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Governing Ourselves: Reflections on Reinvigorating Democracy Stimulated by Gitxsan Governance

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INTRODUCTION

In this chapter, I explore how we can give added precision to – how we can give added life to – the idea that democracy means that the people rule themselves. I especially want to reach towards a vision of democracy in which a political community's citizens see themselves, fundamentally, as custodians of their society's legal and political order. I do so by reflecting upon, and seeking inspiration from, a political order in which members do typically have that sense: the Gitxsan people of northwestern British Columbia.

Democracy has been called, famously, an 'essentially contested concept'.[1] We are in one phase of that contestation and, in reflecting upon how we should go forward, I start from the premise that we should focus upon a core aspiration that typifies a great many understandings of democracy – namely, that *democracy is about the people ruling themselves*. It is about the people participating in the good of self-government. That aspiration does not eliminate democracy's contested character. There remain important and disputed questions about who constitutes the people, about the mechanisms through which the people should exercise their authority, about the dividing line between matters that should be determined collectively and those left to

[1] Bryce W. Gallie, 'Essentially Contested Concepts', *Proceedings of the Aristotelian Society* 56 (1955–56): 167–98.

individual determination, and doubtless many others. Nevertheless, the focus on self-government does real work. It excludes arguments that justify democracy primarily on grounds that have nothing to do with the distinctive good of self-government, such as what makes governments effective, how one maintains political stability, how one secures a wide informational base for governmental decision-making, or how one limits one's rulers. These considerations may identify additional benefits of democracy or parallel goals but they are not, on their own, sufficient substitutes for the core aspiration. Indeed, I suspect that those who advance them rarely see them as substitutes. Rather, these arguments a) are a way of clinging to a form of government that people value because of the core aspiration but that needs buttressing against critiques of democracy's limited achievement of that aspiration in practice, or b) are calculated to persuade an authoritarian regime to permit a democratic transition.

Focusing on the core aspiration keeps our gaze fixed upon the essential appeal of democracy: the hope that, in some material sense, citizens might understand their government's decisions to be their own decisions – that the citizens themselves might, in a way that they accept, 'own' those decisions. The core aspiration is essentially the same as the idea that government should be based on the consent of the governed (although, in this context, consent is not what one might think, as we will see).[2] The core aspiration is also closely related to popular sovereignty, understood to be 'the grounding of the ultimate authority for law and governance within one's own society, so that political power is, in a very real sense, self-authorized and self-determined – not dependent for its authority on the gift of any outside party.'[3] The core aspiration gives voice to what it means to be a citizen. It expresses the dignity in citizenship.

Arguably, it is precisely this aspiration that is in question in our current juncture. The fundamental challenge in many western democracies is the widespread view that the core aspiration is not being fulfilled – indeed, may not be capable of being realized – in current states and institutional structures. Such an alienation from government is a defining element in populist movements of both right and left.[4] It can be seen in the intergenerational

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[2] Jeremy Webber, 'The Meanings of Consent', in *Between Consenting Peoples: Political Community and the Meaning of Consent*, ed. Jeremy Webber and Colin Macleod (Vancouver: UBC Press, 2010), 3–41.

[3] Jeremy Webber, 'Contending Sovereignties', in *The Oxford Handbook of the Canadian Constitution*, ed. Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers (New York: Oxford University Press, 2017), 293.

[4] Margaret Canovan, 'Trust the People! Populism and the Two Faces of Democracy', *Political Studies* 47, no. 1 (1999): 2–16; Pierre Rosanvallon, *Le siècle du populisme: Histoire, théorie, critique* (Paris: Éditions du Seuil, 2020), 72–73; Cas Mudde and Cristóbal Rovira Kaltwasser, 'Exclusionary vs. Inclusionary Populism: Comparing Contemporary Europe and Latin America', *Government and Opposition* 48, no. 2 (2013): 147–74; Cas Mudde and Cristóbal

tensions afflicting many democracies: in the perception that political leadership is ageing, paying insufficient attention to political succession, and neglecting the economic and environmental interests of youth and future generations.[5] It is also, patently, a central theme in today's battles over diversity and inclusion. The challenges themselves are not unprecedented. The drive of people of colour (or women, or sexual minorities, or immigrants …) for inclusion continues struggles that are long-standing and pervasive. The alienation associated with populism and generational sclerosis has recurred throughout the history of contemporary democracies. Indeed, when it comes to the core aspiration, our reach will always exceed our grasp, not least because democracy seeks to realize collective agency in human communities that are inevitably characterized by disagreement. The very fact that the meaning of democracy is contested means that its realization will be imperfect. That is not, however, an argument for inaction. The value of essentially contested concepts is precisely in the struggle to define and realize them, even if – especially if – those ends are never fully achieved. If one accepts the core aspiration in any form, one must continually strive to do better. And the injustices themselves, on almost any view, are real and demand a response.

How can one do so? How can one develop the relationship of citizens to their governments so that they see those governments, with justification, as an expression of their political agency rather than a power that is opposed to them? The answers to those questions are many and varied. One might say that they include the whole history of democracy. When it comes to practical strategies for achieving the core aspiration, we all have much more to learn from a Stacey Abrams or a Greta Thunberg than you have from me.[6] But it is often the case, in situations like this, that we stumble over the terms in which we conceive of the aspiration. We aim for something we cannot achieve and neglect those things we can. Here, then, I want to contribute to how one might conceive of and take steps toward the core aspiration.

Or, to put this chapter's purpose another way, the thoroughly dominant form of our constitutional discourse presumes a separation between government and people – or, at the very least, a counterposing of the two. Liberal democratic writings speak of government being 'constrained' by law

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Rovira Kaltwasser, *Populism: A Very Short Introduction* (New York: Oxford University Press, 2017).

[5] Roberto Stefan Foa, et al., 'Youth and Satisfaction with Democracy: Reversing the Democratic Disconnect?' (Cambridge: Centre for the Future of Democracy, 2020), www.cam.ac.uk/system/files/youth_and_satisfaction_with_democracy.pdf.

[6] Hence the wisdom of James Tully's 'public philosophy' and John Borrows' 'physical philosophy'. See John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 10–13; Patricia Cochran, 'Physical Legal Methodology', in Freya Kodar, ed., 'John Borrows' *Freedom and Indigenous Constitutionalism*: Critical Engagements', *Lakehead Law Journal* 3, no. 2 (2019): 107–10; and James Tully, *Public Philosophy in a New Key*, vol. 1, *Democracy and Civic Freedom* (Cambridge: Cambridge University Press, 2008), 291–316.

and the institutions of electoral democracy. Rights are, above all, conceived as restrictions on government. Constitutions create 'checks and balances.' For its part, progressive politics is about 'speaking truth to power', progressive scholarly critique about recognizing that we are subject to a pervasive governmentality, capillary, inescapable. In contrast, I believe that we need to re-establish, for our age, democracy as a sphere of possibility, a cooperative endeavour to make our world a better place, to achieve goals (action on climate change; better healthcare; more equal distribution of wealth; education for all; equality for women, people of colour, Indigenous peoples, sexual minorities; environmental protection . . . the list goes on) that we would be unable to secure as individuals. Of course, you, dear reader, might now be full of objections, for that vision has never disappeared. Checks on state power on the one hand, and attempts to harness that power on the other, march hand in hand in progressive movements. Rosanvallon has chronicled the wide variety of means by which democratic institutions have blended, throughout democracy's history, empowerment and oversight.[7] But is it wrong to think that confidence in the positive vision of democratic action is now at a low ebb? How might we act to reinforce the sense that government can be ours?

This chapter tries to clarify that objective by reflecting on an institutional context in which members do consider themselves to be custodians of their legal and governmental order: the governance structures of the Gitxsan people of northwestern British Columbia. This is the same Indigenous people that is the focus of Val Napoleon's contribution to this volume (Chapter 11). Indeed, I owe a great debt to Professor Napoleon (Gyooksgan) for my understanding of Gitxsan society.[8] My purpose is not to claim to be an expert on Gitxsan governance. Nor is my focus the significant and continuing impact of colonialism on Gitxsan institutions. Rather, I seek to draw inspiration for the governance of societies generally from what has been, for me, an immensely stimulating engagement with Gitxsan institutions.

The organization of Gitxsan society does not take a state-like form.[9] By this I mean that its institutional structure is not arranged in a comprehensive and

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[7] Pierre Rosanvallon, *La contre-démocratie: La politique à l'âge de la défiance* (Paris: Éditions du Seuil, 2006).

[8] See, especially, Val Napoleon, 'Ayook: Gitksan Legal Order, Law, and Legal Theory' (unpublished DPhil thesis, University of Victoria, 2009); Val Napoleon, 'Did I Break It? Recording Indigenous (Customary) Law', *Potchefstroom Electronic Law Journal* 22 (2019), https://adric.ca/wp-content/uploads/2020/10/Napoleon-Did-I-Break-It-Published-2019-1.pdf; and Val Napoleon, 'Living Together: Gitksan Legal Reasoning as a Foundation for Consent', in *Between Consenting Peoples: Political Community and the Meaning of Consent*, ed. Jeremy Webber and Colin McLeod (Vancouver: UBC Press, 2010), 45–76. However, my debt to Professor Napoleon goes well beyond these works.

[9] The description of Gitxsan society and governance that follows draws on a number of sources, principally discussions with the individuals mentioned in the text accompanying the last paragraph of this chapter's introduction; attendance at the feasts noted there; the works of Val Napoleon cited in note 8; the testimony given in the litigation leading to *Delgamuukw*

highly rationalized architecture, with jurisdictions for creating, interpreting, and enforcing law so arranged that every question is, in principle, subject to a single authoritative answer. Instead, the authority to articulate and interpret the law is widely distributed in society, so that the kinship groups generally called in English 'Houses' (Gitxsan: *wilp* and *huwilp*), the groupings of related Houses known as *wil'naat'ahl*, and various combinations of Houses assembled in feasts all bear their own traditions of Gitxsan law and have authority to interpret and act upon those traditions. Indeed, this is itself a simplification, for especially knowledgeable individuals play important roles in their own right, villages often have distinctive practices and discourses within the broader Gitxsan people, the Gitxsan people as a whole bear a strong sense that they share a common order of law and governance, and there are such close affinities with and connections to the legal orders of the Nisga'a and Tsimshian (neighbouring peoples that speak closely related languages) that one might consider them all variations on a single legal tradition. Moreover, there is an ethic of non-interference and non-imposition among these different instances. Significant disagreements on process and substance can therefore persist indefinitely.

This means that questions about the maintenance of community have a continual presence in Gitxsan society. The task of sustaining community is a matter for conscious effort each time the community assembles to accomplish legal work. Its members are directly responsible for that work, a responsibility that, if it runs into trouble, can lead Houses or groups of Houses to choose to disengage, withdrawing in whole or in part from Gitxsan institutions for varying periods of time. The existence of Gitxsan society is not taken for granted so that the measures necessary to sustain it recede from view. They are not masked by a political identity and institutional frame so dominant that the identity and frame are unimpeachable, as tends to be the case with states.

By reflecting on Gitxsan institutions, then, one can see what it takes to sustain a vibrant society grounded in the active adherence of its members. To

v. *British Columbia* [1997] 3 SCR 1010 (cited in note 10); Margaret Anderson and Marjorie Halpin, eds., *Potlatch at Gitsegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000); Richard Daly, *Our Box Was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver, BC: UBC Press, 2005); Wilson Duff, ed., *Histories, Territories, and Law of the Kitwancool* (Victoria, BC: British Columbia Provincial Museum, 1959); Susan Marsden, 'Northwest Coast *Adawx* Study', in *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives*, ed. Catherine Bell and Val Napoleon (Vancouver: UBC Press, 2008), 114–49; Richard Overstall, in consultation with Val Napoleon and Katie Ludwig, 'The Law Is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow', in *First Nations Cultural Heritage*, 92–113; Richard Overstall, 'Encountering the Spirit in the Land: "Property" in a Kinship-Based Legal Order', in *Despotic Dominion: Property Rights in British Settler Societies*, ed. John McLaren, A. R. Buck and Nancy E. Wright (Vancouver: UBC Press, 2005), 22–49; Neil J. Sterritt, *Mapping My Way Home: A Gitxsan History* (Smithers BC: Creekstone Press, 2016); and Neil J. Sterritt, et al., *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998).

be clear, I will not be advocating a simple transfer of approaches from Gitxsan society to large and diverse polities. Central features of Gitxsan society – such as the role of kin relations, their grounding in histories of great antiquity, the marriage of people to territory, the sense of kinship with non-human beings, even simple questions of population and scale – are clearly not transferable to contemporary non-Indigenous societies, at least not in so many terms. Nor do I mean to suggest that the themes explored here have no counterparts in non-Indigenous political traditions. Fortunately, they frequently do. Rather, my objective is to seek inspiration, clarification, imaginative stimulus, and reinvigoration from an engagement with the Gitxsan thought and practice of law and governance.

My great thanks to those, infinitely more knowledgeable than I am, who generously shared their knowledge with me at many points, especially Glen Williams (Malii), Katie Ludwig (Gal-sim-giget), Darlene Russell (Gux-gal-galsxw), and Audrey Lundquist (Guu jenn sim Simogit). I am particularly grateful to the late Neil J. Sterritt (Madiigam Gyamk), who shared his knowledge, understanding, and wisdom, answering my many questions. My gratitude too to the people who welcomed me to ceremonies, especially those of Malii and Haxbagwootxw (Vince Jackson). I continue to feel a deep obligation to those, now so many passed away, who gave their testimony in the *Delgamuukw* litigation, and from whom, at this distance, I have learned so much.[10] Any mistakes, of course, are my own.

THE INSTITUTIONS AND ORGANIZATION OF GITXSAN GOVERNANCE

I begin with an overview of Gitxsan governance, drawing, from that description, the principal characteristics of the Gitxsan people's responsibility for law and governance. I will focus on institutions derived from Gitxsan tradition. Those institutions co-exist in sometimes contested relationship with structures introduced by Canada's *Indian Act*, or patterned on non-Indigenous models. I refrain from dealing with the latter not because I doubt their legitimacy – those institutions too have become embedded in many Indigenous societies and, if so, I am not entitled to doubt their place – but because, for this chapter, I seek to reflect upon non-state forms of Gitxsan governance. As we will see, in that governance, the paradigmatic institution for the accomplishment of legal operations is the feast (*yukw*, or *li'liget*). The feast cannot be understood without grasping the kinship relations of Gitxsan society. We therefore begin there.

Those kin relations centre on the House. In Gitxsan society, every individual is a member of a House. Each House owns a particular territory (averaging

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[10] The *Delgamuukw* transcripts are an invaluable archive. They have been digitized by the University of British Columbia Library and are now available online: https://open .library.ubc.ca/collections/delgamuukw.

approximately 575 square kilometres) that it administers, from which its members are entitled to draw their sustenance and for which the House is responsible. The term 'ownership' fails to capture the full character of that relationship. Ken Muldoe (Delgamuukw) described the relation as a 'marriage of the Chief and the land'.[11] As that metaphor suggests, the relationship to land is more than merely instrumental (although the land's pragmatic value in sustaining those dependent upon it is indeed important). The relationship also involves a metaphysical bond. A House's territory forms part of a set of possessions, of foundational value to the House, that includes the House's distinctive crests, songs, dances, regalia, names, and relationships with non-human beings. The entitlement to all these treasures is held within the histories of the House, the *adaawk*, passed down and supplemented through generations of recounting in the feast hall.

A House generally consists of between 20 and 200 members.[12] One inherits one's House membership from one's mother, so Houses take the form of extended lineages related through the female line. In Gitxsan country (including the semi-autonomous Gitanyow), there are something like sixty-eight Houses. Each of these Houses is represented by a head chief, who has special responsibility for safeguarding the House's relationship to the territory and all their treasured possessions, protecting the reputation of the House, the organization of harvesting upon the land (and thus for the welfare of all members of the House), and leading the decision-making of the House, which tends to occur through consultation among the principal members of the House and related Houses. In a sense, the head chief stands for the House. When an individual becomes head chief of their House, they assume the chiefly name by which the House itself is known and has typically been known for many generations. Thus, the chief bearing the name Delgamuukw is the head chief of the House of Delgamuukw.

Individuals accede to chiefly names substantially through inheritance. The names belong to the House and are in practice controlled (to a significant extent) by extended families associated with those names (again, with the relevant family members always reckoned through the female line, for one must be a member of the House to bear one of its names). Moreover, inheritance of a chiefly name, especially the most important names, is not automatic. Potential chiefs pass through a succession of increasingly significant names held by the House as they are trained and occupy

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[11] Opening statement of Chief Gisday Wa (Alfred Joseph) and Chief Delgamuukw (Ken Muldoe), *Delgamuukw Trial Transcripts*, May 12, 1987, https://open.library.ubc.ca/collections/delga-muukw/items/1.0018360#poz-3rof.

[12] Napoleon, 'Ayook', 4; Overstall, in 'Encountering the Spirit', 32, says 50 to 150 members is optimum. An average membership of about 190 is suggested by the population estimates in Gitanyow Hereditary Chiefs Office, 'An Indigenous Approach to Sustainability Assessment: Written Submission on 'The Environmental and Regulatory Reviews Discussion Paper', June 2017', October 13, 2017, 3.

progressively more important roles. When an important name becomes available (generally, in the case of a head chief, because of the death of the previous holder), there are typically more than one potential candidate. The relative fitness of the candidates – their knowledge, their character, their training, their wealth, their relationship to the former chief – is then weighed by the principal members of the House. Ideally, those members ultimately agree on the best candidate. That House then holds a feast at which the name is conferred. Names can also be stripped from a holder who is considered by their House to have failed to fulfil their responsibilities, although this rarely occurs (a removal is also accomplished in a feast). A chiefly name therefore has some of the characteristics of an office. A head chief is acutely aware that they are one in a very long line of individuals who have held that name. They seek to live up to the name and to add to, not detract from, its lustre.[13]

The Houses, then, are the principal property-holding and administrative bodies in Gitxsan society, but they are not self-sufficient. Importantly, Houses are dependent on other Houses for marriage partners. One is forbidden from marrying within one's clan, and because every House exists within one of four clans in Gitxsan society, marrying outside one's clan also means that one always, at least in principle,[14] marries a member of a different House. Each marriage, each household, is therefore a meeting of Houses, of territories, of histories. Since spouses generally live together, every House has on its territories spouses who are members of other Houses. Moreover, the children of the spouses inherit the House membership of the mother; thus, if the couple resides on the lands of the husband's House, the children too are members of a House that is not the owner of the lands. Gitxsan society therefore recognizes the right of a spouse to harvest resources on the lands of their spouse's House, of children to harvest on the lands of their father's House, and indeed, to some extent, of grandchildren to harvest on their grandfather's lands, all subject to them acknowledging and complying with the authority of the House chief over those lands. Moreover, there are other expectations and responsibilities, which I won't describe here, that spouses and fathers have towards Houses to which they are related by marriage. Thus, when one considers that every marriage generates such relations, that the relations extend for the lifetime of the holder, and that marriage partners are typically drawn from a number of Houses (including Nisga'a and Tsimshian Houses), Gitxsan country is crisscrossed by

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[13] Daly, *Our Box Was Full*, 88–89, 267–68; Duff, *Histories, Territories*, 37, 40; Napoleon, 'Ayook', 6–7, 67–71, 96–107. See also, for the Gitxsan's close relatives, the Tsimshian, Christopher Roth, *Becoming Tsimshian: The Social Life of Names* (Seattle: University of Washington Press, 2008).

[14] Some marriages do occur in violation of these rules. These are treated, by many Gitxsan, as k'aas' – the equivalent of incest. They play havoc with the cross-cutting obligations and responsibilities of membership. Occasionally, one of the partners is adopted into another House to regularize the situation, but many consider such adoptions improper. See Napoleon, 'Ayook', 80–83.

a complex web of entitlements and responsibilities: both the central entitlements of House members, and the more limited entitlements of those connected to the House by marriage or filiation.

This brings us to the feast. The feast is the forum in which the principal work of law and governance is accomplished, such as conferring names (which, as we have seen, also confers a much broader set of rights and responsibilities); effecting marriages, divorces, and adoptions; the settlement of rights and obligations upon death; the recognition and correction of wrongs; the payment of debts; and, historically and perhaps increasingly again today, making or at least communicating the main decisions over the administration of the House's territory and symbolic possessions.

A feast is hosted by the House that wants the work done. Other Houses must be invited to attend, the number of Houses depending on the importance of the work to be performed. In the feast, members sit with their House (thus spouses sit apart from each other), the Houses themselves being seated within the hall in a manner determined by their relationship to the host House. Members of the host House do not dine at the feast; they occupy one end of the hall, welcoming and seating the guests, preparing or overseeing the preparation of the food, serving the food to the attending Houses, conducting the work of law and governance for which the feast was called, and thanking the attending Houses with gifts at the end. The participation of the attending Houses is essential to the accomplishment of the work. The success of that work is a function of the approval by the attending Houses for what the host House has done. In the feast's final act, the Houses are invited to voice that approval – not their approval for the specific choices made, but that the work has been done properly. Indeed, there may be other instances of assent over the course of the feast; when names are conferred, for example, representatives of the recipient's father's side are invited to welcome the recipient by their new name. The witnessing that occurs throughout the feast can itself be taken as a degree of tacit approval. If guests do not accept what is being done at a feast – if the disagreement is sufficiently serious – they can depart or refuse to attend in the first place. If guests do leave, or even state clear objections, the hosts will be deeply embarrassed. The very legitimacy of what they have done will be thrown into question. They will have lost the currency that a feast is designed to provide, namely acceptance that the House conducts its affairs appropriately and that what it has done therefore deserves respect.[15]

For that reason, there is usually extensive consultation within the host House, beyond the House with persons renowned for their knowledge, and with principal members of other Houses prior to the feast to ensure that any difficulties are identified and settled in advance.[16] Thus, much of the practical work of assembling support occurs before the feast. But that should not distract

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[15] See Daly, *Our Box Was Full*, 57–98; Overstall, 'Encountering the Spirit', 35; Napoleon, 'Ayook', 150–56, 160–64; Napoleon, 'Living Together'.

[16] Napoleon, 'Ayook', 124–28, Napoleon, 'Living Together'.

us from the centrality of the feast itself. The discussions in advance occur so that the feast – the only forum in which certain types of legal work can be accomplished – proceeds smoothly. They are therefore structured and geared to that need. Moreover, there are occasions – rare occasions – when approval is emphatically withheld. Such a result is cataclysmic for the host House.[17] And even if the work of the feast is approved, the speeches by guest Houses at the last act of the feast are an occasion not only for ratifying what has been accomplished but for correcting, expressing approval in guarded terms, or supplementing what the host House (or other guests) have asserted. For those reasons, the feast will be the predominant focus in the discussion that follows.

WHAT THE FEAST TELLS US ABOUT POLITICAL COMMUNITY

What features, then, can we see in the feast that might inform our understanding about the kind of belonging, responsibilities, and entitlements that are inherent in collective self-government?

To begin, note that the lines of authority – judgement and approval – are exercised laterally, not top-down.[18] The legitimacy of work accomplished at a feast depends upon the accumulated approval of the other Houses. The more the Houses approve the work, the more successful the legal operations will have been – and the voicing of approval is relative: a House's approval can be expressed with greater or lesser enthusiasm, with or without subtle corrections. Moreover, each House judges the work according to its own understanding of the tradition. Of course, there is a sense of participating in a common normative order. One hears participants say that 'We are all Temlahan people' (referring to the ancient village that is a common point of origin among the great majority of Gitxsan Houses). That assumption of commonality serves a regulatory function in the legal order: it underpins the authority attributed to the approbation of other Houses; it is why Houses seek the opinions of and listen attentively to knowledgeable Gitxsan generally. Nevertheless, House members cherish deeply – indeed, have a responsibility to cherish – the stories and teachings carried by their own House's *adaawk*. They do not have an obligation to surrender their position in deference to contrasting views, even a consensus view. Certainly, there is a firm ethic against Houses commenting directly on other Houses' *adaawk*. The custody of the normative order lies with the Houses. Authority is distributed.

This means that it is not strictly accurate to say that norms are adjudicated in the feast. Disagreements are not subject to determination and can endure for generations. Nevertheless, there is a weighing of assertions, a counterposing of interpretations, through which assertions are often adjusted and a predominant

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[17] See the example recounted in Daly, *Our Box Was Full*, 290–95.
[18] Napoleon, 'Ayook', 150–56, refers to this as a system of 'reciprocal accountability' and shows how it extends well beyond the feast.

position, a gravitational centre in the discussion, emerges. Uncompromising statements of what Gitxsan law requires can co-exist with an ethic of non-imposition. It is a question of jurisdiction, not a lack of concern with truth. What then regulates disagreement? What keeps the society from flying apart? To some extent, it is the process of reasoning, articulation and response, and emergent coalescence, but that process can only go so far. Ultimately, on some matters, one reaches a point where unresolvable disagreement remains and the Houses are faced with a choice: do they push the disagreement to the breaking point, or do they acquiesce in what appears to be the predominant outcome. Sometimes they do break and withdraw altogether or from certain forms of cooperation. But note the cost. The Houses may lose, to some degree, the benefits of cooperation, such as the peaceable resolution of disputes, the cross-cutting access to territories (which often have different attributes), the ability to engage in communal activities such as certain fisheries, the ability to obtain the affirmation and legitimacy conferred by a feast, and access to marriage partners. The desire to continue these benefits of community can lead – and generally does lead – to acquiescence, although even then the resolution often involves a measure of agreeing to disagree. Those acquiescing are entitled to continue to affirm that their position is right. And, indeed, sometimes the outcome makes concessions, through process or substance, to that position.[19]

Note the characteristics, then, of this political community. The society is not held together by coercion; it is held together by the desire to continue to live in community, with the myriad benefits that entails, by what we might call 'conviviality'. Nor is it held together by consent to a set of substantive propositions, even those provisions that represent predominant opinion within Gitxsan society. Continued community is compatible with persistent agreement to disagree.

This vision of community is tolerant of different modes of belonging. This is true in the sense that different Houses or groupings of Houses can have different degrees of integration into the collaborative networks of Gitxsan society. In a significant sense, Gitxsan society is federal, with members being attached to and participating in webs of interaction at different levels: family, House, village, *wil'naat'ahl*, and feasts that bring together larger or smaller numbers of Houses. That engagement can be asymmetrical. The Gitanyow Houses, for example, generally decline to participate in political initiatives at the level of the Gitxsan as a whole, although they intermarry with other Gitxsan Houses and participate fully in the Gitxsan system of feasting.[20] Gitxsan society also accepts, at the individual level, different reasons for belonging, even different

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[19] See the example discussed at length in Napoleon, 'Living Together'.

[20] Consider this example: although Gitanyow generally guards its political independence, it is one of four bands participating in the Gitksan Government Commission, which provides technical and advisory services regarding a number of areas of band administration. Gitsegukla and Gitwangak do not participate in that body.

visions of the purpose and value of living in society. This is typical of Indigenous societies. To take an example from the Cowichan Tribes in southern Vancouver Island, I remember being struck, at a conference organized jointly with the Cowichan and conducted according to Cowichan protocols, by the words of one community member who, when speaking of Cowichan law and governance, talked of the satisfactions he obtained from fishing.[21] Those satisfactions would not be what a political philosopher (including a Cowichan political philosopher) would tend to think of first, but the diversity of discourse nevertheless has an important human reality, one that we ignore at our peril (the peril of becoming learned fools). Any community is bound together by multiple forms of attachment. Participants in Gitxsan ceremonies, like those of other Indigenous peoples, are a broad spectrum of their community; their contributions and forms of attachment are similarly broad in content and register.

Such a vision of community welcomes diversity in another way. The lack of a single, canonical, compulsory mode of belonging means that participants of different origins can, at least potentially, find a place within Gitxsan society. I spoke of the different histories, different *adaawk̲*, of different Houses. Those *adaawk̲* disclose the Houses' distinctive origins and movements into and through the region, including at times their different ethnic origins. Not only do they record intermarriage with non-Gitxsan neighbours (or non-human beings), but the origin of certain Houses lies outside the Gitxsan orbit. Some Houses of the Frog clan in Gitanyow appear to be descended from the Gitxsan's neighbours to the north, an Athapaskan-speaking people (a different linguistic family from the Tsimshianic family to which the Gitxsan language belongs) called the Tsetsaut.[22] One northern House not associated with Gitanyow is currently seeking recognition as a separate nation from the rest of the Gitxsan Houses; it too claims connection to the Tsetsaut.[23] The Wet'suwet'en people, the Gitxsan's neighbours to the southeast, also speak an Athapaskan language, yet they have adopted the Gitxsan system of Houses, feast and intermarry with Gitxsan, have an important village on Gitxsan territory, and brought major Aboriginal title litigation in concert with the Gitxsan.[24] At the individual level too, non-Gitxsan individuals are from time to time adopted into Gitxsan Houses, assuming a place within the system of kinship by which Gitxsan

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[21] Personal observation, Conference on Indigenous Law in Coast Salish Traditions, organized jointly by Cowichan Tribes, Research Group on Indigenous Peoples and Governance, Pierre Elliott Trudeau Foundation, University of Victoria Faculty of Law, and the Consortium for Democratic Constitutionalism (Demcon), 14–16 October 2010.

[22] Sterritt et al., *Tribal Boundaries*, 19, 21.

[23] This is the Tsetsaut/Skii km Lax Ha Nation. For one element of litigation tied to this assertion of independence which speaks to some of the background, see *Malii* v. *British Columbia (Attorney-General)* (2019) BCSC 2060.

[24] For the foundation of this relationship, see Sterritt, *Mapping My Way*, 65–69. The Gitxsan and the Wet'suwet'en jointly brought the litigation that resulted in *Delgamuukw*.

society is regulated (although adoptees may lack certain capacities, such as the capacity to bear the principal names).[25]

Of course, as a result of their long history of living together, the Gitxsan have developed a commonality that goes well beyond the simple choice to work together. It includes interconnected modes of life, a common language, related forms of law, governance, relationships to land, and the histories, songs, stories, and bodies of commentary and reflection that have been borne by that language (and which now are transmitted in English as well). That commonality is grounded in centuries of interaction, intermarriage, collaboration, conflict, and inter-feasting and now constitutes a variegated, interlocked body of discourse, not least chronicling and sustaining the very practices of law and governance we have seen in this chapter. That discourse is dynamic, continually extended, added to, deepened through the wisdom of its members, influenced by encounters with other peoples' traditions, and applied and adjusted to new situations. This tradition itself constitutes a basis for commitment to the Gitxsan as a whole – for being Gitxsan, for considering themselves 'Temlahan people.' It constitutes the body of story and practice through which they have defined their place in history and on the land, which continues to frame their action in society, and through which they voice their disagreements. Consent as the basis of political community has often been conceived not as a conscious exercise of the will, a choice at a moment in time, or a subscription to a common set of propositions, but rather as a continuing adherence to one's society, the maintaining of a degree of concord between one's inherited traditions and one's actions in society.[26] Gitxsan certainly are attached to their people in this latter way. Their actions in the feast hall are understood to be their actions as Gitxsan, actions that they own, even when they disagree with the specific measure adopted.

Their social identity is, in other words, grounded in the very fact of conducting their legal and governance functions together, through forms that they understand and to which they are attached. The ground of their belonging is not, as in a contract, their agreement to a finite set of principles but their continued participation in institutions in which they may frequently disagree but where they grow to understand each other, where they have the opportunity to build cooperative projects (or to dismantle them), and through which they acquire, when they work at it, an understanding of and fluency in evoking some of the reasons for attachment to the land and to their societies. Belonging to community consists in doing community.

To build community, then, one must draw members into the work of community. Gitxsan society does that, from children's and young people's initiation to the land and the community's relations to it, to the structured succession of names and roles as one accedes to increasingly more challenging leadership roles, to participation in the work of the Houses and, especially, in

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[25] Napoleon, 'Ayook', 131–36.   [26] Webber, 'Meanings of Consent', 17–20.

feasts. Within feasts, members' responsibility for sustaining community is manifest. It is inherent in the act of witnessing the work performed at the feast,[27] the value of which is emphasized by the approval sought of the attending Houses, by the gifts given to them by the host House in appreciation of their role, and by the ethic that if one attends a feast one attends it to the end. For me, though, the most striking example is the *tsek*: the contribution bowl. Feasts are long. Today, they commonly begin at about 5:30 or 6:00 pm and last until 1:00 or 2:00 am (and that is in addition to other collective work that is frequently accomplished earlier on the same day such as, for a feast for the placing of a headstone, the formal receiving of delegations from other Houses, each of whom comes dressed in their regalia, sing their principal mourning song, and express their condolences; the washing of the headstone; and its placing on the grave). A substantial part of the duration of a feast – often something like one to two hours – is devoted to the contribution of funds by House members and by those closely connected to the House to the work of the feast. Those contributing form a line, and as they contribute their names and the amount of their contribution are publicly announced. Those amounts are then tallied, the obligations relating to the feast are tallied too, and the payment of those obligations is then made within the feast itself, with the recipient's name, the service, and the amount of the payment also announced. Any balance is used for charitable donations (also announced) or distributed to guests as part of the gratitude to them for attending. I confess that having been raised in a Christian tradition, with an acute awareness of the duty to separate God and mammon, this intrusion of the material on the spiritual was startling for me, but I was grateful for it. It makes abundantly clear that community requires commitment and work and money and that it is up to members to sustain that community. Political community is not done for us. It is done by us.[28]

     In this account, I have sought to explore the essential groundwork of Gitxsan political community. Although I have found Gitxsan governance profoundly thought-provoking and inspiring, I don't want to leave the impression that Gitxsan society is idealized and conflict-free – a society, in other words, unlike any other human society, in which nothing really needs to be decided or done.[29] That would be to ignore one of the lessons of the practicality of the *tsek*. And

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[27] Napoleon, 'Ayook', 160–64. See also the exploration of witnessing in the proceedings of the Stó:lo people of southwestern British Columbia in Andrée Boisselle, 'Law's Hidden Canvas: Teasing Out the Threads of Coast Salish Legal Sensibility' (unpublished PhD thesis, University of Victoria, 2017), 201–77.

[28] For the *tsek*, see Daly, *Our Box Was Full*, 85–91. A similar realism is manifest in the use of territories. There too, the acknowledgement of the head chief's authority over resource use takes the form, in part, of a contribution of some of the product to the chief. Gitxsan will often use an analogy to taxation to explain that contribution.

[29] Val Napoleon has urged us forcefully to reject such an idealization, not least in her contribution to this volume (Chapter 11).

lest the lateral character of authority in the feast lead one to think that Gitxsan society is radically egalitarian, note that the institution of the feast developed in Gitxsan society when that society was built around a pronounced distinction between chiefly families, commoners, and slaves. Indeed, there was a time when only members of chiefly families participated in the feast.[30] Gitxsan society has now moved in substantially egalitarian directions, with slavery long gone, with women very often holding principal chiefly names and speaking for their Houses in feasts,[31] and with broad consultation and participation in feasts (although the principal chiefly names still tend to be passed down within chiefly families). Like any human society, Gitxsan society is dynamic, typified by disagreements and change and capable of dealing with such processes. But that does not nullify the fact that the lateral forms of authority and approval typical of Gitxsan society hold particular insights for popular sovereignty and democracy. We now turn to those lessons – to the sharpened focus that can be drawn from Gitxsan practice.

LESSONS FOR DEMOCRATIC REFORM

An engagement with Gitxsan governance can help us to clarify the sense in which people understand that a government is theirs. Self-government does not – it cannot – require agreement to the substance of everything government does. That is an impossible standard in human communities, wherein citizens inevitably disagree. Disagreement applies to the substantive norms that govern the society. It also applies to the processes by which the community establishes or interprets norms.[32] Indeed, theories that claim to be based on consent are typically one great fudge: they focus not on what citizens *do* consent to but what the theorist presumes they *would* or *should* consent to. The citizens' reasoning is ascribed to them, stipulated and applied by the theorist.[33] Moreover, this attributed consent – the theorist's stipulation of the citizens' consent – is then used to justify the binding character of the constitution. It thereby constrains, not enables, citizens' agency. A non-consenting citizen cannot, by dissenting, liberate themselves from the government's control. The theorist's stipulated 'consent' nullifies citizens' actual dissent.

So, if not agreement, then what binds human societies together? The Gitxsan experience suggests that the commitment to live in community is grounded simply in one's realization of the value of living in community and the cost of abandoning that support and cooperation. Such a realization stems from a wide

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[30] See Daly, *Our Box Was Full*, 194–210; Duff, *Histories, Territories*, 38, 40; Napoleon, 'Ayook', 148–50.

[31] Indeed, some women have always held chiefly names in Gitxsan society, although the number and prominence of women chiefs appears to have increased.

[32] Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999).

[33] Webber, 'Meanings of Consent', 9–12.

range of phenomena: the practical reality of interdependence with others (including one's reliance on others for one's upbringing or the need to cooperate in activities beyond the capacity of a single individual); the benefits one obtains from being able to draw upon what one's predecessors have achieved; access to resources controlled by others; the value of participating in a common linguistic community and in the storehouse of knowledge carried by that community; a sense of deep connection to the territory and to its spirits; or one's familiarity with and mastery of the common institutions of the people. Indeed, there are as many reasons sustaining members' connection as there are members (probably more). They alone justify a member acquiescing in a decision or in institutions with which they may not wholly agree. That is why 'conviviality' rather than 'consent' is such a useful term: it captures the commitment to live together without over-stipulating what the commitment must be based on. This primordial commitment is multiform. It may end up being conditional – one may, in an extreme situation, feel compelled to abandon one's community – but that involves the severing of many strands of belonging.

In Gitxsan society, that belonging is conceived predominantly in terms of kinship. The use of kinship to determine political membership is not as archaic as one might think. Consider how citizens of today's nation-states acquire their citizenship. Very often, one inherits one's citizenship from one's parents (the jus sanguinis). Even when citizenship is obtained by being born on a state's territory (the jus soli), that principle often co-exists with the jus sanguinis and, in any case, one's place of birth is almost always a consequence of the decisions of one's parents. *Choosing* to become a citizen is the exception, not the rule. It is a common exception, one that deserves great respect in an era of migration. I exercised such a choice when I became an Australian citizen, combining that allegiance with the Canadian citizenship I had acquired at my birth. Nevertheless, the choice to become a citizen, while significant, is just one step in the process of aligning oneself with a community and finding a place within that community, which engages both one's own subjectivity and the community's openness to relationship. It was that complexity of attachment that allowed me to torment my spouse's Uncle Bill, a gruff (and much-loved) Australian patriot, by saying: 'I'm more Australian than you are, Uncle Bill. I'm Australian by choice. You are just Australian by the accident of birth.'

Moreover, one should not fall into the error of assuming that kinship in Indigenous societies is a matter of partiality towards one's immediate family (although Gitxsan people, being human, do feel the tug of that kind of partiality). Think of the extensive web of relations created by Gitxsan kinship: not just the membership one has in one's House (which itself can involve connections that are distant in degree), but the multiple relations that the system of kinship creates to other Houses. Remember that one *must* marry outside one's House, and that, as a result of those marriages, spouses and descendants acquire both responsibilities and rights to share in the resources of each House's territories. Michael Asch speaks of such out-marriage rules,

common in Indigenous societies, as suggesting that one's being is incomplete until it is joined with another's, and sees that notion as lying at the foundation of treaties.[34] Each marriage extends the web of kinship. Think too of the Gitxsan's intermarriage with neighbouring peoples (noted by Val Napoleon, Chapter 11), including the welcoming of new Houses into the Gitxsan fold. In a foundational story of the people of Gitanyow, the House of Gwass-łam invites the House of Mah-ley (Malii) to join with them and form a new society on Gwass-łam's territory.[35] And, of course, individuals too are deliberately brought into Houses through adoption.

Kinship in Gitxsan society is, in short, a way of coming into relationship with others, of building an interlocking society of relationships, that is not reducible to agreement with a set of canonical principles. It clearly understands that community exists prior to one's articulation of principles – that one is born into relationship. Moreover, the Gitxsan web of relations extends to non-human beings and to the land itself. Compare the Cree concept of *wahkohtowin* (interrelatedness). As Jobin, Friedland, Beausoleil, and Kappo say, 'A core aspect of *wahkohtowin* is family relationships; *wahkohtowin* also extends outward in different ways to other Indigenous peoples, to non-Indigenous people, and to relations with non-human beings.' Moreover, '*wahkohtowin* and 'the obligation to extend *wahkohtowin*' continue to exist as such beyond any given struggle – and, importantly, even if we disagree.'[36] As this suggests, the web of relationship extends far. To be clear, it would be a mistake to treat kin relations as being purely metaphorical in Indigenous societies; familial connection, by descent, marriage, or adoption, does operate at the conception's core. But it then results in a vision of a community connected through webs of alliance and cooperation. It defines a sphere in which relations of interdependence are sufficiently strong to sustain institutional forms. I am not suggesting that non-Indigenous societies adopt kinship as their organizing principle – though *fraternité* certainly was tried at an important point in liberalism's development! But shouldn't we think of society as being defined by conviviality, by interdependence, more than by consent? Wouldn't that be more faithful to the multi-stranded nature of our attachments?

Of course, one may then seek to build agreement as to what one will do together, as indeed the Gitxsan do. But note that that search for agreement comes *after* one's recognition of community and that it is rarely if ever perfectly achieved. It is not foundational. It becomes the continual, never finished, always essential work of community. Indeed, participation in that work is precisely what it means to be a responsible member. It is through working together that,

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[34] Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014), 127–31, especially 127n7.

[35] Duff, *Histories, Territories*, 26–27.

[36] Shalene Jobin, et al., 'Wahkohtowin ◁�"�: Principles, Process, and Pedagogy', *Canadian Legal Education Annual Review* (forthcoming): 27, 12.

ideally, one consolidates one's sense of membership and builds one's grasp of the society's procedures, historical knowledge, rhetorical strategies, economies, lands, people, and beings – a mastery of how to work together that is itself a reason for continued adherence. Participation in this work is, as Jim Tully has said, what it means to become a citizen.[37] Thus, if we want to build belonging, we should seek to foster participation. Participation is not just an attribute of citizenship. It is how one consolidates and deepens one's citizenship.

The Gitxsan see this work as a responsibility, not simply an entitlement. Potential chiefs are trained in the skills that leadership requires and then named on their ability to shoulder such responsibilities. Witnessing and approving the results of a feast emphasize that feast-work can only be accomplished with the active attention and judgement of other Houses; indeed, in Gitxsan society, it is that recognition that gives the work the only force it possesses. The *tsek* renders manifest members' obligation to sustain materially the society's institutions – a support essential to the political identity and agency of the Gitxsan people.

One can see analogues for each of the previous paragraphs' affirmations in the operations of state law and governance, but the analogues are often masked by the apparent solidity, the apparent givenness, the heavy institutionalization, of the state. Can we reinforce a comparable responsibility by rendering it visible? One example might be the Australian requirement of compulsory voting. It emphasizes that there is a quid pro quo engaged by the right of citizenship: one must participate in the act of deciding the overall orientation of one's government. A citizen may spoil their ballot, but they need to grasp that ballot and decide what to do with it. It is worth thinking of other ways of rendering visible the interdependence of rights and responsibilities. Might governments' create specially designated funds inspired by the transparency of the *tsek*: a solidarity fund, for example, replenished each year by a progressively graduated proportion of one's tax bill, for achieving the work of economic redistribution? As it stands now, government-administered pensions, employment insurance, and medical insurance build public support for government not just because they address compelling human needs (which they do) but because they crystallize interdependence and mutual responsibility in practical form.

For participation to succeed in forming attachment, opportunities for participation have to be accessible and they have to matter. One reason why Gitxsan society engages its members is that the Gitxsan people is a composite of political communities: families, Houses, in some cases *wil'naat'ahl*, feasting among Houses. These polities each have their own membership, their own ways of doing things, their own stories; some have their own property. They can decline to go along with others' decisions, adhere in part to them, or harmonize their actions with others in ways of their own choosing. They are not held within a mandatory, uniform, centrally determined and enforced

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[37] James Tully, *Public Philosophy in a New Key*, vol. 2, *Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008), 99–100.

structure of law. Each one is a context for collective self-determination in its own right. This allows for the graduated opportunities for political participation that de Tocqueville famously ascribed to voluntary associations, together with different intensities and levels of prominence of roles. Note, however, that in Gitxsan society these polities have a sphere of autonomy and a role in general governance that most states now deny to voluntary associations. Moreover, Gitxsan polities are voluntary only in the sense that an individual can exit Gitxsan political society altogether. Your House membership is regulated by the system of kinship and by the Houses themselves, and, within that system, you are expected to fulfil your responsibilities to the extent you are able.

The Gitxsan structure of polities can be seen, then, as essentially federal, but with an array of polities that is more extensive than the more familiar federalism of states. The Gitxsan structure is not encased within a uniform framework. The ability to dis-adhere is real, albeit costly in terms of the ability to cooperate into the future. The Gitxsan approach tolerates asymmetry so that the patterns of inter-Gitxsan cooperation tend to be quite various – more akin, in some ways, to the diverse patterns of collaboration and autonomy that exist among states in the international realm rather than that between units of a federation. This diversity is a function of the Houses' ability to make their own decisions.

Can we build, within states, a similar structure of graduated and efficacious polities? Many elements of such a structure that once existed have since been undermined. Unions no longer have the presence or power they once had. Forums for political dialogue that brought citizens into interaction with those with whom they disagreed have increasingly been replaced by echo chambers. Finding ways to restore such engagement should be a crucial objective of our time. Some suggestions: First, to be effective, these forums have to be more than voluntary. They have to be treated, to a degree, as analogous to local government, able to make decisions of public consequence (as indeed the Gitxsan's institutions are).[38] One reason for the decline of unions is that many jurisdictions have come to treat them as voluntary associations, not as institutions representing their diverse workforce for the purpose of workplace governance. Second, it helps if they have power over resources. Indeed, the ability to participate in the allocation of resources draws members into governance, making participation consequential, rendering the institutions more representative, and training participants in the stewardship and deployment of resources. Third, it may be necessary to meet political community where it resides, empowering forums where people already convene – environmental groups, religious denominations, unions, student

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[38] See Archon Fung and Eric Olin Wright, 'Deepening Democracy: Innovations in Empowered Participatory Governance', *Politics & Society* 29, no. 1 (2001): 21, 23–24; and Patrick Heller, 'Moving the State: The Politics of Democratic Decentralization in Kerala, South Africa, and Porto Alegre', *Politics & Society* 29, no. 1 (2001): 158.

organizations, arts councils, parents' forums, renters' associations, sports clubs, and many others – and using those as the building blocks for more broadly based organization.[39]

The inclusion of religious organizations in this list may set off alarm bells in some readers' minds. It is true that recognizing existing communities may be in tension with one's wish to create forums that are themselves diverse (though the uniformity even of religious organizations should not be overstated). The extent to which constituent organizations are democratically controlled should also count in this process. But generally, our shorthand conceptions of equality frequently suggest that citizens should be treated identically. Devolved decision-making necessarily produces differential treatment. How do we ensure those differences are okay? These are serious questions. There is a strong case for some mandatory constraints. Such constraints are compatible with the spirit of devolution. After all, the devolved units together create a composite political community, and component units may well require the observance of certain principles as a condition for that cooperation (gender and racial equality, among others). But, if one genuinely wants to deepen democratic participation, those constraints need to be kept as minimal as possible. It is important to remember that the very visibility of devolved decision-making imports a level of accountability – one that takes a form analogous to the lateral constraints in Gitxsan society.

Consider this example. In 2004, an Islamic organization in Ontario stated its intention to use arbitration under that province's *Arbitration Act, 1991* SO 1991, c 17, to deal with the consequences of family separation using Muslim personal law (some Christian and Jewish groups were already engaging in arbitration based on their religious traditions). This generated furore and the government of the day appointed former Attorney-General Marion Boyd to review the situation. She recommended that arbitration based on religious law be permitted subject to a list of requirements, including that arbitrators in such matters prepare and distribute a statement of the principles they would be observing, that the arbitrations only occur if procedural requirements specified in the report were observed, and that the arbitrations be made subject to judicial review on specified grounds.[40] This report was criticized because it would still permit the rights resulting from family break-up to be adjudicated on the basis of religious law. But note what happens in the absence of such adjudication. The vast majority of marital disputes are settled by agreement of the parties. If this were not the case, the courts would be

[39] See, generally, Saul Alinsky, *Reveille for Radicals* (Chicago: University of Chicago Press, 1946), 99–111 and, regarding religious entities as a foundation for broad-based organizing, Jeffrey Stout, *Blessed Are the Organized: Grassroots Democracy in America* (Princeton: Princeton University Press, 2010), 4–5, for example.

[40] Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion*, Report Prepared for the Ministry of the Attorney General of Ontario (December 2004).

incapable of handling the burden. Those private settlements are subject to very little oversight and are concluded on the basis of who knows what principles. In contrast, the Boyd recommendations would have opened those standards to transparency, public commentary, deliberation, procedural protections, and an enhanced measure of judicial review. Note the harnessing of the lateral processes of publicity and commentary. Our current processes tend to draw a bright line between public decision-making, which aspires to be transparent and uniform, and private decision-making, which is invisible and largely uncontrolled. We should instead embrace a gradation of publics together with a gradation of publicness.

Another way to put this argument is that we ought to come to terms with the facticity of political community. All political communities, including states, have a non-neutral, non-universal composition, one that is reflected in their decision-making. Consider this example: In the 1970s and 1980s in the southern United States, litigation challenged the position of historically Black colleges and universities (HBCUs) on the basis that their states' university systems were, in effect, still segregated. Why? Because the HBCUs still attracted disproportionate numbers of African-American students because of the composition of their governing boards, their larger numbers of African-American faculty, and their programmes directed towards African-American students. But how, then, does one desegregate them? By giving them white-majority boards, hiring more white faculty, and changing their programming? One solution strongly pressed but ultimately defeated was to merge the HBCUs with historically white institutions, so that the HBCUs' distinctive character would be eliminated.[41] The fact is that state institutions have a particular character that is a product of their citizenry refracted through their institutions. They are nevertheless empowered to make real decisions. I am proposing that we extend that ability to political communities within the state. If we do so, not only will there be increased opportunities for political participation, our institutions can also escape, to some degree, the impersonality, limited responsiveness, and exclusively top-down character of conventional bureaucratic administration.[42]

This prescription is not anti-state. Indeed, I suspect that greater participation in such forums will lead to greater participation at the level of the state as well, that the state will be more representative, that its variegations will be more visible, and that in consequence the state will have greater legitimacy to pursue vigorous policies, as indeed it must if we are to address the great challenges of our time. For this strategy to work there does need to be a range of agencies,

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[41] See the cases discussed in Wendy Brown-Scott, 'Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?', *Emory Law Journal* 43, no. 1 (1994): 50–53.

[42] See, for example, Anna Yeatman et al., *Individualization and the Delivery of Welfare Services: Contestation and Complexity* (Basingstoke: Palgrave Macmillan, 2009).

sufficient to allow for very broad participation, and there has to be a ladder of opportunities for participation extending to the society as a whole, as there effectively is in Gitxsan society. This has been the experience in the Scandinavian countries. There, social services are frequently delivered by agencies identified with segments of society. Yet the coverage of those agencies is extensive, and the engagement possible within them feeds into the institutions of the state as a whole, broadening and empowering them.[43]

One last lesson from Gitxsan society: Note that Gitxsan political participation is intimately wedded to ceremony and ritual. A feast is marked by set-pieces having symbolic significance: the seating of each guest with their House; the encounter between the host House's *nax nok* (a troublesome and unpredictable spirit) and the guest Houses' invocation of their own *nax nok*; the distribution of goods as an expression of gratitude to the attending Houses; the host House's songs and dances as the work of the feast begins; the order of contributions to the *tsek* by relationship to the House, ending with those of the spouses of House members; the House representatives' commentary on the work of the feast. Indeed, Indigenous peoples often refer to their political processes as 'ceremonies'. In Gitxsan society, it is often the case that the feast itself is primarily ceremonial, with the substantive deliberations, the negotiations, conducted prior to the feast. And yet the ceremonial elements clearly do real work. One obvious example is the response at the end of the feast by each attending House. That event, at the very least, expresses the principle that the most important actions of each House are subject to the approval of other Houses – indeed, derive their force from being seen by the other Houses to be done in the right way. Moreover, that final act of the feast impels and regulates the discussions that occur before the feast, during which the host House strives to ensure that the work will be approved. The preparations for the feast are under the structured, symbolic control of the feast's final event.

This is a reminder of the work that ceremony does in non-Indigenous political life too. Voting is the method by which representatives are chosen, but it is also a powerful affirmation of citizens' absolute equality. The achievement of equality in practice may remain elusive, but each election emphasizes that it is a foundational principle and reaffirms it as a standard for critical evaluation. To take another example, I argued above for compulsory voting not as a way of getting more representative outcomes (though one might make that case) but because of the message it sends about citizens' responsibility. And, as a third example, if administration of some governmental services is devolved to grassroots organizations, perhaps we should require that each organization provide a report of their activities to a meeting of their counterparts, in which

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[43] Lars Skov Henriksen, Kristen Strømsnes, and Lars Svedberg, 'Understanding Civic Engagement in the Scandinavian Context', in *Civic Engagement in Scandinavia: Volunteering, Informal Help and Giving in Denmark, Norway and Sweden*, ed. Lars Skov Henriksen, Kristen Strømsnes, and Lars Svedberg (Cham: Springer, 2019), 1–31.

each organization would assess and comment upon each other's activities. Think what would be learned but also, more importantly, what such a step would communicate about the direction of authority, responsibility, and accountability. Finally, note that the symbols embedded in such practices have the merit of stimulating participation and engagement. Not only do they require parties to act for their very operation, but their implications are open, demanding continued interpretation.

CONCLUSION

The panoply of approaches discussed herein would broaden the foundation of democratic engagement and, I hope, justify citizens in perceiving government to be truly theirs. They are founded on the affirmations that we need to live together in society, that societies are not defined by our substantive agreements, but that we can nevertheless aspire to govern ourselves collectively through practices of participatory decision-making. The greater the engagement, and the more extensive the mechanisms for accountability to each other, the more democratic our institutions will be.

Self-government does not repose upon a firm foundation outside of human endeavour. There is no such terra firma. Rather, it reposes on the quality of our structured interaction, on our ability to speak, on our readiness to hear, on the engaged responsibility of the citizens themselves, and on the institutional structures that allow us to contribute to, test, and assess that engagement. As citizens, we ultimately hold the health of our democratic orders in our hands.