Asymmetrical Recognition: A-Legality and the Problem of Inclusion and Exclusion[♣]

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I. Introduction

Plurality has already been subordinated to unity when one asks how constitutionalism could regulate the process whereby minority groups raise claims to cultural recognition. For the reference to a group as a minority group in quest of cultural recognition takes for granted that, although not (yet) fully recognized as such, the group is nonetheless already part of a collective under a shared constitution. Despite its insistence on diversity, unity is the alpha and the omega of a politics of constitutional recognition: its "alpha," in the form of a pre-given unity in the absence of which minority demands of constitutional recognition would not be intelligible as such; its "omega," in the form of a more inclusive political unity that emerges, if things go well, from struggles for constitutional recognition.

My aim in this essay is to critically scrutinize this interpretation of the tension—if "tension" is at all the proper term—between legal unity and political plurality that emerges with group claims to cultural distinctness. My approach deliberately takes a step back from the contemporary framing of the "multiculturalism debate." Instead of taking this frame for granted, and engaging in the vast discussion about different forms of minority recognition and minority-rights, whether extant or desirable, I will probe one of the frame's key features: reciprocity. My leading question is this: to what extent does the normative idea of reciprocity in the form of mutual recognition between equal—but different—groups under a single constitution succeed in reconciling political plurality and legal unity in the face of strong group claims to cultural distinctness? If it doesn't, and so I will argue, is there another interpretation of recognition which could be brought into play when dealing with such claims?

This essay falls into three parts. Section II peruses the models of politico-legal reciprocity at the basis of what Charles Taylor calls a "politics of equal dignity" and a "politics of difference," with special attention to what might be dubbed a "genealogy" of politico-legal reciprocity. Section III carries forward the analysis of reciprocity by exploring the Canadian Supreme Court's well-known *Quebec Secession Reference*. In particular, it examines the reasoning whereby a constitutional court, when granting recognition to group claims to cultural distinctness, takes for granted that such claims are only legitimate if they are constitutional claims, hence the manifestation of a prior, more fundamental political reciprocity. Section IV concludes by exploring whether and how constitutionalism could deal with group claims to distinctness, cultural or otherwise, that resist inclusion within a circle of politico-legal reciprocity: a-legality. Dealing with such claims, or so I argue, requires a form of political negotiation that partially suspends the normal constitutional regimentation of reciprocity—

[♣] This paper abridges and expands on earlier published material of the author, in particular: Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013); and Hans Lindahl, "Constitutionalism and the Recognition of A-Legality," in Fabio Ciaramelli and Ferdinando Menga (eds.), L'epoca dei populismi. Diritt e Conflitti/The Age of Populism. Rights and Conflicts, special issue of *Teoriea e critica della regolazzione sociale* 2 (2015), 46-67.

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"collective self-restraint," as I will call it. Collective self-restraint is an ingredient feature of recognition as the recognition of a-legality.

II. Liberalism and the Genealogy of Reciprocity

In his well-known essay on the politics of recognition, Charles Taylor sketches out two forms of liberalism. For the one, there is the liberalism that focuses on a "politics of equal dignity," in which "what is established is meant to be universally the same, an identical basket of rights and immunities"; for the other, there is the liberalism that promotes a "politics of difference," in which "what we are asked to recognize is the unique identity of this individual or group, their distinctness from everyone else."[1] Walzer, in his commentary to Taylor's essay, refers to these two forms of recognition in liberal politics as, respectively, "Liberalism 1" and "Liberalism 2."[2] Whereas authors such as Rawls and Habermas are, arguably, champions of Liberalism 1, the votaries of Liberalism 2 include theorists such as Taylor, Kymlicka and Tully. Instead of taking sides in this debate, what interests me is identifying and critically scrutinizing what *joins* the parties in strife, i.e. the shared presupposition that remains beyond the pale of discussion, such that both camps can view themselves as different manifestations of liberalism. This shared presupposition is the normative principle of *reciprocity*. The differences between these authors concern how reciprocity should be conceptualized and how it can be institutionalized; but liberalism, whatever its modulations, is propelled by the idea that a polity is well-ordered to the extent that it actualizes relations of political and legal reciprocity among its citizens.

The idea that reciprocity is constitutive for politics and law holds explicit and undisputed sway in Liberalism 1. Consider to this effect Jürgen Habermas's defence of Liberalism 1 by way of a discourse theory of practical reason. The opening passage of his essay, "Struggles for Recognition in the Democratic Constitutional State," neatly ties together the concept of a modern constitution and the principle of reciprocity:

> Modern constitutions owe their existence to a conception found in modern natural law according to which citizens come together voluntarily to form a legal community of free and equal consociates. The constitution puts into effect precisely those rights that those individuals must grant one another if they want to order their life together legitimately by means of positive law.[3]

Habermas is concerned to show, against Taylor's vindication of a politics of recognition oriented to the constitutional protection of distinct communities, that a "universalistic" understanding of modern constitutions is up to the normative task of protecting the individuals that are the subjects of rights, while also accommodating the struggles for recognition in which the articulation of collective identities takes place. The specifics of his debate with Taylor need not detain us. What interests me in Habermas's interpretation of reciprocity, as was already the case in my perusal of Rawls, is whether and how he deals with what might be called a "genealogy" of reciprocity.

Habermas's aforementioned essay barely discusses this issue. It is only broached obliquely and in passing, when he asserts that "a constitution can be thought of as an historical project that each generation of citizens continues to pursue."[4] He goes ahead to argue that

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[1] Charles Taylor, "The Politics of Recognition" in Amy Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 38.

[2] Michael Walzer, "Comment" in Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition*, note 1 above, 99.

[3] Jürgen Habermas, "Struggles for Recognition in the Democratic Constitutional State," in Gutmann (ed.), *Multiculturalism: Examining the Politics of Recognition*, note 1 above, 107.

[4] *Ibid*.

the "struggle over the interpretation and satisfaction of historically unredeemed claims is a struggle for legitimate rights in which collective actors are once again involved, combating a lack of respect for their dignity."[5] See here a compact formulation of the equiprimordiality of constitutionalism and democracy: the struggle for recognition concerning collective experiences of violated integrity takes place *within* a constitutional cadre and *remains* within it, to the extent that the struggle, if it is to be legitimate, aims to transform the constitution. Group demands of cultural recognition must be formulated as *constitutional claims*, that is, as claims seeking to realize the promise of politico-legal reciprocity lodged in the constitution.

In a later essay, Habermas articulates more fully what he means by referring to the constitution as "an historical project." By delving into this issue, Habermas attempts to defuse an objection that threatens to bring to naught his thesis about the equiprimordiality of democracy and the rule of law. Michelman has shown with respect to the enactment of a polity's first constitution that, in Habermas's words, "[t]he constitutional assembly cannot itself vouch for the legitimacy of the rules according to which it was constituted. The chain never terminates, and the democratic process is caught in a circular self-constitution that leads to an infinite regress."[6] Although Habermas acknowledges the gravity of the problem by referring to the foundation of a constitutional democracy as a "groundless discursive self-constitution," he argues that it is possible to break out of this circularity provided one focuses on the "future-oriented character, or openness, of the democratic constitution."[7] In brief,

> whoever bases her judgment today on the normative expectation of complete inclusion and mutual recognition, as well as on the expectation of equal opportunities for utilizing equal rights, must assume that she can find these standards by reasonably appropriating the constitution and its history of interpretation.[8]

But this surely begs the question: the problem is not merely how to achieve a greater inclusiveness to accommodate those who are subject to a form of exclusion at the foundation of the polity to which they belong. The more fundamental problem is rather that, more or less against their will, a variable range of individuals and groups may have been *included* in the first place; that, despite their opposition, they are deemed to *belong* to the polity. Why should they or those who later rally to their cause at all "have the *task* of actualizing the still-untapped normative substance of the system of rights laid down in the original document of the constitution"?[9] Why should they at all have to view themselves as "participants [who] must be able to recognize the project as *the same* throughout history and to judge it from *the same* perspective"?[10] Here, then, is the fraught political dilemma confronting those individuals or groups who were included in the collective against their will, a dilemma we will encounter repeatedly in the following Section when considering the Québécois separatists and members of aboriginal peoples in Canada. On the one hand, they can raise a constitutional claim that, if successful, allows them to obtain political and legal recognition for their cultural distinctness. But if they set foot down this path, they effectively identify themselves as participants in a project with which they do not want to be associated, hence as a minority group engaged in relations of reciprocity within a broader community. On the other, if they oppose their inclusion, refusing to appeal to the constitution's "still-untapped" normative possibilities of inclusiveness, they expose themselves to the charge that their acts of contestation need not

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[5] *Ibid*, 108.

[6] Jürgen Habermas, "Constitutional Democracy: A Paradoxical Union of Contradictory Principles?," in *Political Theory* 29 (2001), 766-781.

[7] *Ibid*, 774.

[8] *Ibid*, 775.

[9] *Ibid*, 774 (emphasis added).

[10] *Ibid*, 775.

be accepted as such or even listened to because they are not, to borrow and emphasize Habermas's phrase, "*reasonably* appropriating the constitution and its history of interpretation." So if they choose this second path, their acts of resistance are vulnerable to censure for being non-reciprocal acts, acts that fall prey to a performative contradiction—*the* cardinal sin of reason. This dilemma surfaces time and again, during the later career of the polity, with respect to all those members of groups who view their inclusion in the polity as, well, the continuation of a prior annexation.

So, the problem is that the procedural rules of liberal democracies, as articulated and justified by Habermas, presuppose prior acts of inclusion and exclusion that resist legitimation within the constitutional order these acts contribute to creating. The acts of seizing the initiative to found a constitution and reciprocal rights under a constitution are themselves non-reciprocal acts.

What about the "politics of difference" at the heart of Liberalism 2? Here again, reciprocity is the characteristic feature of a "politics of difference," albeit that reciprocity unfolds through a process different to that in a "politics of equal dignity." The basic model of this form of recognition is provided by Hegel's famous discussion of the dialectic of the master and the slave. As Taylor puts it, "[t]he struggle for recognition can find only one satisfactory solution, and that is a regime of reciprocal recognition among equals."[11] Importantly, Taylor notes that even though there are significant differences between Rousseau's and Hegel's approaches to recognition and reciprocity, Hegel concurs with Rousseau's insight that a regime of reciprocal recognition takes place within "a society with a common purpose."[12] This point is important because what is at stake is the *dialectical* structure of recognition: if the struggle for recognition is sparked by the negativity which accompanies a situation experienced as one of inequality, that is, as the absence of mutual recognition, this struggle takes place against the background of *a more fundamental reciprocity that the parties must already have acknowledged*, even if only implicitly, if they are at all to engage in a struggle the stake of which is reaching mutual recognition. Honneth makes this point deftly:

> [I]f the social meaning of the conflict can only be adequately understood by ascribing to both parties knowledge of their dependence on the other, then the antagonized subjects cannot be conceived as isolated beings acting only egocentrically. Rather, in their own action orientation, both subjects have already positively taken the other into account, before they become engaged in hostilities. Both must, in fact, already have accepted the other in advance as a partner to interaction upon whom they are willing to allow their own activity to be dependent.[13]

To be sure, Honneth's analysis in this passage focuses on the mutual dependence between two individuals, rather than on the more general structure of social conflict mediated by law. No less importantly, it has been noted that Honneth's theory of recognition requires considerable expansion to account for the recognition of cultural minorities in modern democratic states, as his account focuses primarily on formal recognition between individuals.[14] But what interests me here is the basic structure of interdependence articulated in the final sentence of this citation, which can be extrapolated and generalized without great difficulty by a theory of

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[11] Taylor, "A Politics of Recognition," note 1 above, 50.

[13] Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, trans J Anderson (Cambridge, Polity Press, 1995), 45.

[14] See Bart van Leeuwen, "A Formal Recognition of Social Attachments: Expanding Axel Honneth's Theory of Recognition" in Inquiry, 2 (2007), 180-205. See also the chapter on multiculturalism in Will Kymlicka, *Contemporary Political Philosophy* (Oxford: Oxford University Press, 2002) 327-376. Significantly, Honneth's recent works, *Freedom's Right: The Social Foundations of Democratic Life* (Cambridge: Polity Press, 2014), and *The I in We: Studies in the Theory of Recognition* (Cambridge: Polity Press, 2012), also fail to address head on claims to cultural distinctness by social groups.

constitutionalism that seeks to give normative, conceptual and institutional shape to a "politics of difference" sensitive to group claims to distinctness. Indeed, such a theory of constitutionalism postulates (i) a prior set of values, interests and purposes that must be assumed as shared by all political actors, and that any group that strives to gain cultural recognition must embrace if its claim is to enjoy the patina of legitimacy; (ii) a shared procedural framework, set out in the constitution, which governs the terms in which the struggle takes place and is settled; and (iii) a redefinition of the content of (i), if all goes well, as a result of constitutional struggle in conformity with (ii).[15]

Notice that the aim of the struggle for recognition, in this understanding of a "politics of difference," is to seek the constitutional affirmation of cultural distinctness within a broader collective. At stake is not relinquishing the group's identity but rather showing, first, how and why it ought to be affirmed in its *particularity* in relation to the general values, interests and purposes of the collective, and, second, why such particularity is the expression of equality, rather than of inequality. Hence if a group's claim to identity is to be taken seriously by the other groups that partake of the collective, then it must appeal to—and aim to transform the meaning of—the values, interests and purposes the group *already* shares with those groups. The group must be able to present its identity as a particular manifestation of a general, more capacious collective identity. Thus the struggle for cultural recognition, on this reading of a "politics of difference," has the form of a dialectic of the general and the particular, such that an initial situation of non-reciprocity—where non-reciprocity denotes a yet-to-be-recognized claim to particularity—yields to a novel state of reciprocity or mutual recognition between equal—but different—groups. Legitimate struggles for differentiation are, in this understanding of a politics of difference, struggles for *internal* differentiation, regardless of whether what is at stake is "accommodation-rights" or "self-government rights."[16]

Although the theory of constitutionalism that emerges from this dialectical reading of the principle of reciprocity is powerful and persuasive in a number of ways, a nagging question remains: Can it elude the problem that the emergence of political reciprocity is never simply the outcome of reciprocity? Can it simply be taken for granted that group claims to cultural distinctness must, as Honneth claims, "in fact, already have accepted the other [groups] in advance as [partners] to interaction upon whom they are willing to allow their own activity to be dependent"? In view of plumbing the implications of these questions I will now turn to examine what has been widely acclaimed as one of the most striking and daring judicial examples of a recognition-based theory of constitutionalism: the Canadian Supreme Court's *Quebec Secession Reference*.[17]

III. "Reconcil[ing] unity and diversity"

The Court's reference has been the object of extended attention, and it is by no means my intention here to review that literature. Instead, I will cull only those aspects of the Court's reasoning that are germane to the theme of reciprocity and its genealogy. My analysis proceeds in three steps. Initially, it canvasses the Court's defense of the principle of reciprocity as concerns the negotiation of constitutional amendments. Subsequently, it critically explores the genealogy of the Canadian federation, and therewith of politico-legal reciprocity, as sketched

[15] See, for example, James Tully, "Struggles over Recognition and Distribution," in *Constellations* 7 (2000), 469-482.

[16] Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism and Citizenship* (Oxford: Oxford University Press, 2001), 152-176.

[17] The Canadian Supreme Court's reference, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217. Citations refer, in the main text, to the sections of the Reference. The Reference is available at: http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do (accessed on 1 July 2015).

by the Court. Finally, it returns to consider how the genealogical problems circumvented by the Court reappear in its vindication of reciprocity, and the implications that follow thereof for its argument as a whole.

A. A Unilateral Right to Secession?

The central question the Court was called on to consider in this reference was "whether Quebec has a right to *unilateral* secession." (§149) The Court rejects such a right. Although the Court does not say so explicitly, it effectively contends that a putative right to unilateral secession is an oxymoron. To invoke a *right*, whatever its nature, is to presuppose relations of political and legal reciprocity with those who must honor the right, or so the Court argues; yet the very idea of *unilateral* secession is incompatible with the reciprocity that must have been presupposed in the act of claiming a *right* to secession. These are, to be sure, but the bare bones of the argument, and it pays to examine in somewhat greater detail how the Court fleshes out its position.

In what amounts to an invocation of the equiprimordiality of constitutionalism and democracy, the Court kicks off its reasoning by asserting that "in our constitutional tradition, legality and legitimacy are linked." (§33) Indeed, the Court argues that there is a constitutive circularity—in the positive sense of the term—governing the relation between constitutionalism and democracy. The first arc of the circularity concerns the constitution as the framework for political deliberation:

> [d]emocracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. (§67)

And it adds: "Constitutionalism facilitates—indeed, makes possible—a democratic political system by creating an orderly framework within which people may make political decisions." (§78) Conversely, and this is the second arc of the circularity, the constitution does not merely regulate political decision-making; it is also, at least in some cases, itself the object of political decision-making. "A system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle." (§78) In line with this general principle it asserts that "constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled." (§76)

The equiprimordiality between constitutionalism and democracy retains all its vigor in a federal structure of government. For the one, and this is the first arc,

> [t]he Constitution binds all governments, both federal and provincial, including the executive branch . . . They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source. (§72)

So, a resounding yea to federalism in the form of a system of government that "enable[s] citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level"! (§66) But—and this should greatly temper the enthusiasm of legal pluralists—the Court makes no bones about the fact that federalism, so conceived, is a way of institutionalizing a *single* legal order: "there is . . . one law for all." (§71) Its guarantor, that is, the guarantor of plurality *within* legal unity, is, predictably, the Supreme Court itself. For the other, and here is the second arc, initiatives by any of the provinces to secede or otherwise transform the terms of Confederation "would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes . . ." (§88) And in a decisive

passage the Court argues that a province that would claim a *right* to secede or to modify the terms of Confederation, without discharging its obligation to negotiate with the other interested parties as established by the Constitution, effectively engages in a performative contradiction. Indeed, a province that invokes a unilateral right both affirms and denies a "reciprocal obligation." In the Court's parlance,

> [r]efusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would put at serious risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values . . . (§95)

B. Seizing the "initiative"

Obviously, the equiprimordiality of constitutionalism and democracy presupposes the foundation of Canada as a federal state. That all parties to the federal state are bound by the "reciprocal obligation" to both negotiate *under* the constitution and *about* their constitutional arrangements requires that a constitution has been put in place, to begin with. What, to use its own phrasing, are "the principles that underlie the legitimacy of the Constitution itself"? (§75)

These are "democracy and self-government," that is, the principle of popular sovereignty: "the Constitution is the expression of the sovereignty of the people of Canada." (§85) Importantly, the Court argues, popular sovereignty does not mean that a province can appeal to this principle to secede unilaterally from the federation. For, it avers,

> [c]onstitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism) . . . (§76)

That majority, to which the representatives of Quebec agreed when negotiating Confederation, is the majority of the Canadian people. In the result the Court asserts that the foundational acts of constitution-making amount to an agreement, whereby its parties commit to acting together into the future in view of promoting their joint interest. The nature of that agreement lies beyond doubt: "the vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces." (§96) So legal reciprocity between the parties to the Canadian federation, as institutionalized in the Constitution, does no more than give legal form to a more primordial form of reciprocity, namely, the political reciprocity which arose as a result of the agreement at the origin of Confederation. Because the agreement was one in which *interested* parties participated, and because Confederation was subsequently extended to *all* interested parties, none of the provinces can secede unilaterally without breaching the rights of those "linguistic and cultural minorities, including aboriginal peoples, . . . who look to the Constitution of Canada for the protection of their rights." (§96) The Court later reiterates this point when emphasizing the importance of the constitutional rights of aboriginal peoples living in the province of Quebec, in the event of a unilateral secession by the province.

But *was* there an original agreement which gave rise to Confederation, and which provides a "sound basis" for "reciprocal obligations" under the Constitution? The Court's answer to this question is, in fact, the linchpin of *Quebec:* "Confederation was an initiative of

elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial *fiat*." (§34) To be sure, protracted negotiations were necessary between those representatives before they could compact Confederation. But the agreement whereby the delegates enacted the Confederation was itself a representational act. As such, it was an *authorized* initiative and, by extension, an *authorized* agreement, or so the Court alleges. Consequently, the initiative to found a Confederation was a *legal* initiative, not a *fiat*—Imperial or otherwise—that would have contaminated the legality and legitimacy of the acts leading to Confederation under a constitution. No less importantly, although the delegates were deemed to represent a *differentiated* unity when founding the federation, they represented, first and foremost, a differentiated *unity*—a "unified country," to repeat the Court's turn of phrase. This double reality of diversity within a more fundamental unity subtends the Constitution; the latter, if imperfectly, represents that reality.

> Federalism was a legal response to the *underlying* political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity. (§43; emphasis added)

Hence the Court's reconstruction of the foundation of the Canadian federation *presupposes* the "underlying" mutuality and unity of "the people then living in the colonies scattered across part of what is now Canada" as the basis of the "reciprocal obligations" which their representatives laid down in the Constitution. Paradoxically, the Court holds that the foundation of the Canadian federation through the enactment of its first constitution actually comes second; indeed, the act of constitution-making that galvanizes legal reciprocity refers back to a prior—the first—foundational moment of political reciprocity, which the Court presupposes without justifying. What the Court has to say about why the framers did not explicitly incorporate these principles into the *Constitution Act, 1867*, also holds for the Court itself: "the representative and democratic nature of our political institutions was simply assumed." (§62)

In short, by arguing that the initiative to found the Canadian federation was taken by representatives of "the people then living in the colonies scattered across part of what is now Canada," the Court can elude—and elide—a thorny problem confronting Liberalism 1 and Liberalism 2: the emergence of politico-legal reciprocity itself. The problem is intimated when the Court acknowledges—as acknowledge it must—that the Canadian federation was born from an *initiative*. In effect, can we at all make sense of an "initiative" without introducing an element of unilaterality into the respective act? To a lesser or greater extent, the initiative to found a polity is always seized. Can it be seriously argued—not least in light of the acts of conquest that remain beyond the compass of the Court's historical reconstruction—that the initiative to found the Canadian federation is merely a representational act, an act mandated by a manifold of individuals who, as Honneth puts it, "have accepted the other[s] in advance as [partners] to interaction upon whom they are willing to allow their own activity to be dependent"?

C. Three Problems

If not, then at least three problems undermine the rest of the Court's argument. First, if the Court argues that there is no unilateral right to secession, because this amounts to an oxymoron, can this argument not be turned against the Canadian Constitution itself? Indeed, do rights and "reciprocal obligations" under the Constitution not lead back to a foundational act which, to the extent that it is unilateral, is incapable of generating rights and "reciprocal obligations"?

This problem crops up in the Court's consideration of the principle of effectivity and *de facto* secession. The Court acknowledges that the province of Quebec could in fact secede from the Canadian federation, and that it might be able to invoke the principle of effectivity in international law when seeking recognition for itself as an independent polity. But, the Court hastens to add, this does not mean that unilateral secession enjoys the status of a legal right.

> The principle of effectivity operates very differently. It proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane. Our law has long recognized that through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status. In the law of property, for example, it is well known that a squatter on land may ultimately become the owner if the true owner sleeps on his or her right to repossess the land. In this way, a change in the factual circumstances may subsequently be reflected in a change of legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. (§146)

Notice how those individuals and groups included against their will in the Confederation can turn the Court's argument against it. In effect, to the extent that the Court, in its historical reconstruction, asserts that the initiative to found the Canadian federation was a representational act, does it not gloss over what they view as the *unilaterality* of this act, hence that their having become members of the federation is "a matter of empirical fact" rather than of right? Yet more pointedly, does not the Court's qualification of the initiative as authorized entail, from their point of view, a "subsequent condonation of an initially illegal act [whereby the Court] retroactively creates a legal right to engage in the act in the first place"?

The second difficulty is a corollary of the first: can the Court simply brush off as "unsound" (§75) the argument that "the same popular sovereignty that originally led to the present Constitution must . . . also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone"? (§75) Can the Court really claim that "our national existence [is] seamless in so many aspects"? (§96) It is significant, in this respect, that the Court invokes the constitutional rights enjoyed by the aboriginal peoples living in the province of Quebec. By calling attention to their rights, the Court seeks to undermine the argument that "the people" of Quebec is a homogeneous group that engages in an act of self-determination. In other words, it contests that such an act could be the legal expression of a prior, more fundamental political reciprocity. And it was indeed the case that secession from Canada was rejected by many among the members of the aboriginal peoples living in the province of Quebec, who invoked rights granted them under the Canadian Constitution when opposing unilateral secession. The question, however, is whether the Court itself does not engage in the kind of inclusive claim with respect to aboriginals that it aims to debunk as illegitimate when advanced by the would-be Québécois separatists:

> Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the *Constitution Act, 1982*, included in s. 35 explicit protection for existing aboriginal and treaty rights . . . The "promise" of s. 35 . . . recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. (§82)

In effect, the first sentence seems to beg the question: Canada emerges as a federal polity when the aboriginal peoples and other groups *become* minorities therein. Not only is the exercise of power under the single constitution of Canada bound to honor the long tradition of respect for minorities but, conversely, constitutional powers are duty bound to (respectfully) treat aboriginal peoples as *minorities* with a view to ensuring that "there is . . . one law for all." This is the political upshot of a recognition-based theory of constitutionalism, which

views differentiation as *internal* differentiation. The dialectic of particularity and generality animating a Canadian "politics of difference" has, as its dark side, another, considerably less benevolent meaning: recognizing the *particularity* of aboriginal peoples as distinct minority groups serves to celebrate and consolidate the *generality* of the Canadian federation of which they are deemed to partake.

For those members of aboriginal peoples that view the foundation of the Canadian federation as a unilateral act of occupation, as the annexation of their ancestral lands, the, oh so gracious and munificent, constitutional acknowledgment of their peoples" "contribution to the building of Canada" is no doubt a particularly invidious way of both securing and concealing alien rule. Indeed, the political and legal reciprocity that a Canadian "politics of recognition" has on offer is what they shun. For them, *recognition is domination*.

The third difficulty concerns, finally, the Court's own authority to issue a reference about the unilateral secession of Quebec. What interests me here is the Court's appraisal of the three circumstances, at international law, that justify unilateral secession. The first concerns peoples under colonial rule, which the Court dismisses out of hand: "the right of colonial peoples to exercise their right to self-determination by breaking away from "imperial" power is now undisputed, but is irrelevant to this Reference." (§132) Yet the Court itself obliquely—and no doubt inadvertently—calls into question its summary dismissal of "imperial" power when it extols the continuity of the rule of law so important to the federation's success in reconciling diversity with unity. Is not the continuity leading from the British Empire to the emergence of the Canadian federation precisely what the separatists both expose and seek to disassociate themselves from? And while many members of the aboriginal peoples in Quebec would strenuously oppose secession, does this mean that they have ceased to view the Canadian federation and its recognition of their status as a culturally distinct minority group as a continuation of "imperial power"? Most fundamentally: does not the Court effectively become both party and judge to the conflict?

The second circumstance in which unilateral secession is justified "is where a people is subject to alien subjugation, domination or exploitation outside a colonial context," i.e. to alien rule. (§133) Remarkably, the Court contents itself with simply citing the passages of the *Declaration on Friendly Relations* which contain the apposite circumstance. The reason for this is that, as is surely patent to all who can see, Quebec is part of the Canadian federation, hence that by definition it is *not* subject to alien rule—nor a fortiori to, say, "foreign military occupation." But, from the perspective of would-be Québécois separatists, this is surely to beg the question: the people of Quebec aspires to secede unilaterally from Canada because it views itself as subject to alien rule. From their perspective, it is not necessarily specious or frivolous to assert that the bases of the Canadian armed forces stationed in Quebec constitute "foreign military occupation." Again the troubling question emerges: does not the Court's claim that it can deliver an authoritative judgment about a right to self-determination render it party and judge at the same time?

The third circumstance arises "where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development." (§138) This circumstance received short shrift from the Court, which argued that it was "manifestly" not at hand with respect to Quebec. Moreover, the Court notes, Quebecers have enjoyed ample and repeated participation in the government of Canada. By participating in the national government, they not only represent the people of Quebec but represent it as part of the people of Canada. Yet what the would-be separatists impugn is not that their representatives should be more assertive in defending the interests of Quebec in the national government but rather that they are their representatives *at all*: not in our name. Have the dice not already been loaded when the Court affirms that constitutional practice grants the people of Quebec a

meaningful exercise of their *internal* right to self-determination, i.e. a right within the Canadian federation?

In short, the Québécois denunciation of recognition under the Canadian constitution evinces a concept of difference that resists neutralization and pacification through the "politics of difference" advocated by a theory of constitutional recognition. At stake is a difference—a claim to group distinctness, cultural or otherwise—that is not merely a manifestation of particularity within a more encompassing generality, whether realized or realizable, but rather a form of difference that obdurately resists inclusion in a given circle of politico-legal reciprocity: *a-legality*.

III. Asymmetrical Recognition

As I use the expression, a-legality is a technical term regarding those kinds of behavior which register as legal or illegal within a legal order (whence the "legality" of a-legality), while at the same time challenging *both* terms of this master distinction (whence the "a" of a-legality). A-legality is not merely a privative manifestation of legality, i.e. disorder, for this would amount to collapsing a-legality into illegality. Instead, the "a" of a-legality points to difference in the sense of *another* possible legality that is more or less incompatible with the order which is challenged. Unless behavior could register in one way or another as legal or illegal to an order, there would be no challenge to that order; it would simply be irrelevant to the law and could not even be ignored by it. But there can be no challenge either if behavior can be given a place in a legal order by simply qualifying it as legal or illegal, i.e. if it is orderable without further ado. Insofar as legal orders structure reality as being either legal or illegal, ordered or disordered, a-legality concerns a feature of reality that resists ordering by a given legal system. The a-legal is both orderable, in the sense of what lends itself to qualification by a legal order as legal or illegal, and *unorderable* because it raises a normative claim that cannot be accommodated on either side of the master distinction with which legal orders operate.

As such, a-legality points to a radical sense of plurality, of political plurality which cannot be integrated into the unity of one legal order because there is a normative claim that eludes what a given legal order can qualify, hence which remains inaccessible to it. In my use of the expression, a-legality is the juridical manifestation of what Edmund Husserl calls strangeness, which he describes as follows: "accessibility in its genuine inaccessibility, in the mode of incomprehensibility."[18] A strong sense of legal pluralism entails that there can be no (il)legality without a-legality.

Be that as it may, the foregoing analysis suggests that it is necessary to reconsider the kinds of problems that confront constitutionalism when engaging with group claims to distinctness, cultural or otherwise. In effect, there is broad agreement in the literature that the task of a theory of constitutionalism, in the face of such claims, is to secure the political and legal conditions for *non-assimilative inclusion*. In other words, it is generally assumed that the vocation of constitutionalism, when dealing with group claims to (cultural) distinctness, is to promote political "stability" in a way that steers clear of the Scylla of "exclusion" and the Charybdis of "assimilation."[19] To the extent that assimilation is a form of exclusion—the exclusion of what the members of a group value as rendering it distinct—non-assimilative inclusion amounts to non-exclusive inclusiveness, that is, inclusive inclusiveness—"hyper inclusiveness," as one might also put it.

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[18] Edmund Husserl, *Zur Phänomenologie der Intersubjektivität,* edited by Iso Kern (The Hague: Martinus Nijhoff, 1973), 631.

[19] Laden correctly identifies exclusion, assimilation, and stability as the three key issues of a politics of identity in the framework of liberal constitutionalism. See Anthony Laden, *Reasonably Radical: Deliberative Liberalism and the Politics of Identity* (Ithaca, NY: Cornell University Press, 2001), chapters 6-8.

There is a great deal to be said for the desideratum of inclusiveness, and I by no means aim to deprecate or minimize its importance. Instead, the main thrust of this essay has been to show that, whatever their merits, liberal theories of constitutionalism confront a fundamental difficulty when attempting to deal with group claims to (cultural) distinctness. Indeed, they are impervious to situations in which *inclusion is the problem signaled by those claims, not its solution*. To reiterate an earlier insight, liberal theories of constitutionalism deal with such claims as *normative* claims to the extent that the latter can be viewed as claims to (cultural) particularity within (political) generality. As a votary of "deep diversity" puts it, liberal theories of constitutionalism postulate "that all members of the society will have one identity that they share, and that can thus be the basis of their unification into a single (albeit diverse and heterogeneous) society."[20] While my purpose is not to defenestrate unity—which is the twin sister of inclusiveness—, I do want to oppose the monism of liberal constitutionalism by highlighting the ambiguity of both desiderata. For, on a liberal reading of constitutionalism, if the majority of the collective is prepared to grant full constitutional recognition to a group's cultural particularity, thereby securing the continued unity and stability of the polity, then further insistence by this minority group that it wants out forfeits all *normative* significance and can be opprobriated, by the majority, as "anarchy" (Laden).

A-legality is not particularity, however. The a-legal, as exemplified by the claims of the Québécois secessionists, denotes a form of distinctness that is recalcitrant to inclusion within a given circle of politico-legal reciprocity. In other words, a-legality concerns the *singular*. Notice that the singular is *not* the particular. In effect, particularity, in the framework of theories of mutual recognition, stands in a dialectical relation to generality. Horkheimer and Adorno point to this notion of singularity (albeit inconsistently) in a fragment of *The Dialectic of Enlightenment*, without, however, drawing the normative implications thereof for a theory of recognition:

> General concepts, formed by individual sciences either on the basis of abstraction or axiomatically, constitute the material of interpretation (*Darstellung*) as much as names for the singular (*Einzelnes*). The struggle against general concepts is senseless. But this does not determine how things stand with the dignity of the general. What is common to many singularities, or what always returns in the singular, need not be more stable, eternal, deeper than the particular (*das Besondere*). The scale of genera is not the same as that of meaningfulness.[21]

Singularity is what registers in a legal order as either legal or illegal, hence in this sense as a particular instance of the general legal rule, yet which raises a normative challenge which definitively eludes incorporation into the legal order, not even when the legal order, in a dialec-

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[20] *Ibid*, 169.

[21] Max Horkheimer and Theodor W. Adorno, *Dialektik der Aufklärung: Philosophische Fragmente* (Frankfurt: Fischer Verlag, 1969), 231. They add, immediately after this citation: "That was precisely the error of the Eleatic philosophers and all those who followed them, beginning with Plato and Aristotle." I would add: "and ending with Honneth and Habermas." It is not surprising, in this context, that Habermas has such difficulties in making ethical sense of Levinas's phenomenology of the human face and its appeal of what is irreducibly singular. According to Habermas, "[e]ach must be able to recognize him- or herself in all that wears a human face. To keep this sense of humanity alive and to clarify it (…) is certainly a task from which philosophers should not feel themselves wholly excused, even at risk of having the dubious role of a "purveyor of meaning" attributed to them." I would retort: each can *and cannot* recognize him- or herself in all that wears a human face. It is in this way that I would draw on the Levinasian theme of the "face"—a face, incidentally, which is not only the face of the human but also of other sentient, and perhaps even non-sentient, beings—to make sense of a non-relational obligation to preserve the strange as a constitutive feature of the ethical dimension of law. See Jürgen Habermas, *Postmetaphysical Thinking: Philosophical Essays*, translated by William Mark Hogengarten (Cambridge, MA: The MIT Press, 1992), .

tical move of generalization, transforms itself by redrawing the distinction between legality and illegality. Although I cannot develop this idea here, I submit that a-legality and the experience of singularity with which legal orders are confronted points to an interpretation of the ethical dimension in law which bursts the conceptual framework available to either universalism or particularism, cosmopolitanism or communitarianism.

From this alternative perspective, "reconciling unity with diversity" and promoting non-assimilative inclusiveness does not exhaust the theory and practice of constitutionalism, for there are group claims to (cultural) distinctness which cannot be accommodated in their own terms within the unity of a politico-legal order. In the same way that the initiatives that give rise to a polity, differentiating it from what become its others, can never be fully included within its legal order, so also there are subsequent claims to difference that resist inclusion within this order—on principle, and not merely in fact. As such, these claims are the manifestation of irreconcilable—and in this sense radical—difference. The stalemate that arises between, on the one hand, the Canadian rebuke that the Quebecer secessionists fall prey to a performative contradiction, and, on the other, the Québécois objection that Canadians beg the question when they demand that Québec present its claim as a constitutional claim, is exemplary for the strong form of *political plurality* proper to radical difference. What goes under the name of "secessionist" movements is but one instance of radical difference, although perhaps it would be more correct to say that radical difference confronts every polity with multifarious figures of secessionist aspirations, whether tumultuous or halcyon, heeded or ignored.

So the fundamental and most general question that arises as a result of our critical scrutiny of *Quebec* and recognition-based theories of constitutionalism is the following: how—if at all—can constitutionalism deal with a-legality? Can constitutionalism respond to radical difference in a way that does not reduce it to a claim concerning *internal* differentiation? Is there a way of responding to a-legality that does not collapse the recognition of difference into *constitutional* recognition? These questions are particularly pressing as concerns secession because the nascent polity perforce emerges through acts that are *themselves* more or less unilateral, thereby reproducing, at least latently, the problem of unwanted inclusion that spawned secession in the first place. This was clearly the case with those aboriginal peoples who rejected becoming part of an independent Quebec.

I don't think there is any way for constitutionalism to respond *directly* to a-legality, that is, to deal with radical claims to cultural distinctness in a way that entirely circumvents demands of reciprocity. Yet it seems to me that the more or less unilateral origin of polities both spawns the possibility of a-legality *and* offers the key to how constitutionalism might be able to deal with it. For if the more or less unilateral inception of a polity catches up with it in the form of group claims to unilateral secession, is it not possible for the polity to respond, when the concrete circumstances so demand, by a novel unilateral act which suspends, *albeit partially*, the constitutional regimentation of reciprocity with a view to initiating political negotiations with those who want out? The suspension of the constitutional regimentation of reciprocity would mean, in such cases, that the negotiation of exit would not be subordinated to the rules governing constitutional amendment, including rules about the majority that must assent to secession by a minority group. For these rules, and the reference to "majority" and "minority" groups, presuppose the reciprocity under a constitution that is rejected by one of the negotiating parties.

This is precisely what the Canadian Court did in the final part of its Reference. Although it responded to the secessionist challenge by declaring that an act of unilateral secession would be unconstitutional, it also introduced two initiatives that can be viewed as responses to a-legality. The first was the assertion that, in the course of negotiations pursuant to the secession, "there would be no conclusions predetermined by law on any issue." (§151)

Secondly, and congruent with the first initiative, "to the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role." (§153) As a result, the Court effectively *suspended* the constitution and legal reciprocity as concerns the content and the control of political negotiations about secession.

These initiative are exemplary, I think, for an interpretation of the recognition of a-legality that takes us beyond the aporias encountered by the model of mutual recognition that informs liberal theories of constitutionalism. I would like to conclude this paper by highlighting some of the central features of this alternative interpretation of recognition, leaving a full development thereof for another occasion.

Notice, to start with, that rather than rejecting reciprocity out of hand, the task of a theory of recognition must be to expose its shadow side, which never abandons legal ordering as the process of instituting relations of reciprocity. Indeed, my reservations about an *exclusively* reciprocity-driven interpretation of constitutionalism boils down to this: every legal order claims to be binding, hence objective, by dint of having instituted or being capable of instituting relations of reciprocity between the members of the collective; but this claim has a blind spot that cannot be suspended by reciprocity. To the contrary: this blind spot is the condition of possibility of reciprocity.

Theories of *mutual* recognition are, in my view, incapable of either adequately conceptualizing or dealing with this blind spot. Nor, as a result, can they deal with a-legality and the experience of singularity to which it gives rise. But this does not entail that we must discard the concept of *recognition,* lock, stock and barrel. Instead, what is required is to emphasize the *asymmetrical* character of recognition. Theories of mutual recognition, as we have seen, assume that recognition involves including the other in ever more general relations of politico-legal reciprocity because boundaries include what they exclude. Hence, struggles for recognition aim to transform misrecognition of the other into the other's recognition by way of a dialectic between the general and the particular, leading to an ever more inclusive "we." Like theories of mutual recognition, the alternative I am proposing takes its point of departure in a struggle for recognition, whereby a collective must respond to claims that its legal order violates the identity of the other. Yet by emphasizing the asymmetrical character of this struggle, a more complex reconstruction thereof is possible: the other's *challenge* is asymmetrical because it is not merely a claim to inclusion in relations of politico-legal reciprocity as a way of redressing the violation of its identity; the *response* of the polity is asymmetrical because it frames the challenge of the other in ways that render it amenable to a response in the terms of (transformed) politico-legal reciprocity available to the polity. Acts of recognition not only include what they exclude but also exclude what they include. Hence, recognition of the other, through (transformed) relations of politico-legal reciprocity, is also always, to a lesser or greater extent, a *mis*recognition of the other, precisely *because* the other is included in (transformed) relations of reciprocity.[22]

How, then, ought a collective to deal with a-legality? In particular, how concretely ought a legal order to respond to the normative challenge raised by the singular if, as we have seen, it definitively eludes the changing scope of a general (constitutional) rule? If, as I am arguing, every legal collective has a blind spot that is constitutive for the possibility of constitutional reciprocity, then collectives ought to recognize that they have a normative blind spot which they can neither fully justify nor remove, and they ought to take this into account when responding to a-legality. The normative content of this "ought" is, I submit, *collective self-*

[22] For a systematic discussion of this idea see Thomas Bedorf, *Verkennende Anerkennung: Über Identität und Politik* (Berlin: Suhrkamp, 2010) and Alexander García Düttmann, *Zwischen den Kulturen: Spannungen im Kampf um Anerkennung* (Frankfurt am Main: Suhrkamp, 1997).

restraint. Most generally, collective self-restraint introduces a certain forbearance in qualifying acts as legal or illegal, constitutional or unconstitutional, such that the first-person plural perspective of a collective is not rendered absolute in the face of a-legality.

What I have in mind both draws on and subverts Carl Schmitt's analysis of exceptional measures. For Schmitt, an "exception is what cannot be subsumed; it defines the general codification."[23] As such, the exception calls forth an exceptional measure. A measure (*Maßnahme*) is not merely an amendment of a norm, in particular a constitutional norm; instead, it is a violation (*Durchbrechung*) of a legal norm in a specific sense of the term:

> a statutory violation of the constitution does not alter the constitutional norm. Rather, it constitutes an individual order that deviates from the norm in a single instance while preserving the general validity of the norm in other cases . . . Such statutory violations of the constitution are in essence measures, not norms. Hence, they are not laws in the Rechtsstaat sense of the word . . .[24]

I would like to defend the idea that the legal recognition of singularity, of what resists inclusion by way of a dialectic of the particular and the general, has the form of an exceptional measure. This is an *indirect* form of recognition, one that suspends or violates a (constitutional) norm, thereby recognizing something *as* something which definitively eludes the rule of law and its attendant forms of constitutional recognition. Notice that this is not an argument against the rule of law. My point is, instead, that if a constitution is the master rule that establishes how relations of reciprocity ought to be instituted in a collective, then the unconditional defense of the rule of law ends up concealing and suppressing the normative blind spot of a legal collective. Indeed, the *Quebec Secession Reference* shows beyond peradventure that the price to be paid for the constitutional empowerment of the members of a collective is a radical disempowerment in the form of a range of practical possibilities which are rendered incompossible with the realm of practical possibilities opened up by that constitution. Constitutions empower *and* disempower.[25] For this reason, whereas liberal constitutionalism equates "lawlessness" with "arbitrariness," I submit that lawlessness, in the form of an exceptional measure that responds to a-legality, is a way of countering the irreducible residue of arbitrariness which dwells in every constitution. More pointedly and perhaps paradoxically, lawlessness, when it takes on the form of collective self-restraint in the face of a-legality, is an integral part of the *authority* of law, not its negation. Indeed, collective self-restraint, in the form of the suspension or violation of constitutional norms, is the kind of respons***a***bility by which a legal collective can take respons***i***bility, albeit indirectly, for the non-reciprocal origin of constitutional reciprocity. Recognition, in my reading, is not merely an act of collective self-recognition, whereby the other is recognized as one of *us*, but also an act of collective self-restraint, by way of measures that seek to sustain rather than destroy the other as irreducibly *other*.

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[23] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab (Cambridge, MA: The MIT Press, 1985), 13 (translation altered).

[24] Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2008), 154.

[25] See Hans Lindahl, "Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change," in *Constellations* 22 (2015) 2, 1963-174.