Diversity and Equality

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Edited by Avigail Eisenberg

Diversity and Equality: The Changing Framework of Freedom in Canada

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Diversity and Equality

Introduction: New Approaches to Freedom in Canada

Avigail Eisenberg

When Thomas Berger published *Fragile Freedoms* in 1981, the *Canadian Charter of Rights and Freedoms* had yet to be passed into constitutional law, multiculturalism was mentioned in a celebratory sentence in a document that focused on bilingualism and biculturalism, and rights stood for treasured ideals meant to protect individual dissent from both the state and the thick political and religious norms of Canadian society. Berger contributed (and still contributes) to a progressive tradition of Canadian scholars and activists who saw Canada's small-c conservative politics in high tension with the liberal and social democratic values that shaped Anglo-American political and legal thought. Even without the Charter, the Aboriginal rights in section 35, or more robust multicultural principles to contend with, the themes and problems that Berger's book touched upon were the subjects of ongoing debates in Canadian society about minority rights. His chapter headings read like a survey of Canadian history: "Louis Riel and the New Nation"; "Mackenzie King and the Japanese Canadians"; "Jehovah's Witnesses: Church, State and Religious Dissent"; "Democracy and Terror: October, 1970"; "The Nishga Indians and Aboriginal Rights." Yet, perhaps surprisingly, the problems Berger explored twenty-five years ago are still the subject of debates about minority rights in Canada today – and, in some cases, involve exactly the same groups. For instance, Métis rights remain in a nascent state, urged on only slightly by a Supreme Court of Canada case in 2003 (*R. v. Powley*); redress is again used, and is still controversial, as a means to respond to past wrongs, including colonial policies that led to the abuse of Aboriginal children in residential schools; freedom and security are balanced according to the calibrated threat of terrorism, perhaps more today than ever before; and the rights of First Nations to self-determination have yet to be adequately defined or recognized within Canada and internationally.

While many of the key issues about minority rights in Canada remain the same, two important changes have occurred in the last twenty-five years.

First, the public engagement with rights discourse is broader and more active than it was twenty-five years ago, and this brings with it both benefits and burdens for guaranteeing minority rights or securing autonomy for national minorities and Aboriginal peoples. Second, the instruments by which rights are secured have changed, the most important change being the entrenchment of the Charter and of Aboriginal rights in 1982. But equally important are new conceptual tools and frameworks with which minority rights and autonomy are debated and discussed in the public sphere.

The changing needs and demands of immigrants, Aboriginal peoples, French and English linguistic minorities, and the Québécois have helped to reveal that, despite universalistic pretensions, rights assume a specific and particular shape within any historical or social context. These changes have had an enormous impact on the institutional context of and scholarly debates about rights, diversity, equality, autonomy, and self-determination. They are worth exploring further in order to gain a better sense of the questions and arguments addressed in this book, which examine the changing framework of freedom and diversity in democratic societies like Canada.

Public Engagement and Deliberation about Minorities

Even though the chapters in this book go well beyond Charter politics and jurisprudence, in most discussions in Canada about the rights of minorities, including national minorities and indigenous peoples, the Charter is an important starting place. This is because the entrenchment of the Charter in 1982 created a sea-change in Canadian politics, partly by introducing Canadians to their constitution and cultivating in them a proprietary attitude to it. Alan Cairns (1990) described this phenomenon as "constitutional minoritarianism" and showed, along with other scholars, who amended and challenged his views (see Abu-Laban and Nieguth 2000; Dobrowlosky 1999; James 2004; Trimble 1998), that the link between Canadian citizens and their constitution was not forged merely by civic pride in having entrenched a strong bill of rights, but was also the product of extensive political lobbying in the years preceding entrenchment. This lobbying turned out to be crucial to shaping a kind of citizen engagement with rights. The architects of the *Constitution Act, 1982,* including Pierre Elliot Trudeau, lobbied particular communities to "buy in" to the deal as a way to stymie provincial government opposition to it. Aboriginal peoples, feminist organizations, and cultural minorities were particular targets of this lobbying. In the end, these communities and networks could claim a role in shaping sections of the new *Constitution Act* in ways that, in some cases, strengthened the protection of rights for Aboriginal peoples, women, and ethnic minorities.

The activated and engaged citizenry that, at least outside Quebec, rallied around Trudeau's project, proved hostile to elite-driven attempts in 1987 to

change the constitution to include the Meech Lake Accord. It also rejected the Charlottetown Accord amendments in 1992, and this time the reasons had less to do with the process, which, after all, included a nationwide referendum, than with substance. In Quebec, opponents argued that the Charlottetown Accord did not offer enough autonomy to their provincial government, while in the rest of Canada the concern was that the accord weakened individual Charter rights because it went too far in enhancing the autonomy and status of Quebec and Aboriginal peoples. One concern, which had considerable sway in the referendum campaign (see Johnston et al. 1996, 66 and 88), was that stronger and more comprehensive guarantees for minority autonomy and self-government would mean weaker and more vulnerable guarantees for individual rights and equality within those communities. This is a classic example of the purported tension between diversity and individual rights that informs many of the chapters in this book. It was also one of the first attempts by the Canadian public to think about rights in terms of the tension between diversity and equality.

What has become of this engaged citizenry, nurtured on Charter values and post-Charter constitutionalism, since the early 1990s? The answers to this question, so far, take us in two different directions. On one hand, this public has, unsurprisingly, organized itself into groups to advance particular interests using the rights available through the Charter and other legal instruments (Brodie 2002; Seidle 1993). Interest-group advocacy using the Charter has steadily increased since the 1980s, partly because many groups see the opportunity to advance their interests using the courts and the Charter rather than by engaging in political lobbying. Some critics have gone so far as to suggest that the Charter has spawned a network of activists and advocates – including liberals, feminists, gays and lesbians, ethnic minorities – within and outside public institutions, who together advance a somewhat coordinated agenda to define Canada's governing values according to their interests (see Knopf and Morton 2000). Other critics argue, to the contrary, that the Charter is deeply hostile to progressive politics and that the values it entrenches do more to secure property rights and ensure the domination of a corporate elite than to improve substantive equality or the quality of freedom that all Canadians ought to enjoy (see Anderson 2004; Bakan 1997; Petter 1987).

More generally, the Charter has, ironically, inspired concern that citizens' engagement with rights is steadily impoverishing Canadian democratic life as the real decisions about how the country is governed are taken to the courts and away from accountable democratic institutions. The evidence for this trend is mixed. Though participation rates in federal and provincial elections have declined since the 1980s, and more attention is devoted by news media to court decisions, it is nearly impossible to link Canada's new rights consciousness to a demise in electoral participation.

Lax participation in electoral politics is more likely related to the lacklustre nature of political parties and current leaders and their failure to attract young voters; to a change in political culture sometimes described as the "decline of deference" (Nevitte 1996); or to the growing crisis in civic literacy (Milner 2002). And in any given case, the interaction between the legislative and judicial spheres over rights-based policy decisions is highly complex at best (Hiebert 2002). As the controversy over same-sex marriage legislation in some Canadian provinces and the United States continues to illustrate, even court decisions that are widely viewed as protecting fundamental rights may not withstand direct and sustained opposition from a hostile legislative majority. For these reasons, it appears to be more likely that the Charter's role in discouraging electoral participation is minor.

On the other hand, in the last twenty-five years Canadians have seen the growth and development of a deliberative culture largely primed by the Charter's entrenchment, though engaged by issues that go well beyond Charter concerns. The Canadian public, or different "publics," are more involved now in shaping the basic principles of democratic governance and coexistence than ever before. Deliberative forums and assemblies have convened to propose fundamental reforms to democratic institutions. For example, in British Columbia, the Citizen's Assembly on Electoral Reform met to consider and suggest changes to the voting system for provincial elections. Deliberative models were used to reassess the role of religious values in public education in Quebec (see Quebec 1999), to shape complex and seemingly expert-intensive policy decisions on such issues as nuclear waste management (see Johnson 2005) or the use of genetic modification on animals and crops, and to work out the terms of coexistence between Aboriginal peoples and settler society through treaty negotiations (see Woolford 2005). What makes these forums deliberative rather than merely participatory is that instead of providing a setting in which people merely express their opinions, they are structured to encourage an exchange of reasons and perspectives and to foster learning among participants, which can become the basis of mutual understanding and ongoing dialogue.[1]

One could argue that a deliberative revolution of sorts has touched political theory and public institutions. Increasingly, all kinds of public institutions are assessed with a view to how well or poorly they facilitate deliberative values and deliberative solutions to conflicts, including those involving minorities. Some scholars have argued that even deep cultural conflicts are best addressed through deliberative forums and interaction rather than through institutions, such as courts, that apply legal rules and liberal principles from on high (see Deveaux 2003; Tully, this volume). In Chapter 1 of this book, James Tully explains why "struggles over recognition" are, by their nature, deliberative as they define and redefine ongoing relations among peoples.

In debates about deliberation in ethnically divided societies, the focal question is to what degree deliberative forums should be structured and supplemented by guarantees for individual rights – such as the right to sexual equality or to participate as an equal in decision making (see Deveaux 2005; Spinner-Halev 2001) – that may limit the terms on which dialogue proceeds or the sort of resolutions that may be reached regardless of what participants decide. In other debates, the focus is on what counts as a deliberative principle or forum in the first place. Even seemingly nondeliberative institutions, such as courts, engage in forms of dialogue that take place either within the institution (e.g., through judicial engagement with evidence, claimants, other judges, or other courts) or between institutions, especially between courts and parliament (see Hogg and Thornton 1999; Petter forthcoming).

The Terms and Tools to Discuss Diversity

The Charter, the equality rights in section 15, the rights of Aboriginal people in section 35, the *Multiculturalism Act,* the *Official Languages Act,* the Nisga'a Agreement, the *Declaration on the Rights of Indigenous Peoples,* Article 27 of the *International Covenant on Civil and Political Rights,* ILO Convention No. 169 ... These are just some of the many legal and political instruments invoked in debates about minority rights in Canada. The scholarship examining these legal instruments is vast, too vast to itemize here. Some of the chapters in this book contribute to this literature by looking at important changes in how the law protects diversity, equality, minority rights, and autonomy. For example, in Chapter 2, I examine the distinctive culture test developed by the Supreme Court of Canada; Cindy Holder, in Chapter 4, looks at the right to culture in international human rights documents; in Chapter 5, Neil Vallance shows how culture is now invoked by Canadian courts in relation to language and Aboriginal rights; and John McLaren traces substantive changes to freedom of religion in Canada in Chapter 8.

Equally profound are the changes within the last twenty-five years to the theoretical frameworks used in public debates about protecting minorities and recognizing self-determination. Two related conceptual frameworks, which both emerged in the late 1980s, established new ways of understanding relations among different peoples in diverse societies such as Canada. The first framework, developed in the work of Charles Taylor, framed struggles among peoples in terms of a "politics of recognition." According to Taylor (1992), a politics of recognition involves a dialogue and struggle with others over the terms on which we understand each other and thereby understand ourselves. Through recognition we form our identities in relation to others, while misrecognition, either by close others or public institutions, can distort and confine our conception of ourselves. The second framework, developed by Will Kymlicka, frames group relations in terms of a

normative approach to multiculturalism. The aim of "multicultural citizenship" is to ensure that each individual has equal access to a secure cultural context and that possessing a minority cultural identity is viewed as conventional and fully accepted within mainstream society (Kymlicka 1995). With the guidance of these two frameworks, scholars, activists, and policy makers began to reassess the relations between minorities and majorities, between national groups, and between individuals and their communities in nearly every area of social, political, and economic life in Canada.

One of the first dimensions highlighted by these new frameworks was that different kinds of groups – e.g., minority nations, immigrant communities, religious communities, linguistic minorities, indigenous peoples – have different kinds of political needs and interests that affect the terms of recognition they seek or the kinds of cultural resources to which their access is impeded, with damaging consequences. In this sense, attention to "difference" rather than sameness, and a "politics of difference" rather than homogeneity, arose as an important way to approach the fair treatment of different peoples (Tully 1995; Young 1990). Taylor's work was particularly successful in pointing out the tension that exists between individualist and communitarian values that groups seek to protect, whereas Kymlicka's work highlighted the sense in which postwar approaches to liberal theory and rights were far too influenced by American political thought. Postwar liberalism was largely shaped by American experiences, especially the distinctive experience of slavery, discrimination, and exclusion suffered by African-Americans. American liberalism provided a poor set of resources for other minorities to draw on, especially immigrant communities, national minorities, and indigenous peoples, each of whom had different experiences of disadvantage and oppression.

A second dimension highlighted by the new frameworks was a tension between individualist and collectivist values. In the early Charter scholarship it was believed that, for good or ill, the Charter entrenched both individualist and collectivist values. Fundamental individual freedoms, such as freedom of speech, religion, association, and equality, had to be reconciled and balanced with rights that protected communities, such as Aboriginal people and linguistic minorities, and the multicultural nature of Canadian society. Some people believed that the tension between these two types of rights gave rise to a healthy and quintessentially Canadian understanding of liberal values. In traditional rights scholarship, this understanding had been expressed in terms of the balance between "dissent" and "social harmony" (see Borovoy 1988). Others argued that the coexistence of individual and collective rights was destructive to Canada's commitment to uphold liberal principles and placed our courts in the unacceptable position of making what amounted to political choices between irreconcilable values (Morton 1985).

But in relation to the rights of cultural, linguistic, and national minorities, the tensions between individual and collective values have given rise to a new and rich set of debates about diversity and equality. The main question that motivates the discussion in this book arises from these debates: How can measures to respect group membership, including autonomy, be reconciled with protections for other fundamental rights? This question gets to the core of what minority rights substantively amount to within any society or jurisdiction, even though it is only recently that questions about minority rights have been framed in this way. The extent to which minorities are protected can be gauged in terms of how public institutions weigh the claims of minorities against other values, like individual rights, children's rights, women's equality, and so forth. In fact, it is not clear that we can understand what any of these fundamental freedoms substantively amount to unless we understand how they are reconciled, in each place and each case of conflict, with the values of minority communities and the values of the broader community. For instance, the meaning of the right to freedom of religion in Canada can only be substantively understood by looking at how this right has been limited by public institutions (e.g., in relation to public property, in forums of public debate, in public schools), how it is accommodated (e.g., in relation to workplace safety, animal slaughter, gender discrimination in employment), and, as Jeremy Webber shows in Chapter 9, how the presumptions about freedom underpin the right.

The tension between diversity and equality has advanced scholarship perhaps most profoundly in the areas of gender equality and children's rights. This is partly because, in relation to gender equality, feminist thought focuses on addressing oppression, not simply ensuring that women are treated the same as men. This means that feminists have to find ways, some of which are discussed by Maneesha Deckha in Chapter 6, of responding to both the oppression of patriarchy as it is upheld by women's cultural, national, or religious communities, and the oppression that women experience as a result of racism, imperialism, and discrimination against their communities by mainstream society. In the case of children, as Colin Macleod shows in Chapter 7, the presence of individual autonomy and the individual's capacity (and right) to consent, which are central assumptions in liberal theories of cultural accommodation, are thrown into question when thinking about children's rights. Children do not choose their religious or ethnic communities, nor can they leave communities that oppress them, so liberalism's usual methods for sorting out how to protect individuals from oppressive communities are not available to children, and this leads to the question of how children's identities ought to be understood.

Finally, the tension between diversity and equality has attracted critical attention to the frameworks that Taylor and Kymlicka helped develop. Much of this criticism has followed from the explosion of theoretical research that

draws on legal cases and political case studies in which diversity and equality, or cultural autonomy and individual rights, are seen to conflict. A key criticism made against the "politics of recognition" is that it works at cross-purposes with a politics of redistribution in the sense that political resources and activism devoted to enhancing recognition sap efforts to amend the unfair distribution of resources (see Fraser 1995). According to these critics, material inequality – including poverty, lack of education and employment opportunities, and inadequate health care and social benefits (which putatively don't count as matters of recognition) – has a more profound impact on the well-being of minorities than denials of recognition. A key criticism made against liberal multiculturalism is that cultural accommodation is insufficiently radical to deal with the aftermath of colonialism and with the kind of oppression that many ethnic groups and indigenous peoples face. These critics, including Shauna McRanor in Chapter 3, argue that multiculturalism facilitates state power because its main project is to set out the terms by which the state can manage ethnic minorities and indigenous peoples without diminishing its authority or power (also see Day 2002; Dhamoon 2005; Kernerman 2005). They also argue, as do many of the contributors to this book, that the interpretation and understanding of culture are central components for sorting out conflicts among peoples using the frameworks of multiculturalism. Yet culture is also a notoriously ambiguous concept, and most attempts by public institutions, like courts, to define or assess cultures are destined to be controversial.

The tension between cultural autonomy and individual rights is an aspect of many legal cases and political controversies that involve minorities. No one thinks that a single resolution to this tension exists. The relationship between diversity and equality is, in this sense, a good example of why the terms on which people interact and deliberate with each other in diverse societies is the subject of ongoing dialogue and inevitable change. Yet amid this discussion and change, citizens demand that public institutions apply nonarbitrary and fair methods to resolve conflicts between protecting minorities and protecting individual rights and equality. Debates about the meaning and interpretation of culture, what it protects, how pluralistic it is, and its relation to individual autonomy, identity, recognition, and freedom are central components of the project to devise methods of inquiry that treat minorities fairly. The new legal instruments and conceptual frameworks examined in this book are some of the tools with which this sort of exploration takes place.

Themes and Approaches

The particular meaning of any right is bound to the social and political debates, negotiations, and commitments that inform the history of the country.

To understand our rights tradition in any other way is to understand it unhinged from the particular groups and precise protections, including the limits and gaps in these protections, that have been either the subject of intense debate (such as the rights of racial minorities) or, until recently, the subject of little debate at all (such as the rights of gays and lesbians). The meaning of rights in Canada, and the character of the freedom minorities enjoy relative to majorities, is bound to this history and to the needs and demands of the particular groups that have been active participants in this history.

This is another way of saying that rights traditions do not exist apart from the cultural and historical debates, negotiations, and commitments among particular peoples. All rights traditions are informed by concrete attempts to accommodate individuals, minorities, and majorities. This does not mean that all peoples in Canada have been accommodated fairly. To the contrary, the meaning of rights in Canada is also informed by the gaps in rights protection. For instance, approaches that only guarantee rights to each individual are now generally viewed as naïve or neglectful of communities whose central values or fragile status require communal rights for protection. The meaning of rights is also informed by the particular groups that have been treated unfairly. For example, the meaning of freedom of religion was historically shaped by relations between Catholics and Protestants, and failed to comprehend the sort of disadvantages faced by Jehovah's Witnesses in the 1950s, by Sikhs in the 1990s, or by Muslims today. And finally, the meaning of rights was in part shaped by the attempts made to balance the protection of minority communities with the fair treatment of women and children within these communities. To understand what freedom of religion or cultural rights mean in Canada involves understanding how these kinds of conflicts have been dealt with historically. All rights traditions are tied to the particular character of the debates in which they have been historically implicated. And the history to which they are tied is messy, full of different ideas and ideals of accommodation and autonomy, some of which, today, are viewed as unjust and biased, and others of which addressed one problem but created many others.

This book does not aim to survey this history, although several contributors provide useful historical accounts that help to explain why new approaches are needed. The main aim is to explore new approaches to address the goals and problems associated with the accommodation of cultural, religious, and national minorities in Canada. The volume brings together nine scholars from philosophy, law, politics, and anthropology whose work critically examines accommodation strategies and means of mutual recognition. Taken together, four themes inform their contributions and represent four areas in which the accommodation or autonomy of minorities is the subject of particularly intense debate in Canada.

The first theme is the tension between, on the one hand, recognizing the self-determination of Aboriginal people and, on the other hand, guaranteeing rights that carry with them homogenizing effects that Aboriginal peoples rightly resist. James Tully provides a leading account of the nature of different kinds of struggles over recognition that have arisen in the last forty years. He shows that these struggles engage the norms of recognition themselves and are dialogical, enduring, and imperfect. His chapter provides the most compelling account to date of why institutions must be designed to facilitate rather than impede struggles over recognition, which requires them to understand and facilitate "dialogical civic freedom."

As one of the few theorists writing today who defends the assessment of minority identities by public institution like courts, I argue, in Chapter 2, that assessing the claims groups advance about their identity is a conventional part of democratic politics and one that often cannot be avoided in diverse communities. Rather than trying to excise identity from democratic politics, public institutions must develop fair and transparent criteria to guide their assessments of identity. In this context, I critically examine the distinctive culture test developed by the Supreme Court of Canada to see how it fares as such a guide.

In Chapter 3, Shauna McRanor provides one of the most powerful accounts of why cultural accommodation strategies are unjust to Aboriginal peoples. What McRanor calls "liberal culturalism" depoliticizes culture as a means to accommodate it. She argues that culture is irrevocably political in nature, and cultural accommodation is thereby irrevocably tied to the distribution of power. Accommodation strategies end up being a means to undermine rather than enhance or protect the freedom of indigenous peoples.

The second theme focuses more acutely on the tensions between protecting culture and protecting rights. Cindy Holder, in Chapter 4, takes the debate to the international level and shows that the concept of cultural rights, although invoked throughout international legal debates, is neither used nor understood uniformly. Holder's analysis cuts through these muddy waters and proposes that culture be interpreted as an activity to which all people ought to have access and thereby a basic right. The most difficult problems that plague "cultural rights theory" cease to be so confounding using this innovative solution.

Neil Vallance provides, in Chapter 5, one of the strongest arguments against the concept of culture being used by the courts and in legal cases. With the eye of an anthropologist and a lawyer, Vallance compares cases involving different minorities that show the Supreme Court applies the term "culture" inconsistently and in a manner that potentially restricts the rights of Aboriginal peoples. Vallance argues that the court's inconsistency and lack

of critical awareness render discussion of culture ill-suited to the reification of legal processes and decisions.

The third theme is the conflict between the accommodation of minorities and protection of the rights of vulnerable members within minority communities. In Chapter 6, Maneesha Deckha offers the most comprehensive survey to date of ethical feminism's resources for addressing problems of cultural and sexual justice. Deckha argues that, of the many approaches, a "differentiated" approach to culture is able to avoid the unjust subordination of minorities and women while also ensuring that discrimination and repression of dissent are not the prices paid by some for the cultural protection enjoyed by others.

Colin Macleod's scholarship on children's rights focuses, in Chapter 7, on the tensions between adults' interests in securing cultural and religious accommodation, and children's interests in developing and protecting their own identities, as well as in securing protection for their basic welfare interests including access to resources and opportunities. Macleod's work goes further than any other scholarship in political philosophy to develop a framework that provides a means to understanding the distinctive interests of adults and children in relation to cultural accommodation.

For the fourth theme, two chapters explore and shape the direction of new approaches to protecting religious minorities in Canada. John McLaren's authoritative account in Chapter 8 traces the history, character, and uneven protection of freedom of religion in Canada. He argues for a new approach to this right, in which judges would deal head-on and openly with the faith-based reasons religious communities wish to follow the practices they do. This kind of open and respectful dialogue, though seemingly bold, is already evident, though inconsistently so, in the approach to religious freedom adopted by Canadian courts.

In Chapter 9, Jeremy Webber also explores how freedom of religion has been interpreted in Canadian jurisprudence, and argues, in what is certainly the most thoughtful reflection written on the philosophical underpinnings of this right in Canada, that religious freedom has an irreducible religious content. The right to freedom of religion is not neutral between religious and secular beliefs, but is founded on a distinctive valuing of religious belief. Freedom of religion therefore involves a richer set of moral choices than approaches to this right have thus far supposed, and these choices have implications for how the freedom is interpreted and, more broadly, for how religious diversity is accommodated in public life.

Readers will note that much ground is covered in this rich collection of work. But the philosophical approach here holds that all conversations are local and all are anchored in a specific set of examples, debates, and problems. This collection is no exception. Rather than pretend that the

authors here cover the gamut and represent the whole state of scholarship on minorities and Aboriginal rights in Canada, I would point out just the opposite. This book does not reflect, nor does it aim to reflect, the state of the debates about minorities or indigenous peoples in Canada. A collection that did engage in such an ambitious project would be plagued by what in my mind are insurmountable problems related to what is included and excluded, what is marginalized and what is represented as central. Too often in scholarship that strives for this level of generality, the reader is offered a product that either surveys the landscape in terms of regional problems (a common Canadian approach that only serves to underline the implicit fact that Toronto, Montreal, and Vancouver dominate popular concerns about minorities) or offers an ideological survey of sorts (thus tipping the metaphorical hat to the liberal values that implicitly set the standard from which all discussions deviate).

The enthusiasm for this book is founded largely in its partiality and local roots. The perspectives and preoccupations of the authors are both broad and narrow. The concerns of these scholars tend to be focused on questions that engage religious freedom and indigenous rights, feminism, children's rights, and the problems of racism. Each of these themes not only describes the contribution of each author but also informs the pieces implicitly. It is with an eye on the same sorts of problems, and on gaps with respect to others, that the perspectives of these authors come alive. This is not to suggest that the gaps are not true gaps or that their absence doesn't skew the conversation. These are certainly relevant concerns. But they are the sort of concerns that we should have about all conversations, whether they are in Nanaimo or Toronto. They are local and incomplete.

Note

1 The political theory and empirical research on deliberative democracy is extensive. Some of the best studies include Ackerman and Fishkin (2004); Bohman (1996); Chambers (2001); Deveaux (2003); Tully (1995); and Warren (2004).

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1
Reconciling Struggles over the Recognition of Minorities: Towards a Dialogical Approach

James Tully

The contributors to this volume were asked to respond to the following question:

> How can measures to protect the freedom of cultural, linguistic, national, and religious minorities be reconciled with measures to protect other fundamental rights when conflicts between the two arise? This question has been historically important in many nations and in the context of developing doctrines of religious freedom, multiculturalism, federalism, and Aboriginal self-determination and self-government. The need to develop a method of resolving such conflicts will continue to grow as many nations become more diverse through immigration, and more committed to decolonization and to recognizing distinctive aspirations of cultural groups.

Over the last forty years, the volatile conflicts among individuals, minorities, and majorities over these diverse concerns have been characterized as "struggles over recognition." Various solutions for reconciling these struggles have been presented by the individuals and groups involved and by decolonization and anti-imperialism spokespersons, indigenous peoples, policy communities, nongovernmental organizations, courts, parliaments, states, international organizations, and legal and political theorists. This chapter is not another solution in the form of the definitive theory of recognition of individuals and groups or the definitive theory of dispute reconciliation procedures. Rather, it is a reflection on aspects of the field of both struggles for and against recognition of various kinds in practice and in the theoretical literature that has developed in response to these local and global conflicts over the last forty years.

If we stand back and reflect on the recent history of the practice and theory of struggles over recognition, we can see a certain trend. It is not the only trend nor the dominant one, but it is significant. It can be seen as a learning process undergone to some extent by the agents involved – by

citizens engaged in the conflicts on the ground, policy communities in various orders of government, nongovernmental organizations, state and international courts, and legal and political theorists. The aim of this chapter is not only to describe the trend but also to characterize it in such a way that we can learn from it. This historical and critical reflection on the recent successes and failures in the recognition of minorities can teach us a new orientation to reconcile 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 what I will call the *dialogical civic freedom* of citizens engaged in and affected by struggles over recognition.

This chapter explores the learning process in five steps. The first sets out the defining features of struggles over recognition. The second summarizes the dominant way in which these conflicts have been approached in practice and theory – the monological and finality orientation – and the problems with this approach. The third step introduces the dialogical approach and the reasons for it. The transition from the ideal of reaching a final consensus to the reality of irreducible reasonable disagreement is examined in the fourth step, while the fifth gathers these trends together in defence of an orientation grounded in dialogical civic freedom to reconcile struggles over recognition. This orientation consists in a turn to studying the activities of struggling for and against a norm of recognition, rather than focusing on the final resolution of these struggles, as the site of civic freedom and citizen identity-formation. For if the five steps in this trend are significant and enduring, it is unlikely that there will be definitive reconciliations of struggles over recognition. The struggles are likely to be enduring features of culturally diverse political and legal associations. The central questions then become, first, how do we 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 to be able to negotiate reasonably fairly without recourse to force, violence, and war? Yet, second, how do we ensure that participation in these open institutions of negotiation (institutions whose norms of recognition must also be open to negotiation) helps generate a sense of attachment to the system of governance under dispute, even among those who do not always achieve the recognition they seek? A short 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?

The wide variety of conflicts over the appropriate forms of the recognition of minorities vis-à-vis individuals (outside as well as inside the minority in question) and other minorities and majorities have come to be characterized

as "struggles over recognition." The first reason for this characterization is that such conflicts are *not* seen as the 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 recognition of the other members of the system of government of which the minority is a member. No members (including parliaments, courts, and states) transcend the field of struggle. The second reason is that the number of other members affected is almost always more than one, so these struggles cannot, except in the most simplified cases, be conceptualized as two-member struggles between self and other, 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 to Sartre and Fanon, tended to assume. That is, struggles over recognition are relational and mutual rather than independent, and they are multiple rather than dyadic. In short, they are struggles "over" recognition, not simply "for" recognition.

The most perspicuous way to conceptualize 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 recognize each other *as* members and coordinate their interaction. Hence, struggles over recognition are, in Habermas' helpful phrase, 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 recognized and governed (1998, 203-38). Let us call these "norms of mutual recognition" and draw out those 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 municipalities, First Nations, provinces, states, supranational political associations, and the United Nations. Classrooms, schools, voluntary organizations, corporations, markets, international human rights regimes, and other systems of action coordination have norms or rules by which the partners recognize each other and cooperate. Acting in accordance with the norms under which the members (individuals and groups) recognize each other, and to which they are subject in their cooperative activities, gives the members their characteristic forms of relational subjectivity or "identity" *as* members, for example, as "subjects" of such and such a government. There are three main axes of the forms of subjectivity of members (as members): (1) members' characteristic discursive forms of self-awareness or self-consciousness, (2) their characteristic nondiscursive forms of conduct in the cooperative system, and (3) their access to resources through the rights

and entitlements attached to the identity under which they are recognized. Norms always normalize or subjectify to varying degrees, as Weber and Foucault have famously shown. Due to the normalizing and relational character of the norms, a conflict that modifies the way one member is recognized necessarily alters the forms of recognition, types of subjectivity, modes of cooperation, and access to resources of all other members in the system of cooperation to some extent.

Further, there are several norms of mutual recognition to which we are subject as members of various associations. While the system of legal rules is the most obvious example, norms can also be cultural, religious, familial, educational, class, medical, corporate, customary, covert, and so on. Individuals are usually subject to many and overlapping norms of mutual recognition and corresponding identities: landed immigrant, individual, male, female, transsexual, family member, member of this or that religion or culture, Vancouver Islander, British Columbian, westerner, indigenous or non-indigenous, union member, retiree, gay or heterosexual, Canadian, and so on. They 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 members impose and modify the norms themselves or through their representatives. In other forms of association, norms are imposed nondemocratically, behind the backs of the members, as in markets and other complex functional systems, or covertly, as in deeply sedimented racist and sexist customary norms. Some norms of mutual recognition are egalitarian, at least in theory, such as individual citizenship; others hierarchical, such as the elaborate ranks in educational systems, bureaucracies, corporations, or the recognition of linguistic groups; some are fixed and relatively immovable systems of domination; others more flexible and open to modification by those subject to them.

A struggle over recognition erupts whenever a prevailing norm of mutual recognition is experienced as intolerable by (some of) the individual or collective agents subject to it. They challenge it and it becomes the site of contestation and struggle. This is the second quality of norms. Although acting in accord with a norm subjectifies or normalizes the actors, it is also possible for those individuals and groups subject to a set of norms to turn against them, to call a norm into question, to challenge its validity, and to struggle to negotiate its modification (in various ways) with the other members who hold it in place, except in extreme cases of total domination. Accordingly, norms are said to have a dual quality: they are both normalizing and normative.[2]

The reasons for a challenge, as we shall see, can be various: because, for example, the prevailing norm fails to recognize individuals or groups at all (exclusion), or it misrecognizes them (as, say, a band rather than a people, a

minority rather than a nation, a religious minority rather than a civilization), or it is imposed undemocratically, or, more recently, it recognizes 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). Finally, a "struggle" can also take a variety of forms: the alteration of customary understanding of interrelated selves and others through the open-ended narrativity of everyday dialogue (for example, the way we recognize each other changes over the course of interaction); a relatively voluntary negotiation and amendment of the contested norm of mutual recognition by the partners subject to it, in the best of circumstances; overt compliance with an imposed and oppressive norm, coupled with covert thoughts and acts of minute resistance, as in residential schools and other total institutions; major legal, political, and constitutional negotiations through legislatures, courts, and referenda; campaigns of civil disobedience; and more violent forms of armed struggle, such as civil wars, anti-imperialist wars of decolonization and self-determination, and the wide variety of intermediate ethnic, cultural, and civilizational conflicts today.

Let this stand as a compressed introduction to the idea of struggles over recognition as struggles over the existing intersubjective norms of mutual recognition in a system of governance; that is, as struggles over the relationships of communication and power through which we are governed. Other features will be introduced in the following sections. I hope to show that this intersubjective and relational way of approaching conflicts over the recognition and accommodation of individuals and groups enables us to see more clearly the trends and learning processes that the field has undergone over the last several decades.

The Monological and Finality Orientation

I will begin by describing the predominant early orientation to struggles over the recognition of multicultural minorities, nations within existing constitutional states (multinationalism), and indigenous peoples. In this approach, theorists, courts, and policy makers looked for a definitive and final solution to these struggles. They did 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. 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 was to increase rather than resolve the conflicts.

In response to the failure of attempts to deny or subordinate the recognition of minorities relative to recognizing 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, therefore, 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 rights. Despite the benefits of this second phase of liberal and nationalist approaches to minority recognition, these attempts generated further problems in theory and practice. The most powerful and vocal minorities gained public recognition at the expense of the least powerful and most oppressed; the rights tended to freeze the minority in a specific configuration of recognition; they failed to protect minorities within the groups who gained recognition; and they did little to develop a sense of attachment to the larger cooperative association among the members of 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.[3]

In retrospect, we can now see that there are two problematic features of this early orientation in both its phases. First, the solutions are handed down to the members from on high, from theorists, courts, or policy makers, rather than passed 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 "straight jacket."[4] Let's call these the monological and finality presumptions respectively and take up each in turn.

From Monologue to Dialogue

The first step in transforming the way we think about conflicts over recognition is to move from the presumption that there can be monological solutions, handed down by 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 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 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 civilizational conflicts through global dialogue.

What are the main reasons for this first step, for the hypothesis that an acceptable norm of mutual recognition should be worked out as far as possible by those who are 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 considerations that have moved many theorists, courts, policy makers, and citizens to take this dialogical turn.

First, in recent decades there has been a deepening commitment to democracy in both theory and practice, not in the institutionalized, 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" (1995, 93). 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.[5]

The second consideration is a condition of the acceptability of a norm of mutual recognition. The identities under which individuals and groups are reciprocally recognized in any form of cooperation actually count as *their* identities only if they can accept them from a first-person perspective; that is, if they can acknowledge them as their own. If an elite determines them, they are experienced as imposed and alien. It follows that the persons who bear the identities 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. Due 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 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 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 would therefore be seen or felt as imposed and unacceptable.

The third reason relates to an important characteristic of the identities recognized under any norm. Identities, and thus acceptable forms of recognition and modes of cooperation with others, are partly dependent on, and constituted by, the dialogical exchange of reasons over them. This is the power of the exchange of reasons. 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 because engagement in the give-and-take of reasons for and against different proposed norms of mutual recognition from the different perspectives of the participants changes (and often transforms) the self-understanding of the interlocutors by breaking down the unexamined group prejudices, stereotypes, and blind spots that they bring to the dialogue.

Thus, our understanding of who we are, of the partners with whom we are constrained to cooperate, and hence of the acceptable norms of mutual recognition change in the course of the dialogue. 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 (Young 1997, 38-74; 2000, 52-120).

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, or a distant ministry are, in contrast, probably least able to meet this requirement and more likely to universalize 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 recognized as "peoples" with the "universal" right of self-determination, based on prior occupancy and sovereignty, and thus to be recognized as "equal" in status to other "peoples" under international law. As a result, the monological orientation, with its preset categories of recognition, misconstrued the nature of the demands.[6]

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 enormously unequal: French and English are 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 equality 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 a majority having the power to suppress or misrecognize 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 conflicts 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 (Benhabib 2002; Laden 2001, 131-85).

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.[7] 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, and thus taking the dialogical step.[8] As a result of this learning experience, the maxim *audi alteram partem* (Always listen to the other side) has come 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.

From Consensus to Reasonable Disagreement and Non-Finality

Recall the second problem with the 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 (and critical ideal) that no matter what procedures for the exchange of reasons are applied to the dialogue about 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 (with good but not decisive reasons for accepting it), even though some interlocutors will have good but not decisive reasons for not accepting it.

There are several reasons for this step from consensus to accepting 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.[9] In practice, this may seem an obvious point to anyone familiar with negotiations.

First, 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 structure the negotiations if they do. Time is always limited; a decision has to be made before all affected have had their say, 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. Second, 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, nonconsensus and reasonable disagreement seem inevitable. Third, there is always a certain room to manoeuvre – to appear to agree, yet to think and act differently – 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 instance of acting in accord with a norm of mutual recognition, the members of an association subtly alter it through interpretation, application, and negotiation (Taylor 1995, 165-80). 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 dis-

agreement to oppressive norms in day-to-day life (De Certeau 1988; J. Scott 1990).

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. Reasonable "dissent is inevitable," as the Supreme Court of Canada nicely puts it (*Reference re Secession of Quebec,* para. 68).[10]

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 could still 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 or unreasonable claim.[11]

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. 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 are plural and open to question in the course of the negotiations.

In practice this has led to a whole new field of alternative dispute-resolution methods, and in theory has led to approaches that highlight different types of dialogue: deliberative democracy, communicative democracy, deliberative liberalism, agonistic democracy, and so on.[12] It is not just 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 analyzed with different approaches. Most importantly, if we are to understand dialogical interaction in all its variations and complexity, we need to study more than some abstract and limited model of "conversation" or "deliberation." Rather, we must study the full range of strategic, communicative, deliberative, and decision-making phases,

from Intifada-like strategic bargaining by recourse to armed struggle at one end through to the idealized calm and nonstrategic exchange of an agreed-upon range of public reasons on which political philosophers tend to focus.[13]

Two conclusions follow from these reflections on theory and practice. First, in the early phases of research in this field, 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. For example, struggles classified as conflicts over distribution, where workers fight for a say in the workplace and environmentalists negotiate for a say over the way their employer's production affects the environment, are also contests to alter the way they are recognized as members. That is, they move from not having a right to a say to having such a right as part of their identity as workers or employees. 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 and redistribution. To use a familiar example, the struggle of the Iraqi people, or of a Kurdish minority within Iraq, to be recognized as a free and self-determining people is also a struggle over the control of their oil reserves, just as the struggle by the United Kingdom and the United States to have Iraq recognized as an open, free-trade, and free-market society is a struggle to ensure that their oil reserves are controlled by the wealthy and powerful.[14]

Second, for the reasons we have surveyed, neither the isolated theorist, court, or policy maker, nor the members engaged in the struggles and democratic dialogues, nor 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 reasonable disagreement (overt or covert) that cannot be eliminated. 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, negotiations to reconcile conflicts over recognition should be dialogical in form, potentially ongoing in practice, general in range, and inseparable from other types of conflict.

Civic Freedom and Practices of "Citizenization"

What implications follow from the learning process we have surveyed and the transformation it brings about in understanding the reconciliation of conflicts over the recognition of minorities?

First, 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 institutionalization 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 this agreement is open to review and possible renegotiation in the future. This is the fundamental democratic or civic freedom of citizens – having an effective say in a dialogue with their governors over the norms through which they are governed.

Let us call this fundamental freedom "dialogical civic freedom." It is not only the right or freedom to speak out against oppressive, exclusionary, or assimilative norms of mutual recognition, as important as freedom of speech is. For it to be effective, it also 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 (discussed above) to bring the powerful to the table. As the Supreme Court explains, this dialogical civic freedom (formulated as the right to challenge a prevailing norm and the duty to negotiate if the challenge is well-supported) underlies and provides the basic test of legitimacy of any legal or constitutional norm in Canada, including the *Charter of Rights and Freedoms (Reference re Secession of Quebec* paras. 68-69). And we have seen that this basic freedom is a formulation of the normative quality of norms. Those members who are subject to norms are free in the sense that there is a field of possible responses available to members in which they can test the acceptability of norms. 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, it *eo ipso* 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 appropriate to free and open, culturally diverse political associations. 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 in the ways one is governed. In complex contemporary political and legal associations, one of the fundamental ways that this process of becoming a citizen 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.[15]

The partners involved, while struggling for recognition of their group, nevertheless come to develop an attachment to the larger association, precisely because it allows them to engage in this second-order free and 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 were suppressed and a norm of mutual recognition were imposed unilaterally. The turn to violence and terrorism increases as the openness to democratic dissent and effective dialogue decreases.

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 learned that there were good reasons on the other side and vice versa; they probably gained 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 such a challenge. 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 the Greek term for contest, *agonistics,* which is now widely used to characterize these struggles, is appropriate.

The dialogical approach thus provides a genuinely democratic solution to the problem of generating a sense of solidarity (and thus peace) in culturally diverse societies. As we saw, the monological and finality orientation 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 orientation, the citizens work out the limits of mutual recognition themselves (as they learn the limits of their own and others' demands through dialogue) and thus identify with

them; they acquire a sense of attachment to, and respect for, their culturally diverse fellow citizens and institutions through the dialogical experience. If this analysis is correct, the path to global peace runs through practices of civic freedom and dialogical reconciliation.[16]

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. First, the theorists, courts, and policy makers have an important yet nonsovereign 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 approach, 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.[17] Rather, the role of theorists, policy makers, and courts, as well as other concerned groups, is to broaden and enter indirectly into 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 criticize the procedures and outcomes; and to 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.

Second, while dialogue is essential for all the reasons that have been given, it is necessary to distinguish it from decision making. The asymmetries in recognition and power that are the underlying cause of a struggle over recognition carry over into the forms of negotiation. The ability of the members' exchange of reasons 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) 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-making institutions at the end of the dialogue, such as courts, parliaments, international human rights regimes, nonpartisan 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 rule of norms in an equal and reciprocal relationship with the right of citizens to test the acceptability of claims and rules through dialogical civic freedom.[18]

Conclusion

If the trend outlined above is significant and worthy of further study, then the type of research that is able to throw critical light on conflicts over recognition will also 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. Normative studies, as we have seen, will continue to play an important yet less lofty role. However, these studies will form part of a broader range of academic research in a relationship of reciprocal and ongoing elucidation with the parties engaged in struggles over recognition, where research throws critical light on the limitations and possibilities in practice, and practice tests the relevance of theory. This more practice-oriented research has developed over the last decades in concert with the trends outlined above and is now well-established. 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 recognized, governed, and blocked from entering into a dialogue over their legitimacy, thereby rendering assimilation, silent oppression, or the recourse to nonviolent 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. It does not celebrate 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 that induces individuals, groups, communities, regions, and minority nations to perform their identity-related

differences and to enter into dialogues and negotiations over their norms of action coordination themselves in downloaded and quasi-autonomous regimes of self-rule.[19] Thus, this kind of research studies who sets the agenda in the negotiations, what techniques of assimilation and domestication are at work in specific types of negotiation (such as treaty negotiations with First Nations), which norms of mutual recognition in a structure of negotiation are insulated from challenge, to what extent recognition is detached from changes in the unequal access to resources (the third axis of analysis), and to what extent are seemingly free and open procedures of negotiations governed at a distance by national governments, global corporations, international regulatory regimes, and military imperialism. In short, it asks to what extent civic freedom is subtly encouraged, manipulated, and governed within these new regimes of inclusive and negotiable norms of mutual recognition in order to make the world "safe for difference."[20]

This new partnership between academic research and struggles over the recognition of minorities thus continues the perennial task of testing the limits imposed on our civic freedom by means of our critical freedom.

Notes

1 For more detailed arguments and cases in support of the approach advanced in this chapter see Gagnon and Tully (2001). I would also like to thank Jakeet Singh for many helpful discussions of this chapter.
2 For a groundbreaking survey of the dual quality of norms see the forthcoming paper by Weiner.
3 For examples of these two phases see Barry (2000), Cairns (2000), and Kymlicka (1995a and 1995b). The limitations of the monological and finality orientation in both phases are analyzed in detail in Kelly (2002). Kymlicka has moved somewhat closer to a dialogical approach in his more recent work. See Coulthard (2003) and McRanor (this volume) for objections to his recent work from the perspective set out here.
4 "Straight jacket" is the phrase used by the Supreme Court of Canada to characterize and criticize the finality presumption. See *Reference re Secession of Quebec,* para. 150.
5 See Laden (2001) and Rawls (1996) for this dialogical reformulation of liberalism.
6 See Ivison, Patton, and Sanders (2000) and Venne (1998).
7 For example see Cairns (2000).
8 An excellent example of the turn to actual cases is Carens (2000).
9 See Rawls (1996, 54-58) and the deepening of Rawls' argument for reasonable disagreement in Waldron (1999).
10 For an analysis of this case see Tully (2001).
11 This is the approach of Habermas and his followers. The classical statement of his consensus view is Habermas 1995.
12 For a critical survey of these different approaches see Dryzek (2000).
13 For a recent survey of the complexity of constitutional deliberations regarding recognition claims in Canada and the various approaches to them see Noël (2003).
14 For a discussion of the relations between recognition and redistribution see Emcke, Markell, and Tully (2000).
15 For a defence of these first two implications see McKinnon and Hampsher-Monk (2000, 1-12) and Maclure (2003a and 2003b).
16 Alan Cairns (2000, 2003) sees this problem of solidarity as the central problem facing culturally diverse societies. The monological and finality solution that he proposes in Cairns 2000 has, I believe, the defects that I outline in the adjoining paragraph.

17 For example, Habermas (1996) and Waldron (1999) tend to equate just agreements with the de facto outcomes of existing representative democratic procedures and majority rule institutions respectively.
18 I would like to thank Oliver Schmidtke for pointing out that I failed to address this point in the conference version of this chapter. For the co-equal status of justice and freedom see Tully (2002).
19 The pioneering study in this second line of analysis is Rose (1999).
20 For critical studies in these two lines of practice-oriented research see Abu-Laban and Gabriel (2002), Alfred (2001), Coulthard (2003), Day (2000), and Strong-Boag et al. (1998). I am indebted to David Scott for pointing out the tendency to complacency in the dialogical literature and the critical need for the second line of research (see D. Scott 2003).

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