initiate constitutional change effectively as they develop the capacity to share and exercise powers of self-government over their traditional territories and negotiate treaties of cooperation with provincial and federal governments.[81]

A multinational democracy is free and legitimate, therefore, when its constitution treats the constituent nations as peoples with the right of self-determination in some appropriate constitutional form, such as the right to initiate constitutional change. This enables them to engage freely in negotiations of reciprocal disclosure and acknowledgment as they develop and amend their modes of recognition and cooperation, in conjunction with the fair reconciliation of other forms of diversity.[82]

In summary, the four characteristics of a constitutional democracy (set out in the Introduction to this chapter), along with the democratic freedom of its members to contest and negotiate the prevailing laws of recognition of their identities as members, the role of the courts and the right of self-determination of peoples, make up the general features of multinational democracies. Of course, there are always differences in history, legal and political traditions, institutions and actors that have to be taken into account, as *Multinational Democracies* shows. This means that the putting into play of these complex interrelated features in any case is always contextual, path-dependent and unpredictable. Hence the salience of an approach to recognition that studies the relationship between democratic freedom and constitutional responsiveness as an on-going dialogue.

[81] See Sharon Helen Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (Penticton: Theytus Books, 1998); and Chapter 8, this volume.

[82] For recent work on the approach of the Supreme Court, see Robert Schertzer, 'Recognition or Imposition? Federalism, National Minorities, and the Supreme Court of Canada', *Nations and Nationalism* 14(1), 2008.

PART 3

Indigenous peoples

CHAPTER 7

The negotiation of reconciliation

INTRODUCTION

In this chapter and the next I turn to one of the longest and most important kinds of struggles over recognition in the world. These are the struggles of over 250 million Indigenous peoples for the recognition of their right of self-determination to govern themselves over their own territories and the accommodation and reconciliation of this by the settler states that have been constructed over them during the last five hundred years. I argue in this chapter that there is a democratic way to negotiate this difficult form of reconciliation that could be acceptable to both parties. It consists in Indigenous and non-Indigenous peoples negotiating a relationship of reconciliation. On this view reconciliation is neither a form of recognition handed down to Indigenous peoples from the state nor a final settlement of some kind. It is an on-going partnership negotiated by free peoples based on principles they can both endorse and open to modification *en passant*. It thus illustrates my approach to struggles over recognition in what is perhaps the most difficult of cases.

On 11 December 1997 the Supreme Court of Canada released its landmark decision on Aboriginal title to land in *Delgamuukw* v. *British Columbia*.[1] The Court explained that the 'source' or justification of Aboriginal title to land is 'its recognition by the Royal Proclamation, 1763, and the relationship between the common law which recognises occupation as proof of possession, and systems of Aboriginal law pre-existing assertion of British sovereignty'.[2] The 'content' of Aboriginal title 'encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes,

[1] Supreme Court of Canada, *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010, reprinted in *Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title*, ed. S. Persky (Vancouver: The David Suzuki Foundation, 1998).

[2] *Ibid*., p. 29.

which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures'.[3]

Having presented a robust right to land and resources, the Court then went on to lay out the stringent criteria any contemporary Aboriginal community would have to meet to prove that they possess title over a particular area of land.[4] Finally, to 'reconcile' this robust right with the existence of Canada, they explained that Aboriginal title always could be infringed by the federal and provincial governments if the infringement '(1) furthers a compelling and substantial legislative objective, and is (2) consistent with the special fiduciary relationship between the Crown and the Aboriginal peoples'.[5] The list of substantial objectives is quite broad: the 'development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims'.[6] The fiduciary relationship requires that any such infringement must be accompanied by 'consultation' with the Aboriginal society affected and with due 'compensation'.[7]

As the Court concluded, the aim of this exercise is not to encourage more litigation but, on the contrary, to present a normative guideline, or form of reasoning, for how the rights of Aboriginal peoples should be reconciled with the existence of the larger Canadian society through political negotiations: 'Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve … a basic purpose of §35(1) – "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."'[8]

The great question, therefore, is what are the respective rights and responsibilities of Aboriginal societies and the federal and provincial governments and how are they 'reconciled' by treaty negotiations, 'reinforced by the judgments' of the Supreme Court? That is, what is a just and practical relationship of negotiation between the Aboriginal and non-Aboriginal people of Canada, one that brings reconciliation? This chapter is one answer to that question, one vision of a just and practical mode of reconciliation.

The particular vision put forward here was developed out of discussions among Aboriginal and non-Aboriginal participants in the consultation processes of the Royal Commission on Aboriginal Peoples and out of the

[3] *Ibid.* [4] *Ibid.*, p. 32. [5] *Ibid.*, p. 35.
[6] *Ibid.* For the limitations of the Court's doctrine of infringement, see Chapter 8.
[7] *Ibid.*, p. 36. [8] *Ibid.*, p. 122.

research carried out under the auspices of the Commission from 1991 to 1996.[9] This vision of a new relationship is not exactly the same as the final report of the Royal Commission on Aboriginal Peoples.[10] I retain five principles rather than the report's four. To avoid subordination, the principle of equality of peoples is applied to the nation-to-nation relation in a slightly different way than in the report, and this leads to a slightly different interpretation of the Canadian confederation. Several of the Commission's specific recommendations are not discussed, such as an Aboriginal Parliament and the amalgamation of existing Aboriginal communities into 60–80 larger units. Nevertheless, the overall relationship and application of the principles is quite similar. The relationship presented here is also similar, I believe, to the vision shared by many Aboriginal people. Of course, there are many who would disagree. The chapter should be seen as a 'critical' rather than a 'regulative' ideal: an argument for a just and practical relationship that can be used to evaluate existing negotiations and treaties, such as the *Nisga'a Final Agreement*,[11] on the one hand, but which is itself permanently open to criticism and revision in the light of further experience and reasonable objections on the other.

The argument is divided into eight sections: (1) two types of relationship, (2) a new or renewed relationship, (3) principle one: mutual recognition, (4) principle two: intercultural dialogue, (5) principle three: mutual respect, (6) principle four: sharing, (7) principle five: mutual responsibility, and (8) Aboriginal self-government and liberal democracy. A short conclusion rounds off the chapter.

1 TWO TYPES OF RELATIONSHIP: TREATY AND COLONIAL

The relationships between Aboriginal peoples and non-Aboriginal Canadians have varied over the last four centuries, from mutually beneficial association to war, dispossession and extermination; from consensual negotiations between equal nations to the coercive imposition of a structure of domination. Whenever relations have passed from consent to coercion,

[9] I would like to thank the Royal Commission for inviting me to play a role in the discussions and research and for granting me permission to publish this chapter, which is based on a paper that I wrote for the Commission.

[10] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*. The principles that define the vision of a renewed relationship are explained in Vol. I of the report, pp. 675–95.

[11] Government of Canada *et al.*, *Nisga'a Final Agreement*. See Chapter 8 of this volume for this agreement.

Aboriginal peoples have refused to submit and resisted in a number of ways: tactical compliance in residential schools and prisons, substance abuse and suicide on reserves, open confrontation and battle, and legal and political challenges.[12]

In this complex history of interaction, two main types of relationship have persisted. The first is the treaty relationship. In it, Aboriginal peoples and newcomer Canadians recognise each other as equal, coexisting and self-governing nations and govern their relations with each other by negotiations, based on procedures of reciprocity and consent, that lead to agreements that are then recorded in treaties or treaty-like accords of various kinds, to which both parties are subject. Treaty making developed in the early modern period as a way of settling differences and governing trade, military and land-sharing arrangements by means of discussion and consent, without interfering in the internal government of either society. Treaty relations were surrounded by a sea of strategic relations of pressure, force and fraud, and the treaty system itself was constantly abused. Nevertheless, from the first recorded treaties in the seventeenth century to the land-base and off-land-base agreements of the Métis from 1870 to the present, the Nunavut Agreement with the Inuit of the eastern Arctic in 1993 and treaty negotiations with the Nisga'a nation of the Pacific Northwest today, the treaty relationship has survived and evolved, comprising over five hundred treaties and other treaty-like agreements. For most Aboriginal peoples, including those who live off Aboriginal reserves, it provides the normative prototype of the just relationship they aim to achieve by their struggles. Let us set it aside for a moment and turn to the second type of relationship.

During the nineteenth century a different relationship was imposed over the Aboriginal peoples without their consent and despite their active resistance. Their status as equal, coexisting and self-governing nations was denied. Their governments were displaced and they were forcibly subjected to the Canadian political system by the establishment of a structure of domination administered through a series of Indian Acts.[13] This colonial regime has gone through several phases. Aboriginal peoples have been treated as obstacles to Canadian settlement and expansion who could be removed from their territories, relocated on Crown reserves and governed by the Indian Act; as primitive wards incapable of consent, whose religions,

[12] Royal Commission, *Report of the Royal Commission*, Vol. I.

[13] For an introduction to the Indian Act, see Donna Lea Hawley, *The Annotated 1990 Indian Act, Including Related Treaties, Statutes and Regulations* (Toronto: Carswell, 1990); and Royal Commission, *Report of the Royal Commission*, Vol. I, pp. 255–332.

languages, cultures and governments could be eliminated, and who could be coerced into the superior Canadian ways by their civilised guardians; as disappearing races who could be marginalised and left to die out; and as burdens on the Crown who could be off-loaded and assimilated to Canadian citizenship by extinguishing or superceding their Aboriginal and treaty rights. More recently, they have been treated as minorities with a degree of legal autonomy, self-government and claims to land within the Canadian political system. What has remained constant through these phases is the colonial assumption that Aboriginal peoples are subordinate and subject to the Canadian Government, rather than equal, self-governing nations subject to the agreements reached through the treaty system.

The colonial relationship was set in place as the settler population increased and spread across Aboriginal America in the nineteenth century, changing the demographic balance and disrupting Aboriginal ways of subsistence. The end of the British and French wars rendered the military alliances with the First Nations irrelevant. The shift from trade to settled agriculture and manufacture caused the trading treaties to decline, and the new technologies led to the over-exploitation of wildlife, undermining Aboriginal economies and forcing Aboriginal peoples into relations of dependency. These factors and others upset the balance of power that underlay the rough equality of the treaty relationship.

The prevailing view of the world of Europeans and European-Canadians in the nineteenth century served to legitimate the colonial relationship. This 'stages' view ranked cultures and peoples hierarchically in accord with their stage in a purported process of world historical development. Modern European nations were taken to be at the highest and most developed stage and their institutions and cultures provided the norm against which all others could be ranked. As the process of modernisation spread around the world from the European centre, the colonies and lower nations would develop into uniform nations like those in Europe. Aboriginal peoples were ranked at the lowest and most primitive stage, in a state of nature without governments or territorial rights, and thus beneath, or earlier than, relations of nation-to-nation equality and consent on which the treaty system had mistakenly been founded. Rather, they were taken to be under the sovereignty of the superior imperial power that discovered them and established effective control. Since Aboriginal people were assumed to be subject to the Crown, the treaties were reinterpreted as domestic contracts to settle them on land the Crown reserved for them, to grant them hunting, gathering and fishing rights under Canadian law, subject to the pleasure of the Crown, and to extinguish whatever pre-contact rights they might have had.

In the twentieth century, the Eurocentric biases of the stages view that legitimated the colonial relationship in the heyday of European imperialism have been exposed by scholars in the human sciences as the imperial system has been partially dismantled in practice. Former European colonies have gained their freedom and equality as self-governing nations. In the case of Canada, it was only in 1982 that the main vestige of British colonial rule was removed by the patriation of the Constitution (until then, amendment of the Constitution was still subject to imperial consent). In their many struggles, the Indigenous peoples of the world are demanding that the process of decolonisation be extended to them, and for the same reasons. As a post-colonial attitude spreads, Aboriginal peoples are beginning to be seen, not as lower and subordinate, but as contemporary and equal; not to rank them in Eurocentric stages but to see them for what they are – as 'diverse': that is, exhibiting cultural similarities and dissimilarities. These monumental changes are beginning to have effects in court cases, constitutional negotiations, international law, the United Nations and in the attitude and behaviour of citizens who wish to free their society from the disgraceful vestiges of internal colonialism and to recognise Aboriginal peoples as equals.[14]

This enlightened trend is confronted by a powerful backlash that seeks to reassert the colonial relationship and justify it by uncritically repeating the discredited assumptions of the stages view and court rulings based on them, and by playing on the fears of the consequences of recognising the equality of Aboriginal people.[15] If this dangerous confrontation is to be overcome, two questions need to be answered. What is the just form of recognition of Aboriginal peoples and what is the practical form of accommodation of this recognition by the former colonising society? I would like to argue now that they should be recognised as equal, coexisting and self-governing nations and accommodated by renewing the treaty relationship.

[14] For the stages view of historical development and criticisms of it, see Tully, *Strange Multiplicity*, pp. 7–17, 58–98.

[15] For a good example of the backlash, see Melvin H. Smith, *Our Home or Native Land? What Governments' Aboriginal Policy is Doing to Canada* (Victoria, British Columbia: Crown Western, 1995). For a discussion and criticism of the lower court decision on which Smith's argument is based (and which was overruled by the Supreme Court in *Delgamuukw* [1997]), see Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw* v. *The Queen* (Montreal: Institute for Research on Public Policy, 1992). For a full account of this complex and important court case, see Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby, British Columbia: Talon Books, 1998).

2 A NEW RELATIONSHIP

From the discussions between Aboriginal and non-Aboriginal people over the last fifteen years, as well as the extensive research and dialogue carried out under the auspices of the Canadian Royal Commission on Aboriginal Peoples, a relationship that would meet the demands of justice and utility on both sides appears to consist of the following five principles: mutual recognition, intercultural negotiation, mutual respect, sharing and mutual responsibility. Mutual recognition means that Aboriginal peoples and Canadians recognise and relate to each other as equal, coexisting and self-governing peoples throughout their many relations together. Once mutual recognition is achieved, they engage in intercultural negotiations with the aim of reaching agreements on how they will redress past injustices and associate together in the future. Mutual respect, sharing and mutual responsibility inform the relations of association and interdependence to which they agree. These principles constitute an Aboriginal–Canadian Charter that should govern relations between Aboriginal and non-Aboriginal peoples. If they were adhered to, the distrust and confrontation would give way to trust and civility.

For each principle, I explain its meaning in both cultures, the respective values associated with it, the injustices it redresses, and the mutual benefits it bestows on both partners in the relationship. In this way, I hope to show that each principle is drawn from and in accord with both Aboriginal and Western values. Indeed, these principles are the norms implicit in the ways Aboriginal and non-Aboriginal peoples have acted together in the past, when these ways have been just and fair, and they have withstood critical examination in the present. The relationship will be proven to be valid if these principles come to be accepted in the course of further critical discussion by all Aboriginal and non-Aboriginal people affected by them. These are, it seems to me, the rather exacting demands of justice in a post-colonial age.

3 MUTUAL RECOGNITION

The first and most difficult question in engaging in a just relationship is for the participants to agree on how they should recognise each other at the outset and relate to each other throughout. The first principle of mutual recognition as equal, coexisting and self-governing peoples and cultures answers this initial question. It means that non-Aboriginal Canadians recognise the distinctive presence of First Peoples in Canadian life and, at

the same time, Aboriginal people recognise that non-Aboriginal people are also of this land, by birth and adoption, with histories, institutions, rights and enduring interests having their equal legitimacy. This form of mutual recognition replaces the unilateral recognition of the colonial relationship, where non-Aboriginal Canadians recognised themselves as self-governing and Aboriginal peoples as subject to Canadian governments, as either a persisting or extinguishable minority.

Mutual recognition consists in two steps: the acceptance of this form of recognition by both peoples and its public affirmation in the basic institutions and symbols of Canada. When people enter into a relationship they always recognise each other under some description. Recognition is usually habitual and unreflective, part of one's customary cultural understanding of, and attitude towards, self and others. The taken-for-granted form of recognition sets the horizon with which one envisions and relates to oneself and others. Up to the 1960s, the stages view provided the unquestioned horizon of recognition for many Canadians and it was inscribed in the institutions of Canadian society. Since then, it has been called into question and criticised, and the movement to a mutually acceptable form of recognition initiated through public discussions, court challenges, curriculum reform, constitutional negotiations and film-making.

The transformation in the way Aboriginal and non-Aboriginal people recognise and relate to one another is difficult because it involves freeing oneself, and each other, from deep-seated prejudices and habits of thought and behaviour inherited from the imperial past. However, the change can be put in its proper perspective if it is placed in the wider context of analogous changes in self-understanding that Canadians are undergoing, as they free themselves from captivity to other inegalitarian relations of the imperial age. Over the last sixty years, Canadians have learned to recognise themselves, not as colonials subordinate to the British people, but as members of a self-governing confederation, different but equal to the peoples of the world. This new form of post-colonial recognition was then publicly affirmed by a Canadian flag and the patriation of the Constitution. European Canadians have recently learned to recognise non-European Canadians, not as inferiors unfit for the rights of citizenship, but as citizens equal to themselves with cultures worthy of preservation, and to affirm this recognition in the Constitution. After centuries of exclusion and subjection, Canadian women have been recognised as equal citizens. This gender equality has been affirmed in the Constitution and the enormous changes in mutual recognition and relations between women and men this will involve have been initiated. The mutual acceptance

and affirmation of Aboriginal and non-Aboriginal peoples as equal, coexisting and self-governing, and the public acknowledgment of this in the Constitution, should be seen as part and parcel of these analogous transformations in the way Canadians recognise and relate to each other.[16]

Before we turn to the justifications of this form of mutual recognition, let me briefly explain its three features: *equality, coexistence* and *self-government*. The desire for the equality of the two peoples, their cultures and governments, has been an important theme historically, best symbolised in the ceremonies and speeches surrounding the negotiation and signing of treaties over the last three centuries. These sentiments are repeated by contemporary Aboriginal leaders seeking modern treaties to resolve outstanding tensions over lands, a nation-to-nation relationship, and a seat at the constitutional negotiating table.

As we have seen, this vision of a relationship between equals competed with, and was eventually overshadowed by, a colonial vision in which Aboriginal peoples and their cultures were treated as unequal and ranked as inferior. North America was retrospectively seen either as uninhabited at the time of European arrival or as inhabited by primitive peoples who, because they did not have European state formations and institutions of property, lacked government and jurisdiction. These ethnocentric assumptions have no place in a post-colonial civilisation or in the new relationship.

The second feature, coexistence, means that the governments and cultures of Aboriginal and non-Aboriginal peoples coexist or continue through all their relations and interdependencies over time. This involves abandoning the strategies of the past, which have been rejected by the Aboriginal peoples, and whose remnants are still with us. These include the dogmas that Aboriginal peoples became subject to Canadian sovereignty without their consent and that treaties extinguished, and Canadian laws supercede, Aboriginal rights to govern themselves by their own laws. Strategies of assimilation, such as the 1969 White Paper, and tactics of integration, whereby the traditions of Aboriginal peoples and Canadians are melded into a common whole, should also be abjured as unjust.[17]

Coexistence is a relationship in which Aboriginal peoples and Canadians live side by side, governing their own affairs in a relationship that values this form of political diversity. However, this is not a relation of separation and

[16] For the two concepts of equality that warrant these demands for recognition, see Taylor, 'The Politics of Recognition'.

[17] For the arguments against extinguishment, see Mary Ellen Turpel and Peter Hogg, 'Treaty Extinguishment of Aboriginal Title: The Legal and Historical Context' (Manuscript prepared for the Royal Commission on Aboriginal Peoples, 1993).

isolation. Natives and newcomers have interacted for centuries. Their identities and cultures have been shaped by these interactions, and a dense set of intercultural relations of interdependency and shared histories has developed on the middle ground wherever interaction takes place. Although many of the interrelations are unequal and dominating, they cannot be disentangled and separated from the peoples who have associated within them for so long. The objective of a new relationship is rather to lay the guidelines for the reform of these interrelations and the formation of egalitarian relations of interdependency. Nevertheless, no matter how interdependent the partners become, the recognition of coexistence ensures that Aboriginal cultures and governments will continue throughout.

Thirdly, Aboriginal and non-Aboriginal peoples should recognise each other as equal peoples who govern themselves and their lands by their own laws and cultures. They in turn govern their common relations in accord with the five principles on equal footing. The treatment of Aboriginal peoples as unequal and therefore subject to the laws of Canada without their consent constitutes the injustice on which the colonial system rests. Recognition brings decolonisation and freedom to Aboriginal peoples and to all Canadians, who long to free themselves and their children of any further complicity in a democratic society that contains a regime of inequality within.

In sum, there are no more basic values in Aboriginal and Western traditions than the right of peoples to govern themselves by their own laws and ways; for their laws and cultural ways to coexist and continue through their interrelations with others; and for them to be treated as equals.

What, then, are the justifications for this form of mutual recognition? Why should Aboriginal and non-Aboriginal peoples accept and affirm this self-description as equal, coexisting and self-governing peoples as the basis of their acting together? The form of recognition I recommend can be justified first by the arguments that justify the recognition of any self-governing nation: the basic principles of political theory, international law, the common law of the Commonwealth and former Commonwealth countries, and the conventions of the Canadian and American constitutions.

Aboriginal people were the first inhabitants of the American continents. As the result of long use and occupation they have continuing rights to the land unless they are properly relinquished. Further, they have the status of independent, self-governing nations in virtue of prior sovereignty, grounded in the practice of governing themselves by their own laws and ways, of entering into international relations with other Aboriginal nations and with Europeans when they arrived. Their status as self-governing

nations was acknowledged in many early relations and it was not surrendered by the establishment of settler governments or by treaties. The rights of Indigenous peoples to self-determination and the preservation of their cultures, rights that are increasingly but not completely recognised at the international level, are a further source of justification.

Legal support is found in the common-law tradition established by the Crown, settler governments and Aboriginal nations around the world in the early period of European colonialism. The First Nations were recognised as independent, self-governing nations, equal in status to the Crown, in the early treaties and land negotiations, in landmark appeals to the Privy Council, in the Royal Proclamation of 1763, in the rulings of John Marshall, the early Chief Justice of the United States, and, by implication, in the constitutional amendments of 1982 that reaffirmed the Royal Proclamation and Aboriginal and treaty rights.[18]

However, as we have seen, after the balance of power shifted to the settlers, Aboriginal governments were suppressed by colonial laws that claimed to supplant their rights to hunt and fish, to educate their children, to move about freely, to associate together, to worship, to speak their languages. The policy of successive Canadian governments has been to continue the subjection of Aboriginal people to Canadian law without their consent. In the negotiations over the last decade, Aboriginal peoples have insisted on recognition of the inherent right of self-government. They have sought to re-establish public recognition of their long-suppressed but never-relinquished identity as First Nations by tabling the following justifications. These various justifications can now be drawn together in order to present a synoptic sketch of the new relationship and its principles.

When Europeans arrived, the Aboriginal peoples they encountered were independent, self-governing nations equal in status to European nations.[19] Their status as self-governing nations rested on exactly the same criteria in international law, then and now, as the status of European nations: the proven ability to govern themselves on a territory over time and to enter into international relations with other nations. These are the universal criteria of the inherent right of self-government on which nationhood rests in the

[18] For the various arguments for the treaty relationship and the inherent right of self-government summarised here, see Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. II, Part 1, pp. 9–245; and Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Canada Communication Group Publishing, 1995).

[19] This is Chief Justice Marshall's formulation in Supreme Court of the United States, *Worcester* v. *the State of Georgia* [1832], 31 US (6 Peter's Reports) 515, reprinted in *The Writings of John Marshall, Late Chief Justice of the United States, upon the Federal Constitution* (Boston: James Monroe and Company, 1839). For a discussion, see Tully, *Strange Multiplicity*, pp. 117–24.

modern world. The Aboriginal peoples had every right to recognise the Europeans as immigrants subject to their laws (perhaps granting them some sort of minority status), as nations did then and do now. The only valid way, therefore, that Canada and the United States could acquire sovereignty in North America was by gaining the consent of the sovereign nations that were already here, as would be the case anywhere else in the world. The Aboriginal peoples agreed to recognise the settlers as coexisting, self-governing nations, equal in status to themselves, with the right to acquire land from them, over which the settler governments could then exercise jurisdiction and sovereignty, by means of nation-to-nation treaties based on mutual agreement. This is the basis of the treaty relationship.

Accordingly, in treaty after treaty down to this day, the Aboriginal peoples have recognised the European settlers and their successor societies as equal, self-governing nations in North America on the condition that they recognise the equal yet prior status of the nations who were already here. Hence the phrase 'First Nations'. The Aboriginal peoples recognised the settler communities as nations because it fitted in with their customary way of recognising and governing relations with other Aboriginal nations. The French and British officials participated in this system of mutual recognition because it fitted in with their familiar way of recognising and governing relations with other nations and because they needed the First Nations as allies.

Therefore, the basic justness of Canada as a self-governing federation actually rests on its recognition by the Aboriginal peoples, not the other way round. Their consent to recognise Canada is, in turn, conditional on Canada's acknowledgment of the Aboriginal peoples' equal yet prior status as nations, and, secondly, on Canada conducting relations with the First Nations by consent gained through the treaty system. There is no other valid justification of Canada as a sovereign federation and no way of avoiding this one. The other purported justifications reduce to 'might makes right', which is no justification at all; to specious misrecognitions of the status of the Aboriginal peoples at the time of contact, such as the imperial fiction of a state of nature; or to begging the question by presupposing the sovereignty of the Crown, as in the colonial relationship.

If Canadian governments fail to enter into negotiations to recognise the status of the Aboriginal peoples as equal yet prior nations, then they violate the inherent right of self-government, the ground on which the legitimacy of the global system of nations rests. This structural injustice would become increasingly glaring as the light of post-imperial civilisation gradually exposes the colonial relationship with its insupportable presumption of Crown

sovereignty. If, conversely, Aboriginal and non-Aboriginal peoples mutually recognise and relate to each other as equal, coexisting and self-governing nations, bound together by treaty relations which rest on the consent of those governed by them, and affirm this form of recognition in the Constitution and basic institutions of Canadian society, then they will dissolve the underlying cause of the current confrontation. Canada will then be a just confederation, and an exemplary member of the post-colonial age.

Canada is far from being a just confederation today. Nevertheless, all societies are unjust to some extent. Justice and legitimacy are not equivalent. A society is legitimate and worthy of obedience if and only if the members suffering an injustice have the right to initiate political, legal or constitutional change and the other members have a duty to enter into negotiations in good faith to rectify the injustice. This is the test of legitimacy articulated by the Supreme Court of Canada and it applies generally.[20] Consequently, as long as Canada recognises the injustice and enters into negotiations over decolonisation and reconciliation with Aboriginal peoples in good faith, as the Court enjoins in *Delgamuukw*, then Aboriginal people have a duty to obey existing laws unless and until they are changed or replaced by Aboriginal legislation. If, however, Canada refuses to negotiate in good faith and the injustice becomes a permanent structure of domination, then Aboriginal people and other Canadians have a right to dissent and engage in acts of civil disobedience, as in any other case.

The confederation of Aboriginal and non-Aboriginal Canadians

If this is a fair sketch of mutual recognition of the partners in the treaty relationship, I want to turn to the relationship itself and its basis in the consent of those governed by it. I will speak of Canada and the First Nations as 'partners' in treaty relations and the relationship itself as a 'partnership'. Before doing so, I would like to clarify the partnership by drawing an analogy to the similar relationship between the provinces and the federal government.

When the colonies confederated in 1867 they were recognised as having equal and inherent rights to govern themselves by their own assemblies, laws and cultures, in virtue of their long prior development of responsible government. This right was further recognised to coexist or continue through all the relations they were later to engage in with each other and with the federal government. The federal government, for example, is not

[20] See Chapter 6, this volume.

understood to have the right to extinguish or discontinue the political and legal institutions of the provinces, or to alter the Constitution, which sets out the relations among them, in ways that affect them without their consent. The relations among them are understood to be based on consent. Owing to these universal, liberal principles of equality, continuity and consent, this kind of confederation is called a liberal or 'contract' confederation. It is simply the application of the same liberal and democratic principles governing the relationship between citizens and government in social contract theories to the relationship between provinces and the central government in federal theory.

The principle of mutual recognition that defines a just relationship among provinces and the federal government analogously defines a just relationship among First Nations and the confederation of provinces and federal government. The first difference is that the right of the federal and provincial governments to exercise jurisdiction over their respective territories is based on their recognition of the prior right of the Aboriginal nations and, consequently, the reconciliation of Aboriginal rights through treaties. This apparently was understood at the time of confederation and the numbered treaties were made to meet the requirement.[21] In the absence of treaties today, the principle of mutual recognition takes the status quo as authoritative and enjoins treaty negotiations and just settlements in accord with the five principles, as the Supreme Court recommends in *Delgamuukw*. For the provincial and federal governments to deny the treaty relationship between Aboriginal and Canadian governments would be to violate the conditions of their own legitimacy. To acknowledge it is to live up to their own principles.

The second difference is that the relations of interdependence among provinces and the federal government are based on intergovernmental delegation, and first ministers' negotiations and referendums, and recorded in the Constitution and its amendments, whereas Aboriginal–Canadian relations are based on treaty negotiations, recorded in treaties and treaty-like agreements, and given constitutional protection under Section 35 of the Canadian Constitution.

To summarise, I am suggesting that Canada should be seen as comprising two confederations rather than one. The 'first' confederation (or federation) is the treaty confederation of the First Nations with the Crown and later with the federal and, to some extent, provincial governments. The second

[21] See Darlene Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: University of Saskatchewan Native Law Centre, 1989).

confederation (or federation) is the constitutional confederation of the provinces and federal government.[22] The basis of the first confederation is the sets of relations that the First Nations, Inuit and Métis have established with the Crown, federal government and provincial governments over the centuries by mutual agreement. The term 'Canada' is usually taken to refer to the second confederation only (the federal–provincial confederation) and Aboriginal peoples are treated as if they were part of it. But Aboriginal peoples have never been a part of that confederation and it is a travesty of history to pretend otherwise. Therefore, let us use the term 'Canada' from now on to refer to the political association of the two confederations, and abandon the narrow, colonial use of the term. Aboriginal peoples are 'Canadians' in this broad sense of the word: that is, members of Aboriginal nations and members of the federation of the Aboriginal nations and the federal-provincial confederation.

The current problem is that Aboriginal peoples have been treated as if they were wholly within the second, federal-provincial confederation, and subject to its laws, either as individual citizens, minorities or quasi-autonomous governing units analogous to municipalities or provinces. This colonial relationship is not only unjust, for the reasons I have sketched out, but also impractical. Aboriginal peoples are brought into a confederation they had no role in setting up and in which they are overwhelmed by non-Aboriginal laws and ways, as well as by the greater power of the provinces. They have struggled against it in each of its phases. A good example of this is the pragmatic policy on Aboriginal self-government of successive federal governments since the 1990s. The government refuses[23] to engage in 'abstract' questions of justice related to the inherent right of Aboriginal self-government. Instead, it assumes that self-government is a right within Canadian law, and then proceeds to negotiate land claims and self-government as a package of minority rights under Canadian law. Although some of the agreements might be roughly the same in practice as agreements that would be reached under the five principles, the policy has two defects which generate perverse effects in practice.

[22] I use the phrase 'confederation (or federation)' because, as is well known, the relations of both the federal-provincial confederation and the Aboriginal nations-federal-provincial confederation are partly federal and partly confederal. For the sake of brevity, I use 'confederation' to stand for both types of relation.

[23] See Government of Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Indian Affairs and Northern Development, 1995).

Firstly, because this procedure finesses rather than faces the first principle of mutual recognition, it is unjust and serves to perpetuate the colonial relationship. The Aboriginal people involved do not gain the decolonisation and recognition they seek and deserve and, as a result, feel done down and dissatisfied with the agreement, as well as alienated from other Aboriginal nations who hold out for proper recognition. Nevertheless, the Aboriginal people involved feel constrained to agree because they fear that if they hold out a future government riding the backlash will give them no recognition whatsoever. Consequently, the negotiation is a *modus vivendi* rather than a just agreement.[24] Secondly, because the status of Aboriginal peoples as equal, coexisting and self-governing nations and the process of decolonisation are not explained to non-Aboriginal peoples, these ad hoc negotiations look like the granting of special status to a minority and the violation of the principle of equality before the law. Non-Aboriginal Canadians feel their interests have not been properly represented and justice has not been served. This fuels the backlash and further confrontations, as the federal government should have learned from the last one hundred years of similar policies.

If the two confederations are acknowledged, Aboriginal peoples gain the recognition they deserve, yet they still form part of Canada in the broader sense of a political association of two confederations. Very little change to the Canadian Constitution would be required. Section 91(24) of the Constitution can be read as recognising the existence of the first confederation. Section 25 specifies the treaty character of the relations of the confederation, and Section 35 can be interpreted to recognise and affirm an inherent right of self-government.

There are two practical advantages to this arrangement. (1) Most Canadians wish to affirm the Aboriginal presence in Canada and most Aboriginal peoples wish to affirm both their status as equal, coexisting and self-governing peoples and their participation in Canadian society. The way these reasonable demands can be reconciled is to expand our post-colonial horizons and think of Canada and Canadians in the broad, two-confederation sense. (2) Aboriginal peoples would no longer be erroneously assimilated to some sort of minority or unrealistic province-like status. By regarding Aboriginal peoples in this distinctive and historically accurate way, as 'peoples', their relationship within Canada in the broad sense would be seen for what it is: *sui generis*.

[24] For the distinction between a *modus vivendi*, or balance of power, agreement and a just agreement, see Rawls, 'Political Liberalism: Reply to Habermas', p. 146.

4 INTERCULTURAL DIALOGUE

Once the way Aboriginal and non-Aboriginal peoples should recognise each other is established, the next question pertains to how they should work out their relations together. The answer is through dialogues of negotiation in which they meet as equals. Dialogue is the form of human relationship in which mutual understanding and agreement can be reached and, hence, consent can replace coercion and confrontation. Between Aboriginal and non-Aboriginal people, it is an intercultural dialogue in which the partners aim to reach mutual understanding and uncoerced agreements by contextually appropriate forms of negotiation and reciprocal questioning on how they should cooperate and review their relations of cooperation over time. Specific types of relations are agreed to, written down as treaties, put into practice, reviewed and renewed. It is not a once-and-for-all agreement, as in social contract theories, nor an accord frozen in a constitutional document. It is a conversation between the members of Aboriginal and non-Aboriginal cultures in all walks of life over the time they live together and share this land.

An intercultural dialogue is different from a dialogue within Aboriginal or non-Aboriginal cultures. Here the participants discuss and act in the customary practices of their culture. They acquire the abilities to think and act in these customary ways, and to reflect on and revise them, by growing up in their cultures. This implicit cultural sociability or shared cultural understanding of how to speak and act together is just what it means to be a member of a dynamic culture, or cultures, and to have a cultural identity, or identities, whether one is Haida and Canadian or Prince Edward Islander and Canadian.

When Aboriginal and non-Aboriginal partners engage in a dialogue to reach agreement on something, they unavoidably bring their cultural understandings with them, yet they enter a space where their cultures overlap, a middle ground. The dialogue is therefore intercultural, and more difficult for that reason. All sorts of misunderstandings arise just because the partners act implicitly in accordance with their different cultural understandings and expectations. There is a temptation for the more powerful to overcome these difficulties by forcing their cultural ways of speaking and acting on the other and to justify this by their presumed superiority. This was the role of the stages view discussed earlier.

The new relationship has no place for the injustice of non-Aboriginal people speaking for Aboriginal people, either in the imperial monologue of command and obedience or in the more subtle injustice of permitting

Aboriginal people to speak, but only in the languages, traditions and institutions of the dominant society. Justice demands a democratic dialogue in which partners listen to and speak with, rather than for, each other. Each speaks in their own languages and customary ways, on equal footing, in order to reach fair agreements. This principle of self-identification, of listening to the voices of others in their own terms and traditions, is now widely recognised as the first step in a just dialogue.

This seems like an impossible task only because of another false assumption of the imperial age: that cultures are independent, closed and internally homogeneous. As we have learned over the last sixty years, cultures are interdependent, overlapping and internally complex. Cultures exist in dynamic processes of interaction, negotiation, internal challenge and reinterpretation, and transformation. As a result, humans are always members to varying degrees of more than one culture. They experience misunderstandings and differences within their first cultures, such as between genders, generations and classes, that are not completely different in kind from misunderstandings and differences across cultures. Cultural understanding and identity is thus enormously more complex, open-textured, interactive and dynamic than the old vision of closed and homogeneous cultures presupposed.

So, when Aboriginal and non-Aboriginal partners meet on the middle ground, they are not trapped in closed and mutually incommensurable world-views. They have been interacting for over three hundred years. Interaction has shaped the cultural identities of both in complex ways (even giving rise to a distinctive intercultural people, the Métis), and it has brought into being a multitude of intercultural ways of discussing and acting together. The treaty system is perhaps the best known of these practices, woven together out of customs from many cultures, but there are innumerable others. An intercultural middle ground thus already exists, where the cultural understandings of the partners, while not the same as their first cultures, are not completely foreign. There is enough shared ground to find their feet together.

It is important not to misunderstand this inherited intercultural middle ground on which Aboriginal and non-Aboriginal people must begin to discuss their ways of cooperating in the future. It is far from an ideal speech situation. It is shot through with relations of inequality, force and fraud, broken promises, failed accords, degrading stereotypes, misrecognition, paternalism, enmity and distrust. Notwithstanding, there is also a multiplicity of paths and ways Aboriginal and non-Aboriginal people have walked together over their long history in peace and friendship, with good

intentions and mutual respect. They have shared goods and knowledge, made treaties and traded together, built bridges, airlines and computer systems, managed resources, learned about ecology and language, defended Canada together through many wars, fallen in love and stood in mutual awe of each other's art and spirituality. The resulting intercultural institutions and practices, as distorted as they are, provide the starting ground for a new dialogue of equality. There is no alternative; no ideal speech situation, no Esperanto language of discussion that transcends Aboriginal and non-Aboriginal cultures, no one universal language.

As Aboriginal and non-Aboriginal people begin to converse on the distorted intercultural middle ground by trying to recognise each other as equals and accord mutual respect to each other's cultures, they can exchange their different stories, and, through the long process of question and answer, free each other from their deep-seated misunderstandings. In this way, dialogue itself will gradually transform from within the distorted intercultural practices in accordance with the demands of justice. One example of this is the intercultural dialogue that has developed around recent constitutional and treaty negotiations and the Canadian Royal Commission on Aboriginal Peoples. Aboriginal and non-Aboriginal speakers have broken down the hegemony of the old imperial languages of European political traditions and gradually developed forms of expression that are faithful to their own traditions yet understandable to others.

Intercultural dialogue has deep roots in Aboriginal cultures, in diplomatic relations among nations, in the exchange of stories at public feasts, in the consensus forms of government, and in elder-child relations. In non-Aboriginal cultures undistorted dialogue is the norm implicit in many of the most valued practices and institutions, from parliamentary democracy and free speech to relations of mutual understanding and criticism in the sciences. Dialogue with the aim of uncoerced agreements is thus the implicit norm of free relationships in both Western and Aboriginal cultures.

Furthermore, there is a special bond that holds the partners, and indeed the country, together in an intercultural dialogue. For many Aboriginal and non-Aboriginal Canadians, the history of their association with members of the other community has become part of their identity as Canadians. The bond is not one of unity of purpose, but of a partnership in a shared history with people whom they recognise as different. The understandings of the shared history are of course very different. Nevertheless, for many people this is one vital aspect of their identity as Canadians; not just that there are members of the other group present in Canada but that there is a partnership, a shared life.

One purpose these Canadians share is sustaining the partnership, the historical conversation between them, as part of their sense of identity as Canadians. It cannot be the aim of a partnership of this kind to reduce one partner to the image of the other, for the partnership exists in virtue of the recognition and maintenance of their differences. This is a unique form of association that has developed in spite of the long struggle to reduce the relationship to a unity. In some respects it resembles the partnership between many English-speaking Canadians and Québécois and Québécoises. Its disappearance would be experienced as an irreparable loss, like the loss of a close friend. This fragile bond, this tangled sense of being woven together like different yet inseparable rows of wampum beads in an ancient belt that have rubbed themselves smooth over long use, is often overlooked. Yet, after all is said and done, it is the sort of bond that holds a confederation together. This shared sense of a destiny together, for better or worse, provides the element in which intercultural dialogue has its life and hope.

5 MUTUAL RESPECT

Once Aboriginal and non-Aboriginal peoples recognise each other as equals, it is necessary that they go on to show respect for each other, their languages, cultures, laws and governments, in their dialogue and conduct together if their relations are to be harmonious.

Respect has a somewhat different significance in Aboriginal and non-Aboriginal cultures. In many Aboriginal groups, particularly those adhering to traditional ways, great respect is shown to an elder who has lived long and acquired wisdom. Here respect is accorded due to the specific worthiness of the individual person. This kind of respect relative to specific worth is common in many Aboriginal relations. However, there is another sense of respect where it is bestowed on all members of the circle of life because they are members of the circle of life: to animals, plants, waters, spirits, as well as to human beings. Failure to show respect to humans or other-than-humans means violating spiritual law and is likely to bring retribution in some form or other. Respect is a valued aspect of relationships in non-Aboriginal cultures as well. Respect is often thought to be earned by personal effort and is therefore withheld from someone who fails to meet society's standards of behaviour. Demonstration of respect can also be demanded by persons and institutions of authority. However, there is another sense of respect that is similar to the circle of life sense in Aboriginal culture. Here, human beings are said to warrant a certain respect in virtue of being human,

as being of equal dignity and thus treated as ends rather than means. This general sense of respect is often extended beyond the human species, to all living things, to God's creatures and to nature.

There is a kind of mutual cultural respect that is akin to the more general, circle-of-life sense of respect in both Aboriginal and non-Aboriginal ethics. This kind of respect needs to be cultivated if mutual recognition of the two partners is to be effective and their relations harmonious. It is a public attitude of mutual respect for each other's cultures that undergirds individual self-respect, and so the ability to act freely and responsibly in public and private life. One can say that the wellbeing of members of both cultures is dependent on each other's attitude of cultural respect.

If a public attitude of mutual cultural disrespect prevails, as with the colonial relationship, then cultural difference is seen as a deficiency or disability. The child who enters an exclusively English or French language school speaking only Cree will be treated as linguistically deficient. The industrial worker who goes hunting to help provide food for his extended family will be treated as a delinquent worker. The teacher and boss see the attachment of the pupil and worker to their own cultural differences as a sign of disrespect towards authority. Each thinks the other a bigot, intolerance and racism escalate, commands and the giving of orders replace dialogue. The sense of the pupil's and worker's self-worth is undermined, the strength of their conviction in learning and working dissipates, and self-abuse and dependency follow. The result is then pointed to by the teacher and boss to warrant and reinforce their initial disrespectful attitude, thereby closing the vicious circle. Of course, the other members of Aboriginal cultures can and do seek to shore up the self-confidence of the pupil and worker by affirming the respectability of their language and hunting. But, because non-Aboriginal Canadians outnumber them by such a large number, their public attitude of cultural disrespect corrodes their cultural self-assurance as a whole.

Therefore, a public attitude of mutual cultural respect needs to accompany the mutual recognition and public acknowledgment of the equality of Aboriginal and non-Aboriginal peoples and governments. This includes respect on both sides, based on the membership of all Canadians in the circle of life. The justification for this attitude is partly economic self-interest, the realisation that it will provide the social basis for lives of individual initiative and economic self-sufficiency. There is also a dimension of moral consistency in extending to Aboriginal people the same kind of cultural respect that European-Canadians have enjoyed in their own case, and which has always been the unacknowledged spring of their self-respect and initiative.

In addition to the way mutual cultural respect beneficially empowers both partners to live free and responsible lives, rather than the mutual detriment of a climate of disrespect, it furnishes another benefit. The experience of living in a society where a variety of languages, forms of government, economic organisations and religions thrive and intermingle enriches each person's life, enabling them to see their own culture as one among many, and so gaining a self-critical and tolerant attitude, rather than the haughty intolerance and stultifying dogmatism of the colonial vision. This is good in itself, but it also develops the kind of character that is needed to live and compete in the culturally diverse global market of the twenty-first century. Mutual cultural respect thus creates the positive and mutually supportive climate that enables relations among cultures to be harmonious, rather than the acrimonious and strife-ridden relations of the colonial culture of disrespect. The mutual respect for cultural diversity needs to be affirmed and taught as a fundamental characteristic of the civic ethos of Canada.

6 SHARING

The relations of interdependency between Aboriginal and non-Aboriginal peoples are also characterised by the principle of sharing. For relationships between the partners to evolve and develop, they must involve an element of sharing; the giving and receiving of benefits. Although sharing sustains all relations, I want to discuss its application to economic, political and legal relations, since these are the most important and the most contested.

The practice of sharing is at the centre of many Aboriginal cultures. The harmony and balance among all living things is sustained by a chain of benevolence and gratitude. An animal that is asked to give up its life for the benefit of humans, for example, should be treated with the reciprocal gratitude, usually in a ceremony of thanksgiving. The sharing of gifts accompanies commercial and treaty agreements. A person will share their goods and home with a visitor in need, who, in turn, will express the appropriate gratitude by returning the gift in kind at a later date to some other needy person. Sharing is not just one relation among many; it is seen as the basis of all relations. The bonds that hold many Aboriginal cultures together are created and renewed in great public ceremonies of sharing through the giving and receiving of gifts, such as the Potlatch among the west coast nations.

Canada is founded on an act of sharing that is almost unimaginable in its generosity. The Aboriginal peoples shared their food, hunting and

agricultural techniques, practical knowledge, trade routes and geographic knowledge with the needy newcomers. Without this, the first immigrants would have been unable to survive. As we have seen, the Aboriginal peoples formalised the relation of sharing in the early treaties in the following form: they agreed to share this land with the newcomers on the agreement that the newcomers would neither attempt to govern them nor use their land without their consent. The treaties involved other exchanges as well, such as trade, military, educational and medical benefits, and political and legal interrelations, but the sharing of land and trade on this understanding were at the heart of the relationship.

In the early period, many of the newcomers, especially the Canadiens and Canadiennes, entered into these relations of sharing, acquiring land by agreement, exchanging gifts at treaty ceremonies and annually at trading posts in Aboriginal country, expressing gratitude to their Aboriginal hosts by practices such as thanksgiving, and developing a global trading system in which both partners shared their technologies and knowledge without assimilation. This partnership is the foundation of Canada's economic development and wealth; a partnership that the Aboriginal peoples seek to renew.

When the colonial system was erected in the nineteenth century, government was imposed and land taken without Aboriginal consent. The original sharing of their goods and knowledge, the gift of the land, and their contribution to the trade and settlement economy were eliminated from most history books and Canada's collective memory. This act of greed and ingratitude was legitimated by the specious justifications mentioned earlier. Within the social Darwinism and racism of the colonial ideology, the Aboriginal practices of gift giving and sharing were outlawed and classified as primitive and communistic, obstacles to the exchange-and-saving relations of a market economy. Aboriginal people were said to waste and squander their goods and to have contributed little if anything to Canada's growth. If they remained faithful to their ethic of sharing, this was taken as proof of their backwardness and the justification for policies of forced removal and assimilation. Despite this attempt to bury the sharing relation at the base of Canada's prosperity, non-Aboriginal Canadians continued to reciprocate by providing some support for the generous people who had been so ungratefully dispossessed and displaced. Unfortunately, within the distorted colonial relationship, this support was now seen as a burden and welfare, rather than a woefully unfair return, and channelled into relations of economic and social dependency, rather than the older relations of economic interdependency.

The justification for the attack on Aboriginal sharing practices was the assumption that relations of economic cooperation can evolve and be maintained on calculations of immediate self-interest alone. If this were true, then the 'gift form' is a pre-market relation and a threat to modernisation. This assumption, which prevailed for about a century, has been shown to be erroneous. The older view, which the early administrators shared, and learned from classic authors such as Aristotle and Cicero, has been shown to be correct by contemporary game theorists and economists. This is the view that forms of economic cooperation can evolve and be sustained only if an element of sharing or gift giving is involved; that is, if the partners look out for their long-term shared interest to some extent and act towards each other accordingly. The people in the exchange see themselves not only as calculators of immediate advantage, but as partners who share in relations of mutual benevolence and gratitude over time. If this dimension of sharing is overlooked, the acids of ingratitude corrode the social fabric. This dimension of 'sociability' is a necessary condition of the highly complex relations of modern economic and political cooperation.

This insight is incorporated, for example, in the social policies of the European Union, in the social network of Canada and other modern societies, and in the policy of equalisation that is seen by many as a necessary bond of the Canadian confederation. The sharing involved in equalisation is partly a consideration of long-term interest; for the regions that are better off today were worse off yesterday and can reasonably expect to be so again in the future, so it is in their long-term interest to be benevolent today in the expectation of gratitude tomorrow. But it also goes deeper than this and closer to the Aboriginal understanding of sharing. It is the acknowledgment, essential to any cooperative partnership over the long term, that the Canadian economy is a shared enterprise to which all contribute and from which all should benefit, as a necessary condition of its overall social harmony and balance. The distribution mechanisms of the economy acting alone fail to deliver these benefits equitably (to put it mildly), and so fail to provide the conditions that enable the economy to survive.

The great question now is how can sharing be built into a new, post-colonial relationship in order to generate mutually beneficial economic interdependence and ecologically benign forms of resource management? The answer is, firstly, as in any modern cooperative relation, that the partners must recognise and respect the rights of each, their rights of self-government and equality as peoples, and they must acknowledge and manifest mutual cultural respect. Under the head of sharing, there must be a recognition and public acknowledgment of the presently unacknowledged

and suppressed relation of sharing at the foundation of the Canadian confederation and economy, in our histories, narratives and public institutions.

As a long overdue act of justice and gratitude to initiate the new relationship, Aboriginal communities should have access to ancestral lands that were unjustly taken from them, sufficient for self-reliance where possible, and in a way that respects the rights of non-Aboriginal Canadians as well. These land claims need to be worked out through treaty negotiations 'reinforced by judgments' of the Supreme Court. Aboriginal societies should be assisted in developing economic self-reliance through new relations of economic cooperation, resource development and the sharing of knowledge and technologies, just as they once helped non-Aboriginal people. For the partners to engage in productive relations together, and as an act of reciprocal justice, the appalling social and economic inequalities of Aboriginal peoples need to be levelled up to the Canadian equalisation norm, by channelling public funding into policies of economic cooperation and self-reliance, rather than dependency, welfare and despair. These mutually agreeable policies should aim at the development of Aboriginal economic self-sufficiency, through partnership arrangements in resource management and development, and so the phasing out of federal financial support.

These policies will vary widely for Aboriginal nations with different land bases and for Aboriginal peoples living in urban areas and participating in the non-Aboriginal economy. However, the principle is the same; the long overdue recognition that our present prosperity rests on an unacknowledged and unreciprocated relation of sharing extended by the Aboriginal people to all, and the realisation that our future prosperity and wellbeing rests on equitable relations of sharing in the future.[25]

The second dimension of sharing is a just means of sharing legal and political powers. Aboriginal communities vary greatly in their ability and desire to govern themselves by their own laws. Some wish to leave most powers to the federal and provincial governments and voluntarily subject themselves to those laws. Others wish to repatriate many of their legal and political powers and to govern themselves in accord with their own laws and

[25] For discussions of sharing, see Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. II, Part 2, and Vol. III; Royal Commission on Aboriginal Peoples, *Sharing the Harvest: The Road to Self-Reliance* (Ottawa: Canada Communication Group Publishing, 1993); Royal Commission on Aboriginal Peoples, *Aboriginal Peoples in Urban Centers* (Ottawa: Canada Communication Group Publishing, 1993); and Royal Commission on Aboriginal Peoples, *The Path to Healing* (Ottawa: Canada Communication Group Publishing, 1993).

traditions. Aboriginal peoples living off the reserves require another form of relation to their home First Nation and to the federal and provincial laws. One of the immense advantages of the treaty relationship over any other possible system is that it can handle this range of inter-delegation of powers in a way that is responsive to local differences and open to experimentation and revision, from the Nunavut public government to the Sechelt municipal-style arrangement.

For the relations of sharing of legal and political powers to be just, they need to be based on the principles laid out above. The inter-delegation relation must be based on intercultural dialogue negotiations between equals, based on mutual consent, recorded in treaty-like agreements, and open to review and amendment in the future. Most important, no matter how many powers an Aboriginal nation agrees to delegate to, or leave with, the federal or a provincial government, its status as an equal, self-governing nation continues.

At the present time many laws are applied to Aboriginal peoples without their consent, many treaties have been violated, and, in some cases such as British Columbia, treaty negotiations have just begun. While Aboriginal peoples protest this, very few are in a position to govern themselves immediately. This dilemma is at the centre of the current expensive and destructive impasse. Aboriginal and non-Aboriginal people have a strong interest in establishing a system that is acceptable to both sides, flexible and dependable. Non-Aboriginal Canadians have, I believe, two major concerns that the commission should address.

The first concern is that Aboriginal self-government should not involve a large sum of public money in a time of acute recession. It should decrease the amount of public money currently distributed to Aboriginal people. The only way to meet this concern is if Aboriginal peoples become economically self-sufficient. The means to economic self-sufficiency is a sufficient land and resource base to support Aboriginal government and economic development with the rest of Canada. This can be done by returning to the Aboriginal nations a sufficient amount of the lands that have been unjustly taken from them. As these lands and resources are developed in cooperation and Aboriginal people are employed, federal payments and exemptions could be decreased accordingly.

The size of the land base and the degree and type of self-government should be tailored to the size and locale of the Aboriginal nations. If Aboriginal title and self-government are impossible to implement, as in highly populated areas, then, as the Supreme Court recommends, due consultation and compensation needs to be negotiated. For Aboriginal

people living off the reserves, policies designed to enable them to participate in the Canadian economy and still participate in their respective First Nations may serve the same purpose. Also, the interests and rights of non-Aboriginal peoples need to be represented in the negotiations as a requirement of mutual recognition. If these policies were explained as a matter of redress for past injustices and of decreasing federal payments, I believe most Canadians would accept it. Presumably Canadians would like to see Aboriginal people become economically independent and contribute to the Canadian economy, rather than remain a burden on it.

The second concern widely expressed by non-Aboriginal Canadians is the assurance that Aboriginal governments will not become uncontrolled dictatorships. I believe there are two related points here. One is that Aboriginal leaders be made accountable to Aboriginal people: that their rule be based on the agreement of Aboriginal citizens. The fear expressed is that as the Indian Act is dismantled, a class of Aboriginal male elites will seize power and rule despotically against their own people.[26]

This is a concern that is shared by many Aboriginal peoples as well, especially Aboriginal women. To meet this concern, it is neither necessary nor practical that Aboriginal peoples set up representative governments modelled on non-Aboriginal governments. One of the advantages of defining Aboriginal governments as a distinct confederation is that different forms of responsible Aboriginal governments are to be expected, based on Aboriginal traditions, customs and innovations. These forms will vary across Aboriginal nations, with their different traditions, circumstances and needs. However, the condition of democracy must be met: Aboriginal governments must be dependent on and answerable to the people they govern in a manner appropriate to their ways.

The second point is that there should be constitutional limits on Aboriginal governments. For non-Aboriginal Canadians, the Canadian Charter of Rights and Freedoms is the most obvious example of such a limit. Consequently, this point is often expressed as a demand to impose the Charter on Aboriginal peoples. However, there are two objections to the imposition of the Charter that follow from the principles of mutual recognition. The federal government has no right to impose it without the consent of Aboriginal peoples and although the Charter embodies basic, cross-cultural values, it does so in a specific manner that is shaped by the cultures, history and circumstances of non-Aboriginal Canadians.

[26] For an example of this concern, see Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993).

Aboriginal governments require Charter limits that Aboriginal peoples agree to and that derive from Aboriginal cultures, history and circumstances.

The basic limits are the rights and freedoms of due process, the ability of citizens to participate in their governments, freedom of speech, gender equality, security of the person and so on. These values, shared by Aboriginal and non-Aboriginal peoples, are given constitutional expression in a wide variety of forms in different countries. Even within Canada, the Charter is applied differently in different regions. Therefore, these shared values need to be formulated in a way that is appropriate to Aboriginal cultures and ways, just as the Charter is to the distinctive ways of non-Aboriginal Canadians. There are numerous ways this could be done. An Aboriginal Justice on the Supreme Court, an Aboriginal interpretative clause in the Charter and simple sensitivity in applying the Charter, as in the acceptance of oral evidence in *Delgamuukw*. Another alternative, favoured by many male and female Aboriginal citizens, is for Aboriginal peoples to develop their own charters and, in the first instance, to appeal to them in their own courts, as proposed in the *Nisga'a Final Agreement*. In addition, Canadian laws continue to apply to Aboriginal governments unless and until specific Aboriginal laws and institutions are established that are mutually acceptable. Moreover, Aboriginal governments will be constrained by a variety of United Nations agreements and the evolving international law of Indigenous peoples. The negotiations between Aboriginal and non-Aboriginal partners concerning healthcare, justice, resource development, environmental protection and employment will involve yet more limitations.[27]

7 MUTUAL RESPONSIBILITY

The final principle is that the partners act responsibly towards one another and towards the habitat they share. Aboriginal Elders explain that the identities of their people are related to the places they live; that the Creator has placed them here with the responsibility to care for life in all its harmonious diversity. The responsibility to care for all the ecologically interrelated forms of life is timeless, looking back to the wisdom of one's ancestors and forward to seventh generation in the future. This unshakeable sense of responsibility to the source and network of life is at the core of Aboriginal identity. As noted earlier, it is coupled with a strong sense of

[27] For a discussion of this concern and various responses, see Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. IV; and Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System* (Ottawa: Canada Communication Group Publishing, 1993).

individual or self-responsibility. A person learns to take up his or her responsibility to others and the environment through an individual quest for understanding of and attunement to one's place in nature, which marks the passage to adulthood (this is familiar to many Canadians through the song by Susan Aglukark entitled 'Shamaya').

It would be idealistic to hold that this twofold ethic of responsibility finds perfect expression in the organisation and administration of everyday affairs of Aboriginal peoples. Still, the Elders who emphasise responsibility, more than rights to do as one pleases, are speaking from an ancient and powerful understanding of the nature of humankind and its place in the larger community of life on this planet. Younger people, in positions of leadership as well as in positions of dependency and despair, are turning to them for guidance and inner strength.

Non-Aboriginal Canadians have their own cultural understanding of responsibility. A high value is placed on individual responsibility, and individual freedom is associated with responsibility in many traditions. The sense of individual responsibility extends to caring for one's family and friends and care for the common good of one's communities, from local associations, to the Canadian federation, and to a sense of responsibility for endangered peoples and species around the globe.

Although an exploitative stance of irresponsibility towards nature prevailed over the last century, on the assumption that nature was a limitless resource for the use and abuse of the human species, this Faustian presumption has been discredited. Many people, especially in the environmental sciences, argue that this stance has caused enormous damage to the environment and threatens to render the planet uninhabitable. There is a dawning awareness of the environment as a living system of interdependency in which humans should have a prime responsibility for safeguarding its delicately balanced ecological diversity. In this view, we should be responsible for the caretaking of ecological diversity for the same reason as we should for cultural diversity. Both goods are the very condition of our existence and wellbeing.

The change in attitude from the earlier, exploitative stance is even deeper than this for many Canadians. It is the sense that the diverse ways of life of Canadian peoples have their history and their being in this encompassing and awe-inspiring ecological diversity. To act irresponsibly is not just short-sighted but a spiritual failure; an act of sacrilege and desecration against the source of being of the peoples we are.

This broader vision of Canada as a harmonious confederation of cultural and ecological diversity, and of Canadians as caretakers of this irreplaceable

dwelling place of endless beauty, can be understood to some extent in the spiritual traditions of non-Aboriginal Canadians. However, there is something distinctively Canadian about this emerging sense of identity, as if Canadians have finally freed themselves from their colonial habit of defining themselves in traditions derived from Europe and taken responsibility for defining themselves. It is not surprising, therefore, that many have turned to the Indigenous Canadian wisdom of Aboriginal Elders for guidance and cooperation in working out an ethic of responsibility appropriate to this new vision of Canada. Mutual responsibility, then, provides the final fibre for weaving a just and inspiring partnership between Aboriginal and non-Aboriginal peoples.

8 ABORIGINAL SELF-GOVERNMENT AND LIBERAL DEMOCRACY

The arguments given above show that the relationship embodies familiar principles of justice. I would now like to argue that the relationship preserves, and indeed enhances, the goods that citizens expect from a liberal democracy. For there would be a deep conflict in values if removing the colonial relation between Aboriginal and non-Aboriginal people in the name of justice, equality and self government led to a society in which other values associated with liberal democracies were thereby compromised. It is important to see that this is not the case. The new relationship preserves the values of a liberal democracy in a way appropriate to a just, culturally diverse society, and thus will be an exemplar for other plural societies in the twenty-first century.

Aboriginal and non-Aboriginal peoples expect a political association to provide the basis for the individual freedom and dignity of its members in both the public and private spheres. It should enable them to participate freely and with equal dignity in the governing of their society and to live their private lives in accordance with their own choices and responsibilities. The first good, civic participation, cannot be achieved by seeking to assimilate Aboriginal peoples to non-Aboriginal forms of government. This is not only unjust, for the reasons given, it is the cause of the alienation, anomie and defiance that come to any free people who are forcefully governed by alien laws and ways. Self-government enables Aboriginal peoples, just as it enables non-Aboriginal peoples, to participate in governing their societies in accord with their own laws and cultural understanding of democracy, to overcome alienation and to regain their dignity as equal and active citizens. This in turn generates a strong sense of pride in, and

allegiance to, the Canadian confederation as a whole because it is the protector, rather than the destroyer, of self-government and citizen participation.

The crucial feature of democratic participation and citizen dignity is not a canonical form of institutions. This was one of the mistakes in the stages view of historical development. Rather, the practice of government should rest on the sovereignty of the people, enabling them to exercise their powers of self-rule in culturally appropriate ways, and to amend or overthrow the government if it thwarts their powers. Accordingly, the forms of democratic participation and citizen dignity appropriate to Aboriginal and non-Aboriginal peoples are similar but not identical.

Aboriginal peoples, with their smaller societies, tend to place greater emphasis on direct participation and government by consensus. In many cases, political authority rests on the ability of the person or council to sustain the actual consent of each citizen over time. When on-going consent is lacking, the people often form sovereign bodies, such as healing circles, to reform defective practices. The inequalities of rule imposed through the Indian Act, such as men over women, are being dissolved as the colonial system is dismantled and these democratic forms are revitalised and renovated, in an analogous way to the reform of gender inequalities in non-Aboriginal governments. Although these forms of face-to-face self-government have always been an ideal in Western traditions, non-Aboriginal governments, owing to their size and degree of institutionalisation, place more emphasis on representative government and majority rule, with compulsory obedience even if citizens dissent from the outcomes.[28]

The second good, individual freedom and responsibility, is equally important. It too is understood in slightly different ways in both cultures. Aboriginal peoples in general have a strong sense of responsibility to their communities combined with an equally strong commitment not to interfere with, but only to provide suggestive role models for, the freedom of the individual in taking up these responsibilities in an autonomous way. As a result there is in general a larger commitment to individual freedom in parenting, friendship and work than in non-Aboriginal societies, where a greater degree of intervention and conformity is seen to be necessary and valuable.

[28] For an important and timely critical analysis of Aboriginal governance by a leading Indigenous scholar, see Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Toronto: Oxford University Press, 1999). See also, J. Anthony Long, 'Political Revitalization in Canadian Native Indian Societies', *Canadian Journal of Political Science* 23(4), 1990: 751–74; and Boldt, *Surviving as Indians*, pp. 132–61.

The protection and enhancement of both civic and individual freedom and responsibility has always been the primary concern of liberalism. In recent years liberal theorists have asked how these values can be preserved in the more culturally diverse, post-colonial societies of today. They have argued that the social condition of being able to exercise civic and individual freedom in pursuing and revising one's life plans is that people are members of viable cultures that provide the necessary and partly constitutive context for individual autonomy and choice. Consequently, viable cultures are now seen as a primary good of a liberal society.[29]

Previous liberal theorists agreed with this but presumed that modern European cultures were superior cultural bases for individual freedom. Since they presumed that these 'superior' cultures developed as a result of modernisation itself, they held that governments need not be concerned with cultural preservation once non-Europeans were drawn or coerced into the process of modernisation. They could therefore look on the extinguishment of cultural diversity and the inculcation of European culture with indifference or moral approval.

In hindsight, theorists now see that this line of argument of liberalism during the imperial age not only misunderstood the relation of cultural diversity to modernisation but also overlooked another condition of individual freedom and responsibility: self-respect. Individuals can engage in citizenship and personal freedom only if they have a threshold of self-respect; a sense of one's own value and the secure conviction that what they have to say and do in politics and life are worthwhile. The social basis of self-respect is that others recognise the value of one's activities and goals; that there is an association in which individuals can acquire a level of confidence in the worth of what they say and do. Since what people say and do, the plans they formulate and revise, are partly constituted by their cultural identity, the condition of self-respect is a society in which their culture, or cultures, is recognised and affirmed by others, both by those who do and those who do not share that culture, or cultures.

Consequently, a society whose members view the disappearance of the cultures of other members with indifference or moral approval, or who treat them with indignity, derision and contempt, destroys the self-respect of those members and, in so doing, undermines their abilities to be citizens

[29] I am thinking specifically of the work by the Canadian liberal philosopher Will Kymlicka on liberalism and minorities. See, Will Kymlicka, *Multicultural Citizenship*, and, Kymlicka, ed., *The Rights of Minority Cultures*. The so-called 'liberal' critics of the treaty process and self-government seem to be unaware of this literature by liberal theorists, which refutes their criticisms. See, for example, Graham Gibson, 'Comments on the Nisga'a Treaty', *BC Studies* 120 (Winter), 1998–99: 55–72.

and autonomous individuals in work and private life. The disastrous effects of successive policies of cultural destruction and assimilation on the self-respect of Aboriginal peoples prove this obvious but overlooked point beyond reasonable doubt. Thus, if a liberal democratic society is to provide the basis for its two most important liberties, civic and personal, it must protect the cultures of its members and engender the public attitude of mutual respect for cultural diversity that self-respect requires.

There are many ways this can be done: the protection of all Canadian cultures from Americanisation, each province's right to govern in accordance with its distinct laws and ways, official language minorities, multiculturalism, and the special role of Quebec in protecting its culturally diverse, predominantly French-speaking society. For Aboriginal cultures, there is only one just way this can be done: by recognising their inherent right to govern themselves in accordance with their own cultures, and engendering among both Aboriginal and non-Aboriginal people respect for each other's cultures. Consequently, the mutual recognition of Aboriginal and non-Aboriginal peoples as equal, coexisting and self-governing peoples is not only just, but also preserves and enhances the values of liberal democracy in a manner appropriate to a culturally diverse and post-colonial age.

CONCLUSION

There are two major objections to the relationship I have recommended. The first is that it is incompatible with individual equality and rights. I have responded to this by showing that the opposite is the case. Individual equality and rights enable citizens to participate in government and to exercise their individual freedom in the private sphere. The mutual recognition of and respect for Aboriginal and non-Aboriginal peoples as equal, coexisting and self-governing peoples provides the conditions for equality of civic participation and individual freedom in a culturally diverse society. In addition, this proposal complements Canada's long, liberal, common-law tradition of accommodating individual rights and equality with the preservation and promotion of the various cultures of its citizens.

The second objection is that this kind of legal, political and cultural pluralism will lead to the disunity of the confederation. Again, the opposite is the case. The assumption that the unity of a political association requires the uniformity of its members derives from the early modern period of national consolidation and centralisation, where cultural differences were experienced as a threat to one's own insular identity and treated as inferior. It has no place in the world of today.

The proof is in the dismal record in practice. The attempts to gain unity through uniformity have failed. The Aboriginal peoples have suffered centuries of policies to assimilate or integrate them, on the assumption that the unity of a political association requires uniformity. These concerted efforts have caused resistance, despair and confrontation. Other cultural members of the Canadian confederation have suffered analogous forms of suppression in the name of national unity. None of these has succeeded, except in the case of the extinction of a number of Aboriginal peoples of Canada. Rather, these imperious attempts to impose a uniform and homogeneous Canadian identity have led to one crisis of unity after another. The record is abhorrent and intolerable.

On the contrary, the recognition and accommodation of cultural, legal and political diversity historically has eased the confrontations and conflicts in Canadian society, and enabled the members of the confederation to work together on their common problems and aspirations. Canadians should continue to draw on these rich sources of plural government, federalism and mutual respect, beneath the dead machinery of uniformity, and show to themselves and others that unity and strength derive from the love of a confederation that protects and harmonises, rather than assaults and denigrates, our diverse identities.

CHAPTER 8

The struggles of Indigenous peoples for and of freedom

INTRODUCTION

Despite the *possibility* of negotiating reconciliation with Indigenous peoples presented in Chapter 7, the experience of negotiations has failed to live up to the standards endorsed by the Canadian Royal Commission on Aboriginal Peoples. This chapter addresses two principal questions: what are the main obstacles to negotiating reconciliation? And what are the practices of freedom available to Indigenous peoples and non-Indigenous people who support them to overcome the obstacles? It starts from two specific questions raised by Duncan Ivison and Paul Patton: in what ways does *political theory* act as an obstacle by contributing to the colonisation of Indigenous peoples, and what resources exist in political theory for supporting the struggles of Indigenous peoples for freedom and reconciliation? Section 1 sets these two questions in the broader historical context of the interaction between the various governmental strategies of the internal colonisation and incorporation of Indigenous peoples and the strategies of resistance of Indigenous peoples over the last three hundred years. With this context in place, section 2 surveys the legal and political theories that have been employed to legitimate the strategies of colonisation and how these arguments still continue to inform recent court cases and treaty negotiations despite some significant improvements. Section 3 turns and examines the counter-arguments Indigenous and non-Indigenous scholars and activists have advanced to refute these arguments in national and international forums and to provide the legal and political arguments for the negotiation of reconciliation laid out in Chapter 7. The section concludes that the force of reasoned refutations and proposals for decolonisation and freedom through negotiation are necessary yet insufficient by themselves. The underlying legitimating presumptions are so deeply woven into the everyday practices of colonial governance – including treaty negotiations – that they continue to function as background 'hinge propositions' around which

negotiations take place. The final section thus turns to the multiplicity of practices *of* freedom within the prevailing relations of colonial governance that Indigenous peoples and their supporters are exercising on the ground today (introduced in section 1). These diverse activities of acting otherwise, negotiation and confrontation are also necessary and complementary steps on the path to the negotiation of reconciliation.

1 INTERNAL COLONISATION AND ARTS OF RESISTANCE

To approach the two questions of the introductory section properly, it is necessary to know the theoretical and practical contexts in which they arise. They are not new questions. They have been raised and answered in various ways ever since the first encounter of Europeans with Indigenous peoples, and they have been raised in, and partly given rise to, the complex language (or multiplicity of languages) of modern Western, non-Indigenous political thought. In this chapter Western political theory is used broadly to refer to the political, legal and social theories, and reasoned legal decisions and legislative and policy documents written by European, North and South American, Australian and New Zealand non-Indigenous authors from the beginning of the modern period in Europe to the present. These theories in turn make up part of the complex, shared and continuously contested languages of modern Western political thought. This motley language of Western political thought has two well-known characteristics. It is a language woven into the everyday political, legal and social practices of these societies and, in a slightly more technical and abstract key, a language of interpretation and critical reflection on the practices of these societies (in the institutions of law and policy as well as academia). It is, in short, the language of both political self-understanding and self-reflection of these societies and their non-Indigenous members.

It is not the language of political self-understanding and self-reflection of Indigenous peoples, even though they are constrained to use it. They have, for lack of better terms, Indigenous political theories and a complex and contested shared Indigenous language of political thought. These two languages are not closed, incommensurable or independent of each other, but they are massively unequal in their effective discursive power in the present. One is the dominant language that presents itself as a universal vocabulary of understanding and reflection; the other a subaltern language, which, when it is noticed at all, is normally taken to be some kind

of minority language within the dominant language of Western political thought.[1]

These two questions do not arise in a vacuum but in response to a fundamental problem in practice. The practical problem is the *relation between the establishment and development of Western societies and the pre-existence and continuing resistance of Indigenous societies on the same territory*. This general problematic relation takes different specific forms in Canada, the United States, New Zealand and Australia; these specific forms vary widely within each of these societies in relation to different Indigenous societies; and these in turn vary over time. Despite wide variation, the relation is commonly called the 'internal colonisation' of Indigenous peoples by the dominant societies. As the systems of internal colonisation and the arts of resistance by Indigenous peoples change over time, they periodically give rise in the dominant societies to the sorts of questions addressed in this chapter (these questions arise much more frequently in Indigenous societies, where colonisation is the lived reality). To address our questions effectively, therefore, it is necessary to understand the main features of systems of internal colonisation and practices of resistance, as well as the more specific features that have become problematic in the present and given rise to critical reflection.[2] To do this in a short chapter, it is necessary to restrict the investigation to North America and mostly to what is now called Canada.

'Internal colonisation' refers, firstly, to the historical processes by which structures of domination have been set in place on Great Turtle Island (North America) over the Indigenous peoples and their territories without their consent and in response to their resistance both against and within these structures. The relevant institutions of the United States and Canada constitute structures of domination in Weber's sense because they are now relatively stable, immoveable and irreversible vis-à-vis any direct confrontation by the colonised population, as the massive display of force at Kanesatake-Oka, Quebec, in 1990 was designed to show.[3] They

[1] For the failure of Western political theorists to enter into a just dialogue with Indigenous peoples and their political traditions, see Dale Turner, *This is not a Peace Pipe: Towards an Understanding of Aboriginal Sovereignty* (Toronto: University of Toronto Press, 2006). I am greatly indebted to this Anishinaabe political philosopher for helping me to understand the shortcomings of Western political theory in relation to Indigenous political theory, as well as the possibilities for a fair dialogue in 'Vision: Towards an Understanding of Aboriginal Sovereignty', in *Canadian Political Philosophy: Contemporary Reflections*, eds. Wayne Norman and Ronald Beiner (Oxford: Oxford University Press, 2001).

[2] For this approach to the problem, see Chapter 1, this volume.

[3] For the confrontation at Kanesatake-Oka, see Craig MacLaine and Michael Baxendale, *This Land is Our Land: The Mohawk Revolt at Oka* (Montreal: Optimum Publishing, 1991); and Geoffrey York and Loreen Pindera, *Peoples of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown and Co., 1991).

'incorporate' or 'domesticate' the subordinate Indigenous societies. These two concepts are widely used by Indigenous peoples to refer to the form domination takes: that is, as a matter of fact and of the coloniser's law, Indigenous peoples exist *within* the dominant societies (as minorities, domestic, dependent nations, Aboriginal peoples or First Nations *of* Canada and so on).[4]

Secondly, within the stable structures of incorporation, internal colonisation refers to the vast array of more mobile and changeable techniques of government by which Indigenous peoples and their territories are governed in a wide variety of ways within the US and Canadian political systems. Techniques of government refer to the totality of modifiable discursive and non-discursive ways and means employed in strategies for guiding the conduct of Indigenous peoples, directly and indirectly, and responding to their resistance. Ever since the consolidation of the control of the United States and Canada over two-thirds of the continent and the effective assertion of exclusive jurisdiction by the middle of the nineteenth century, the struggles of Indigenous peoples on the ground have primarily involved attempts to modify the techniques of government to gain degrees of self-government and control over some of their territories, rather than direct confrontation with the background structures of domination. Of course, there is not a sharp distinction between structures of domination and techniques of government in practice, as what appears to be a part of the immoveable background to one generation can be called into question and become the object of struggle and modification by another, and vice versa. The former is like the relatively stable river banks that change imperceptibly, while the latter is like the changing waters of the river.

The processes of internal colonisation have developed in response to the struggles of Indigenous peoples for freedom both against and within colonisation on the one hand, and in response to overriding objectives of the settler societies and the capitalist market on the other. There have been four major dimensions to these processes.[5] When Europeans invaded and began to settle in North and South America, they encountered free, vibrant,

[4] The best introductions to how these two concepts are used by Indigenous peoples is Turner, *This is not a Peace Pipe*; and Alfred, *Peace, Power, Righteousness*. I am greatly indebted to this Kanien'kehaka Mohawk political scientist for helping me to understand the system of internal colonisation and the two arts of resistance and freedom practised by Indigenous peoples. See also his earlier work, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Toronto: Oxford University Press, 1995).

[5] For a summary of the historical research on the four dimensions of colonisation over four historical periods in Canada, see the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. I.

sovereign Indigenous nations with complex forms of social and political organisation and territorial jurisdictions that were older (3,000–30,000 years), more populous (60–80 million) and more variegated than Europe. Firstly, through the spread of European diseases, wars and the destruction of Indigenous societies, the interlopers reduced the population by roughly 90 per cent by the turn of the twentieth century (from 10 million to 0.5 million in Canada and the USA). Secondly, they usurped the existing traditional forms of government and subjected Indigenous peoples to French, British and then Canadian and US governments, either directly, through various techniques of assimilation, or indirectly, through setting up systems of internal self-rule (band councils in Canada) governed by special authorities and departments of the dominant societies.

Thirdly, to build Western political societies on the territories and ruins of Indigenous societies, the newcomers gradually displaced the rapidly decreasing native population to small reserves, appropriated their territories by effectively exercising exclusive jurisdiction over them, and opened them to resettlement by the rapidly increasing immigrant population and to capitalist development, either indirectly, as in the early fur trade, or directly, as in agriculture, fishing, forestry, mining and other forms of resource extraction. Fourthly, in the early stages and again in the present, where Indigenous resistance has been effective, usurpation and appropriation often have been preceded or accompanied by treaty making. This has modified the processes to some extent and created relations of cooperation. The long-term effects of these four dimensions for the vast majority of native people in Canada have been to reduce formerly economically self-sufficient and interdependent native societies to tiny overcrowded reserves, inter-generational welfare dependency, substandard housing, diet, education and health facilities, high levels of unemployment, low life-expectancy and high rates of death at birth. The predictable high levels of substance abuse, incarceration and suicide for native people living on or off reserves that follow from these conditions undermine their wellbeing and self-esteem.

This form of colonisation is 'internal' as opposed to 'external' because the colonising society is built on the territories of the formerly free, and now colonised, peoples. The colonising or imperial society exercises exclusive jurisdiction over them and their territories, and the Indigenous peoples, although they comply and adapt (are de facto colonised), refuse to surrender their freedom of self-determination over their territories and continue to resist within the system as a whole as best they can. The essence of internal colonisation, therefore, is not the appropriation of labour (as in slavery), for

this has been peripheral, or depopulation (genocide), for Indigenous populations have increased threefold in this century, or even the appropriation of self-government (usurpation), for at different times Indigenous peoples have been permitted to govern themselves within the colonial system (as in the early treaty system and perhaps again today). Rather, the ground of the relation is the appropriation of the land, resources and jurisdiction of the Indigenous peoples, not only for the sake of resettlement and exploitation (which is also true in external colonisation), but for the territorial foundation of the dominant society itself. In external colonisation, colonies and the imperial society coexist on different territories. The colonies can free themselves and form geographically independent societies with exclusive jurisdiction over their respective territories (as Canada, United States, Australia and New Zealand have done in relation to the former British Empire). With internal colonisation, this is not possible. The problematic, unresolved contradiction and constant provocation at the foundation of internal colonisation, therefore, is that the dominant society coexists on and exercises exclusive jurisdiction over the territories and jurisdictions that the Indigenous peoples refuse to surrender.

It follows that the entire system of internal colonisation is seen by both sides as a temporary means to an end. It is the *irresolution*, so to speak, of the relation: a matrix of power put in place and continuously provoked by and adjusted in response to the arts of resistance of Indigenous peoples. The temporary nature of internal colonisation is obvious enough from the Indigenous side. They unsurprisingly would prefer to resolve it by regaining their freedom as self-governing peoples. It is not as obvious from the side of the colonising society, and it is commonly overlooked in the theoretical and policy literatures, which tend to accept the colonial system as an end in itself and seek to justify and ameliorate it in some new form or another. However, since the beginning, the long-term aim of the administrators of the system has been to resolve the contradiction by the complete disappearance of the Indigenous problem: that is, the disappearance of the Indigenous peoples *as* free peoples with the right to their territories and governments. There are two major *strategies of extinguishment* and corresponding techniques of government by which this long-term goal has been and continues to be sought.[6]

[6] Accordingly, the techniques of government standardly have two objectives: to cope with the immediate situation in the short term and to move Indigenous peoples towards extinguishment in the long run. See, for example, the four policies analysed by the Canadian Royal Commission in *Report of the Royal Commission*, Vol. I, pp. 245–604.

(1) The first type of strategy is that Indigenous peoples could become extinct, either in fact, as was widely believed to be the trend in the late nineteenth century (through dying out) and is widely heard again today (through intermarriage and urbanisation), or in deed, as the overwhelming power of the dominant society could gradually wear down and weaken the Indigenous population to such an extent that their will and ability to resist incorporation would be extinguished, as various marginalisation hypotheses have projected throughout this century (and as the appalling conditions on most reserves portend today).

(2) The second and more common strategy is the attempt to extinguish the rights of Indigenous peoples to their territories and self-government. Over the last three centuries there have been three enduring types of this second strategy of extinguishing the rights of Indigenous peoples. The first type is either to presume that Indigenous peoples do not have the rights of self-governing peoples that pre-exist and continue through colonisation or to try to demonstrate, once and for all, that they do not have such rights. The presumption of Crown sovereignty, *terra nullius*, the discovery doctrine, and the primitive or less-developed thesis are examples of discursive techniques employed in this strategy. The second type is to extinguish Indigenous rights either unilaterally (through conquest, the assertion of sovereignty and the doctrine of discontinuity, supercession or by the unilateral effect of law-making) or voluntarily (through treaties and cession). The third and equally familiar type of strategy is to transform Indigenous peoples into members of the dominant society through re-education, incentives and socialisation so that they lose their attachment to their identity. The methods employed include outlawing Indigenous political and social practices and establishing band councils in their place, residential schools, adoption, exchanging native status for voting rights, programmes of deindigenisation and westernisation, and fostering a co-opted native colonial elite to administer the system.[7]

Once one or more of these three types of extinguishment is presumed to be successful, a number of different strategies of incorporation of Indigenous peoples as members of the dominant society have been put into practice by mobilising a corresponding range of techniques of government. There are two major competing *strategies of incorporation* in Canada today: strategies 3 and 4.

[7] For a summary of historical research on the three strategies of extinguishing rights, see the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. I, pp. 137–200, 245–604, and section 2 below.

(3) The first incorporation strategy is *assimilation*, so Indigenous persons are treated like any other member of the settler society. Difference-blind liberalism, the policy of the former Reform Party of Canada, the Statement of the Government of Canada on Indian Policy of 1969, and various forms of delegated, municipal-style self-government are examples of this approach. The other strategy of incorporation (4) is a severely limited form of official *accommodation*, where Indigenous peoples are recognised and accommodated as members of Canada and the bearers of, or at least claimants to, a range of Aboriginal group rights, in exchange for surrendering or denying the existence of their rights as free peoples. Recent Supreme Court rulings, the present treaty process, and various policies and influential theories of Canada as a multicultural and multinational society, such as the Three Orders of Government of the failed Charlottetown Accord, are examples of this neo-colonial approach. In the last type of case, commonly called reconciliation, the prevailing system of incorporation is transformed into a legitimate system of group recognition and rights in the Canadian Constitution by the agreement of the Indigenous peoples themselves, and thus the problem is finally dissolved.[8]

These four strategies and techniques make up the dominant side of the complex agonistic relation of colonial governance vis-à-vis Indigenous resistance. From the side of the ruling peoples, this Goliath versus David relation is a political system that underlies and provides the foundation for the constitutional democracies of Canada, the United States, Australia and New Zealand. The aim of the system is to ensure that the territory on which the settler societies are built is effectively and legitimately under their exclusive jurisdiction and open to settlement and capitalist development. The means to this end are twofold: the on-going usurpation, dispossession, incorporation and infringement of the rights of Indigenous peoples coupled with various long-term strategies of extinguishment and accommodation which would eventually capture their rights, dissolve the contradiction and legitimate the settlement (see section 2).

From the side of Indigenous peoples, it is a political system that overlies and is illegitimately based on making use of their pre-existing governments and territories. It is a system established and continually modified in

[8] For the strategies of assimilation and accommodation, see Andrew Armitage, *Comparing the Policy of Aboriginal Assimilation: Australia, Canada and New Zealand* (Vancouver: University of British Columbia Press, 1995); Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. I, pp. 201–44, 245–604; Culhane, *The Pleasure of the Crown*, pp. 90–110; Wayne Warry, *Unfinished Dreams: Community Healing and the Reality of Aboriginal Self-Government* (Toronto: University of Toronto Press, 1998); and section 2 of this chapter below.

response to their two distinct types of arts of resistance and freedom: against the structure of domination as a whole, in the name of the freedom of self-determination, and within it, by compliance and internal contestation of the strategies and techniques, in the name of the freedom of insubordination and dissent.

Firstly, Indigenous peoples struggle *for* their freedom as peoples in resisting the colonial systems as a whole, in each country and throughout the world of 250 million Indigenous people. Given the overwhelming power of the dominant societies, they cannot confront them directly in struggles of liberation to overthrow occupying imperial powers, as decolonisation has standardly unfolded in the modern period. Nevertheless, from appeals to the Privy Council in the seventeenth century to statements to the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations today, their 'word warriors' have never ceased to declaim the illegitimate system of internal colonisation and proclaim their sovereignty and freedom (see section 3).[9]

Secondly, they exercise their freedom *of* manoeuvre within the system. In any relation of power by which techniques of government are mobilised to govern the conduct of Indigenous peoples, individually and collectively, there is always a range of possible comportments – ways of thinking and acting – that are open in response, from the minuscule range of freedom exercised in hidden insubordination in total institutions such as residential schools to the larger and more public displays of the repatriation of powers of internal self-government, healthcare, education and territorial control. Over the centuries, Indigenous peoples have developed a vast repertoire of arts of infrapolitical resistance to survive and revitalise their cultures, nations and federations, to keep Indigenous ways of being in the world alive and well for the next generations, to adapt these ways and stories to the present strategic situation, to comply with and participate in the dominant institutions while refusing to surrender, to regain degrees of self-rule and control over their territories when possible, and so to seek to transform internal colonisation obliquely from within (see section 4).[10]

[9] For the concept of a word warrior, see Dale Turner, 'Vision: Towards an Understanding of Aboriginal Sovereignty', and section 3 below. For a recent statement of Indigenous sovereignty and self-determination, see Taiaiake Alfred, '*Tewehià:rak* (We Should Remember)' (United Nations Commission on Human Rights: Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations, 17th Session, Agenda Item 5, 28 July 1999).

[10] For this second type of freedom and Indigenous art of resistance, see Alfred, *Peace, Power, Righteousness*. The concept of arts of resistance is adapted from James C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (New Haven: Yale University Press, 1990).

2 LEGITIMATIONS OF INTERNAL COLONISATION

Section 1 set out the main features of the practical relation between internal colonisation and practices of resistance that has become problematic in the present and the focus of theoretical discussion in the legal, political and academic centres of the dominant societies. It has become problematic over the last thirty years due to the capitalist expansion and intensification of the colonial appropriation of formerly neglected or under-exploited Indigenous lands and resources, on the one hand, and the globally coordinated insubordination of Indigenous peoples on the other. The conflicts on the ground have led to five major types of overlapping forms of conflict and dispute irresolution: recourse to the domestic courts and international law; legislative and constitutional change; treaty making and other forms of political negotiations; unilateral action by domestic and transnational resource companies, interest groups and governments despite Indigenous rights and protests; and native communities unilaterally governing themselves and exercising jurisdiction over their territories despite the law. Critical and historical reflection on these disputes has brought to light the long history of the unresolved system of internal colonisation and practices of resistance of which these contemporary struggles form a part.[11]

With this practical context in view, it is now possible to address the first question: in what way does Western political theory contribute to the colonisation of Indigenous peoples? Western political theories written within the larger language of political self-understanding and self-reflection of Western societies in general serve either to legitimate or to delegitimate the colonisation of Indigenous peoples and their territories. When they serve to legitimate internal colonisation, by justifying, defending, or serving as the language of governance and administration of the system and its conflicts, political theories play the (sometimes unintended) role of a discursive technique of government in one or more of the four strategies of extinguishment and accommodation. When they serve to delegitimate the system in one way or another, political theories are a discursive technique in a practice of resistance. With a few notable exceptions, Western political theory has played the role of legitimation in the past and continues to do so today. This section sets out a brief history of

[11] The extensive research commissioned by the Royal Commission on Aboriginal Peoples from 1991 to 1996 is a good introduction to this entire field.

types of legitimation and two contemporary examples of litigation and negotiation.[12]

Briefly, in the first two centuries of overseas expansion Europe emerged from relative obscurity to become the most powerful centre of nations and empires in the world, based largely on the wealth and power generated from the settlement and exploitation of Indigenous lands and resources. Almost every major European political and legal theorist presented a justification of imperialism. When the colonies freed themselves from the British Empire and developed modern societies on the continued appropriation of Indigenous lands and resources, many of their leading legal and political theorists carried on and elaborated the traditions of interpretation and justification of the legal and political system of internal colonisation that their canonical European predecessors had begun. In late nineteenth-century Canada, as the Indigenous population was reduced and marginalised and internal colonisation firmly secured, the need for further legitimation was correspondingly diminished. The reigning ideology of the superiority of European-derived societies and the inferiority of Indigenous societies served as the taken-for-granted justification for the removal of Indigenous populations, who were seen as obstacles to the progressive exploitation of their lands. The relative disappearance of the issue from the public agenda does not mean that resistance did not continue in less public ways. It signals that the immigrant society now took the exclusive and legitimate exercise of sovereignty over Great Turtle Island for granted as the unquestionable basis of their society. The question disappeared and was replaced by an abstract starting point for theories of constitutional democracy that has nothing to do with the way these societies were founded. The prior existence and sovereignty, as well as the continuing colonisation and resistance, of Indigenous peoples was rarely mentioned until it began to reappear at the margins during the last decade of the twentieth century.[13]

Yet, even in the late nineteenth and early twentieth centuries when conditions of maximum Western self-confidence and dogmatic superiority

[12] For the study of political theories in legitimating or delegitimating aspects of the status quo, see Tully, ed., *Meaning and Context*.

[13] For an overview of early modern and modern political theory in relation to the Indigenous peoples of America, see Turner, *This is not a Peace Pipe*; Robert A. Williams, Jr, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990); James Tully, 'Aboriginal Property and Western Theory', in *Property Rights*, eds. Ellen Frankel Paul, Fred D. Miller and Jeffrey Paul (Cambridge: Cambridge University Press, 1994); Tully, *Strange Multiplicity*, pp. 58–99; Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c.1500–c.1800* (New Haven: Yale University Press, 1995); Culhane, *The Pleasure of the Crown*, pp. 37–72; and David Armitage, *The Ideological Origins of the British Empire* (Cambridge: Cambridge University Press, 2001).

prevailed, a lingering uncertainty about the legitimacy of the settler society remained unresolved in practice. Under the cover of public complacency, officials nonetheless found it necessary to sign a series of extinguishment treaties with a handful of Indigenous peoples who were portrayed in the dominant discourse as too primitive to have any rights or to require their consent to take their lands and subject them to colonial rule. Incredibly, the officials asserted that scrawled Xs by a few native people on written documents constituted agreements to cede and extinguish forever whatever rights they might have to tracts of land larger than the European continent. The signatories were said to agree to this in exchange for tiny and crowded reserves (which were soon reduced further) and a few usufructuary rights that exist at the pleasure of the Crown. On the other side, Indigenous people understood these treaties in the same way as the earlier peace and friendship treaties: as international treaties among equal nations to agree to work out ways of sharing the use of land and resources while maintaining their freedom as nations.[14]

Although Indigenous communities began to rebuild, reorganise and fight for their rights during the first half of the twentieth century, their activities did not make a significant impact on the public agenda until the 1970s. The Nisga'a Nation's assertion of their rights to collectively use and occupy their traditional lands led to the judgment of the Supreme Court of Canada of *R* v. *Calder* (1973), which is now seen as marking the transition to the present period. Six of seven judges agreed that Nisga'a Aboriginal rights derived from their occupation of their traditional territories prior to contact. In the oft-repeated phrase of Mr Justice Judson, 'when the settlers came, the Indians were there, organised in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means.'[15] Three judges went on to say that their Aboriginal rights had been extinguished unilaterally by general legislation; three said Aboriginal rights could not be extinguished unilaterally except by specific legislation; and the seventh decided against the Nisga'a on the traditional British Columbia argument that this type of case could not be brought against the province of British

[14] For these treaties, see the Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. I, pp. 148–200, and Vol. II, pp. 9–64; Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence: An Alternative to Extinguishment* (Ottawa: Canada Communication Group Publishing, 1995), pp. 1–59; and John L. Tobias, 'Canada's Subjugation of the Plains Cree, 1879–1885', in *Sweet Promises: A Reader on Indian-White Relations*, ed. J. R. Miller (Toronto: University of Toronto Press, 1991).

[15] Supreme Court of Canada, *Calder et al.* v. *Attorney-General of British Columbia* [1973] 34 D.L.R. (3d) 145, S.C.R. 313, at 156. For background, see Daniel Raunet, *Without Surrender, Without Consent: A History of the Nisga'a Land Claims* (Vancouver: Douglas and MacIntyre, 1996).

Columbia without the appropriate legislation. Although the Nisga'a lost their appeal, the Court found that Aboriginal rights existed at the time of contact and split evenly on whether or not they had been extinguished. So, the contradiction at the foundation of Canadian society and its underlying system of internal colonisation once again entered the public agenda.

As the last section indicated, two major official strategies of incorporation have been advanced to resolve the contradiction: to incorporate Indigenous people by means of assimilation or accommodation (strategies 3 and 4). The assimilation approach has support among some federal and provincial parties, the lower courts, economic interest groups and about half the general public, especially when they are polled on more specific and detailed questions about Indigenous self-government. The accommodation approach has support in the higher courts, the federal political parties and the province of British Columbia in the current treaty process, and roughly half of the general public, especially when polling questions are posed in general terms.[16] Although incorporation by accommodation is legitimated by policies and theories of multiculturalism, it is more illuminating to investigate the basics of the strategy in two forums: the Supreme Court of Canada and the treaty process. While each approach gives different degrees of recognition and accommodation to Indigenous peoples, both do so within the indubitable sovereignty of the Canadian state over Indigenous peoples and so do not question, let alone challenge, the continuing colonisation of Indigenous peoples and their territories but serve to legitimate it.

In a series of decisions from *R.* v. *Sparrow* (1990) to *Delgamuukw* v. *B.C.* (1997), the Supreme Court has defined the rights of Aboriginal peoples as those Aboriginal rights that are recognised and affirmed in Section 35 of the Constitution Act, 1982.[17] There are four main steps in the argument the Court advances to define these constitutional rights.

Firstly, the Court incorporates Indigenous peoples into Canada and subjects them to the Canadian Constitution in the very act of recognising their rights as rights within the Canadian Constitution. In so doing, it reaffirms the

[16] See Wayne Warry, *Unfinished Dreams*, pp. 20–30, 249–55, for a discussion of the support for these two strategies. For an influential defence of assimilation, see Smith, *Our Home or Native Land?*

[17] For a broad survey of Aboriginal and treaty rights in Canada from Indigenous and non-Indigenous perspectives, see Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997). For an excellent survey of the series of decisions from *Sparrow* to *Van der Peet*, to which I am greatly indebted, see Michael Asch, 'From "Calder" to "Van der Peet": Aboriginal Rights and Canadian Law, 1973–1996', in *Indigenous Peoples' Rights in Australia, Canada and New Zealand*, ed. Paul. Havemann (Auckland: Oxford University Press, 1999).

system of internal colonisation. The Court does not acknowledge that Indigenous peoples possess any rights that pre-exist the assertion of sovereignty by the Crown in 1846 (in British Columbia) over the territory now called Canada; rights that may render the establishment of Crown sovereignty subject to their consent and which may have survived unsurrendered into the present. The rights that Aboriginal peoples have in Canada are said to have their source or foundation in the pre-existence of organised Aboriginal societies, systems of laws and the occupation and use of their territories since time immemorial. Nevertheless, these activities, institutions and practices, which are the universal criteria of sovereignty and self-determination, did not give rise to any rights until they were recognised by the Crown, as common-law rights until 1982, and as constitutional rights thereafter. As the Court explains with respect to Aboriginal title (the Aboriginal right to land):

> from a theoretical standpoint, Aboriginal title arises out of the prior occupation of the land by aboriginal peoples and out of the relationship between the common law and the pre existing system of aboriginal law. Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this [underlying] title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.[18]

As a result of the nonsense of speaking about rights of Indigenous peoples to their territories prior to the recognition of their rights within the common law, there is no reason to doubt that the unilateral assertion of sovereignty by the Crown over their territories, without their consent, constituted the legitimate achievement of sovereignty:

> [I]t is worth recalling that while British policy toward the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown. [19]

Thus, Indigenous peoples are subject to internal colonisation by a combination of a doctrine of *terra nullius* (the land of no one) and a doctrine that

[18] *Delgamuukw* v. *B.C.* [1998] 1 C.N.L.R. 14, at para. 145. For an analysis of *Delgamuukw*, to which I am greatly indebted, see Kent McNeil, 'Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got it Right?' (York University, Toronto: *Twelfth Annual Robarts Lecture*, 25 March 1998). For a broad textual and contextual analysis of the cases leading up to *Delgamuukw* in 1997, see Culhane, *The Pleasure of the Crown*.

[19] *R* v. *Sparrow* [1990] 70 D.L.R. (4th) 385 (SCC), at 404, cited in Asch, 'From "Calder" to "Van der Peet"', p. 439.

discovery, settlement and recognition by other European powers constitute legitimate sovereignty and subjection.[20]

The second defining characteristic of the Aboriginal rights that Indigenous peoples are recognised as having, only in virtue of being members of the Canadian society and subject to its sovereignty, is that they derive exclusively from the distinctiveness of Aboriginal peoples as *Aboriginals*. They do not derive from any universal principles, such as the freedom and equality of peoples, the sovereignty of long-standing, self-governing nations, or the jurisdiction of a people over the territory they have occupied and used to the exclusion and recognition of other peoples since time immemorial. The Court explicitly rejects any appeal to such universal general rights of the liberal Enlightenment as a ground of Aboriginal rights.[21]

The Court has shown that a wide range of cultural, ceremonial and economic rights, including rights to the land, can be derived from the distinctiveness of Aboriginal peoples and that these rights need not be limited to the distinctive practices, customs and traditions they engaged in at the time of contact. A limited right of self-government within the Canadian constitutional structure may also be derived from Aboriginal distinctiveness in future cases. This exclusive ground of Aboriginal rights in the politics of difference (without the universal demand for freedom that underlies and justifies it) has thus ushered in a higher degree of internal autonomy for Indigenous people within the colonial system than they have been permitted since the middle of the nineteenth century, when administrative intervention in their internal affairs began in earnest. Nevertheless,

[20] The date the Court gives for the assertion of sovereignty over Indigenous peoples and their lands is 1846, the year of the Treaty of Washington between the British Crown and the United States in which the southern border of the colonies of British Columbia and Vancouver Island was settled between them. 'Settlement' is perhaps a misnomer as the immigrant settlements were resettlements on lands from which Indigenous peoples had been removed. See Cole Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographic Change* (Vancouver: University of British Columbia Press, 1997). These resettlements covered a tiny portion of British Columbia and they were nowhere near the Gitxsan and Wet'suwet'en territories. The Indigenous population still outnumbered the non-Indigenous population when the colony joined Canada in 1871 and their lands were transferred to the Crown in Canada without their consent. See section 3 below for the rejection by the International Court of Justice of the Supreme Court's type of argument that settlement and recognition by another European power without the consent of Indigenous peoples legitimates sovereignty.

[21] *Delgamuukw* v. *B.C* [1998] at paras. 114, 141. For the appeal to their 'distinctness' as 'aboriginals' as the sole basis of Aboriginal rights in earlier judgments, see Asch, 'From "Calder" to "Van der Peet"', pp. 432, 436–7, 439. For the Court's rejection of any appeal to the general and universal rights of the Enlightenment as a source of Aboriginal rights, see *Van der Peet* v. *The Queen* [1996] 137 D.L.R. (4th) 289 (SCC), at 300, cited in Asch, 'From "Calder" to "Van der Peet"', pp. 435, 439. Asch argues that this feature of the Court's judgments legitimates and continues the colonial status of Indigenous peoples.

it denies Indigenous peoples the right to appeal to universal principles of freedom and equality in struggling against injustice, precisely the appeal that would call into question the basis of internal colonisation.[22]

The third step in defining Aboriginal rights concerns the content and proof of Aboriginal title. As above, the right of an Aboriginal people to land is derived from their distinctive occupation of the land at the time of contact and the Crown's recognition of that occupation as a common-law and constitutional right. Aboriginal title is a distinctive or *sui generis* proprietary right, yet similar to fee simple. It is a right to the land and its exclusive use, alienable only to the Crown, and held communally. The land may be used for a variety of purposes that do not need to be distinctive to the Aboriginal community, such as resource extraction, subject to the limitation that the land cannot be used in a manner that is irreconcilable with the distinctive nature of the attachment to the land by the Aboriginal people claiming the right.[23]

Following from the first two steps, the onus of proof is not on Canada to prove that it has the underlying title to all Indigenous territories. This, as we have seen, is not a claim but an assertion validated by its acknowledgment by other European powers. Rather, the burden of proof is made to rest with Indigenous peoples, who are presumed not actually to possess Aboriginal title, but to be making a claim to it before the Court. For an Indigenous people to possess and be able to exercise title to their land, they have to prove to the satisfaction of the colonial Court that they occupied the claimed land at the time the Crown asserted sovereignty over them, and that the occupation was exclusive.[24] No such proof has been made. Even if such a proof is successful in the future, the structure of the process further entrenches the taken-for-granted colonial relationship in which the claim is presented and the proof granted or withheld.

The fourth and final step is that once a claim to Aboriginal title is proven, and presuming the land and resources have not been developed in the interim, the title has still to be reconciled with the sovereignty of the Crown. That is, the Crown must take into account the justifiable objectives of the larger Canadian society that conflict with an Aboriginal land right, infringe the right accordingly and compensate the Aboriginal people for the infringement. The Court explains in *Delgamuukw* that proven Aboriginal title can be infringed by the federal and provincial governments if the

[22] This is the main thesis of Asch, 'From "Calder" to "Van der Peet"'.
[23] *Delgamuukw* v. *B.C.* [1998] paras. 112–39; McNeil, 'Defining Aboriginal Title in the 90s', pp. 2–6.
[24] *Delgamuukw* v. *B.C.* [1998] paras. 140–59; McNeil, 'Defining Aboriginal Title in the 90s', pp. 7–8.

infringement furthers a compelling and substantive legislative objective and if it is consistent with the fiduciary relation between Crown and Aboriginal peoples. The 'kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title' are:

> the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, and the building of infrastructure and the settlement of foreign populations to support those aims[.][25]

It is difficult to see in these objectives much difference from the early justifications of dispossession in terms of the superiority of European-derived societies and their developmental imperatives.[26] The federal and provincial governments are not obligated to gain the consent of the Aboriginal people whose right they infringe (another unique feature of this constitutional right) or to bring them in as partners in the developmental activities. As in the nineteenth century, they are under a duty only to compensate them for taking their land. Compensation involves consultation (deeper than mere consultation, and consent if it involves fishing and hunting regulations), and the compensation paid should vary with the nature of the title affected, the severity of its infringement and the extent to which Aboriginal interests are accommodated.

In summary, the underlying reason why the land rights of Aboriginal peoples can be treated in this imperial manner is that Aboriginal societies unquestionably are distinctive colonies incorporated within and subject to the sovereignty of the larger Canadian society:

> Because … distinctive aboriginal societies exist within, and are part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantive importance to that community as a whole (taking into account the fact that aboriginal societies are part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are a part; limits placed on those rights are, where the objectives furthered by those limits

[25] *Delgamuukw* v. *B.C.* [1998] paras. 165, 166–9; McNeil, 'Defining Aboriginal Title in the 90s', pp. 8–14.

[26] For these justifications, see above at note 13. McNeil, 'Defining Aboriginal Title in the 90s', pp. 11–12, comments: 'This sounds very much like a familiar justification for dispossessing Aboriginal peoples in the heyday of European colonialism in Eastern North America – agriculturists are superior to hunters and gatherers, and so can take their land. But Lamer C. J. was not referring to the seventeenth and eighteenth centuries – he was talking about the present day, as justification for infringement only became relevant after Aboriginal rights were constitutionalised in 1982!'

are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.[27]

That is to say, the internal colonisation of Indigenous peoples itself provides the ultimate justification for the infringement of the rights they have within Canadian society.

In the conclusion of *Delgamuukw*, the Supreme Court recommends that the Gitxsan and Wet'suwet'en peoples turn to the treaty process in the political arena to settle their lands, guided by the framework the Court sets out, rather than returning to an expensive retrial. An example of this alternative strategy is the negotiations of the Nisga'a Nation of Northern British Columbia with the federal government and, after 1990, the provincial government of British Columbia. Twenty years of negotiations led to a treaty, the *Nisga'a Final Agreement*, in 1998. The treaty shows fairly clearly what can be expected from the present treaty process.

The Nisga'a treaty follows for the most part the framework set out by the Supreme Court. The Preamble states that the objective is the same as the Court's – to reconcile the prior presence of Aboriginal peoples and the assertion of sovereignty by the Crown – but to achieve reconciliation by negotiation rather than litigation. Like the approach of the Supreme Court, the Nisga'a are recognised from the outset as Aboriginal people within Canada and subject to the Crown. They are an Aboriginal people or a First Nation *of* Canada. Furthermore, the aim of the negotiations is to define the undefined distinctive Aboriginal rights that the Nisga'a have under Section 35 of the Constitution Act, 1982, exhaustively and completely in terms of the rights and remedies set out and agreed to in the treaty.[28]

In place of the Court's step of infringement of and compensation for the lands they occupied at the time the Crown asserted sovereignty, the Nisga'a voluntarily gave up to the Crown in the negotiations 93 per cent of their traditional territory. Over the remaining 7 per cent (approximately 2,000 square kilometres), they are allotted Aboriginal title in the form of an

[27] *Delgamuukw* v. *B.C.* [1998] para. 161. Lamer C. J. is citing with approval an earlier case, *R* v. *Gladstone* [1996] 2 S.C.R. 723, para. 73.

[28] Government of Canada *et al.*, *Nisga'a Final Agreement*, Preamble, clauses 2, 3 and 6, p. 1. The Agreement was signed by the three parties on 4 August 1998 after twenty years of negotiation. The Nisga'a people ratified the Agreement by a vote of 61 per cent in a referendum and the people of British Columbia ratified it by a narrow majority vote in the provincial legislature. One Indigenous nation, the Gitanyow, claim that the original Nisga'a land claim includes part of their traditional territory. For an overview of the arguments pro and contra, see the articles in *BC Studies* 120 (Winter), 1998–99. For the legal and historical background, see Hamar Foster, 'Honouring the Queen: A Legal and Historical Perspective on the Nisga'a Treaty', *BC Studies* 120 (Winter), 1998–99: 11–37; and Raunet, *Without Surrender, Without Consent*.

estate in fee simple proprietary right under the Constitution, some rights with respect to traplines, wildlife and migratory birds outside Nisga'a lands and approximately $200 million in compensation. Unlike the Court, which has not ruled on an Aboriginal right of self-government, but following the federal and provincial government's policies of recognising such a right in principle, the Nisga'a Nation negotiated an Aboriginal right of limited, Western-style self-government, with more powers than a municipality yet less than a province, and within the bounds of the Constitution.[29]

Like the Court, the federal government has never questioned the legitimacy of the unilateral exercise of sovereignty over the Indigenous peoples and their territories.[30] Nevertheless, as we have seen, governments of Canada have always been concerned to extinguish whatever rights Indigenous peoples might have independent of the Canadian legal system. Therefore, unlike the Court, which does not acknowledge such rights, the treaty stipulates that the rights set out are the full and final settlement of the Aboriginal rights of the Nisga'a, not only under Section 35, but any rights they may have or come to have as Indigenous peoples from any other source. For greater clarity, any such rights are either modified and continued in their entirety in the treaty rights, or the Nisga'a Nation releases them to Canada.[31]

Although the term is 'release' rather than the traditional 'extinguishment', the legal effect is the same. As far as I am aware, this appears to be the first time in the history of Great Turtle Island that an Indigenous people, or at least 61 per cent of its eligible voters, have voluntarily released their rights as Indigenous peoples, not to mention surrendering over 90 per cent of their territory, and accepted their status as a distinctive minority with group rights within Canada.[32] Notwithstanding, once the rights of self-determination of Indigenous peoples are recognised under international

[29] Government of Canada *et al.*, *Nisga'a Final Agreement*, pp. 31–158 (land and resources), pp. 159–95 (self-government and justice). For the details of the land settlement, see *Appendices: Nisga'a Final Agreement* (Victoria, BC: Ministry of Aboriginal Affairs, 1999).

[30] See, for example, the 1989 submission of the Attorney General of Canada in defence of the earlier, lower court challenge by the Gitxsan and Wet'suwet'en peoples for legal recognition of their rights to jurisdiction over their traditional territories. It states, 'The plaintiffs' claim to ownership and jurisdiction over all the lands in the claim area. The Attorney General of Canada responds: Ownership and jurisdiction constitute a claim to sovereignty. If the plaintiffs ever had sovereignty, it was extinguished completely by the assertion of sovereignty by Great Britain.' Cited in Asch, 'From "Calder" to "Van der Peet"', p. 444, note 29.

[31] Government of Canada *et al.*, *Nisga'a Final Agreement*, clauses 22–9, pp. 20–1.

[32] Although the provincial government has heralded this treaty as a 'template' for the treaties now under negotiation with fifty other First Nations, most of the other First Nations have said that it is not a template. For a devastating criticism of the Agreement, and the modern treaty process in British Columbia more generally, as a strategy of assimilation, see Alfred, *Peace, Power, Righteousness*, pp. 119–28.

law, it is doubtful if these release clauses could be used to deny them to the Nisga'a people.

3 STRUGGLES FOR FREEDOM

Western political theories need not legitimate colonisation. Political theorists can employ the language of Western political thought critically to test these dubious justifications, to delegitimate them and to test the claims of Indigenous peoples for and of freedom. This orientation takes up the second question: what resources exist in political theory for thinking about the possibilities of a non-colonial relation between Indigenous and non-Indigenous peoples?

Recall that Indigenous peoples resist colonisation in two distinct ways. Firstly, they struggle against the structure of domination as a whole and for the sake of their freedom as peoples. Secondly, they struggle within the structure of domination vis-à-vis techniques of government, by exercising their freedom of thought and action with the aim of modifying the system in the short term and transforming it from within in the long term. The former (a struggle for decolonisation by direct confrontation with words or deeds) is the subject of this section, whereas the latter strategy is addressed in the final section.

A people can struggle directly against colonisation in two ways: by words or deeds. In this case the recourse to deeds in the form of a direct confrontation in a revolution to overthrow the colonial system is next to impossible. The states against which the revolution would take place are the most powerful in the world and they exist on the same territory as the colony. Confrontation by words rather than deeds consists in confronting and refuting the arguments that legitimate internal colonisation. Underlying the arguments we have surveyed in the last section are two presumptions that serve to legitimate the system of internal colonisation. The first is that the exercise of exclusive jurisdiction over the territories of Indigenous peoples is not only effective but also legitimate: it was either legitimately established in the past or the present irresolution is in a process of being legitimately resolved today, by one or more of the four main strategies (of section 1). The second presumption is that there is no viable alternative. Given the modern system of independent nation-states each with exclusive jurisdiction over its territory, either the dominant state exercises exclusive jurisdiction or the Indigenous people do after a successful colonial revolt, but the latter is impossible. These two presumptions reinforce each other. They are among the propositions that are so deeply woven into contemporary societies that they function as the

'hinge propositions' around which negotiation and litigation continue to take place.[33]

It is possible to struggle in words by confronting and seeking to invalidate the two legitimating hinge propositions. This is the way of Indigenous word warriors and of Western political theorists who take a critical stance towards the legitimating and deeply embedded myths of their society. This critical activity consists in three major exercises: (1) to test if the freedom and equality of Indigenous peoples as peoples with jurisdiction and governance over their territories is defensible by the principles of Western political thought, (2) to test the alleged validity of various legitimations of their incorporation and (3) to show that the second hinge proposition is a false dichotomy which conceals a way of resolving the underlying contradiction of the colonial system: namely, Indigenous peoples and settler peoples can recognise each other as free and equal on the same territory because jurisdiction can be shared as well as exclusive.

Dale Turner explains that Indigenous word warriors have their ways of engaging in these three exercises by presenting Indigenous political theories which draw on the Indigenous language of political thought. By listening to and responding to these presentations in critical discussions, members of the dominant society can begin to free themselves from the hold of the hinge propositions and take a critical stance. These intercultural dialogues are the best and most effective way, for they enable Westerners to see their conventional horizon as a limit and the dialogues are themselves the intimations of and indispensable groundwork for a future non-colonial relationship between genuinely free and equal peoples.[34] A next-best approach is to draw on the resources of critical self-reflection available within the dominant Western language of political thought to challenge the comfortable and unexamined prejudices of self-understanding and present a non-colonial alternative.

In this second approach, employed by Indigenous and non-Indigenous scholars over the last forty years, the three critical exercises go together. To

[33] For the idea of a hinge proposition, see section 4 below.

[34] For the dialogical approach from an Indigenous perspective, see Turner, 'Vision: Towards an Understanding of Aboriginal Sovereignty'. For a critical survey of dialogical approaches in the Western tradition in relation to the Gitxsan and Wet'suwet'en negotiation practices, see the fine study by Natalie Oman, 'Sharing Horizons: A Paradigm for Political Accommodation in Intercultural Settings' (Ph.D. dissertation, McGill University, Montreal, 1997). See also the approach developed by John Pocock in Aotearoa, New Zealand, 'Waitangi as Mystery of State: Consequences of the Ascription of Federative Capacity to the Maori', in *Political Theory and the Rights of Indigenous Peoples*, eds. Duncan Ivison, Paul Patton and Will Sanders (London: Cambridge University Press, 2001). This is the intercultural dialogue I discuss in Chapter 7 of this volume.

show that Indigenous peoples are self-determining peoples with jurisdiction over their territories entails that the standard legitimations of their colonisation are false, since these legitimations presuppose that Indigenous populations are not peoples, and the third exercise then follows. The two most thoroughly researched and reasoned arguments of this comprehensive kind are the prior and coexisting sovereignty argument and the self-determination argument. Let us examine each in turn.

The prior and coexisting sovereignty argument begins with a historical investigation of the situation at the time that Europeans arrived on Great Turtle Island and the Crown asserted sovereignty. America was inhabited by Indigenous peoples, divided into separate stateless nations, independent of each other and the rest of the world, governing themselves by their own laws and ways, and occupying and exercising jurisdiction over their territories. As a consequence, they met the criteria of free peoples and sovereign nations in the law of nations and so were equal in status to European nations. The question then is how can the Europeans legitimately settle and establish their sovereignty: that is, acquire their own territory and exercise jurisdiction over it and establish their own political and economic institutions? This is the sound starting point for an inquiry into justice and legitimacy of governments and jurisdiction in America; not the fictitious and counterfactual original position that has dominated most political theory for the last century.[35]

The only defensible answer in accordance with unbiased Western principles of international law at the time and today is that the legitimate achievement of non-Indigenous sovereignty in North America consists of two steps. The first is that first discovery, some settlement, the assertion of sovereignty by a European nation, and the international negotiation of boundaries with other affected European colonising nations is sufficient to establish sovereignty vis-à-vis other European nations. However, this step has no effect on the Indigenous nations of the territories over which

[35] This starting point is a paraphrase of John Marshall, an early Chief Justice of the United States, in Supreme Court of the United States, *Worcester* v. *the State of Georgia*, pp. 515–97. The two-step procedure, international treaties and continuing sovereignty are also features of Marshall's famous argument. See Tully, *Strange Multiplicity*, pp. 17–127. This is incompatible with his earlier statement that Indigenous nations are domestic and dependent, unless an Indigenous nation has agreed to this status in international negotiations, but there is no evidence of this. For the limitations of Marshall's use of the prior and continuing sovereignty argument, see Turner, *This is Not a Peace Pipe*. Another famous articulation of the prior and continuing sovereignty argument is the *Kaswentha* or Two Row Wampum model of treaty making between free and coexisting peoples of the *Haudenosaunee* or Iroquois confederacy. See Tully, *Strange Multiplicity*, pp. 127–9; and Alfred, *Peace, Power, Righteousness*, pp. 52–3, 104, 113.

sovereignty is asserted, because these nations, unlike the other European nations, have not given their consent. To legitimate their exercise of sovereignty on Great Turtle Island, the European nations had next to gain the consent of Indigenous peoples. This second step is fundamental to legitimation, for it follows from the basic principle of Western law, both domestically and in international relations among independent nations, that the exercise of sovereignty must be based on the consent of those affected by it.[36]

To gain the consent of Indigenous peoples, representatives of the Crown are hence required to enter into negotiations with Indigenous peoples as nations equal in status to the Crown. The negotiations are nation-to-nation and the treaties that follow from agreement on both sides are, by definition, international treaties. If the Crown pretends that the treaty negotiations take place within its overriding jurisdiction (as in the examples in the previous section), then it fails to recognise the status of Indigenous peoples, incorporates and subordinates them without justification, thus rendering the negotiation illegitimate. Under such circumstances, the Indigenous nations in question have the right to appeal not only to domestic courts for redress of infringement, but, if this fails, to international law, like any other nation.[37]

Under these circumstances, the Indigenous peoples were and are willing to give their consent to the assertion of the coexisting sovereignty of the Crown on three conditions. The Indigenous peoples continue to exercise their own stateless, popular sovereignty on the territories they reserve for themselves and the newcomers are not to interfere. The settlers can establish their own governments and jurisdictions on territories that are unoccupied or are given to them by Indigenous peoples in return for being left alone on their own territories. Thirdly, Indigenous peoples agree to share jurisdictions with the newcomers over the remaining, overlapping territories. That is, one party to a

[36] This fundamental principle has been upheld by the International Court of Justice in its advisory opinion: *Western Sahara: Advisory Opinion of 16 October 1975* (The Hague: ICJ Reports, 1975). See note 42 below.

[37] This understanding of treaties and of the Royal Proclamation of 1763, as international treaties among equal nations or peoples, is the way treaties are understood by Indigenous peoples and it has gained considerable historical and normative support by Western scholars. See John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government', in *Aboriginal and Treaty Rights in Canada*; Sharon Helen Venne, 'Understanding Treaty 6: An Indigenous Perspective', in *Aboriginal and Treaty Rights in Canada*; Royal Commission on Aboriginal Peoples, *Treaty Making in the Spirit of Co-Existence*, pp. 59–70, and *Report of the Royal Commission*, Vol. II, Part 1, p. 18: 'In entering into treaties with Indian nations in the past, the Crown recognised the nationhood of its treaty partners. Treaty making … represents an exercise of the governing and diplomatic powers of the nations involved to recognise and respect one another and to make commitments to a joint future. It does not imply that one nation is being made subject to the other.'

treaty does not extinguish its rights and subordinate itself to the other. Instead, they treat each other as equal, self-governing and coexisting entities. They set up negotiation procedures to work out consensual and mutually binding relations of autonomy and interdependence and to deal multilaterally rather than unilaterally with the legitimate objectives of the larger society. These are subject to review and renegotiation when necessary, as circumstances change and differences arise.[38]

This constitutes a genuine resolution of the problem of internal colonisation. It shows that Indigenous peoples were independent peoples or nations at the time of the assertion of sovereignty by the Crown, that this status has not been legitimately surrendered and, consequently, that the prevailing legitimations of exclusive Crown sovereignty are indefensible. The presumption that jurisdiction must be exclusive is replaced with two (Indigenous) principles: free and equal peoples on the same continent can mutually recognise the autonomy or sovereignty of each other in certain spheres and share jurisdictions in others without incorporation or subordination. This is a form of treaty federalism with the capacity to negotiate fairly all the legitimate objectives of the now much larger settler society (including obligations beyond Canadian borders) much better than the present system of infringements, protests, lawsuits, negotiations and uncertainty. In summary, prior and continuing 'sovereignty' does not refer to state sovereignty, but, rather, to a stateless, self-governing and autonomous people, equal in status, but not in form, to the Canadian state, with a willingness to negotiate shared jurisdiction of land and resources.[39]

[38] See Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. I, pp. 675–96. That is, Indigenous peoples are equal partners *with* Canada, not subordinate partners already *in* or *of* Canada. For the latter view, see Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Canada Communication Group Publishing, 1993). There is a tension between these two views in the final report of the Royal Commission. For a defence of the former view, see Chapter 7, this volume.

[39] For this conception of non-state and non-exclusive sovereignty, as 'popular' sovereignty or a 'free people', see Alfred, *Peace, Power, Righteousness*, pp. 54–72; and Turner, *This is Not a Peace Pipe*, pp. 19–30. For a comprehensive account and pragmatic defence of this argument and the self-determination argument, based on a critical review of the extensive literature generated by the Royal Commission, see Michael Murphy, 'Nation, Culture and Authority: Multinational Democracies and the Politics of Pluralism' (Ph.D. dissertation, McGill University, Montreal, 1997). For a similar study for Australia, with more emphasis on the self-determination argument, see Lisa Mary Strelein, '*Indigenous Self-Determination Claims and the Common Law in Australia*' (Ph.D. dissertation, Australian National University, Canberra, 1998). I am greatly indebted to these two excellent theses. See also the reconstruction and application of the prior and continuing sovereignty argument by Robert A. Williams, Jr., *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (New York: Oxford University Press, 1997).

Notwithstanding the availability and legitimacy of this resolution, it has been overwhelmed by the drive of colonising states to establish their exclusive jurisdiction and to legitimate it by doctrines of discovery and incorporation and by interpreting treaties as domestic instruments of extinguishment and release, as we have seen. Hence, Indigenous peoples have turned to the second argument, the 'self-determination argument'. They have worked through international law to gain recognition and protection of their status as peoples with the right of self-determination. The extensive research and reasoning that support their prior and coexisting sovereignty also, and *eo ipso*, support the recognition of Indigenous populations as internally colonised peoples to whom the principle of self-determination applies.[40] The principle or right of the self-determination of colonised peoples is one of the fundamental and universal principles of the United Nations and international law. In Article 1(2) of the Charter and the Covenants of the UN, self-determination is equal in status to individual human rights. Moreover, it is in general the principle that has justified decolonisation struggles since the Enlightenment, including those of Canada, the United States, Australia and New Zealand.[41]

Indigenous peoples have gained considerable support at the UN. In an advisory opinion of the International Court of Justice, *Western Sahara*, the ICJ rejected the doctrine of discovery and asserted that the only way a foreign sovereign could acquire a right to enter into territory that is not *terra nullius* is with the consent of the inhabitants by means of a public agreement. The Court further advised that the structure and form of government and whether a people are said to be at a lower level of civilisation are not valid criteria for determining if the inhabitants have rights, such as the right of self-determination. The relevant consideration is if they have social and political organisation. This line of reasoning calls into question the

[40] See, Murphy, 'Nation, Culture and Authority'; Strelein, 'Indigenous Self-Determination'; Venne, *Our Elders*; and Patrick Macklem, 'Normative Dimensions of the Right of Aboriginal Self-Government', in *Aboriginal Self-Government: Legal and Constitutional Issues*, ed. Royal Commission on Aboriginal Peoples (Ottawa: Canada Communication Group Publishing, 1995), for the complementarity of the two arguments. When these two arguments are presented from an Indigenous perspective, there is always, in addition, the reference to the special relation that Indigenous peoples have to the lands they have occupied and identified with for millennia, a relation that is not captured by Western notions of private property or jurisdiction. For an introduction to this holistic understanding of being-in-the-world, see Alfred, *Peace, Power, Righteousness*, pp. 42–4; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission*, Vol. II, Part 2, pp. 434–63; and Venne, *Our Elders*, pp. 122–8.

[41] See Sharon Venne, *Our Elders*, pp. 68–106, for a careful survey of these documents and the major commentaries on them. Compare Murphy, 'Nation, Culture and Authority', pp. 116–51, and Sterlein, 'Indigenous Self-Determination', pp. 54–86. Recall that the Supreme Court of Canada rejected an appeal to the universal right of self-determination as a ground of Aboriginal rights, at note 21 above.

doctrines that continue to serve to deny the prior and continuing rights of Indigenous peoples in Canada.[42] In addition, Indigenous peoples managed to have established, within the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission of Human Rights, a Working Group on Indigenous Populations in 1982. The Working Group provides a forum for presentations by Indigenous peoples, and it issued a Draft Declaration on the Rights of Indigenous Peoples, which states that Indigenous peoples have a qualified right to self-determination.[43]

Despite such occasional glimmers of hope, Indigenous peoples were not recognised as colonised peoples to whom the principle of self-determination applies until September 2007.[44] The reason for this is that international law, the United Nations and its Committees are created by existing nation-states and they will do everything in their power to deny the application of the principle of self-determination if it threatens their exclusive jurisdiction.[45] There are four main ways its application to Indigenous peoples has been denied in international law. These four arguments are analogous to and complement the earlier arguments in domestic law to incorporate and assimilate or accommodate Indigenous peoples within the exclusive jurisdiction of existing nation-states. As in the domestic case, Indigenous and non-Indigenous scholars have critically examined these rationalisations, shown them to be dubious and defended the application of the principle to Indigenous peoples.

The first argument was that Indigenous peoples do not meet the criteria of 'peoples' but are 'populations' or 'minorities' within states. This strategy is not difficult to employ because there is no official agreement on the criteria and the general guidelines are vague. Even so, studies by Special Rapporteurs at the UN tend to substantiate what independent research has

[42] International Court of Justice, *Western Sahara: Advisory Opinion*, summarised in Venne, *Our Elders*, pp. 45–7. The Court continued this line of reasoning in *Case Concerning East Timor (Portugal* v. *Australia)* (The Hague: ICJ Reports, 1995). For the Supreme Court of Canada's use of the argument of discovery and non-consent that the ICJ rejects in *Western Sahara*, see note 20, and for the use by the Attorney General of Canada of an extinguishment argument that the ICJ also rejects, see note 30.

[43] See Venne, *Our Elders*, pp. 51–3, 92–4, 107–63, for the struggles over the Draft, and 205–28 for the Draft Declaration. The right of self-determination is asserted in Article 3 and qualified in Article 31.

[44] The General Assembly of the United Nations adopted the Declaration on the Rights of Indigenous Peoples on 13 September 2007 by an overwhelming majority. Canada, the United States, Australia and New Zealand voted against it.

[45] 'Collective rights embodied in a claim to self-determination are seen as a threat to the sovereignty of the dominant state. This tension between Indigenous self-determination and the state's assertion of [exclusive] sovereignty is a recurrent theme throughout this discussion [at the UN] as it is the basis of arguments against the recognition of a right of Indigenous peoples to self-determination' (Strelein, 'Indigenous Self-Determination', pp. 55–6).

shown: the Indigenous peoples of the Americas are peoples in the clear meaning of the term as it is used in the Charter and the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples, and thus the principle of self-determination enunciated in the Declaration applies to them.[46] It is difficult to see how peoples who have governed themselves over their territories for millennia and have not surrendered under a few centuries of colonisation could be denied the status of peoples by those who have colonised them, without introducing a biased criterion that the ICJ has said to be inadmissible.

The second argument was the 'saltwater' thesis that the right of self-determination applies only to colonised peoples on geographically separate territories from the imperial country. This notorious and arbitrary thesis in the General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples neatly legitimates the dismantling of external colonies in the twentieth century while excluding internal colonies, thereby denying Indigenous peoples the same right as other colonised peoples and protecting the exclusive jurisdiction of the major drafters of the Declaration.[47]

A third, more serious, argument is that the right of self-determination of colonised peoples is subordinate to the protection of the territorial integrity of existing nation-states from disruption.[48] There are two cogent responses to this third argument. Firstly, it presupposes what is in question: namely, the legitimacy of the present territorial integrity of existing nation-states. The second, and more important, response is that the recognition of the right of Indigenous peoples to self-determination does not entail the disruption of the territorial integrity of existing nation-states. This would be

[46] United Nations, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res. 1514 (XV), UN GAOR, 15th Session, Supp. No. 16, UN Doc. A/4684 (14 December 1960), at 66. For the studies of four Special Rapporteurs see Venne, *Our Elders*, pp. 75–82, especially the study by Aureliu Cristescu, cited at p. 76.

[47] United Nations, *Declaration on the Granting of Independence*, p. 66, paras. 6–7 together with Resolution 1541 (XV), UN GAOR, 15th Session, Supp. No. 16, Principle IV, 29. See Sterlein, 'Indigenous Self-Determination', pp. 59–60. This saltwater restriction on self-determination was introduced in 1960 in explicit opposition to the Belgium initiative to extend it to peoples, including Indigenous peoples, within independent states.

[48] 'Any attempt aimed at the partial or total disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations' (United Nations, *Declaration on the Granting of Independence*). This is reinforced by the United Nations, *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UN GAOR, 25th Session, Supp. No. 28, UN Doc. A/5217 (24 October 1970), at 121. The 2007 Declaration recognises the right of self-determination of Indigenous peoples in Article 3 and the territorial integrity of existing states in Article 46.

the case only if the exercise of the right of self-determination by Indigenous peoples took the European and Third World form of decolonisation and the establishment of sovereign nation-states with exclusive jurisdiction over their territories. For Indigenous peoples, as we have seen, the exercise of self-determination consists in decolonisation and the recognition of Indigenous peoples as free, equal and self-governing peoples under international law, coupled with shared jurisdiction over lands and resources on the basis of mutual consent.[49] This achieves rather than disrupts territorial integrity (if 'integrity' has any normative content) by amending an illegitimate exclusive jurisdiction into a legitimate shared jurisdiction. This kind of post-Westphalian, multiple and overlapping governance and jurisdiction is said to be the general tendency of global politics in many spheres. There is no non-discriminatory reason why it should be denied in this specific case, only the tenacity by which existing states hold on to their exclusive jurisdiction, inherited from an earlier period in which state sovereignty ruled supreme.[50]

The final and most prevalent argument is that the principle applies only to colonised peoples, whereas Indigenous peoples are said already to enjoy the right of self-determination within existing nation-states. This comes in two varieties. The first is that the right of self-determination is satisfied when Indigenous peoples are counted as part of the fictitious, homogeneous sovereign people of a nation-state and are able to exercise the same individual rights of participation as other citizens.[51] Here, the reduction of the rights of peoples to undifferentiated individual rights of participation is used to gloss over the existence of more than one people in an existing nation-state and so to legitimate their assimilation. Given the dispossession, usurpation and cultural genocide this ruse conceals, it is beneath contempt. Even so, critical liberal theorists have responded that it undermines the individual liberties and goods that liberal democracy is supposed to secure,

[49] In addition to the references at note 39, see Venne, *Our Elders*, p. 92; Sterlein, 'Indigenous Self-Determination', pp. 16–33; and Wendy Moss, 'Inuit Perspectives on Treaty Rights and Governance', in *Aboriginal Self-Government: Legal and Constitutional Issues*.

[50] See Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000) for a cogent theory of global democratic governance that recognises individuals, minorities, peoples and states, and Young, 'Hybrid Democracy: Iroquois Federalism and the Postcolonial Project', in *Political Theory and the Rights of Indigenous People*.

[51] The United Nations, *Declaration on Friendly Relations*, reprinted in Arangio-Ruiz Gaetamp, *The United Nations Declaration on Friendly Relations and the System of the Sources of International Law* (Alphen ann den Rijn: Sijthoff & Noordhoff, 1979), para. 1. See Sterlein, 'Indigenous Self-Determination', pp. 60–2.

by destroying the appropriate institutions of self-rule in which they are cultivated and protected.[52]

The second, more sophisticated, version of this argument is that forms of accommodation that recognise degrees of self-government and land rights within existing nation-states satisfy the criteria of *internal* self-determination. The right of internal self-determination is the right of a people within a larger state to govern themselves in a wide range of matters, including at most such things as culture, religion, education, information, health, housing welfare, economic activity, land and resource management, environmental practices and membership.[53] If a people exercise such a right, then they are not colonised. They are internally self-determining. Only if this right of *internal* self-determination is thwarted by the encompassing society may a people in principle exercise the right of *external* self-determination: that is, free themselves from the dominant society and set up their own nation-state. Since societies with systems of internal colonisation claim to be moving in the direction of recognising the right of internal self-determination, the demand for self-determination is being met and these societies are legitimate under international law.[54]

The response to it by Indigenous people is that this argument could be used to perpetuate rather than dismantle the system of internal colonisation by giving international legitimacy to domestic policies of incorporation and accommodation.[55] As we have seen, Indigenous peoples were not recognised as peoples with the right of self-determination under international law until 2007. Even under the 2007 Declaration, the transcendent priority of existing exclusive state jurisdiction and territorial integrity is reproduced rather than questioned by the way the distinction between internal and external self-determination can be interpreted, thereby eliding the resolution that Indigenous people seek.

The principle or right of self-determination is, on any plausible account of its contested criteria, the right of a people to govern themselves by their

[52] See, Laden, 'Constructing Shared Wills'; Murphy, 'Nation, Culture and Authority'; and Kymlicka, *Multicultural Citizenship*. Dale Turner and Michael Murphy argue that while Kymlicka's well-known theory protects Indigenous peoples from assimilation, it preserves colonial accommodation: Turner, *This is Not a Peace Pipe*, pp. 1–30; and Murphy, 'Nation, Culture and Authority', pp. 59–74.

[53] This is a paraphrase of the rights of internal self-determination in the *Declaration on the Rights of Indigenous Peoples* [2007].

[54] This distinction between internal and external self-determination reflects the way the right of self-determination has evolved within a framework of the territorial integrity of existing states. The United Nations, *Draft Declaration on the Rights of Indigenous Peoples*, accepts internal self-determination at Article 31.

[55] See Venne, *Our Elders*, pp. 119–22, 138–63.

own laws and to exercise jurisdiction over their territories, either exclusively or shared. A people are said to govern themselves, and thus to be a free people, when the laws by which they are governed rest on their consent or the consent of their representatives. The condition of consent holds for legislation and even more fundamentally for the Constitution. If the Constitution does not rest on the consent of the people or their representatives, or if there is not a procedure by which it can be so amended, then they are neither self-governing nor self-determining but are governed and determined by a structure of laws that is imposed on them. They are unfree. This is the principle of popular sovereignty by which modern peoples and governments are said to be free and legitimate.[56]

Yet, this principle of popular sovereignty and condition of self-determination is not fully met by the present application of internal self-determination. An alien constitution, the constitution of the surrounding nation-state, is imposed over Indigenous peoples and their territories without their consent and to which they are subject. Their internal self-determination presently exists within the Constitution, which functions as a closed structure of domination over which they have no effective say. The Constitution functions exactly as the kind of 'straightjacket' that the Supreme Court of Canada condemned in *Reference re the Secession of Quebec*.[57] Indigenous peoples will be free and self-determining only when they govern themselves by their own constitutions, and these are equal in international status to Western constitutions. That is, they will have an effective say in having their constitutions recognised and accommodated in a negotiated treaty relationship *with* the present constitutions of existing states, not *within* them.[58] In contrast, the present application of the right of internal self-determination within the prevailing constitutional order constitutes a form of indirect colonial rule. It is worth noting that this situation is not unlike earlier forms of British indirect colonial rule, which Canadians, Americans, Australians and New Zealanders found to be an intolerable form of unfreedom and the justification for their own successful struggles for decolonisation and freedom. Yet, for reasons that do not withstand public scrutiny, they do not hesitate to impose such a yoke on weak and captive peoples within their own borders.[59] The interpretation of the Declaration of 2007 so that it includes

[56] This universal principle is endorsed by the Supreme Court of Canada in *Reference re Secession of Quebec*.

[57] See Chapter 6, this volume. [58] For this argument, see Chapter 7, this volume.

[59] For similar arguments, see Sterlein, 'Indigenous Self-Determination'; Young, *Inclusion and Democracy*, Chapter 7; Borrows, 'Questioning Canada's Title to Land'.

these people-to-people treaty negotiations is the next step in the freedom 'for' Indigenous peoples.

4 STRUGGLES OF FREEDOM

Despite the cogency of research and arguments supporting the freedom of Indigenous peoples in domestic and international arenas, the system of internal colonisation remains in place and the two presumptions that reinforce it remain largely unquestioned in negotiation and litigation. One reason for this inertia is of course the overwhelming power and interest of the existing nation-states with internal Indigenous colonies. Another is that presupposed propositions that play the hinge role in a society – of legitimating its routine way of political and economic life – are relatively immune to direct criticism. They are background norms of the daily operation and criticism within the normal practices of negotiation and litigation and thus are not brought into the foreground space of questions.[60] The irresolution thus remains in theory and practice.

If such hinge propositions and the social system they legitimate change over time, by being thrown into question effectively in practice, they do so obliquely, by means of more local and indirect criticism and modification within the system they frame. The multiplicity of immanent activities of challenging specific strategies and techniques by the available democratic means of dissent, insubordination and acting otherwise may not only modify this or that rule of the system, which is important in itself, but may also in the long run bring about the self-overcoming of the system itself.[61] Consequently, the arts of resistance involved in struggles *of* freedom to modify the system of internal colonisation from within are a necessary complement to the refutations of the legitimation arguments of the last section. They are arguably more effective in the long run.

The diverse range of possibilities of thinking and acting differently vis-à-vis the relations of knowledge and techniques of government that reproduce the system constitute a limited field of human freedom, not unlike the constrained freedom of colonials in any other colonial system. They consist in such activities of working with and against; complying and adapting while resisting the allure of co-optation; indigenising the degree of self-government

[60] For hinge propositions, see Wittgenstein, *On Certainty*, pp. 341, 343, 655 and the fine analysis by Linda Zerilli, 'Doing Without Knowing'.

[61] This is one of the central theses of the later work of Michel Foucault, 'What is Enlightenment?', in *The Essential Works*, Vol. I, p. 316, and Scott, *Domination and the Arts of Resistance*.

and land use recovered; connecting reserve and off-reserve native people; linking arms with non-Indigenous partners in economic, educational and environmental relationships, and simply exercising powers of self-determination here and now. These arts of words and deeds have been practised since the beginning of colonisation. In addition to the spectacular public displays of resistance, they are mostly quotidian acts of protecting, recovering, gathering together, keeping, revitalising, teaching and adapting entire forms of Indigenous life that were nearly destroyed. The persistence of traditional medicine, healing and child-rearing practices, the revitalisation of justice circles, Indigenous languages and political ways, and the astonishing recovery and renaissance of Indigenous art are some of the examples of these arts of resistance and indigenisation that Taiaiake Alfred and others call 'self-conscious traditionalism'.[62]

These practices of freedom on the rough ground of daily colonisation usually fall beneath the attention and interest of Western political theorists, unless they are members of an oppressed group, and the big, abstract questions of normative legitimation tend to capture the attention of most of the field. Yet it is these unnoticed contextual struggles of concrete human freedom in the face of techniques of government and strategies of legitimation that have brought the internal colonisation of Indigenous peoples to the threshold of public attention and critical reflection in our time. And it is these that have the potential to lead in the long run to the same kind of freedom for Indigenous peoples that Western political theorists and citizens already enjoy, but which is currently based on the unfreedom of Indigenous peoples.[63]

[62] Alfred, *Peace, Power, Righteousness*, pp. 80–8, and see the careful work on Mohawk arts of resistance by Audra Simpson, '(De)constructing the Politics of Indigeneity', in *Political Theory and the Rights of Indigenous Peoples*.

[63] See *Volume II*, Chapter 9, for a broad account of these and other forms of civic freedom.

Conclusion

CHAPTER 9

A new field of democracy and civic freedom

INTRODUCTION

This concluding chapter is an attempt to synthesise what has been learned from Part 1 on a new style of public philosophy and from Parts 2 and 3 on case studies of struggles over recognition. As we have seen, over the last forty years the volatile conflicts among individuals, minorities and majorities of diverse kinds have been characterised as 'struggles over recognition'. Various solutions to how these struggles can be reconciled have been presented by the individuals and groups involved: decolonisation and anti-imperial spokespersons, Indigenous peoples, policy communities, non-governmental organisations, courts, parliaments, states, international organisations, and legal and political theorists. This chapter is a reflection on the field of struggles for and against recognition of various kinds in practice and the cognate field of academic literature that has developed in response to these diverse conflicts. Drawing on the resources of the earlier chapters, it presents a survey of the field of struggles and a synopsis of how it should be studied.

If we stand back and reflect on the recent history of the field of the practice and theory of struggles over recognition, we can see a certain trend. It is not the only trend or the dominant trend, but it is a significant one. This trend can be seen as a learning process undergone to some extent by the actors involved – by citizens engaged in the conflicts on the ground, policy communities in various orders of government, non-governmental organisations, domestic and international courts, and legal and political theorists. My aim is not only to describe the trend but also to characterise it in such a way that we can learn from it. What can be learned from this

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form of historical and critical reflection on the recent successes and failures of the recognition of individuals and communities is a new orientation to the reconciliation of clashes over recognition in the future; an orientation that promises to bring peace rather than conflict to the twenty-first century. This is an orientation towards the dialogical *civic freedom* of the agents engaged in and affected by *struggles over intersubjective norms of mutual recognition*. It constitutes a new field that combines struggles over recognition and their reconciliation through dialogue in conjunction with other means.

The first section lays out the salient features of struggles over recognition. Section 2 discusses the interrelations between recognition and distribution struggles. The third section summarises the dominant way these conflicts have been approached in practice and theory – the monological and finality orientation – and the problems with this approach. Section 4 introduces the dialogical approach and the reasons for it. The transition within the dialogical approach from the ideal of reaching a final consensus to the reality and consequences of irreducible reasonable disagreement is examined in the fifth section. The sixth section gathers these trends together in the defence of an orientation to reconciling struggles over recognition grounded in civic freedom. This orientation consists in a turn to the study of the activities of struggling for and against a norm of recognition as the site of civic freedom and of the transformation of citizen-identity, rather than focusing exclusively on the final resolution of such struggles. For, if the six steps in this trend are significant and enduring, there are unlikely to be definitive reconciliations of struggles over recognition. They are likely to be enduring features of political, legal and economic associations. The central questions then become, firstly, how to develop institutions that are always open to the partners in practices of governance to call into question and renegotiate freely the always less-than-perfect norms of mutual recognition to which they are subject, with a minimum of exclusion and assimilation, and how to be able to negotiate reasonably fairly without recourse to force, violence and war. Yet, secondly, participation in these open practices of dialogue (practices whose norms of recognition must also be open to negotiation) must also help to generate a sense of mutual understanding and trust among the contesting partners and an attachment to the system of governance under dispute, even among those members who do not always achieve the recognition they seek. A discussion of the reciprocal relationship between academic research and struggles on the ground that follows from this approach rounds off the chapter.

1 WHAT ARE STRUGGLES OVER RECOGNITION?

Many approaches to struggles over recognition start from a monological perspective. That is, they focus on a claim for recognition advanced by an agent and go on to evaluate it in abstraction from the field in which it is raised, whether the claim is advanced in terms of rights, identities or culture. I believe that we should focus on the field of interaction in which the conflict arises and needs to be resolved. The first reason for this shift in focus is that a conflict is not a struggle of one minority for recognition in relation to other actors who are independent of, unaffected by and neutral with respect to the form of recognition that the minority seeks. Rather, a struggle for recognition of a 'minority' always calls into question and (if successful) modifies, often in complex ways, the *existing* forms of reciprocal recognition of the other members of the larger system of government of which the minority is a member. No members (including parliaments, courts and states) are transcendent to the field of struggle. Next, the number of other members affected is almost always more than one, so these struggles cannot, except in the most simplified cases, be conceptualised as two-member struggles between self and other, master and slave, bourgeois and proletarian, minority and majority, minority and the state, or individual and collective, as an older tradition of reflection on struggles over recognition from Kant and Hegel, Mill and Marx, to Sartre and Fanon, liberals and communitarians tended to assume. That is, struggles over recognition are relational and mutual rather than independent, as well as multiple rather than dyadic. In a word, they are complex struggles 'over' recognition, not simply 'for' recognition.[1]

The most perspicuous way of conceptualising these first two features is to say that struggles over recognition are struggles over the intersubjective 'norms' (laws, rules, conventions or customs) under which the members of any system of government recognise each other *as* members and coordinate their interaction. Hence, struggles over recognition are always struggles over the prevailing intersubjective norms of mutual recognition through which the members (individuals and groups under various descriptions) of any system of action coordination (or practice of governance) are recognised and governed. Let us call these 'norms of mutual recognition' and draw out the features that are relevant for the argument at hand.

Norms of mutual recognition are a constitutive feature of any system of rule-governed cooperation, not just of formal political systems such as

[1] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 2001), pp. 93–148.

municipalities, provinces, nations, states, federations, supranational political associations and the United Nations. Classrooms, schools, prisons, voluntary organisations, professions, bureaucracies, corporations, markets, international human rights regimes, modes of production, military organisations and other systems of action coordination have norms or rules by which the partners are led to recognise each other and cooperate.[2]

Recently, 'struggles over recognition' has been used in a narrow sense to refer to the struggles over cultural, ethnic, linguistic and religious modes of recognition and contrasted with 'struggles over distribution'. However, these identity-related struggles have effects in the realm of distribution of power and resources and, conversely, struggles over distribution are also always struggles over recognition. Moreover, 'struggles over recognition' in the narrow sense are also confusingly contrasted with the liberal form of recognition *as* 'free and equal' individuals and states, yet this too is a norm of recognition among others. Thus, it is more accurate to start with 'struggles over recognition' in the 'broad' or 'ontological' sense to refer to the 'recognition dimension' of any type of struggle over prevailing norms of recognition and their effects in the realm of distribution and redistribution (and in *any* field in which humans recognise each other and interact under various descriptions), and then narrow the reference as the specific cases under consideration warrant.[3]

Acting in accordance with the norms under which the members (individuals and groups) are led to recognise each other and to which they are subject in their cooperative activities gives the members their characteristic forms of relational (inter)subjectivity, 'subject position' or 'identity' *as* members; as relational 'subjects' to and of such and such a government. There are three main axes of the forms of subjection or subjectivity of members (as members): (1) their characteristic discursive forms of self-awareness or self-consciousness, (2) their characteristic non-discursive forms of conduct in the cooperative system and (3) their access to or exclusion from resources and power through the rights, duties and entitlements attached to the identity under which they are recognised (distribution).

Moreover, interacting in accordance with an intersubjective norm over time (acting normally) 'normalises' or subjectifies the partners to varying

[2] Foucault, 'Technologies of the Self' and 'The Political Technologies of Individuals', in *Technologies of the Self*.

[3] James Tully, 'Struggles over Recognition and Distribution', *Constellations* 7(4), 2000: 469–82; Patchen Markell, 'The Recognition of Politics: A Comment on Emcke and Tully', *Constellations* 7(4), 2000: 496–506.

degrees, as Weber and Foucault have shown.[4] A norm is a relation of meaning and power that shapes the behaviour and expectations of the partners to varying degrees. This is how members of an association take on their forms of self-awareness and modes of comportment *as* members. Owing to both the relational and the normalising character of norms of mutual recognition, therefore, a conflict that modifies the way one member is recognised necessarily alters to some extent the three axes: the forms of recognition, types of subjectivity, modes of cooperation and access to resources of the other members of the system of cooperation.

Further, the norms of mutual recognition to which humans are subject as members of various associations are multiple. While the system of legal rules is the most obvious example, they can be cultural, religious, familial, educational, class, corporate, customary and covert. Individuals are usually subject to many, overlapping norms of mutual recognition and corresponding identities: landed immigrant, individual, male, female or transsexual, family members, member of this or that religion, language or culture, province, state, civilisation, westerner or easterner, northerner or southerner, Indigenous or non-Indigenous, unemployed, worker, professional, retiree, gay or heterosexual, subject to various media, colonised or coloniser, and so on.

Norms can be imposed and enforced by a wide variety of informal and formal institutions in an equally wide variety of ways. In self-governing associations the individual and group members impose and modify the norms themselves or through their representatives. In other forms of association, norms are imposed non-democratically, behind the backs of the members, as in markets and other complex functional systems, such as the global systems of states and economic imperialism, or covertly, as in deeply sedimented racist and sexist customary norms. Some norms of mutual recognition are formally egalitarian, at least in theory, such as individual citizenship; most others are hierarchical, such as the elaborate ranks in educational systems, bureaucracies, corporations or in the recognition of linguistic groups; some are fixed and relatively immoveable systems of domination, others more flexible and open to modification by those subject to them.

A struggle over recognition irrupts whenever some of the individuals or groups subject to a prevailing norm of mutual recognition experience it as unbearable (along any of its three axes). They challenge it and it becomes

[4] Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford, CA: Stanford University Press), pp. 1–105.

the site of contestation. This 'turn' is the second aspect or quality of norms. While acting in accord with a norm subjectifies or 'normalises' the actors to vastly varying degrees, it is also within the range of possibility, to varying degrees, for the individual and group actors subject to a norm to turn, call it into question, challenge its acceptability or legitimacy, and struggle to negotiate its modification or transformation (in various ways) with the other members who strive to hold it in place, except in extreme cases of total domination. Accordingly, norms are said to have a dual quality: 'normalising and normative'.[5] This second aspect of norms can also be described as the *freedom* of those subject to a norm to have a say over it: to be agents as well as subjects.[6]

The capacity of subjects to a norm to be active agents with respect to the ways they follow the norm – to test its acceptability and modify it *en passant* – is not an aspect of norm-following that comes along *after* normalisation in heroic acts of desubjectification, as many presume, but is internal to the practices of learning to follow a norm, to recognise others under it and relate to them accordingly, to correct our mistakes, to question cases of rule-following, to negotiate what counts as following the rule and so on. Rule-following is interactive rather than passive obedience to a prescriptive norm.[7]

The reasons for a challenge, as we shall see, can be various: because, for example, the prevailing norm fails to recognise subjects as members at all (exclusion); or it includes yet misrecognises and assimilates them (as, say, a band rather than an Indigenous people, a minority rather than a nation, a religious minority rather than a civilisation); or it alienates and exploits (as Marxists say of the capitalist norm of recognition of wage labourers); or it is imposed undemocratically; or, more recently, it recognises them and induces them to perform and affirm their identity, yet in an assimilative, folkloric or manipulative way, as in government and corporate strategies to market 'diversity'.[8] Finally, a 'struggle' can take a wide range of forms. At one end, the daily to-ing and fro-ing of communication, interpretation, negotiation and action among members interacting 'normally' subtly modifies the norms to which they are subject, often in unanticipated ways.[9]

[5] Antje Wiener, 'The Dual Quality of Norms and Governance Beyond the State: Sociological and Normative Approaches to Interaction', *Critical Review of International Social and Political Philosophy*, 10(1), 2007: 47–69.
[6] Foucault, 'The Subject and Power', in *The Essential Works*, Vol. III.
[7] See Chapter 2 of this volume, and *Volume II*, Chapter 9.
[8] Yasmeen Abu-Laban and Christina Gabriel, *Selling Diversity: Immigration, Multiculturalism, Employment Equity, and Globalization* (Peterborough: Broadview, 2002).
[9] Michel de Certeau, *The Practice of Everyday Life* (Berkeley: University of California Press, 1988).

A norm exists in this interactive practice.[10] More organised forms of struggle include relatively voluntary negotiations and amendments of the contested norm of mutual recognition by the partners subject to it in the best of circumstances; the overt compliance with an imposed and oppressive norm coupled with covert thoughts and acts of minute resistance;[11] recourse to local grievance procedures and ad hoc dispute resolution; legal, political and constitutional negotiations through legislatures, courts and referendums; campaigns of civil disobedience; and more violent forms of armed struggle, such as civil wars, anti-imperial wars of decolonisation and self-determination, and the wide variety of intermediate ethnic, cultural and civilisational conflicts today.

2 THE INTERRELATION OF RECOGNITION AND DISTRIBUTION

Next, a struggle over the prevailing norms of mutual recognition will always have effects in the realm of distribution of access to resources and vice versa. Recognition and distribution are internally related in virtue of axis 3 of a norm of recognition (the rights, duties and entitlements to power and resources that are attached to the identity of a member under the norm).

Schematically, a struggle over recognition is standardly both a challenge to a prevailing norm of intersubjective recognition and a demand for another norm of recognition by a group (or groups) of citizens against those who oppose the proposed change and defend the status quo, or advance a change (or changes) of their own. Any such struggle to alter the identity-related norms under which citizens are led to recognise themselves and others will have effects in the distribution or redistribution of the relations of power among them. For starters, the new rule of recognition of each other will itself constitute a redistribution of 'recognition capital' (status, respect and esteem under axis 1). A demeaning or degrading form of misrecognition tends to undermine the basic self-respect and self-esteem that are necessary to empower a person to develop the degree of autonomy and sense of self-worth that is required to participate equally in the public and private life of his or her society, often leading to well-known psychological and sociological pathologies. A successful struggle for recognition (and the struggle itself in many cases) gains for an individual the recognition and respect from the dominant society that often furnishes an important basis of self-respect and self-esteem, enabling him or her to participate on a

[10] Taylor, *Philosophical Arguments*, pp. 165–80. [11] Scott, *Domination and the Arts of Resistance*.

par with the others.[12] So, straight off, the achievement of recognition itself redistributes the opportunity of citizens to gain economic and political power.[13] Next, the alteration in reciprocal recognition will also alter in complex ways the more traditional objects of distribution: that is, the prevailing (unjust) relations of political, economic and social power that the rule of recognition legitimates (axes 2 and 3).

For example, struggles over equity policies for women, visible minorities, persons with disabilities, Aboriginal people and immigrants in the public and private sectors over the last thirty years, where successful, not only give these citizens a form of public recognition. By challenging deeply sedimented racist, sexist and xenophobic social norms of recognition, they also redistribute access to universities, jobs, promotion and the corresponding relations of economic power. Struggles for electoral reforms that render elected offices more representative of the multicultural diversity of the electorate, where successful, give misrecognised and non-recognised minorities public recognition and redistribute access to and exercise of political power. Struggles for the legal recognition of linguistic and cultural minorities often distribute political and economic power, access to media and schools, and so on. Finally, the constitutional recognition of non-recognised nations and Indigenous peoples within larger constitutional democracies by means of legal and political pluralism, land redistribution and complex federalism entails the redistribution of political and economic power.

Conversely, a struggle for distribution or redistribution usually involves an amendment to the prevailing norms of recognition. For example, the struggles of citizens to have a democratic voice in national and transnational corporations (over the conditions of work and reinvestment, the type of product, the effects on the environment and so on) is, *eo ipso*, a challenge to the prevailing legal norms of mutual recognition of citizens and corporations. It is a demand of citizens to be recognised as the bearers of democratic

[12] I say 'an important basis' because groups that are misrecognised and oppressed can also cultivate their own forms of self-affirmation, self-respect and self-esteem in the face of discrimination. These alternative strategies are not as directly related to distribution and often pay the price of economic hardships, at least in the short term.

[13] This is the traditional account of the relation between recognition and self-respect and self-esteem. See Honneth, *The Struggle for Recognition*. As many commentators have noted, the further claim by Honneth and Habermas that self-confidence, self-respect and self-esteem fall into the three separate spheres of the family, politics and ethics is a particular and partial form of recognition, not a universal and impartial framework for struggles over recognition. Its triumph as a meta-norm would mark the denial of reasonable cultural pluralism. For this argument, see Chapter 3 of this volume. I am indebted to David Owen, 'Self-Government and Democracy as Reflexive Co-operation: On Honneth's Social and Political Ideal', in *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory*, eds. Bert Van den Brink and David Owen (Cambridge: Cambridge University Press, 2007).

rights (or social and economic rights) in a sphere where this aspect of citizen-identity has not been recognised in liberal democracies (i.e. the private sphere). Further, if a demand for distribution also includes the impartial norm of recognition that the demand should apply to all citizens in exactly the same way, this is often seen as the misrecognition of the identity-related differences of citizens (or the disguised imposition of the norms of the dominant group) and challenged on these grounds, while others may oppose it on the grounds of distribution alone.[14] Moreover, as Habermas adds, even a negotiated struggle over distribution that begins within established rules of intersubjective recognition of the actors involved often and unpredictably spills over into a struggle over the background rules of recognition:

> Practical discourses cannot be relieved of the burden of social conflicts to the degree that theoretical and explicative discourses can. They are less free of the burdens of action because contested norms tend to upset the balance of relations of intersub jective recognition. Even if it is conducted with discursive means, a dispute about norms is still rooted in the struggle for recognition.[15]

Consequently, the various types of political struggle typical of our time exhibit both recognition and distribution aspects. They are internally related in complex and case-specific ways. What is required, therefore, is a bifocal form of critical analysis that clarifies empirically and normatively the recognition and distribution dimensions of contemporary struggles and their interaction, along the three axes, without reducing one to the other. Indeed, the complex *interaction* between distribution and recognition appears to be characteristic of political struggles today.[16]

Let these first two sections stand as a compressed introduction to the idea of struggles over recognition *as* struggles over the existing intersubjective norms of mutual recognition in any system of governance: that is, as struggles over the relationships of communication and power through which we are governed. This way of approaching conflicts over recognition – as struggles, negotiations, resolutions and irresolutions in fields of normative relationships of reciprocal recognition and cooperation – enables us to see more clearly the

[14] Taylor, 'The Politics of Recognition', p. 43.
[15] Habermas, *Moral Consciousness and Communicative Action*, p. 106.
[16] There are two traditions of critical theory that aspire to study both aspects of these struggles: a more universalistic approach associated with Jürgen Habermas, Axel Honneth and Seyla Benhabib and a more contextual approach associated with Iris Marion Young, Nancy Fraser and Nikolas Kompridis. See Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political-Philosophical Exchange* (London: Verso, 2003).

trends and learning processes that the fields of both practice and study have undergone over the last several decades.

3 THE MONOLOGICAL AND FINALITY ORIENTATION

I would like to begin with the predominant early orientation to struggles over the recognition of cultural, linguistic, ethnic and religious minorities, nations within existing constitutional states, decolonising peoples, and Indigenous peoples in the 1960s and 1970s. The approach I have in mind is for theorists, courts and policy makers to look for a definitive and final solution to these struggles. They do this by trying to work out the theory, legal rules or policy of the just norms of mutual recognition for these kinds of groups vis-à-vis the recognition of individuals as free and equal. In the first phase, this often involved simply reasserting the two dominant forms of legal and political recognition: that is, difference-blind liberalism or uniform nationalism.[17] But, since many of the struggles over multicultural, multinational and Indigenous recognition are precisely against the assimilative injustices of these policies of recognition and governance, the result has been to increase rather than resolve the conflicts.

In response to the failure of attempts to deny or subordinate the recognition of minorities relative to recognising individual equality (understood as treating each individual identically) and the uniformity of the nation, many theorists, courts and policy makers within this orientation accepted the legitimacy of minority recognition and so the need to reconcile it with the freedom and equality of individuals. They tried to do this by working out theories and policies of the just norms for the mutual recognition of types of minorities and individuals: that is, theories and policies of minority and cultural rights.[18] Despite the benefits of this second phase of liberal and nationalist approaches to minority recognition, these attempts have generated further problems in theory and practice. The most powerful and vocal minorities gain public recognition at the expense of the least powerful and most oppressed; the set of rights tend to freeze the minority in a specific configuration of recognition; they fail to protect minorities within the groups who gained recognition; and they do little to develop a sense of attachment to the larger cooperative association among the members of

[17] Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge: Polity Press, 2001).

[18] Kymlicka, *Multicultural Citizenship* and *The Rights of Minority Cultures*; Bhikhu Parekh, *Rethinking Multiculturalism: Cultural Diversity and Political Theory* (Cambridge, MA: Harvard University Press, 2000).

minorities, occasionally increasing fragmentation and secession (the problem they were supposed to solve). The response to these problems in turn has been a kind of unresolved oscillation in theory and practice between the two phases.[19]

In retrospect we can now see that there are two problematic features of this early orientation in both its phases. Firstly, the solutions are handed down to the members from on high – from theorists, courts or policy makers – rather than passing through the democratic will-formation of those who are subject to them. They are thus experienced as imposed rather than self-imposed. The second problem is the assumption that there are definitive and final solutions to struggles over recognition in theory and practice. The norms of mutual recognition handed down are thus experienced as a 'straightjacket'.[20] Let us call these the monological and finality presumptions respectively and take up each in turn.

4 FROM MONOLOGUE TO DIALOGUE

The first step in transforming the way we think about conflicts over recognition has been from the presumption that there can be monological solutions, handed down from a theorist, court or policy community, to the approach that any resolution has to be worked out as far as possible by means of dialogues among those in the field who are subject to the contested norm of mutual recognition. Reconciliation should be dialogical. This important step is expressed in the widespread turn to varieties of deliberative, agonistic and negotiated democracy in theory and policy, and in the astonishing proliferation of democratic procedures of dispute resolution in all areas of contemporary societies, from the resolution of local conflicts over recognition in equity policies through to global conflicts over the recognition of suppressed minorities, nations and international human rights, and on to the United Nations' commitment to reconciling civilisational conflicts through global dialogue.[21]

[19] Andrew Vincent, *Nationalism and Particularity* (Cambridge: Cambridge University Press, 2002); Paul Kelly, ed., *Multiculturalism Reconsidered: 'Culture and Equality' and Its Critics* (Cambridge: Polity Press, 2002); Brian David Miller, Judith Squires, Oliver Schmidtke, *et al.*, 'Review Symposium on Culture and Equality', *Ethnicities* 2(2), 2002: 261–87; David Owen, 'Culture, Equality, Polemic', *Economy and Society* 32(2), 2003: 325–41.

[20] The Supreme Court of Canada, in a landmark reference case, used this phrase to describe a constitutional system that is not open to dialogical civic freedom and negotiation. See Supreme Court of Canada, *Reference re the Secession of Quebec*, cited in Chapter 6 of this volume.

[21] John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000).

What are the main reasons for this first step that an acceptable norm of mutual recognition should be worked out by those subject to it through some form of the exchange of reasons in negotiation, deliberation, bargaining and other forms of dialogue? I think there are four main reasons that have moved many theorists, courts, policy makers and citizens to take this dialogical turn.

Firstly, over recent decades there has been a deepening commitment to democracy in both theory and practice, not in the institutionalised, representative majority rule sense, but in the more direct sense of popular sovereignty, civic participation and people 'having a say' over the norms to which they are subject. The old principle of *quod omnes tangit* (what touches all must be approved by all) has reappeared in dialogical form, as, for example, in Habermas' proposed formulation D: 'only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity *as participants in a practical discourse*'.[22] This direct democratic principle is now said to be equal in status to the liberal principle of the rule of law. If the rule of law is imposed without passing through a practical discourse of those affected by it, it is now commonly said to be illegitimate in virtue of a democratic deficit. A legitimate rule or norm of law must also be a rule 'of and by the people'. Even liberalism and constitutionalism, which used to be thought of in terms of a set of basic principles (rules) that limit democracy from the outside, have been reconceived around the ideal of the exchange of public reasons among free and equal citizens who work up the principles themselves.[23]

The second consideration is a condition of the acceptability of a norm of mutual recognition. The identities under which individuals and groups are reciprocally recognised in any form of cooperation actually count as *their* identities only if they can accept them from a first-person perspective: that is, acknowledge them as their own. If an elite determines them, they are experienced as imposed and alien. It follows that the persons who bear them need to have some sort of say over their formulation, or over the selection of trusted representatives who negotiate for them, if they are not to be alienated from the outcome. Owing to the relational character of recognition, this consideration holds not only for the members of the minority seeking recognition, but also for the other affected members of the system of governance. Thus, to ensure that a new norm of mutual recognition is acceptable by all, it needs to pass through an inclusive dialogue or what we

[22] Habermas, *Moral Consciousness and Communicative Action*, p. 66.
[23] Rawls, *Political Liberalism*; Laden, *Reasonably Radical*.

should call a multilogue. If all affected are not in on the exchange of reasons, they will not understand why the agreement was reached, what were the reasons for the demands of others that helped to shape the agreement, why their own negotiators seemed to moderate their demands and so on. The agreed-upon norm of mutual recognition would thus seem like a sell-out or an unnecessary compromise, and thus as imposed and unacceptable.[24]

The third reason relates to an important characteristic of the identities recognised under any norm. Identities, and thus acceptable forms of recognition and modes of cooperation with others, are partly dependent upon and constituted by the dialogical exchange of reasons and rhetoric over them. The forms of recognition that individuals and groups struggle for are articulated, discussed, altered, reinterpreted and renegotiated in the course of the struggle. They do not pre-exist their articulation and negotiation in some unmediated or ascriptive pre-dialogue realm. For example, the self-understanding of men and women, Muslim and Christian, French and English and Indigenous and non-Indigenous has changed enormously over the last decades of conflict, negotiation and discussion. The reason is that engagement in the give and take of reasons for and against different proposed norms of mutual recognition from the various perspectives of the participants changes (and often transforms) the self-understandings and background comprehensive doctrines and world-views of the interlocutors, breaking down unexamined group prejudices, stereotypes and blind spots that they bring to the dialogue. Free dialogue does not rest on and shield background assumptions and comprehensive doctrines from public discussion. It brings them into the public sphere and subjects them to critical discussion.[25]

Thus, our understanding of who we are, of the partners with whom we are constrained to cooperate, and hence the acceptable norms of mutual recognition change in the course of the dialogue.[26] Accordingly, the members need to be in on the webs of interlocution of the struggle in order to go through these changes in self-understanding and other-understanding, or they will literally not be able to identify with the norm of recognition that others who have gone through the negotiations find acceptable.[27]

[24] Laden, *Reasonably Radical*, pp. 99–185.

[25] I do not see how the deep-seated prejudices and stereotypes in citizens' background comprehensive doctrines can be scrutinised, criticised and overcome unless they are brought into the space of public questioning.

[26] This is one of the reasons I suggest in Chapters 5 and 6 that we should think of recognition as more akin to the flexible term 'acknowledgment' than to the concept of recognition with its connotations of authenticity and finality.

[27] Young, *Intersecting Voices*, pp. 38–74 and *Inclusion and Democracy*, pp. 52–120; Laden, *Reasonably Radical*, pp. 194–9.

Moreover, as we can see from these considerations, a norm of mutual recognition of various members of a political association recognises them under negotiated and changeable identities. These identities, over which they are willing to struggle for appropriate recognition by each other, are inseparable from the goods they associate with their membership: as individuals (free and equal), as members of various groups (religious, linguistic, cultural and so on) and the diverse goods of the shared political association. A norm of recognition thus always implicates the right and the good in complex ways that we are just beginning to understand.

A fourth, pragmatic consideration is that the only fairly reliable and effective way to work up a norm of mutual recognition that does justice to the diversity and changeability of the members of contemporary political associations is to ensure that all affected have an open and effective say in the deliberations and formulations. A lone theorist, an elite court and a distant ministry are in contrast probably least able to meet this requirement and more likely to universalise their own partial perspective or to work with unexamined stereotypes.

For example, struggles over recognition were initially simply taken to be conflicts between 'particular' cultural, religious, linguistic, Indigenous and other forms of 'minority diversity' and the impartial and universal 'equality' of individuals. But this was based on a lack of understanding of many of the claims classified under 'diversity'. Many of the claims that Indigenous peoples are actually making around the world are not claims for minority status nor are they primarily based on culture or diversity. They are claims to be recognised as 'peoples' with the 'universal' right of self-determination, based on prior occupancy and sovereignty, and thus to be recognised as 'equal' in status to other 'peoples' under international law and federal constitutional law. As a result, the monological orientation, with its pre-set background and stereotypical categories of recognition, misconstrued the nature of the demands.[28]

Another example is the demand for recognition of a minority language, culture or religion. Often the demand is not for the recognition of some kind of particular diversity that conflicts with impartial equality but for another kind of equality. In Canada, for example, the prevailing norm of mutual recognition of languages and cultures is neither impartial nor even-handed, but unequal for historical reasons: French and English are

[28] Alfred, *Peace, Power, Righteousness*; Michael Murphy, 'The Limits of Culture in the Politics of Self-Determination', *Ethnicities* 1(3), 2001: 367–88; John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

publicly supported and enforced as the languages of integration. Speakers of minority languages are not asking for 'special treatment' but rather for some kind of parity of respect in this situation of inequality.

If we listen to what people are trying to say in actual cases, the demands of minorities are often made in the face of the majority having the power to suppress or misrecognise minorities, to assimilate them to the majority's cultural norms and to present this as if it were universal. These cases are not conflicts between 'diversity' and 'equality' but among groups with tremendous inequalities in power and resources (in virtue of the three axes of the prevailing norms of mutual recognition), and corresponding inequalities in the power to construct the identities of others through the day-to-day exercise of the prevailing norms of governance and cooperation.[29]

The actual struggles are often about these sorts of underlying inequalities, not some hypothetical conflict between diversity or special treatment on one side and the defenders of the universal equality of the status quo on the other, as the monological approach tends to structure the debate.[30] Therefore, the point is not to start with some general thesis about diversity versus equality, or any other framework, but to examine actual cases to see what the conflict is about. This entails *listening* to the people engaged in the struggles over the prevailing norms of recognition in their own terms, especially those who are silenced, excluded or disregarded as unreasonable because of their mode of speaking, and thus taking the first dialogical step.[31] As a result of this learning experience, the maxim of *audi alteram partem* (always listen to the other side) is coming to be a widespread convention of reconciliation procedures.

Considerations such as these four have called into question the top-down, monological approaches and have moved many participants, policy makers, courts and theorists to turn to inclusive dialogical approaches to resolve recognition conflicts. We can summarise this step by saying that a condition of an acceptable norm of mutual recognition is that it rests – as far as possible – on what I earlier called the second or normative aspect of a norm, namely the dialogical civic freedom of those subject to it to have a say over it.[32]

[29] Laden, *Reasonably Radical*, pp. 131–85; Young, *Inclusion and Democracy*.

[30] For example, Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000); Barry, *Culture and Equality*.

[31] Owen, 'Cultural Diversity and the Conversation of Justice'; Nikolas Kompridis, 'Struggling over the Meaning of Recognition: A Matter of Identity, Justice or Freedom?', *European Journal of Political Theory* 6(3), 2007: 277–90.

[32] For a review of some recent works that have taken this turn, see James Tully, 'Approaches to Recognition, Power and Dialogue', *Political Theory* 32(6), 2004: 855–62.

5 FROM CONSENSUS TO REASONABLE DISAGREEMENT AND NON-FINALITY

Recall the second problem with early orientation: the finality presumption. When citizens struggling over norms of mutual recognition, policy makers, courts and theorists turned to dialogue, they initially brought a version of this presumption with them. They presumed that under the best of circumstances a consensus among the participants could be reached and thus that consensus ought to function as the regulative ideal of actual negotiations. There could still be a just, definitive and final resolution, only now the people affected, rather than the theorist or policy maker, would reach agreement on it, or approximate it, through some form of dialogue. Partly for theoretical reasons and partly from experience in diverse dispute-resolution situations, this presumption has given way to the contrary hypothesis that no matter what procedures for the exchange of reasons are applied to proposed norms of mutual recognition, in either theory or practice, an element of 'reasonable disagreement' or 'reasonable dissent' will usually remain. That is, an agreement on a norm reached through dialogue can be reasonable (good but not decisive reasons for accepting it) even though some interlocutors will have good but not decisive reasons for not accepting it. What are some of the main reasons for this step from consensus to accepting the reasonableness of those who dissent and can give good reasons for their disagreement?

There are several reasons for thinking that even in ideal theory practical reasoning of this general and complex kind is inherently indeterminate and disagreement ineliminable, thus leaving a plurality of contestable conceptions of the just norms of mutual recognition in any case.[33] This insight has brought about a profound reconceptualisation of the law as a system of norms over which there is always reasonable disagreement.[34]

In practice, reasonable disagreement may seem an obvious point to anyone familiar with negotiations. There are always asymmetries in power, knowledge, influence and argumentative skills that block the most oppressed from getting to negotiations in the first place and then structuring the negotiations if they do. Time is always limited; a decision has to be taken before all affected

[33] Rawls, *Political Liberalism*, pp. 54–8, and Rawls, *The Law of Peoples*, pp. 129–80.

[34] Waldron, *Law and Disagreement*; Neil Walker, 'The Idea of Constitutional Pluralism', *Modern Law Review* 65(3), 2002: 317–59; Gráinne de Búrca and Neil Walker, 'Law and Transnational Civil Society: Upsetting the Agenda?', *European Law Journal* 9(4), 2003: 387–400; Richard Bellamy, 'The Rule of Law', in *Political Concepts*, eds. Richard Bellamy and Andrew Mason (Manchester: Manchester University Press, 2003); Shaw, 'Relating Constitutionalism and Flexibility in the EU'; and 'Process, Responsibility and Inclusion in EU Constitutionalism', *European Law Journal* 9(1), 2003: 45–68.

have had their say and so usually the powerful have an inordinate say; future generations have no say yet are often the most affected; limitations in the agreement are often exposed only after it is implemented and experimented with; and so on. Also, as we have seen, the identities of those involved in the multilogue are modified in the course of the negotiations in complex and unpredictable ways. Given these features, non-consensus and reasonable disagreement seem inevitable.

Moreover, as we have seen above, there is always a certain 'room for manoeuvre' (*Spielraum*) or field of possible comportments in interpreting and acting in accord with a norm of mutual recognition (whether it is a norm of argumentation in the dialogue or a norm of mutual recognition that has been implemented in practice after negotiations). Even in the most routine activity of acting in accord with a norm of mutual recognition, the members of an association subtly alter it in unpredictable ways through interpretation, application and negotiation. They can often appear to agree while thinking and acting differently. In other cases, overt agreement, or a manufactured consensus, can mask the vast terrain of hidden scripts and arts of resistance by which subjects act out their reasonable disagreement to oppressive norms in day-to-day life. This field of existential possibilities renders any 'agreement' on a norm subject to the 'uncertainty, the suspense, the possibility of irreversible change, which surrounds all significant action, however "rule-guided"'.[35]

Considerations of this kind in theory and in reflection on dispute resolution in practice have led many to lower the threshold of expectations in struggles over recognition from the finality through consensus presumption to the working hypothesis that a reasonable agreement will be faced with reasonable disagreement. 'Inevitably, there will be dissenting voices', as the Supreme Court of Canada nicely puts this turn.[36] Nevertheless, many theorists and practitioners who took this step retained the finality presumption in one crucial area. They argued that even though agreements would always be subject to reasonable dissent, there still could be a consensus on a definitive theory of the just procedures of dialogue. This could be worked up in theory and employed as a transcendental standard to judge any existing negotiation and to specify what counts as a reasonable and unreasonable claim.[37]

[35] Taylor, *Philosophical Arguments*, p. 177; Chapter 2, this volume.
[36] Supreme Court of Canada, *Reference re the Secession of Quebec*, §68.
[37] Habermas, *Moral Consciousness and Communicative Action*, pp. 43–116, and *Between Facts and Norms*.

However, there is no reason why the considerations of 'reasonable disagreement' should not apply to the procedures of negotiation, and thus to the concept of a 'reasonable' claim as well.[38] For it is the most common thing in both the ideal world of theoretical debate and the real world of negotiation for theorists and negotiators to move backwards to challenge the procedural rules with which they began. So we now have the view that the procedures of negotiation must be open to question in the course of negotiations, reasonable disagreement over them will persist, and there will be an indeterminate plurality of reasonable procedures. This should be unsurprising, for procedures of negotiation are themselves norms of mutual recognition. Consequently, the modes of acceptable argumentation have expanded from the initial ideal of consensus on what counts as a 'public reason', 'claim of validity' or 'procedure of argumentation', to the view that criteria and procedures of argumentation and 'reasonable' claims are plural and open to question in the course of the negotiations.[39]

In practice this has led to a whole new field of alternative dispute-resolution methods and, in theory, to approaches that highlight different types of dialogue: deliberative democracy, communicative democracy, deliberative liberalism, agonistic democracy, the fusion of horizons, radical translation and so on.[40] It is not only that there are different models of dialogical negotiations. In addition, there are various aspects to the complex activity of negotiation under any model that need to be exposed and analysed under different approaches. Most importantly, if we are to understand dialogical interaction of the interlocutors in all its variations and complexity, we need to study more than some abstract and limited model of 'conversation' or 'deliberation'. The field of study is the full range of strategic, communicative, deliberative, negotiated and decision-making interactions, from Intifada-like strategic bargaining by recourse to armed struggle at one end through to the idealised, calm and non-strategic

[38] Waldron, *Law and Disagreement*; Walker, 'The Idea of Constitutional Pluralism'.

[39] Stuart Hampshire, *Justice is Conflict* (Princeton: Princeton University Press, 2000); Toulmin, *Return to Reason*; Lasse Thomassen, 'Democracy, Inclusion and Exclusion: Habermas, Laclau and Mouffe on the Limits of Democracy' (Ph.D. dissertation, Essex University, 2003); Jocelyn Maclure, 'On the Public Use of Practical Reason: Loosening the Grip of Neo-Kantianism', *Philosophy and Social Criticism* 32(1), 2004: 37–63.

[40] Benhabib, ed., *Democracy and Difference*; Mouffe, *The Democratic Paradox*; Fred Dallmayr, *Achieving Our World: Toward a Global and Plural Democracy* (Lanham, MD: Rowman and Littlefield, 2001); Boaventura de Sousa Santos, 'The World Social Forum: Toward a Counter-Hegemonic Globalization', 2 parts, in *The World Social Forum: Challenging Empires*, eds. Jai Sen, Anita Anand, Arturo Escobar and Peter Waterman (New Delhi: Viveka Foundation, 2004). Available at: www.choike.org/nuevo eng/informes/1557.html [Accessed 27 October 2006].

exchange of an agreed-upon range of public reasons on which political philosophers tend to focus.[41]

Two conclusions follow from these reflections on theory and practice. As was introduced above, in the early phases of research the finality presumption was strengthened by the complementary assumption that struggles over recognition could be confined to a narrow and clearly demarcated range of issues of 'cultural' and 'identity-related' conflicts. This has been shown to be false in two different yet related ways. Once these conflicts are seen as struggles over prevailing norms of mutual recognition, they can be seen to be an aspect of any kind of struggle. As we saw in section 2, struggles classified as conflicts over distribution are also contests to alter the way they are recognised as members (as having a say). Next, as our examples have shown, these struggles are always struggles over the third axis of forms of recognition (the access to resources) to some extent and thus cannot be neatly separated from struggles over distribution or redistribution. To use a familiar example, the struggle of the Iraqi people to be recognised as a free and self-determining people, or of a Kurdish minority within Iraq, is also a struggle over the control of their oil reserves, just as the war by the United Kingdom and the United States to have Iraq recognised as an open free trade and free market society is to ensure that they control Iraq's oil reserves.

It is equally conclusive that neither isolated theorists, courts, policy makers, the members engaged in the struggles and democratic dialogues, nor even some ideal set of procedures can be expected to provide the final and definitive resolution to what counts as the just norms of mutual recognition. None has the final word. Any agreement will be less than perfect. It will rest to some extent on unjust exclusion and assimilation and thus be confronted with ineliminable reasonable disagreement (overt or covert). A norm of mutual recognition is thus never final, but questionable. It follows that in a free and open society, existing norms of mutual recognition should be open to public questioning so these reasons can be heard and considered. They should be open to review and potential renegotiation. Reconciliation is thus not a final end-state but an activity that inevitably will be reactivated from time to time.

In summary, reconciling conflicts over recognition is dialogical in form, general in range, inseparable from other types of conflict, and potentially recurring in practice.

[41] David Kahane and Catherine Bell, eds., *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: University of British Columbia Press, 2004).

6 DIALOGICAL CIVIC FREEDOM AND PRACTICES OF CITIZENISATION

What implications follow from the learning process we have surveyed and the transformation it brings about in understanding the reconciliation of conflicts over recognition?

Firstly, if the route to resolving conflicts over norms of mutual recognition is to turn to inclusive and dialogical practices of negotiation and if, in the best of circumstances, there will be reasonable disagreement over the imperfect procedures and particular resolution, it follows that the primary orientation of reconciliation should not be the Platonic search for definitive and final procedures and solutions, but, rather, the institutionalisation and protection of a specific kind of democratic freedom. The primary aim will be to ensure that those subject to and affected by any system of governance are always free to call its prevailing norms of recognition and action coordination into question, to present reasons for and against modifying it, to enter into dialogue with those who govern and who have a duty to listen and respond, to be able to challenge the prevailing procedures of negotiation in the course of the discussions, to reach or fail to reach an imperfect agreement to amend (or overthrow) the norm in question, to implement the amendment; and then to ensure that the implementation is open to review and possible renegotiation in the future. This is the fundamental democratic or civic freedom of citizens – of having an effective say in a dialogue over the norms through which they are governed.

This fundamental civic freedom is not only the right or freedom to speak out against oppressive, exclusionary or assimilative norms of mutual recognition, as important as the freedom of speech is. For it to be effective, it needs to be correlated with a duty on the part of the powerful to listen to these voices and to respond with their reasons for the status quo: that is, to enter into an open *dialogue* governed by *audi alteram partem*. If the duty to listen and respond is ignored and dialogue suppressed, then civic freedom takes the many forms of civic dissent and disobedience to bring the powerful to the table. As we have seen, this basic freedom is a formulation of the normative quality of norms. Those members who are subject to them are free in the sense that there is a field of possible responses available to them in which they can test the norms' acceptability. We can thus see yet another democratic reason for rejecting the monological and finality orientation. If a norm is presented and imposed as final, as this orientation presents all norms, in so doing it violates this fundamental freedom and renders the norm illegitimate.

The second implication is that the experience of direct or indirect participation in these kinds of dialogical struggles helps to generate a new kind of second-order citizen-identity and solidarity appropriate to free, open and pluralistic forms of association. One comes to acquire an identity *as* a citizen through participation in the practices and institutions of one's society, through having a say in them and over the ways one is governed. In complex contemporary political, legal, cultural and economic associations, one of the fundamental ways that this process of citizenisation occurs is through participation in the very activities in which the norms of mutual recognition in any subsystem are discussed, negotiated, modified, reviewed and questioned again.[42]

The partners involved, while struggling for recognition of their group, nevertheless come to develop a complementary, second-order attachment to and solidarity with the larger association, precisely because it allows them to engage in this democratic activity from time to time. These activities of struggling over recognition also allow citizens to dispel *ressentiment* that might otherwise be discharged in violent forms of protest and terrorism if this openness is suppressed and a norm of mutual recognition is imposed unilaterally. On this hypothesis, the turn to violence and terrorism increases as the openness to dialogical civic freedom decreases.[43]

Even those who do not win the latest struggle have good reasons to develop a sense of belonging to a political association that is free and open in this contestatory sense. Because they were in on the discussions, they learn that there were good reasons on the other side and vice versa. Their fellow citizens are not strangers seen through the lens of prejudice and inherited stereotype, but people they come to know and understand through the exchanges. Moreover, they probably gain some degree of recognition in the compromise agreement, and, given reasonable disagreement, they can continue to believe that their cause is reasonable and worth fighting for again. Most importantly, they know that they have the freedom to challenge the latest hegemonic norm of mutual recognition in the future if they can generate the reasons to support it. And, in fact, this kind of identification is a common feature of most contestatory games: the players competing in them generate a form of identification with the game itself above their team loyalties and their particular victories and losses. So, perhaps it is

[42] Catriona McKinnon and Iain Hampsher-Monk, eds., *The Demands of Citizenship* (London: Continuum, 2000), pp. 1–12; Jocelyn Maclure, 'Disenchantment and Democracy: Public Reason Under Conditions of Pluralism' (Ph.D. dissertation, University of Southampton, 2003).

[43] Benjamin Barber, *Jihad vs. McWorld: How Globalism and Tribalism are Reshaping the World* (New York: Ballantine Books, 1996), p. 292.

appropriate that the Greek term for the arts of contestation, 'agonistics', is now widely used to characterise these struggles, the complex set of civic virtues the participants acquire and exercise, and the conflicting goods they pursue.[44]

Of course, openness to and exercise of dialogical civic freedom and negotiation is not the only source of solidarity. The substance and reality of that collective identity comes from a variety of other sources, such as participation in collective and cooperative projects, a shared collection of goods, equality before the law, and the different ways diverse individuals and groups relate intersubjective norms to their histories, identities and so on.[45] Notwithstanding, participation in the critique of the injustices of the collective identity of the association, by means of testing the shared norms of recognition of that identity through the exercise of democratic freedom, is also a powerful source of allegiance across other differences. The reasons for this are not so different from the arguments of theorists such as Habermas. They argue that the public, dialogical activities of constitutionalising the European Union, within an open-ended and dynamic framework of constitutional traditions, will themselves help in generating a sense of attachment to the EU: the so-called 'constructivist gambit'.[46]

This approach thus provides a genuinely democratic solution to the problem of generating a sense of solidarity (and thus peace) in any kind of association composed of non-homogeneous members. As we saw above, the monological and finality approach fails on this count, either by denying or limiting recognition from the outside in the first phase (thereby fuelling the conflicts) or by handing down recognition rights from on high in the second phase (thereby fuelling separateness). In the dialogical and non-finality approach, the citizens themselves work out the limits of mutual recognition (as they learn the limits of their own and others' demands through dialogue) and thus tend to accept them, at least provisionally; they also acquire a sense of attachment to and respect for their culturally

[44] David Owen and Russell Bentley, 'Ethical Loyalties, Civic Virtue, and the Circumstances of Politics', *Philosophical Explorations* 4(3), 2001: 223–39; Chapters 4 and 5, this volume.

[45] Rainer Forst, *Contexts of Justice: Political Philosophy Between Liberalism and Communitarianism* (Berkeley: University of California Press, 2002), p. 101; Michael Wilkinson, 'Civil Society and the Re-imagination of European Constitutionalism', *European Law Journal* 9(4), 2003: 451–72; and see the discussion of seven sources of unity proposed by the Supreme Court of Canada in Chapter 6 of this volume.

[46] Jürgen Habermas, 'Why Europe Needs a Constitution', *New Left Review* 11(5), 2001: 1–22; Habermas, 'On Law and Disagreement: Some Comments on Interpretive Pluralism', *Ratio Juris* 16 (2), 2003: 187–94; and Neil Walker, 'Europe's Constitutional Momentum and the Search for Polity Legitimacy' (Working Paper, Faculty of Law, European University, 2004).

diverse fellow citizens and institutions through the dialogical experience. This new kind of solidarity, sometimes called conviviality, is engendered in the first instance in negotiating the complex norms of recognition and interaction of everyday activities in deeply diverse societies.[47] If this analysis is correct, the path to global peace in the multiplicity of imperfect practices of governance in which diverse citizens cooperate runs through practices of civic freedom and dialogical reconciliation.

The third implication is cautionary and deflationary. It is important not to elevate civic dialogue to the status of the new solution to all problems of recognition. It too is defeasible. The monological claims of justice of the theorists, courts and policy makers have an important yet non-sovereign counterbalancing role to play in this new approach. Although they have been dethroned from their position of legislating the just solution or procedures prior to dialogue with their fellow citizens, their proposals for a just resolution remain crucial to the process. As we have seen, while they do not have the final word, neither do the citizens engaged in the dialogue nor any particular institutional set of procedures. Contrary to the consensual, majoritarian and procedural interpretations of the dialogical turn, the deliberations of citizens in specific institutions cannot become the indubitable source and standard of justice, because they too are always fraught with imperfections, injustices and irreducible disagreements.[48]

Rather, the role of theorists, policy makers and courts, as well as other concerned groups, is to enter indirectly into and broaden the dialogue on a par with others: to present their theories, guidelines and proposals to those engaged in the negotiations, to help clarify the claims of justice and injustice, equality and inequality put forth by the members involved in the direct negotiations, to criticise the procedures and outcomes, and respond to questions and challenges in turn. In general, the deliberations will be better informed if they are open to the wider context of reciprocal criticism and scrutiny from other public actors, institutions and epistemic communities.[49]

Of equal importance, while dialogue is essential for all the reasons that have been given, it is necessary to distinguish it from decision taking. The asymmetries in recognition and power that are the underlying cause of a struggle over recognition carry over into the forms of negotiation. The

[47] See Chapter 5, this volume, and Chapter 8, *Volume II*.

[48] For example, Habermas, *Between Facts and Norms*, and Waldron, *Law and Disagreement* tend to equate just agreements with the outcomes of representative democratic procedures and majority rule institutions, respectively.

[49] Shaw, 'Process, Responsibility and Inclusion'.

ability of the exchange of reasons among the members of an association to unsettle the prejudices and alter the outlooks of the most powerful groups is limited. In these circumstances a majority decision-making rule (such as a referendum) just leaves an oppressed minority hostage to the majority at the end of the discussions (and the foreknowledge of this often drains the dialogue of its capacity to alter the prejudices of the majority). Therefore, minorities need to be able to appeal to other decision-taking institutions at the end of the dialogue, such as courts, parliaments, international human rights regimes, non-partisan adjudicators or mediators, global transnational networks and so on. These too are imperfect and need to be open to challenge in turn, but they provide indispensable checks and balances on the powers of the dominant groups to manipulate the dialogue and manufacture agreement.

These three implications illustrate a central feature of the dialogical approach. In the monological and finality approach, justice and the rule of norms are given priority over the democratic freedom of citizens. As we have seen, the dialogical orientation does not reverse this ordering in an unlimited celebration of unbounded contestation or the will of the majority. Rather, in each step it seeks to place the claims of justice and the institutional rule of norms in an equal and mutual relationship of checks and balances with the right of citizens to test the acceptability of claims and norms through the exercise of dialogical civic freedom in various formal and informal dispute-resolution procedures.[50]

CONCLUSION: PUBLIC PHILOSOPHY IN A NEW KEY

If the trend summarised in the preceding sections is significant and worthy of further study, then the type of research that is able to throw critical light on conflicts over recognition also will be different from the model of research associated with the monological and finality orientation. The aim will not be to retreat to an abstract normative point of view and elaborate standards for norms of mutual recognition and procedures of negotiation.

[50] This complex field of historically contingent institutions, intersubjective norms of mutual recognition, forms of subjection and practices of dialogical civic freedom bears a family resemblance to Richard Bellamy's reconstruction of the republican tradition (Bellamy, 'The Rule of Law'), Jo Shaw's responsible and inclusive constitutionalism (Shaw, 'Process, Responsibility and Inclusion'), Gráinne de Búrca and Neil Walker's transnational civil society (Búrca and Walker, 'Law and Transnational Civil Society') and Boaventura de Sousa Santos' new legal common sense (*Toward a New Legal Common Sense: Law Globalization and Emancipation* (London: Butterworths, 2002)).

Normative studies, as we have seen, will continue to play an important yet less lofty role in dialogue with citizens engaged in actual conflicts on the ground. However, these studies form a part of a broader field of academic research in a relationship of reciprocal elucidation with the parties engaged in struggles over recognition, where research illuminates the limitations and possibilities in practice and practice tests the relevance of theory. As we have seen throughout this volume, this more practice-oriented research has developed over the last few decades in concert with the trends in practice outlined above. There are two main lines of this kind of critical research on struggles over intersubjective norms of mutual recognition oriented towards civic freedom and peace through dialogue.

The first is to study the multiplicity of ways in which individuals and groups are excluded from calling into question the imposed norms through which they are recognised, governed and blocked from entering into a dialogue over their legitimacy, thereby rendering assimilation, silent oppression or the recourse to non-violent and violent resistance the only alternatives. This kind of research aids in making specific systems of norms of recognition and governance more inclusive and dialogical; open to the ongoing negotiation of those subject to them.

The second and more recent line of research takes the global trends to inclusivity, dialogue and the negotiated character of identities in practice and theory as its starting point and reflects critically on them. While it takes a positive attitude towards these three trends, it is like the third, cautionary implication of the previous section in not celebrating inclusivity, dialogue and negotiated identities unconditionally and complacently, as a kind of 'just so' story. Rather, it takes these trends as a new form of emerging national and global governance, of governing individuals, groups, communities, regions and subaltern nations through inducing them to enter into dialogues over local and global norms of action coordination in downloaded and quasi-autonomous regimes of self-rule.[51] Thus, this kind of research studies who sets the agenda in the negotiations, what techniques of assimilation and subjectification are at work in specific types of negotiation, which norms of mutual recognition in a structure of negotiation are insulated from challenge, the extent to which recognition is detached from changes in the unequal access to resources (the third axis of analysis), and the extent to which seemingly free and open procedures of negotiations are governed 'at a distance' by national governments, global corporations, international

[51] Rose, *Powers of Freedom*; Hardt and Negri, *Empire*, pp. 260–303.

regulatory regimes, and military imperialism. In short, it asks to what extent civic freedom is subtly encouraged, manipulated and governed within new regimes of inclusive and negotiable norms of mutual recognition in order to make the world 'safe for difference'.[52]

This new field of public philosophy thus continues the perennial task of testing the limits imposed on our civic freedom by means of our critical freedom.

[52] David Scott, 'Culture and Political Theory', *Political Theory* 31(1), 2003: 92–115, raised the concern about the complacency of the 'inclusionary' research and the need for the second. I take up both lines of research in *Volume II*.

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