

CHAPTER I

Demands for constitutional recognition

The constitutional question raised by the politics of cultural recognition: six examples and three similarities

The question I wish to address in this book is the following. Can a modern constitution recognise and accommodate cultural diversity? This is one of the most difficult and pressing questions of the political era we are entering at the dawn of the twenty-first century. The question can even be said to characterise the coming era, for when it is not described in relation to the preceding period, as a post-imperial or post-modern age, it is often described in its own terms, as an age of cultural diversity. The question is not whether one should be for or against cultural diversity. Rather, it is the prior question of what is the critical attitude or *spirit* in which justice can be rendered to the demands for cultural recognition.

We can begin to gain an initial grasp of this elusive question by briefly surveying the range of political struggles which have rendered cultural diversity problematic, causing it to become a locus of political action and philosophical reflection. In contemporary political vocabulary, the various struggles for recognition of cultural diversity are classified as different in kind and studied by different specialists. There is no single term which covers them all. As a result, whatever similarities and differences in degree, rather than in kind, may exist among them are hidden from view by our ordinary forms of language. Accordingly, I will introduce the phrase 'the politics of cultural recognition' to gather together the broad and various political activities which jointly call cultural diversity

into question as a characteristic constitutional problem of our time.

The most familiar form of the politics of cultural recognition is the claims of nationalist movements to be constitutionally recognised as either independent nation states or as autonomous political associations within various forms of multinational federations and confederations. As existing nation states and former empires are hard pressed by these cultural demands from within, they are also faced with pressures to recognise and accommodate larger, supra-national associations with powerful cultural dimensions, such as the European Union and the North American Free Trade Agreement. Caught in the interstices of these large and volatile struggles, longstanding linguistic and ethnic minorities advance claims for constitutional recognition and protection.

Cutting across the complex terrain of these three forms of demand, and frequently conflicting with them, the multicultural or 'intercultural' voices of hundreds of millions of citizens, immigrants, exiles and refugees of the twentieth century compete for forms of recognition and protection of the cultures they bring with them to established nation states. These intercultural demands (as I shall call them) range anywhere from schools and social services in one's first language, publicly supported TV, film and radio, affirmative action, and changes in the dominant curricula and national histories, so that they respect and affirm other cultures, to the right to speak and act in culture-affirming ways in public institutions and spheres. In response, modern societies have begun to be called 'multicultural', yet with no agreement on what difference this makes to the prevailing understanding of a constitutional society.

Complicating further this bewildering landscape, the demands of feminist movements for recognition are raised within and across each of these struggles for national, supra-national, minority and intercultural recognition. The claim of cultural feminists, broadly speaking, is not only that women should have an equal say within the constitutional institutions

of contemporary societies and their authoritative traditions of interpretation. Because the constitutional institutions and traditions of interpretation were established long ago by men to the exclusion of women, it follows that they should be amended from the ground up, so to speak, in order to recognise and accommodate women's culturally distinctive ways of speaking and acting, so that substantive gender equality will be assured in the daily political struggles in the institutions the constitution founds. Making this task even more difficult, women's culture itself is not homogeneous, but multicultural and contested.

The last example of the politics of cultural recognition, yet the first in time and history, is the demands of the 250 million Aboriginal or Indigenous peoples of the world for the recognition and accommodation of their twelve thousand diverse cultures, governments and environmental practices. Throughout the world, they are fighting to be recognised as First Nations in international law and in the constitutions of modern societies that have been imposed over them during the last five hundred years of European expansion and imperialism. Their struggles for constitutional recognition intersect and clash with the other examples of cultural recognition in many different ways.

The struggles of the Aboriginal peoples of the world, and especially those of the Americas, for cultural survival and recognition are a special example of the phenomenon of the politics of cultural recognition. By my lights, they are exemplary of the 'strange multiplicity' of cultural voices that have come forward in the uncertain dawn of the twenty-first century to demand a hearing and a place, in their own cultural forms and ways, in the constitution of modern political associations. By 'exemplary', I do not mean that their challenge is an instance of a general rule or an ideal type of the politics of cultural recognition, but that it is a particularly enlightening example.

There is abundant scholarship on constitutionalism from the perspective of nationalism, supranationalism, linguistic and ethnic minorities, interculturalism and feminism. There

is also considerable specialised scholarship on Aboriginal peoples and international law and the constitutional law of specific countries. However, there is little on the Aboriginal peoples and the historical formation of contemporary constitutionalism. One of the central arguments of this book is that if constitutionalism is approached from the perspective of the struggles of Aboriginal peoples, unnoticed aspects of its historical formation and current limitations can be brought to light. I believe that the vision of constitutionalism that this unique perspective affords, in conjunction with the perspective of the other, more familiar, demands, is capable of transforming the way we think about constitutionalism.

If sharp boundaries are drawn around each of these six types of cultural recognition on the basis of their dissimilarities and they are studied separately, as is usually the case, then the similarities among them are overlooked. Their separation in theory is reinforced by the fact that they clash, often violently, in practice. It is thus often assumed that they are incompatible and incommensurable. However, when they are rearranged and grouped together as examples of the politics of cultural recognition, and we look and see, their disregarded resemblances come to light and disclose the landscape of contemporary political conflict which raises the question of constitutionalism and cultural diversity.

Among the many similar aspects, three are important for the purposes of this book. First, demands for cultural recognition are aspirations for appropriate forms of self government. The forms of self rule appropriate to the recognition of any culture vary. Some, such as nationalist movements and Aboriginal peoples, strive for their own political institutions. Others, such as linguistic minorities, multicultural groups and women, seek to participate in the existing institutions of the dominant society, but in ways that recognise and affirm, rather than exclude, assimilate and denigrate, their culturally diverse ways of thinking, speaking and acting. What they share is a longing for self rule: to rule themselves in accord with their customs and ways.

The call for forms of self rule, the oldest political good in the world, has been obscured by the redescription and adjudication of the various claims in terms of nationalism, self determination, the rights of individuals, minorities and majorities, liberalism versus communitarianism, localism versus globalism, the politics of identity and the like. Although these dominant and exhaustively analysed categories catch aspects of the phenomenon, they mis-identify the shared aspiration and segment it into a cacophony of heterogeneous claims. The resemblance is further obscured by the sheer diversity of forms of self rule they long for and, as we shall see, by the restricted conception of self government available in the prevailing language of constitutionalism.

The second similarity is the complementary claim that the basic laws and institutions of modern societies, and their authoritative traditions of interpretation, are *unjust* in so far as they thwart the forms of self government appropriate to the recognition of cultural diversity. The sovereignty of the people is in some way denied and suppressed, rather than affirmed and expressed, in the existing constitutional forms, thereby rendering unfair the daily politics that the constitution enframes. The constitution, which should be the expression of popular sovereignty, is an imperial yoke, galling the necks of the culturally diverse citizenry, causing them to dissent and resist, and requiring constitutional amendment before they can consent. Again, the similarity of the injustice claimed in each of the six examples is obscured by the wide variety of forms it takes.

The final similarity I wish to draw to your attention is the ground of both the aspiration to culturally appropriate forms of self rule and the claim of injustice. It is the assumption that culture is an irreducible and constitutive aspect of politics. The diverse ways in which citizens think about, speak, act and relate to others in participating in a constitutional association (both the abilities they exercise and the practices in which they exercise them), whether they are making, following or going against the rules and conventions in any instance, are always to some extent the expression of their

different cultures. A constitution can seek to impose one cultural practice, one way of rule following, or it can recognise a diversity of cultural ways of being a citizen, but it cannot eliminate, overcome or transcend this cultural dimension of politics.

Hence, the argument is that if the cultural ways of the citizens were recognised and taken into account in reaching an agreement on a form of constitutional association, the constitutional order, and the world of everyday politics it constitutes, would be just with respect to this dimension of politics. Since the diverse cultural ways of the citizens are excluded or assimilated, it is, to that extent, unjust. Moreover, a certain priority is claimed for justice with respect to cultural recognition in comparison with the many other questions of justice that a constitution must address. Since other questions of justice must be discussed and agreements reached by the citizens, the first step is to establish a just form of constitutional discussion in which each speaker is given her or his due, and this is exactly the initial question raised by the politics of cultural recognition.

So, despite their variety and apparent novelty, the examples of the politics of cultural recognition, in virtue of their three family resemblances, share a traditional political *motif*: the injustice of an alien form of rule and the aspiration to self rule in accord with one's own customs and ways. Seen in this light, they are struggles for 'liberty' in the remarkably enduring sense of this term. From the struggles of the Italian city states for *libertas* against imperial rule during the Renaissance, to the European and American revolutions for liberty in the early modern period, and to the national liberation movements of the twentieth century, 'liberty' has meant freedom from domination and of self rule. What is distinctive of our age is a multiplicity of demands for recognition at the same time; the demands are for a variety of forms of self rule; and the demands conflict violently in practice.

The mutual recognition of cultural diversity: three features of the common ground and three historical movements

Consequently, the question of our age is not whether one or other claim can be recognised. Rather, the question is whether a constitution can give recognition to the legitimate demands of the members of diverse cultures in a manner that renders everyone their due, so that all would freely consent to this form of constitutional association. Let us call this first step towards a solution 'mutual recognition' and ask what it entails.

In the first instance, it cannot be the traditional nationalist recognition of one culture at the expense of excluding or assimilating all others. This widespread constitutional nationalism comes in a variety of types and has been recommended by writers as different as the authors of *The federalist papers* in the 1780s, Johann Gottlieb Fichte in the *Addresses to the German nation* in 1807–8 and Sir John Seeley, in *The expansion of England* in the 1880s. I also believe the solution cannot be to presume that a constitution can avoid recognising any culture. As we shall see, such Esperanto constitutionalism, recently defended by a number of liberal theorists, is an illusion which hides from view the imperial culture embodied in most liberal constitutions, as the classic liberal theorists realised. A recent example of presumed, culture-blind liberal constitutionalism is the Canadian Charter of Rights and Freedoms of 1981. Rather than uniting the citizens on a constitution that transcends cultural diversity, it has fostered disunity. The province of Québec, the Aboriginal peoples, women and the provinces resisted it at various times as the imperial imposition of a pan-Canadian culture over their distinct cultural ways. Many other countries, such as the United Kingdom and New Zealand, have experienced similar public debates over charters of rights and cultural diversity.

The consequence of national and liberal constitutions, which have been the dominant forms over the last three hundred years, is precisely the contemporary resistance and demands for recognition of the members whose cultures have

been excluded, assimilated or exterminated. A just form of constitution must begin with the full mutual recognition of the different cultures of its citizens.

Second, mutual recognition cannot be simply the recognition of each culture in the same constitutional form. There is a tendency to imagine this is possible because 'cultures' are conceived as analogous to the more familiar constitutional concept of 'nations'. Hence, the age of 'multiculturalism' is seen as a kind of extension of the last three centuries of multinationalism with no fundamental change in constitutional thinking required.

When the revolutions of central and eastern Europe overthrew the old imperial constitutions after 1989, the peoples who demanded recognition redescribed their cultures as 'nations' (the most prestigious form of cultural recognition). They then inferred that the only form of constitutional recognition of a nation must be an independent nation state. Under the logic of this inference, they tended to pass rapidly through multinational constitutional federations and to disintegrate into nationally defined states. These revolutions thus continued one of the oldest conventions of modern constitutionalism: every culture worthy of recognition is a nation, and every nation should be recognised as an independent nation state. Although this has been the dominant form of constitutional recognition since the seventeenth century, it cannot be simply extended to the demands for cultural recognition today.

As writers as different as Ernest Gellner and David Maybury-Lewis have argued, the consequence is impractical. There are over fifteen thousand cultures whose members demand recognition, yet a world system of fifteen thousand independent states on this tiny and interdependent planet would be unworkable. It does not follow that the present system of nation states is unalterable, as conservatives have concluded. Change and impermanence have been features of the system since 1648. The international system would still be workable if, say, East Timor separated from Indonesia, Scotland from the United Kingdom, Catalonia from Spain,

Québec from Canada or the predominantly Spanish-speaking states from the United States.

The system would be unworkable only if the norm that every nation should be a state were applied universally as the solution to demands for cultural recognition. The established nation states have constrained the proliferation of states in the past by restricting the application of the term 'nation' in international law. The reason why continuing in this manner is now in question is the sheer number of demands for recognition as nations, coupled with the exposure of the manipulation of the criteria of nationhood in the past to preserve the powers that be.

It is clear that the dominant constitutional norm that every nation should be recognised as an independent state needs to be supplemented by the idea that nations can achieve just recognition in multinational federations of various kinds, such as Germany, Israel–Palestine, India, the United Kingdom, the Russian federation and the European Union. However, even though the *practice* of multinational and multiregional federation is as old as modern constitutionalism, the norm of independent nation states is so predominant that the basic concepts of contemporary constitutionalism are defined in agreement with it. The concepts of the people, popular sovereignty, citizenship, unity, equality, recognition and democracy all tend to presuppose the uniformity of a nation state with a centralised and unitary system of legal and political institutions. Accordingly, when forms of multinational federalism are advanced as solutions to some of the demands for cultural recognition, they appear *ad hoc*, even as a threat to democracy, equality and liberty, rather than as forms of recognition that can be explained and justified in accordance with the principles of constitutionalism.

The more important reason why the two assumptions that cultures worthy of recognition should be nations and nations should be recognised as states need to be revised is that they mis-identify the phenomenon of cultural diversity we are trying to understand. According to the concept of a culture (or nation) that developed with the formation of modern

constitutionalism from the seventeenth to the twentieth century, a culture is separate, bounded and internally uniform. Over the last forty years this billiard-ball conception of cultures, nations and societies has undergone a long and difficult criticism in the discipline of anthropology. As Michael Carrithers summarises in *Why humans have cultures*, it has gradually been replaced by the view of cultures as overlapping, interactive and internally negotiated. Let us look at each of these three features of cultural diversity, for we cannot grasp the politics of cultural recognition without them and the way they transform our understanding of being with others in the world.

The way the inherited normative vocabulary misrepresents the cultural diversity of our time was tragically exposed in the early 1990s across the Ukraine, the Baltic states, the Caucasus, central Asia, Russia and the former Yugoslavia. As new nation states were formed and recognised, overlapping minority cultures within, as well as nationals left without the new boundaries, in turn immediately demanded recognition as nations. Cultural minorities in these minorities in turn demanded recognition and protection. There is no end or exception to this criss-crossing and overlapping of cultures in the world. The tragedy of Bosnia–Herzegovina, or of the Hutu, Twa and Tutsi of Rwanda, Burundi, Zaire and Tanzania in East Africa, is only a recent example of the policies and wars of repression, assimilation, exile, extermination and genocide that compose the long and abhorrent history of attempts to bring the overlapping cultural diversity of contemporary societies in line with the norm of one nation, one state. Aboriginal peoples of America, for example, have suffered similar ethnic cleansing for five hundred years. Far from silencing demands for cultural recognition, these wars in the name of the unity of the nation have been met with unconquerable resistance, as the suppressed cultures snap back like so many bent yet unbreakable twigs, as Sir Isaiah Berlin aptly puts it.¹

Constitutionalism in an age of diversity is yet more difficult than this. Not only do cultures overlap geographically and

come in a variety of types. Cultures are also densely interdependent in their formation and identity. They exist in complex historical processes of interaction with other cultures. The modern age is intercultural rather than multicultural. The interaction and entanglement of cultures has been further heightened by the massive migrations of this century. Cultural diversity is not a phenomenon of exotic and incommensurable others in distant lands and at different stages of historical development, as the old concept of culture made it appear. No. It is here and now in every society. Citizens are members of more than one dynamic culture and the experience of 'crossing' cultures is normal activity. In *Europe and the people without history* (1982), Eric Wolf showed that the interaction and interdependency of cultures is not a recent phenomenon; the cultures of the world have been shaped and formed by interaction for a millennium.

Finally, cultures are not internally homogeneous. They are continuously contested, imagined and reimagined, transformed and negotiated, both by their members and through their interaction with others. The identity, and so the meaning, of any culture is thus aspectival rather than essential: like many complex human phenomena, such as language and games, cultural identity changes as it is approached from different paths and a variety of aspects come into view. Cultural diversity is a tangled labyrinth of intertwining cultural differences *and* similarities, not a panopticon of fixed, independent and incommensurable worldviews in which we are either prisoners or cosmopolitan spectators in the central tower.

Let me illustrate these three features of cultural diversity with an example from Canada. When the former prime minister of Canada, Pierre Trudeau, sought to recognise and affirm an unifying Canadian constitutional identity in the Canadian Charter of Rights and Freedoms, the ten provinces immediately claimed that it failed to recognise the legal and political cultures of the provinces and demanded a constitutional amendment. The government of Québec further argued that the Charter constituted an imperial yoke over

Québec's distinctive French-language and civil-law culture, forged through centuries of interaction with English-language Canada, and that it needed to be amended to recognise Québec's cultural distinctiveness. The 633 Aboriginal First Nations of Canada protested that the Charter oppressed and failed to recognise their Aboriginal cultures: that is, their forms of self government, legal systems, languages and so on.

The way in which Aboriginal cultures were to be constitutionally recognised was then immediately contested by Aboriginal people who live on reserves as opposed to those who live off the reserves. The French-speaking minorities in the English-speaking provinces protested that the provinces had failed to recognise and protect their distinctive minority status, and the English-speaking minority within Québec did the same with respect to Québec's claim to cultural recognition.

Moreover, women protested that the entire exercise was being carried on in a male voice and that the Charter would have to be amended to recognise the substantive equality of women in the basic institutions and traditions of interpretation of the constitution. Women in Québec and women in the rest of Canada, as you will be by now not surprised to learn, formulated their demands for constitutional recognition in slightly different ways, challenging the presumed unity of the nationalisms in Québec and the rest of Canada on the one hand, and of women's cultures on the other. Aboriginal women also protested against the way in which Aboriginal men articulated the identity of Aboriginal cultures. Then, Aboriginal women themselves divided along lines that are familiar around the world today. Some sought to have their voices heard within Aboriginal governments as they were identified by traditional male leaders, while others sought to protect themselves by having the Charter applied directly to Aboriginal governments. Finally, the multicultural groups and visible minorities of Canada demanded recognition of their cultural distinctiveness across each of these constitutional claims.

This Canadian example of cultural diversity is not exceptional. The constitutional negotiations from 1990 to 1994

in South Africa, the velvet revolution and the break up of Czechoslovakia, the Waitangi Tribunal in Aotearoa–New Zealand, the public debates of language and gender in the United States, Faustin Twagiramungu's negotiations towards multicultural rule in Rwanda, the negotiations towards Palestinian self rule or the conflict over minorities in the European Union illustrate the points just as well. Of course, the way the politics of cultural recognition is expressed varies in accord with the constitutional traditions of different societies. In many cases, it remains in the political realm, barely questioning the background constitution, especially if the constitution is flexible. In many other cases constitutional negotiations are unavoidable. When these fail, recourse is made to armed conflict. Often a struggle for recognition ranges across all three strategies, as in the cases of Northern Ireland, the Chukchi of Russia, the Basques, the Maya of the Chiapas region of Mexico, the Sioux nation of the United States, or countless other examples. A tangled labyrinth of cultural voices constitutes the popular sovereignty of contemporary societies.

As a consequence of the overlap, interaction and negotiation of cultures, the experience of cultural difference is *internal* to a culture. This is the most difficult aspect of the new concept of culture to grasp. On the older, essentialist view, the 'other' and the experience of otherness were by definition associated with another culture. One's own culture provided an identity in the form of a seamless background or horizon against which one determined where one stood on fundamental questions (whether this identity was 'British', 'modern', 'woman' or whatever). Having an identity consisted in being oriented in this essential space, whereas the loss of such a fixed horizon was equated with an 'identity crisis'; with the loss of all horizons. On the aspectival view, cultural horizons change as one moves about, just like natural horizons. The experience of otherness is internal to one's own identity, which consists in being oriented in an aspectival intercultural space constituted by the three features mentioned above.

Jacques Derrida, in his brief reflection on European unity, puts it this way:²

What is proper to a culture is to not be identical to itself. Not to not have an identity, but not to be able to identify itself, to be able to say 'me' or 'we'; to be able to take the form of a subject only in the non-identity with itself or, if you prefer, only in the difference with itself [avec soi]. There is no culture or cultural identity without this difference with itself.

Consequently, from the outset citizens are to some extent on a negotiated, intercultural and aspectival 'middle' or 'common' ground with some degree of experience of cross-cultural conversation and understanding; of encountering and being with diverse others who exhibit both cultural similarities and dissimilarities. The politics of cultural recognition takes place on this intercultural 'common' ground, as I shall call the labyrinth composed of the overlap, interaction and negotiation of cultures over time. Of course, mutual recognition is not rendered unproblematic by the reconceptualisation and clarification of the ground on which we stand, for encounters on the common ground are shot through with inequality, misrecognition, domination and strife. However, the problem of mutual recognition is put in a new light and rendered possible by the disclosure of a common ground. Any serious reflection on the problems of constitutionalism in the age of cultural diversity should begin, therefore, with the three features of the common ground as its initial conditions. Yet, despite this transformation in the understanding of cultures, as Clifford Geertz remarks, theorists tend to continue to uphold variations of the old view, inherited from the age of European imperialism, of humans situated in independent, closed and homogeneous cultures and societies, and so to generate the familiar dilemmas of relativism and universalism that accompanied it.³

No one reasonably doubts that these claims for cultural recognition constitute one of the most dangerous and pressing problems of the present age. The racial, linguistic, national, ethnic and gender tensions of these struggles are a dimension

of almost every social relation of modern societies. It is not as if cultural relations could be separated from other social relations and treated in isolation. Culture is a way of relating to others in any interaction, a way of following or challenging a social rule, and so a dimension of any social relation, from a cultural slur in the workplace to the relations among nations. As Hobbes put it at the beginning of modern constitutionalism, the third cause of political conflict is 'a word, a smile, a different opinion, and any other signe of undervalue, either direct in their persons, or by reflexion in their Kindred, their Friends, their Nation, their Profession, or their Name'.⁴ What we need to understand today is the extent to which the solutions advanced by Hobbes and the other modern theorists of constitutionalism are now part of the problem

There is no sign that these struggles will dissipate in the future. Quite the opposite. All the signs indicate that the massive dislocation, movement and interaction of peoples caused by decolonisation and globalisation will increase cultural diversification and conflict. One may greet the coming age with despair, as Sir Isaiah Berlin has done, or with hope, as Carlos Fuentes and Edward Said have recommended. Either way, the question of whether a constitution can recognise and accommodate cultural diversity will be, so to speak, a political centre of gravity of the age, held firmly and irrepressibly in place by the conflicting struggles for recognition that lie around it.

The situation I believe we face can now be brought into focus with a broad and rough sketch. I will fill in the details and nuances in later chapters. Modern constitutionalism developed over the last four centuries around two main forms of recognition: the equality of independent, self-governing nation states and the equality of individual citizens. It also developed in opposition to imperialism. First, in Europe, constitutional nation states defined themselves in opposition to the *imperium* of the papacy and the Holy Roman Empire without, and to the feudal and absolutist society of ranks within. European nations in turn constructed their own

imperial systems over the non-European world, thus adding an imperial dimension to modern constitutionalism.

Second, constitutionalism came into prominence throughout the world as former colonies freed themselves from European imperialism, built equal and independent constitutional nation states, and grappled with their older customs and traditions, while citizens struggled for equal recognition within and the new states created their own empires over Indigenous peoples. The global movement of anti-imperialism, modern constitutionalism and neo-imperialism began with the thirteen colonies in 1776 and continued through the monumental wars of liberation and decolonisation in the nineteenth and twentieth centuries, down to the overthrow of the Soviet imperial system after 1989 and South Africa today. No doubt it will continue.

The politics of cultural recognition constitutes a third movement of anti-imperialism and constitutionalism, this time by the peoples and cultures who have been excluded and suppressed by the first two movements of decolonisation and constitutional state building. Aboriginal peoples, women, linguistic and ethnic minorities, intercultural groups, suppressed nations and supranational associations experience the constitution of modern nation states as an imperial yoke imposed over their cultures, in a manner analogous to the way in which the proponents of the first two movements of constitutionalism experienced the old imperial systems they overthrew. This continuity among the three movements explains why the older language of imperial oppression and liberation has reappeared in the newer struggles and why they are often called struggles against cultural imperialism.

The second continuity is, as I mentioned above, that the people wish to govern themselves constitutionally by their own cultural ways. The difference from the first two movements is that, for the most part, they do not seek to build independent nation states in order to gain independence and self government. Rather, they seek forms of cultural recognition and degrees of self rule on the culturally various common ground within and across existing nation states. Seen in this light, the

politics of cultural recognition is a continuation of the anti-imperialism of modern constitutionalism, and thus the expression of a genuinely post-imperial age.

It is not a radical break, heralding the beginning of post-modern constitutionalism. Yet it is a continuation that cannot be merely assimilated into the conventional forms of recognition available in modern constitutionalism for, as I have indicated, it is these stultifying forms of constitutional recognition that suppress and thwart the cultural identities of those who demand recognition. The task of this book is to investigate how much of the inherited forms of modern constitutionalism needs to be amended to do justice to these tangled demands for cultural recognition. Paraphrasing a famous Cambridge political theorist, this book might be called *Western constitutional theory in the face of a culturally diverse future*.

'The spirit of Haida Gwaii' as a symbol of the age of cultural diversity
I would now like to introduce a symbol of the spirit of a post-imperial age of cultural diversity. It is the wonderful sculpture by Bill Reid, the renowned artist of Haida and Scottish ancestry from the Haida nation of *Haida Gwaii* (the Queen Charlotte Islands) off the northwest coast of Great Turtle Island (North America). The sculpture is a black bronze canoe, over nineteen feet in length, eleven feet wide, and twelve feet high, containing thirteen passengers, *sghaana* (spirits or myth creatures) from Haida mythology. (Please refer to the illustration at the front of the book.) *Xuuwaji*, the bear mother, who is part human, and bear father sit facing each other at the bow with their two cubs between them. *Tsaang*, the beaver, is paddling menacingly amidships, *qqaaxhadajaat*, the mysterious, intercultural dogfish woman, paddles just behind him and *Qaganjaat*, the shy but beautiful mouse woman is tucked in the stern. *Ghuuts*, the ferociously playful wolf, sinks his fangs in the eagle's wing and *ghuut*, the eagle, seems to be attacking the bear's paw in retaliation. *Hlkkyaan qqusttaan*, the frog, who symbolises the ability to cross boundaries (*xhaaidla*) between worlds, is, appropriately enough, partially in and out of the boat. Further down in the

canoe, the ancient reluctant conscript, brought on board from Carl Sandburg's poem, 'Old Timers', paddles stoically (up to a point). *Xuuya*, the legendary raven – the master of tricks, transformations and multiple identities – steers the canoe as her or his whim dictates. Finally, in the centre of this motley crew, holding the speaker's staff in his right hand, stands *Kilstlaai*, the chief or exemplar, whose identity, due to his kinship to the raven (often called *Nangkilstlas*, the One who gives orders), is uncertain. Bill Reid asks of the chief, 'Who is he? That's the big question.' So the chief has come to be called 'Who is he?' or 'Who is he going to be?'⁵

The name of this amazing work of art is *The spirit of Haida Gwaii*. Since *Haida Gwaii* means 'the island home (or place) of the Haida', and 'Haida', like many Aboriginal national names, means simply 'the people', including all the animal and spiritual people who live in *Haida Gwaii*, the sculpture is 'the spirit of the home of the people'.

The spirit of Haida Gwaii came into being in Bill Reid's hands between 1984 and 1991. The passengers had to be rearranged several times and work had to be interrupted to protest against logging on *Haida Gwaii* and support the struggle for recognition of Haida sovereignty. The sculpture was transported to Washington DC and placed in the courtyard of the Canadian Chancery on 19 November 1991. Sitting directly across the street from the National Gallery, it is destined to become one of the major artistic landmarks of the Americas. A second bronze canoe in jade green patina was cast in 1994 and placed in the Vancouver Museum. *The spirit of Haida Gwaii* thus now sits on both shores of its Great Turtle Island home as a symbol of the 'strange multiplicity' of cultural diversity that existed millennia ago and wants to be again.

Claude Lévi-Strauss has said that, 'thanks to Bill Reid, the art of the Indians of the Pacific coast enters into the world scene: into a dialogue with the whole of mankind'.⁶ The question is, what kind of dialogue does Bill Reid's artwork invite humankind to engage in? How is a non-Aboriginal person to approach *The spirit of Haida Gwaii* in the right spirit, in, so to speak, the spirit of *Haida Gwaii*, in order to try to

answer this question? How can a non-Aboriginal person, after centuries of appropriation and destruction of Indigenous civilisations, free himself or herself from deeply ingrained, imperious habits of thought and behaviour and approach this symbol in the appropriate way? Exploring this question will introduce many of the themes of cultural recognition that will concern us in later chapters.

When James Cook landed on *Haida Gwaii* in 1778 and superimposed the name of a queen who bore no relation to it, there were ten thousand Haida flourishing on the islands and mainland. They maintained a delicate balance with the sea and forest and sustained a civilisation that had evolved over the previous twelve thousand years. Within 138 years of contact with Europeans their population was reduced over 90 per cent by the spread of European diseases, such as measles and smallpox, cultural dislocation and killing. Only 558 Haida remained alive in 1915. Forty villages were reduced to four.

The near extermination of the Haida by European imperial expansion is entirely typical of how Aboriginal peoples have fared throughout the Americas and wherever Europeans settled. The population of the Americas at the time of contact and invasion is estimated by historical demographers to be 80 to 100 million people. (The population of Europe was 60 to 70 million people.) They lived in a wide variety of complex and interrelated societies, some over thirty thousand years old. Ninety to ninety-five per cent of the Indigenous population was destroyed by European diseases, war, starvation and cultural destruction. For many nations, such as the Beothuk, Taino and Massachusetts, only the names remain. The Aboriginal population of what is now commonly called the United States and Canada was reduced from 8 to 12 million in 1600 to half a million by 1900, when the genocide subsided.

Bill Reid writes:⁷

Sometimes they [the European invaders] found great cities, the homes of people with cultures as advanced as their own, and sometimes so beautiful they thought they had stumbled into fairyland, so they promptly destroyed them. Sometimes they found beautiful,

gentle, generous people, so they made slaves of them and killed them.

Sometimes they found people who weren't so nice, so beautiful, or gentle and generous, but were almost as avaricious and acquisitive as they were themselves. These they dealt with as allies or trading partners until they'd relieved them of the goods they coveted; then they destroyed them and their cultures.

Like many other Aboriginal nations in the nineteenth and twentieth centuries, Haida government, constitution, religion, language, trade, family structures and burial practices were classified as a primitive stage of historical development, outlawed and uprooted. Haida land and fishing areas were taken and forests cut. Plant and animal species were reduced to a shadow of their former abundance and diversity. A modern constitutional regime was superimposed over ancient Haida customs and ways without Haida consent. Haida people were assimilated to this so-called superior state of development by being taken from their families at a young age and forced into residential schools where they learned European languages and ways, and suffered physical and sexual abuse. When these techniques of assimilation failed, they were returned to tiny areas of logged out and polluted land, called reserves, classified as obstacles to progress and left to gradually disappear because they were judged unfit for modern constitutional society.

Looking back on the wreckage of this long injustice in 1933, the Lakota Sioux Elder, Luther Standing Bear, asked the question that is now posed by the politics of cultural recognition to the constitutionalism that accompanied and legitimated it:⁸

Did a kind, wise, helpful and benevolent conqueror bring this situation about? Can a real, true, genuinely superior social order work such havoc? Did not the native American possess human qualities of worth had the Caucasian but been able to discern and accept them; and did not an overweening sense of superiority bring about this blindness?

During each period of this 'American holocaust', as the historian David Stannard argues it should be called, the

Aboriginal peoples have resisted and refused to submit as best they could, from silent forms of refusal and tactical compliance in residential schools and prisons to armed battle, confrontation, negotiation, accommodation, agreement and co-operation on the land and in the courts. The result has been, as we shall see, the complex, historical interaction on a vastly unequal common ground between the relentless domination of an overpowering imperial order and the indomitable liberty of ancient peoples.

Since the early twentieth century, and especially since World War II, the Haida and other Aboriginal nations, in the face of appalling social and economic conditions, have sought not only to resist and interact, but to rebuild and reimagine their cultures; to 'celebrate their survival'. *The spirit of Haida Gwaii* is both a symbol and an inspiration of this revival and 'world reversal', as the Aboriginal peoples call it: to refuse to regard Aboriginal cultures as passive objects in an Eurocentric story of historical progress and to regard them from Aboriginal viewpoints, in interaction with European and other cultures. Although this monumental work of art cannot but be grounded in, and a celebration of, Bill Reid's own cultures, it is as well an ecumenical symbol for the mutual recognition and affirmation of all cultures that respect other cultures and the earth. The difficult reversal of worldview enjoined by *The spirit of Haida Gwaii* and required for mutual recognition is described by the Mi'kmaq poet Rita Joe, from her perspective, in the following way:⁹

Your buildings tall, alien,
Cover the land;
Unfeeling concrete smothers,
 windows glint
Like water to the sun.
No breezes blow
Through standing trees;
No scent of pine lightens my burden.

I see your buildings rising skyward,
 majestic,
Over the trails, where men once walked,

Significant rulers of this land
Who still hold the aboriginal title
In their hearts
By traditions known
Through eons of time.

Relearning our culture is not difficult,
Because those trails I remember
And their meaning I understand.

While skyscrapers hide the heavens,
They can fall.

The spirit of Haida Gwaii evokes a boundless sense of wonder. It is the mystical. I want to walk in silence around its overflowing spirits, letting their endless perspectives and interrelations awaken the play of my imagination from its dogmatic slumber. I know its meaning is unfathomable and my words are unworthy. Mine is a crude voice over a multiplicity of cultural voices who, if one could only learn to look and listen, speak for themselves. The sheer, manifest presence of the myth creatures confronts and calls into question the overweening sense of superiority which, since first contact, has rendered us deaf and blind to the multiplicity of spirits who constitute this place and its ways and led us to impose alien constitutions and interpretations over them.

Here, Aboriginal and European myths cross, for the oldest European constitutional story is that of Oedipus who, led by his own sense of superiority, transgresses the customs and ways of Thebes and imposes an alien constitutional culture, which then blinds him to the injustice that lies at the foundation of his rule. Oedipus and the citizens of Thebes are so accustomed to their constitutional order that it takes an outsider, the blind Tiresias, to see the underlying fault. This tragedy of misrecognition and usurpation is finally revealed to him in *Oedipus at Colonus*, but it is fully grasped only by Antigone, daughter of Oedipus and Jocasta, the child of the crossing of native and newcomer cultures. Antigone courageously tries to bring this most fundamental of political lessons to the attention of Creon, king of Thebes, by

upholding the customary ways of burial against the prevailing law. Creon, like Oedipus, is blinded by the imposed constitutional order and its immanent, yet seemingly universal, standards of justice. This terrifying stance of cultural hybris and blindness he portrays is graphically depicted by the chorus in the 'Ode to man'. As a result, he fails to recognise either the justice of Antigone's demand or the means of accommodating it offered by the conciliatory Haemon, his son and Antigone's lover, and exemplary citizen of the intercultural common ground. And so the tragedy continues.

First and foremost, it is surely safe to infer, the spirit in which *The spirit of Haida Gwaii* should be approached is a willingness to listen to its culturally diverse spirits. Let us listen to the voice of Bill Reid:¹⁰

Here we are at last, a long way from *Haida Gwaii*, not too sure where we are or where we're going, still squabbling and vying for position in the boat, but somehow managing to appear to be heading in some direction. At least the paddles are together, and the man in the middle seems to have some vision of what's to come.

Bill Reid seems to interpret *The spirit of Haida Gwaii* as if he were not the creator but witness, fellow traveller and mediator. He is reluctant to say anything definitive about its meaning. Tentatively and with respectful circumspection, he describes how it seems and appears to him, as if he too were trying to find or to hear the appropriate words to recognise this strange multiplicity that has come into being, somewhat inadvertently, before him. Although this collection of Indigenous beings has been here for millennia, it is as if we are being asked to see and hear them for the first time, and so to learn the art of mutual recognition.

Approaching *The spirit of Haida Gwaii* in the right spirit does not consist in recognising it as something already familiar to us and in terms drawn from our own traditions and forms of thought. This imperial attitude is to be abjured. Rather, recognition involves acknowledging it in its own terms and traditions, as it wants to be and as it speaks to us. No matter from which direction you approach the canoe, the crew

members manifestly seem to say that, after centuries of suppression, they are here to stay, in their own cultural forms and ways. Hence, if there is to be a post-imperial dialogue on the just constitution of culturally diverse societies, the dialogue must be one in which the participants are recognised and speak in their own languages and customary ways. They do not wish either to be silenced or to be recognised and constrained to speak within the institutions and traditions of interpretation of the imperial constitutions that have been imposed over them. This world reversal, from a habitual imperial stance, where one's own customary forms of reflection set the terms of the discussion, to a genuinely intercultural popular sovereignty, where each listens to the voices of the others in their own terms, is the most important and difficult first step in contemporary constitutionalism.

A constitutional dialogue in 'The spirit of Haida Gwaii'

The spirit of Haida Gwaii, I would now like you to imagine, can be seen as just such a constitutional dialogue, or multilogue, of mutual recognition. The passengers are squabbling and vying for recognition and position each in their culturally distinct way. They are exchanging their diverse stories and claims as the chief appears to listen attentively to each, hoping to guide them to reach an agreement, without imposing a meta-language or allowing any speaker to set the terms of the discussion. The chief's subjection to the rule of mutual recognition is symbolised by the crests of the crew's nations and families carved in the speaker's staff. Bill Reid has spent decades preparing to portray such a dialogue by recreating the cultural distinctiveness and interrelations of each of the spirit creatures, first by mastering the great Haida artistic traditions of formline sculpture in which they appear and then by learning the myth stories they are telling each other.

The conversation also seems to be 'diverse' in the three respects of overlap, interaction and negotiation mentioned above. The narratives of the thirteen *voyageurs* tell of how their identities have been shaped and formed through millennia of overlapping interaction together. They exist as they are, in all

their distinctiveness, not in spite of, but in virtue of, their interdependency over time and history. These aspects are embodied in the endless ways in which they overlap and criss-cross without losing their identities in their astonishing arrangement in the canoe. The intercultural dimension of the sculpture is further heightened by the presence of non-Haida travellers: the mainland beaver and wolf, and the ancient reluctant conscript from European–American mythology.

The questioning, contestation and renegotiation of their cultural identities seem plain for all to see. Is this not the constitutional game they are playing as they vie and squabble for position, both in the canoe and in Haida mythology? The chief signals this Derridean feature because, although a Haida chief is usually a man, he is called *laana augha*, village mother, so he must act like a mother in caring for the common good if s/he is to secure respect and authority. All the passengers are Métis, exhibiting the non-identity of cultural identities: the dogfish and mouse women, the bear mother, who is part human, the wolf with his human forepaws and the others, for they are other-than-human persons who take off their furs and feathers at home and converse like human persons.

The theme is crystallised in *Xuuya*, the raven steering the canoe, who is forever changing his or her identity and so illustrating that things are not always as they appear – that our habitual forms of recognition are often stultifying forms of misrecognition which need to be upset and reversed from time to time. Members of the black canoe thus have the civic ability to see their association from multiple viewpoints. Jamake Highwater, a Blackfoot–American philosopher, explains that this ability of reflective disequilibrium, which is common to Aboriginal cultures, has been learned by twentieth-century European artists and writers through their interaction with ‘primitive art’ and slowly introduced into European cultures under the name ‘post-modern’.

Now, the ability to change perspectives – to see and understand aspectively – is acquired through participation in the intercultural dialogue itself. By listening to the different stories others tell, and giving their own in exchange, the

participants come to see their common and interwoven histories together from a multiplicity of paths. Nurturing a reflective awareness of the diversity of cultural perspectives is a major function of Aboriginal storytelling at public festivals and constitutional negotiations. *The spirit of Haida Gwaii* is designed to awaken and stimulate this dialogical capacity for diversity awareness. As you walk around the canoe you soon realise that it is impossible to take it in from one comprehensive viewpoint. It defies this form of representation. Rather, you are drawn to see it from the perspective of one passenger after another, and their complicated interrelations guide you to see the whole now under one aspect, now under another.

Since recognition is never definitive, the particular constitutional arrangement of the members of the canoe is presumably not meant to be fixed once and for all. Constitutional recognition and association change over time, as the canoe progresses and the members change in various ways. A constitution is more like an endless series of contracts and agreements, reached by periodical intercultural dialogues, rather than an original contract in the distant past, an ideal speech-situation today, or a mythic unity of the community in liberal and nationalist constitutionalism.

The spirit of Haida Gwaii also depicts in a striking manner a specific concept of equality as equity. All members are equally recognised and accommodated, as far as possible, in terms of their own cultural identity. The result is that the constitutional arrangement of the canoe is far from uniform. The members make up an association more akin to the irregular arrangement of an ancient, custom-based constitution than to a modern, uniform constitutional association. The overall cultural diversity is a thing of justice and beauty, analogous to ecological diversity and just as important for living and living well on this planet. However, as we shall see, it offends against a powerful norm of uniformity in modern constitutionalism and provides one of the major objections to the politics of cultural recognition.

How do the citizens tell if the constitutional arrangement they have reached at this point in their journey is equitable

and just? There is no transcendental standard beyond the discussion in the canoe from which it can be measured. This Platonic viewpoint is, as we have seen, unavailable. The answer would seem to be that they practise the spirit they embody. They are always willing to listen to the voices of doubt and dissent within and reconsider their present arrangement, just as *The spirit of Haida Gwaii* asks us to listen to the voices of cultural dissent around the world. This foundation of the constitutional association in the sovereignty of the people, rather than the sovereignty of the existing constitution, is symbolised by the ancient reluctant conscript, the unobtrusive paddler Bill Reid brought fondly aboard from European and European–American history:¹¹

I am an ancient reluctant conscript.

On the soup wagons of Xerxes I was a cleaner of pans.
On the march of Miltiades' phalanx I had a haft and head;
I had a bristling gleaming spear-handle.
Red-headed Caesar picked me for a teamster.
He said, 'Go to work, you Tuscan bastard,
Rome calls for a man who can drive horses.'

...

Lincoln said, 'Get into the game; your nation takes you.'
And I drove a wagon and team and I had my arm shot off
At Spotsylvania Court House.

I am an ancient reluctant conscript.

Like Antigone, this ancient citizen reminds us of stoical survival and endurance, but also of the limit to reluctant conscription and submission. Bill Reid speaks of the conscript in a voice perhaps close to his own:¹²

A culture will be remembered for its warriors, philosophers, artists, heroes and heroines of all callings, but in order to survive it needs survivors. And here is our professional survivor, the Ancient Reluctant Conscript, present if seldom noticed in all the turbulent histories of men on earth. When our latter day kings and captains have joined their forebears he will still be carrying on, stoically obeying orders and performing tasks allotted him. But only up to a point; it is he who finally says, 'Enough', and after the rulers have disappeared into the morass of their own excesses, it is he who builds on the rubble and once more gets the whole thing going.

If the strange cultural multiplicity of *The spirit of Haida Gwaii* is not recognised and accommodated after all the oppression over all the years, then the mute inglorious conscript says 'enough' and refuses to bear the burden any longer. This is neither the revolt of the glorious nation nor the revolution to end the agony of politics and usher in the universal constitution of the kingdom of ends. No, the conscript is more humble and lower down in the boat, carrying the constitutional association on his shoulders. She is you and me. His 'enough' is the irruption of popular sovereignty, as old and endless as politics itself, against the suppression of difference. She is the true *laana augha*, the mother of the disappeared and the child of Antigone and Haemon. Because of his dissent, politics is not a series of necessary stages of historical development, the progression of a universal rule or the evolution or homogeneous nations, but the unpredictable voyage we call history. Over the centuries, and perhaps forever, she has breathed the spirit of both endurance and liberty into politics and, in so doing, preserved the wonderful multiplicity against all the power piled up to silence it.

The spirit of Haida Gwaii evokes one final and immensely optimistic vision of cultural diversity. For all the celebration of diversity and the vying for recognition, the paddles are somehow in unison and they appear to be heading in some direction. The ship of state glides harmoniously into the dawn of the twenty-first century. This seems to imply that the kind of constitutional change required to meet the just demands for recognition can be carried out without capsizing a society. Instead, it seems to suggest that a society can amend its constitution in the course of engaging harmoniously in its daily, subconstitutional politics.

This is a difficult, *Xuuya*-like image to grasp because the tendency since the seventeenth century has been to think of a modern constitution as an unsurpassable form established long ago by founding fathers, standing behind and providing the foundation for democratic politics. The constitution is thus one area of modern politics that has not been democratised over the last three hundred years. Constitutional change

can occur in one of two ways: either by amendment within the forms of recognition laid down in the constitution and its traditions of interpretation or by overthrow of the constitution through war and revolution. Yet if the demands for cultural recognition are taken up and translated into the given forms of constitutional recognition, then the sovereignty of the people, which the constitution is presumed to express, will be thwarted, for this is the injustice of the prevailing language of constitutionalism according to the politics of cultural recognition. Popular sovereignty in culturally diverse societies appears to require that the people reach agreement on a constitution by means of an intercultural dialogue in which their culturally distinct ways of speaking and acting are mutually recognised.

Perhaps the great constitutional struggles and failures around the world today are groping towards a third way of constitutional change, symbolised in the ability of the members of the canoe to discuss and reform their constitutional arrangements in response to the demands for recognition as they paddle. On this *Haida Gwaii*ian view, a constitution can be both the foundation of democracy and, at the same time, subject to democratic discussion and change in practice. The chapters that follow are an exploration of this possibility.