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SETTLING ON WORDS: SOVEREIGNTIES, BORDERS, AND TRANSFORMATIVE CONSTITUTIONALISM IN CANADA

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Abstract

This article analyzes Canada's Constitution as a contested "borderland," a site where competing claims to sovereignty, identity, and moral legitimacy intersect and often clash. While the *Charter of Rights and Freedoms* promises inclusivity and equality, I argue it remains fundamentally embedded within a settler-colonial order that persistently marginalizes Indigenous peoples. Treaties, when understood as dynamic and relational borders, challenge the Crown's assertion of absolute authority and underscore the need for constitutional transformation grounded in justice and what Dwayne Donald calls "ethical relationality," drawn from the Cree concept of *wâhkôhtowin*. At the same time, immigrant communities access the *Charter* as a gateway to rights, even as they enter a legal system built upon the dispossession of Indigenous nations – raising moral questions about legal obligation and inclusion. Drawing on Joseph Raz's "service conception" of authority, this article offers a philosophical audit of Canada's constitutional legitimacy. Through a structured application of Raz's three theses – normal justification, dependence, and pre-emptive force – I show how current legal directives frequently fail to align with the moral reasons of Indigenous and minority communities. Engaging with Indigenous legal theorists such as John Borrows and Dwayne Donald, I advocate for transformative constitutionalism, culminating in a renewed constitutional compact rooted in Willie Ermine's notion of ethical space. Such a framework, I argue, offers the conceptual and normative tools to reimagine sovereignty and legal authority in genuinely pluralistic terms.

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1 Introduction

Constitutional frameworks in settler-colonial states like Canada are not merely legal instruments; they embody moral projects shaped by contested histories, shifting social dynamics, and evolving power relations.[1] This article argues that Canada's Constitution functions as a borderland – understood here as a dynamic, contested terrain marked by overlapping and frequently competing claims to sovereignty, identity, and inclusion. Within this space, Indigenous peoples, immigrant communities, and established settler populations continuously negotiate and redefine what justice entails amidst ongoing colonial dispossession and multicultural coexistence, underscoring the urgent necessity of constitutional transformation.

Such tensions are most evident in the divergent relationships that Indigenous and immigrant communities maintain with the Canadian legal order. Indigenous peoples invoke treaty obligations as living frameworks that predate and coexist with the Crown's Constitution.[2] These treaties expose the limitations of Canadian laws in respecting Indigenous intellectual and discursive traditions. In contrast, newcomers often view the *Charter of Rights and Freedoms* as a beacon of inclusion, even as it exists within a constitutional framework built on the dispossession of Indigenous nations. Given this, one can challenge the presumption that there is a prima facie obligation to obey Canadian laws, particularly when treaties are violated, or Indigenous sovereignty is undermined. Treaties highlight a seemingly intractable dialectical conundrum: while immigrants may value the rights and freedoms entrenched in the *Charter*, their legal obligations remain inextricably entangled in a colonial legacy that undermines its moral foundation.

Drawing on Joseph Raz's "service conception" of authority,[3] I contend that the legitimacy of a legal order depends on its ability to serve and strengthen the

[1] James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*, The Seeley Lectures, No. 1 (Cambridge: Cambridge University Press, 1995), https://doi.org/10.1017/cbo9781139170888.

[2] John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 31–34.

[3] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 53–61; Thomas May, "On Raz and the Obligation to Obey the Law," *Law and Philosophy* 16, no. 1 (1997): 135–138, https://doi.org/10.2307/3504817.

moral agency of those subject to its laws. Legal and constitutional authority is therefore compromised where it systematically ignores Indigenous sovereignty or fails to address the enduring injustices of settler colonialism. Leanne Betasamosake Simpson and John Borrows demonstrate that Indigenous communities in Canada, despite the well documented assimilationist policies of the state, continue to hold and develop robust legal orders – rooted in ceremonies, storytelling[4], kinship, and frameworks of relational governance – which challenge the foundational assumption that Crown sovereignty reigns supreme.[5]

A more just and inclusive constitutional future, I argue, lies in contemplating a form of transformative constitutionalism: a framework of legal and social transformation that aspires to rectify colonial injustice, honour multiple sovereignties, and accommodate pluralistic norms.[6] Transformative constitutionalism has been explored in contexts such as post-apartheid South Africa and certain Latin American jurisdictions, and it offers valuable insights for Canada. It can shape constitutional conversations to explicitly recognize Indigenous legal orders, foster cross-cultural dialogue, and address environmental stewardship.

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4 The term "storytelling" is used cautiously, since it often reflects Western assumptions of linearity, fixed authorship, and textual primacy. These risk obscuring Indigenous understandings of narrative as relational, embodied, place-based, and sustained through community, land, memory, and reciprocal responsibilities. Indigenous storytelling carries obligations and lived practices beyond conventional literary form. I am grateful to Elder Miiksika'am, Elder Hayden Melting Tallow, Elder Roy Bear Chief, John Fischer, Audra Foggin, Gabrielle Weasel Head, Victoria Bouvier, Christopher Grignard, and Linda Van der Zande for their guidance and insights that deepened my appreciation of these distinctions. Any errors are my own.

5 The assimilationist policies of the Canadian government have long aimed to suppress Indigenous legal orders and cultural practices. Key examples include the Indian Act (1876), which imposed Euro-Canadian governance structures and banned traditional ceremonies such as the potlatch and sun dance, the residential school system, designed to forcibly assimilate Indigenous children by eradicating their languages and traditions, and the 1969 "White Paper", which proposed eliminating Indigenous legal distinctions and rights, prompting widespread resistance through documents like the "Red Paper" or "Citizens Plus." See "Indian Act," August 15, 2019, secs. 1–5, https://laws-lois.justice.gc.ca/eng/acts/I-5/; Truth and Reconciliation Commission of Canada, "The Final Report of the Truth and Reconciliation Commission of Canada," vol. 1, 2015, 51–68; Jean Chretien, "Statement of the Government of Canada on Indian Policy, 1969," Department of Indian Affairs and Northern Development, Ottawa [Ontario], 1969, http://files.eric.ed.gov/fulltext/ED043431.pdf; The Indian Association of Alberta, "Citizen Plus: The Red Paper" (The Indian Association of Alberta, 1970). Despite these policies, Indigenous nations have preserved and revitalized vibrant legal orders. See Leanne Betasamosake Simpson, *As We Have Always Done: Indigenous Freedom through Radical Resistance* (Minneapolis, MN: University of Minnesota Press, 2020), 48–52; Borrows, *Canada's Indigenous Constitution*, 27–31.

6 Karl E. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, no. 1 (January 1998): 147–152, https://doi.org/10.1080/02587203.1998.11834974; Borrows, *Canada's Indigenous Constitution*, 16–17.

Transformative constitutionalism offers a pathway to resolve the dialectical impasse I have identified, particularly through Willie Ermine's concept of "ethical space"[7] – an intercultural arena where diverse moral and legal traditions can meet on more equitable terms. By anchoring constitutional authority in a genuine commitment to reciprocity and the interconnected well-being of all living beings, Canada can transcend its entrenched colonial paradigm and reimagine its constitutional relationships on foundations of justice and mutual respect.

This paper proceeds in five parts. First, it outlines the philosophical foundations of legal obligation and authority, drawing on Joseph Raz's service conception to develop a normative test – anchored in the dependence and normal justification theses – for evaluating whether Canadian legal directives generate legitimate pre-emptive duties. Second, it applies this framework to Canadian constitutional practice, revealing legitimacy gaps in areas such as treaty federalism, multicultural arbitration, and state secularism. Third, it examines the deeper philosophical assumptions behind Raz's model, including autonomy, exclusionary reasons, and the relational dimensions of liberal authority. Fourth, it moves beyond liberal theory to engage Indigenous legal traditions, focusing on Dwayne Donald's ethical relationality and Willie Ermine's ethical space as paradigmatic alternatives that reframe legal obligation around kinship, memory, and ecological accountability. Finally, the paper concludes by proposing transformative constitutionalism – grounded in intercultural jurisprudence and relational pluralism – as a path toward a renewed constitutional compact in Canada.

By framing Canada's Constitution as a contested borderland, this paper underscores that constitutional legitimacy cannot rest on a singular liberal foundation. Instead, legitimacy must emerge from sustained, reciprocal relationships between Indigenous nations, settler institutions, and immigrant communities. The idea of the borderland – where sovereignties meet, clash, and co-create – captures the lived complexity of Canada's constitutional terrain. In engaging both Razian service and Indigenous jurisprudence, the paper offers a philosophical and practical pathway to reimagine sovereignty, law, and belonging in genuinely pluralistic terms.

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[7] Willie Ermine, "The Ethical Space of Engagement," *Indigenous Law Journal* 6, no. 1 (2007): 193–203, https://jps.library.utoronto.ca/index.php/ilj/article/view/27669.

2 Legal Obligations and the Liberal-Constitutional State

The question of whether individuals possess a moral duty to obey the law has long been a central concern in political philosophy.[8] Philosophical debates on this issue range from those who argue for absolute sovereignty to those who emphasize personal autonomy and resistance to unjust laws. At one end of the spectrum, Thomas Hobbes famously posits that the sovereign's authority is essential to prevent the chaos of the state of nature, granting the law a presumption of legitimacy that individuals must respect unless survival is at stake.[9] In contrast, John Locke grounds legal authority in consent, arguing that individuals obey laws as part of a social contract that protects natural rights to life, liberty, and property.[10]

This tension between authority and autonomy finds one of its starkest expressions in Robert Paul Wolff's compelling defense of philosophical anarchism, which contends that obedience to law is fundamentally incompatible with the autonomy required by moral agents,[11] while the champion of Enlightenment

[8] Plato's *Crito* offers a foundational dialogue on the tension between state authority and individual autonomy. In the text, Socrates argues that citizens have a moral obligation to obey the laws of their city-state, even when those laws appear unjust in specific circumstances. This obligation, according to Socrates, stems from an implicit social contract formed through one's lifelong participation in and benefit from the state's institutions. Socrates personifies the Laws, which contend that to disobey them is to undermine the very order that makes communal life possible. However, the dialogue also highlights the limits of such authority, as Socrates frames his decision to accept the state's punishment (his death sentence) as consistent with his personal moral principles, rather than blind adherence to authority. See Plato, *The Trial and Death of Socrates: Euthyphro, Apology, Crito, Death Scene from Phaedo*, trans. G. Grube, 3rd ed. (Cambridge, MA: Hackett Publishing, 2000), pts. 49e–54e.

[9] Hobbes argues that in the absence of a sovereign authority, human life would devolve into a "state of nature," characterized by a perpetual "war of all against all." In this state, life is "solitary, poor, nasty, brutish, and short." To avoid such chaos, individuals relinquish their natural freedoms and consent to the authority of a sovereign, whose laws they are morally bound to obey for the sake of survival and social order. See Thomas Hobbes, Hobbes: Leviathan [1651], ed. Richard Tuck, *Cambridge Texts in the History of Political Thought* (Cambridge: Cambridge University Press, 2019), chap. 13, pp. 89–91, https://doi.org/10.1017/cbo9780511808166.

[10] Locke's *Second Treatise of Government* contrasts Hobbesian absolutism by arguing that government derives its legitimacy from the consent of the governed. Individuals enter into a social contract to secure their natural rights – life, liberty, and property. However, when governments fail to protect these rights or become tyrannical, citizens retain the right to resist and withdraw their consent. See John Locke, Two Treatises of Government, in *Cambridge Texts in the History of Political Thought: Locke,* ed. Peter Laslett (Cambridge: Cambridge University Press, 1988), secs. 87–90; pp. 330–332.

[11] In *In Defense of Anarchism*, Wolff argues that the autonomy of moral agents is fundamentally incompatible with the concept of legal authority. Autonomy, for Wolff, requires individuals to act according to their own rational judgment and moral principles, while legal authority demands

rationality, Immanuel Kant, locates the justification for obedience in whether a law reflects universal moral principles discerned through reason.[12] Under Kant's deontological framework, moral agents must act only according to maxims that can be willed as universal law[13] – a standard that places strict conditions on the moral validity of legal commands.[14] In this way, Kant bridges the extremes of absolute sovereignty and radical autonomy by positing reason as the thoughtful mediator between the individual's moral duty and the authority of law. Taken together, such philosophical perspectives bracket the debate on legal obligation, offering sharply contrasting justifications for compliance and resistance.

The philosophical foundations outlined above are particularly relevant to Canada's constitutional framework, where the presumption of legal obligation is complicated by a colonial history and the complexities of a pluralistic society. For Indigenous peoples, the imposition of Crown sovereignty undermines pre-existing legal orders and treaty relationships, challenging the moral legitimacy of Canadian law.[15] For immigrant communities, Canada's multicultural framework offers certain protections but obscures the colonial foundations of its legal architecture, raising questions about the legitimacy of laws rooted in dispossession.[16]

At the heart of such discussions is the liberal-constitutional tradition, which seeks to justify legal authority through concepts like the rule of law, popular consent, and social contracts.

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compliance with laws irrespective of personal moral assessment. This conflict leads Wolff to conclude that no state can legitimately command absolute obedience from its citizens. See Robert Paul Wolff, *In Defense of Anarchism* (Sydney: HarperCollins, 1970), 18–21.

[12] Kant emphasizes that legal authority must align with universal moral principles discerned through practical reason. For him, laws are legitimate only when they conform to the categorical imperative, which demands that individuals act according to maxims that could be universally willed. Obedience to unjust laws violates the moral autonomy central to Kantian ethics. See Immanuel Kant and H. J. Paton, *Groundwork of the Metaphysic of Morals* (New York: HarperCollins, 2009), sec. 2: 421–427, pp. 33–45.

[13] Pauline Kleingeld has argued that notions of "universal" reason and moral law have historically been used to rationalize colonial projects, revealing a tension between Kant's ideals and their appropriation by agents of imperial expansion. See Pauline Kleingeld, *Kant and Cosmopolitanism* (Cambridge: Cambridge University Press, 2013), 37–42.

[14] Immanuel Kant, *Prolegomena to Any Future Metaphysics: With Selections from the Critique of Pure Reason* (Cambridge: Cambridge University Press, 1997), sec. 60; Immanuel Kant, Critique of Pure Reason, in *The Cambridge Edition of the Works of Immanuel Kant*, ed. Paul Guyer and Allen W. Wood (Cambridge: Cambridge University Press, 2013), sec. A800/B828-A819/B847, https://doi.org/10.1017/cbo9780511804649.

[15] Borrows, *Canada's Indigenous Constitution*, 15–17; Simpson, *As We Have Always Done*, 23–27.

[16] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights.* 2nd ed. (Cary, NC: Oxford University Press, 1995), 123–129.

John Rawls defends the view that legitimate laws emerge from principles of justice chosen by rational individuals operating behind a "veil of ignorance."[17] According to Rawls, this hypothetical position ensures that individuals formulate principles without knowledge of their own social status, abilities, or personal circumstances, thus prioritizing fairness and equality in the resulting social arrangement. From this "original position," Rawls derives two key principles of justice.[18] The First Principle – often called the "equal basic liberties" principle – guarantees equal fundamental rights and liberties (e.g., freedom of thought, expression, association) for all citizens. The Second Principle – comprising fair equality of opportunity and the "difference principle" – permits social and economic inequalities *only if they benefit the least advantaged members of society*. Together, Rawls's principles aim to establish a just and stable political order in which the rule of law reflects collective rationality and fairness.[19]

However, Rawls's model has been criticized for presupposing equal participation and abstracting from historical injustices.[20] In settler-colonial contexts such as Canada, Indigenous nations were neither equal parties nor genuine consenters to the constitutional arrangements that continue to govern them. These arrangements, shaped by asymmetrical power relations and colonial imposition, fundamentally fail to meet the Rawlsian criteria of fairness and reciprocity. Indeed, one might argue that the liberal order regards its obligations to Indigenous peoples not as duties owed to political equals, but as acts of *noblesse oblige* – expressions of benevolent paternalism rather than mutual recognition. This posture implicitly treats Indigenous nations as passive recipients of justice rather than as co-creators of legal and moral order. The lack of meaningful Indigenous participation in treaty processes – which, though often framed as contracts, were underwritten by power imbalances and divergent legal worldviews – compounds this critique. As John Borrows emphasizes, treaties reflect profound differences in understandings of law, governance, and reciprocity, further challenging the adequacy of Rawlsian assumptions in pluralistic, postcolonial societies.[21]

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[17] John Rawls, *A Theory of Justice* (London: Harvard University Press, 1971), secs. 3–4.
[18] Ibid., secs. 11–13.
[19] Ibid., 52–55.
[20] See Charles W. Mills, *The Racial Contract*, 25th ed. (1997; repr., Ithaca, NY: Cornell University Press, 2022), 23–26; Tully, *Strange Multiplicity*, 28–33; Glen Sean Coulthard, *Red Skin, White Masks*, Indigenous Americas (Minneapolis, MN: University of Minnesota Press, 2014), 14–18.
[21] Borrows, *Canada's Indigenous Constitution*, 93–96.

Moreover, Rawls's later work, *The Law of Peoples*, extends his theory to the global sphere by introducing "decent hierarchical societies," which – though not strictly liberal – are still expected to uphold certain principles of justice, such as human rights and fairness in international relations.[22] Yet, critics argue that Rawls's abstract formulation sidesteps the concrete realities of colonialism and racial inequality that continue to shape global power distributions. Charles W. Mills, for instance, contends that classical social contract theory systematically excludes racialized and Indigenous groups, thereby normalizing a world order rooted in their subjugation.[23] Tully adds that liberal constitutionalism, by focusing on "universal" rational agreement, overlooks culturally distinct forms of governance and relegates Indigenous constitutional claims to the periphery.[24] Similarly, Glen Sean Coulthard demonstrates how the politics of recognition in settler-colonial states can reinforce, rather than dismantle, colonial hierarchies by imposing conditions on Indigenous autonomy that conform to dominant liberal norms.[25]

These critiques resonate with broader currents in postcolonial and Indigenous thought that regard colonialism and racial hierarchy not as deviations but as constitutive of Western political modernity. Frantz Fanon famously argued that the universalist ideals of liberalism were grounded in the dehumanization of colonized peoples. Sylvia Wynter extends this claim, showing how the Enlightenment figure of "Man" operates as a colonial over-representation that displaces non-European ontologies and epistemologies.[26] Mills, in turn, reframes the social contract as a "racial contract," one that systematically privileges white settler interests under the guise of neutrality and reciprocity.[27]

In the Canadian context, Himani Bannerji has shown how the state's multiculturalism policy depoliticizes cultural difference, masking the deeper colonial asymmetries that structure Canadian legal and political life.[28] As discussed earlier, Coulthard critiques liberal recognition for reproducing these asymmetries

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[22] John Rawls, *The Law of Peoples* (London: Harvard University Press, 1999), 4–6, 62–65, https://doi.org/10.2307/j.ctv1pncngc.

[23] Mills, *The Racial Contract*, 23–28.

[24] Coulthard, *Red Skin, White Masks*, 14–18.

[25] Ibid., 14–18.

[26] Frantz Fanon, *The Wretched of the Earth*, trans. Constance Farrington, Penguin Modern Classics (1961; repr., New York, NY: Grove Press/Atlantic Monthly Press, 2017); Sylvia Wynter, "Unsettling the Coloniality of Being/Power/Truth/Freedom: Toward the Human, After Man, Its Overrepresentation – An Argument," *CR The New Centennial Review* 3, no. 3 (2003): 257–337, https://doi.org/10.1353/ncr.2004.0015.

[27] Mills, *The Racial Contract*, 10–12.

[28] Himani Bannerji, *The Dark Side of the Nation* (Toronto: Canadian Scholars, 2000), 35–40.

by inviting Indigenous peoples into a reconciliatory framework that ultimately secures settler state authority. Building on this, Audra Simpson introduces the concept of *refusal* – a deliberate rejection of the presumption that Indigenous legitimacy must be affirmed through the apparatus of the settler state.[29] Similarly, Eve Tuck and Wayne Yang argue that settler and Indigenous political projects are often incommensurable, particularly when liberal inclusion is offered as a substitute for structural redress or sovereignty.[30]

From this vantage, Rawls's model – premised on fair cooperation between free and equal parties – appears ill-suited to the Canadian context. The gap between the liberal promise of inclusion and the lived experience of dispossession and marginalization calls into question whether liberal egalitarianism can accommodate political relationships grounded in treaty, reciprocity, and nation-to-nation respect. Instead, it risks reinscribing a politics of *noblesse oblige*, in which gestures of justice serve to affirm the moral authority of the settler state rather than to dismantle its structural dominance.

This failure of liberal egalitarianism to account for Indigenous political and legal orders points to the need for alternative frameworks that begin not with abstract principles, but with the concrete coexistence of distinct normative traditions. One such framework is legal pluralism, which foregrounds the multiplicity of legal systems within a single political community and offers a more accurate lens through which to understand the Canadian constitutional landscape.

2.1 Legal Pluralism and the Challenge of Sovereignty

Legal pluralism postulates that more than one legal system can coexist within a single political community. This concept is particularly relevant in settler-colonial states like Canada, where the coexistence of Indigenous legal orders and state law presents both challenges and opportunities for rethinking legal authority. As Brian Tamanaha observes, legal pluralism highlights how state law is but one among many normative orders that govern social behaviour, often overlapping with religious, customary, and community-based systems.[31] These

[29] Audra Simpson, "On Ethnographic Refusal: Indigeneity, 'Voice' and Colonial Citizenship," *Junctures: The Journal for Thematic Dialogue* 9 (2007): 67–80.

[30] Wayne Yang and Eve Tuck, "Decolonization Is Not a Metaphor," *Decolonization: Indigeneity, Education & Society* 1, no. 1 (2012): 1–40.

[31] Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *The Sydney Law Review* 30, no. 3 (2007): 375–411, https://doi.org/10.4324/9781315091891-17.

legal frameworks predate European contact and continue to function despite centuries of colonial suppression. The concept of legal pluralism reveals the resilience of Indigenous governance structures and their enduring relevance in shaping the Canadian legal landscape.

Legal pluralism also emerges from the normative systems that immigrant communities bring with them, ranging from religious-based legal traditions – such as Sharia tribunals, Halakha committees, and ecclesiastical courts – to customary dispute-resolution practices rooted in various diasporic traditions. While the Canadian state often tolerates these practices within strict boundaries, it does not typically recognize them as equal or parallel legal systems. For example, the 2005 debate over the use of Sharia law in Ontario family arbitration highlighted the tensions between multicultural accommodation and the state's insistence on a singular legal authority.[32] Such tensions underscore the limits of legal pluralism in Canada, where non-state legal orders are often relegated to the margins.

Nonetheless, the concept of legal pluralism illuminates the moral dimension of obedience by showing that formal state law is not the only source of normative obligation. Tully argues that legal authority must be evaluated not merely by its formal structure but by its capacity to engage meaningfully with the diverse legal orders that exist within a political community.[33] If individuals already operate within their own legal frameworks – be they Indigenous or culturally specific – then the mere fact that the state has enacted legislation does not necessarily create a superior moral obligation to obey it. Instead, it becomes necessary to ask whether the state's legislation aligns with or disrupts existing legal orders and whether it promotes a reciprocal relationship between the state and those governed.

This is precisely the crux of Raz's argument in *The Morality of Freedom*. Raz contends that the moral authority of law cannot be assumed but must be justified by its ability to facilitate better conformity to reason and justice than

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[32] Natasha Bakht's analysis of the 2005 Sharia arbitration controversy shows how Ontario's eventual ban on faithbased family tribunals revealed the province's reluctance to treat nonstate forums as parallel legal orders, underscoring the practical limits of Canadian legal pluralism – particularly where gender equality concerns are invoked. See Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women," *Social Science Research Network* (April 18, 2008), 1–24, https://papers.ssrn.com/abstract=1121953.

[33] James Tully contends that a constitution's legitimacy rests on its ongoing ability to open a dialogical space in which the varied legal and cultural orders living within a polity can participate as equals, rather than on the document's formal structure alone. Tully, *Strange Multiplicity*, chap. 2.

individuals could achieve independently. In a context like Canada, where legal pluralism highlights the coexistence of diverse normative systems, the legitimacy of state law ought to be measured by its capacity to recognize and harmonize with these systems, rather than imposing itself unilaterally. This is particularly true in relation to Indigenous sovereignty, where the state's failure to adequately acknowledge and integrate pre-existing legal orders undermines its moral authority.

In short, Raz supplies a yardstick that pluralism itself lacks. Where liberal theorists often smuggle legitimacy into the premise of a "social contract," Raz treats obedience as something that must be earned in concrete practice. Because Canadian law presides over at least three interacting normative universes – Indigenous, settler, and diasporic – it is the perfect laboratory for a service conception audit. What follows dissects Raz's framework and tests it against Canadian examples.

Settler-colonial constitutions often claim universal legitimacy while large portions of the population experience them as coercive. Raz's service conception of authority is attractive precisely because it refuses to take any claim of legitimacy at face value; it asks for evidence that legal directives actually help the governed act on the reasons that already bind them. Three cumulative theses operationalize this demand.

These philosophical and legal perspectives can be contrasted to reveal the divergent foundations of obligation and sovereignty. Table 1 provides a synthesis of these positions.

The table underscores three analytical payoffs. First, it deromanticizes universality. A rule that works brilliantly for one constituency (pathogen screening, stopsigns) can be illegitimate for another if it ignores the latter's foundational reasons, as the Potlatch Ban did. Second, it turns "consultation" from etiquette into substance. Under the dependence thesis, policymakers must know – and be guided by – the reasons their directives will supposedly serve. Mere information sessions after a bill is drafted will not do. Third, it explains selective civil disobedience. When Wet'suwet'en hereditary chiefs treat a "no-gathering" injunction as morally void, they are not lawless; they are applying Raz's logic that a directive failing dependence and normal justification lacks preemptive force.

Canadian constitutionalism now stands at a fork – either broaden the circle of dependence – embedding Indigenous and minority rationales inside the legislative process – or concede that large segments of the population have no moral duty to obey state law.

Table 1: Philosophical Perspectives on Legal Obligation

Thesis	Core Claim	Canadian illustration (when it succeeds)	Illustration (when it fails)
Normal-Justification	A directive is legitimate only if, by obeying, subjects are *better able* to live according to their own moral or prudential reasons than by deciding alone.	The national blood donation protocol – uniform screening for pathogens – serves every donor's reason to protect recipients.	The 1927 Potlatch Ban forbade a central cultural practice while purporting to "civilize" West Coast nations; it offered no service to the communities it targeted.
Dependence-Justification	The directive must be *grounded in* the very reasons that already apply to its subjects, not in alien or paternalistic goals.	The Nisga'a Final Agreement codifies fishing law within provincial regulations, aligning state oversight with Indigenous conservation norms.	The federal *Species at Risk Act* lists culturally important game animals without Indigenous consultation, thereby ignoring subsistence reasons.
Pre-Emption	Only when the first two theses are satisfied does the directive gain *pre-emptive* force: subjects ought to treat it as conclusive, suspending further private deliberation.	A stop sign at a rural four-way is obeyed even at 3 a.m. because drivers know the rule reflects their shared reason to avoid collisions.	A posted "no-gathering" injunction on unceded Wet'suwet'en land lacks pre-emptive force for hereditary chiefs whose legal order was never consulted.

Source: Author's synthesis, drawing on Hobbes, *Leviathan*; Locke, *Two Treatises of Government*; Wolff, *In Defense of Anarchism*; Kant, *Groundwork of the Metaphysic of Morals*; Rawls, *A Theory of Justice*, and *The Law of Peoples*; Raz, *The Morality of Freedom*, 46–57; Mills, *The Racial Contract*; Tully, *Strange Multiplicity*; Coulthard, *Red Skin, White Masks*; Fanon, *The Wretched of the Earth*; Wynter, "Unsettling the Coloniality"; Borrows (various); Simpson, *As We Have Always Done*. Supplementary references: Emma Louise Knight, "The Kwakwaka'wakw Potlatch Collection and Its Many Social Contexts: Constructing a Collection's Object Biography" (Master Thesis, University of Toronto, 2013), https://utoronto.scholaris.ca/server/api/core/bitstreams/d2fb243c-4024-4b0f-97d9-7d527c3eb20b/content; Nisga'a Final Agreement Act (1999); Anna V. Smith, "The Endangered Species Act's Complicated Legacy in Indian Country," *High Country News*, December 1, 2023, http://www.hcn.org/issues/55-12/endangered-species-the-endangered-species-acts-complicated-legacy-in-indian-country/; Cory Ruf, "Closing Arguments Heard in Court Case of Wet'suwet'en Land Defenders," Amnesty International Canada, December 17, 2024, https://amnesty.ca/human-rights-news/closing-arguments-heard-wetsuweten-court-case/.

The limits of reciprocity are visible in recent Supreme Court jurisprudence. Table 2 highlights three landmark cases that move part way toward Raz's dependence criterion yet fall short of full legitimacy.

Table 2: Indigenous–Settler Constitutional Frameworks and Interpretations

Landmark cases inching toward dependence	**Service test score**
Haida Nation – duty to consult on resource decisions	Partial: consultation, not co-decision making
Tsilhqot'in – recognition of Aboriginal title	Partial: veto possible, but Crown-override "in the national interest"
Multani – kirpan allowed in schools	Pass for Sikh students, but no general rule for other faiths

Source: Author's synthesis, drawing on the Royal Proclamation (1763); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Calder v. British Columbia (Attorney-General), [1973] S.C.R. 313; Constitution Act, 1982, s. 35; Haida Nation v. British Columbia (Minister of Forests) – SCC Cases (2004); Tsilhqot'in Nation v. British Columbia – SCC Cases (2014); Multani v. Commission scolaire Marguerite-Bourgeoys – SCC Cases (2006); John Borrows, *Law's Indigenous Ethics* (Toronto: University of Toronto Press, 2019); Simpson, *As We Have Always Done*; J. R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 2000); Kent Roach, *Canadian Justice, Indigenous Injustice: The Gerald Stanley and Colten Boushie Case* (Montreal: McGill–Queen's University Press 2019); Tully, *Strange Multiplicity*.

Although the Supreme Court of Canada now speaks the language of reciprocity – mandating consultation (Haida Nation), confirming Aboriginal title (Tsilhqot'in), and protecting minority expression (Multani) – each ruling stops at the same cliffedge: the Crown keeps a unilateral override. Whether framed as the "national interest" or enacted by blanket statute, that safetyvalve lets the state retract recognition whenever its own priorities shift.

From Raz's vantage, this is fatal. A power that can be withdrawn at will cannot satisfy the dependence thesis (it no longer tracks the governed parties' own reasons) or the normal justification thesis (subjects are not reliably better off obeying a revocable promise). Break those links and the chain of legitimacy snaps; no pre-emptive duty to obey survives.

This structural defect becomes stark in two arenas where Canadian legal pluralism is tested daily. The first is treaty federalism, where Indigenous and Crown sovereignties are formally meant to coexist yet, in practice, repeatedly collide whenever Ottawa asserts an overriding jurisdiction. The second is minority arbitration, where faith-based tribunals were initially permitted but then abruptly prohibited, a reversal that reveals how quickly proclaimed commitments to tolerance can give way to the imposition of uniformity.

Raz's benchmark sharpens the stakes:

> The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (...) if he accepts the directives of the alleged authority as authoritatively binding.[34]

In other words, the burden of proof lies with the state. Legitimacy is not earned by historic pedigree or procedural gestures; it requires demonstrable service – evidence that people really are "better able to comply with their own reasons." Where Parliament can still extinguish Aboriginal title or revoke religious arbitration wholesale, that burden remains unmet and Raz's service test fails. Canadian law is left, at best, directive without authority – enforceable, perhaps, but morally inert where legitimacy is most needed.[35]

What follows traces the fallout of this legitimacy gap. I adopt the term "the Razian service test for preemptive authority" or "Raz Test" to capture Raz's cumulative framework[36]: a legal directive creates a genuine, pre-emptive obligation to obey only when it passes both the normal justification thesis (obedience leaves subjects better able to act on their own reasons) and the *dependence* thesis (the directive is grounded in those same reasons). If either condition fails, the chain breaks and no duty arises.[37]

One might also consider how Raz's service conception illuminates structural features of Canadian constitutionalism – specifically, the non-absolute nature of *Charter* and section 35 rights. Section 1 of the *Charter* permits reasonable limits on rights "as can be demonstrably justified in a free and democratic society," while section 35 jurisprudence introduces a "justified infringement" test

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[34] Raz, *The Morality of Freedom*, 53.

[35] This concern with epistemic legitimacy complements Raz's service conception by underscoring that legitimacy requires reciprocal recognition of how communities generate and validate knowledge. Willie Ermine's "ethical space" calls for epistemic humility, ensuring Indigenous worldviews are not subsumed under state categories of rationality. Audra Simpson's "refusal" and Tuck and Yang's critique of incommensurability similarly challenge the assumption that legitimacy can be secured without respecting epistemological plurality. A directive therefore fails not only when it contradicts a subject's material reasons but also when it dismisses their way of reasoning.

[36] Although Raz's service conception is well known in legal philosophy, it has rarely been used as a diagnostic tool in constitutional analysis. Webber and Dyzenhaus engage Raz in different contexts, but without developing an operational framework. This article distills his three theses – dependence, normal justification, and pre-emptive force – into a "Razian service test" and applies it systematically to Canada's constitutional order, linking liberal jurisprudence with Indigenous relational ethics to critique state authority and envision transformative legitimacy. See David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: Oxford University Press, 2010); Jeremy Webber, *The Constitution of Canada*, 2nd ed. (Oxford: Hart Publishing, 2021).

[37] Raz, *The Morality of Freedom*, chap. 2.

under the framework of *R v. Sparrow* and its progeny. From a Razian standpoint, these justificatory mechanisms are not inherently problematic. What matters is whether the resulting limitations continue to satisfy the dependence and normal justification theses. That is: do they track the moral reasons of those they bind, and do they enhance subjects' capacity to live in accordance with those reasons?

In practice, however, many *Charter* and section 35 limitations fall short. The Crown often invokes public order, national security, or economic necessity to override Indigenous legal practices or minority rights claims – rationales that reflect the state's priorities rather than the situated reasons of affected communities. When section 35 rights are overridden on the basis of a vague "national interest," the directive ceases to reflect Indigenous normative frameworks and instead reasserts unilateral Crown authority. In Razian terms, this fails both dependence and normal justification. Thus, while these sections ostensibly allow for balancing, they do so within a framework that structurally favours majoritarian state reasoning over pluralistic responsiveness. The very architecture of justified limitation in Canadian constitutionalism remains vulnerable to legitimacy failure under Raz's test.

One might also consider how Raz's service conception applies not only to discrete legal episodes but to the broader structure of Canadian constitutionalism. Both section 35 of the *Constitution Act, 1982* and the *Charter of Rights and Freedoms* are designed to recognize and protect fundamental rights. Yet neither guarantees those rights as absolute. Section 1 of the *Charter* permits "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," and section 35 jurisprudence has developed a doctrine of "justified infringement" that allows the state to override Aboriginal and treaty rights under certain conditions.

From a Razian standpoint, such override mechanisms are not illegitimate in principle. What matters is whether the limitation continues to satisfy both the dependence thesis – that the directive is grounded in the moral reasons already applying to its subjects – and the normal justification thesis – that subjects are better able to comply with those reasons by obeying the directive. The empirical burden remains with the state: it must show that its infringement genuinely serves the interests and frameworks of those affected. In practice, however, many such justifications – often framed in terms of vague public interest or administrative efficiency – fail to meet either test. Where the Crown invokes national interest to limit section 35 rights or applies section 1 to constrain minority expression without regard for culturally embedded reasons, it fails to track

the moral sources of obligation. In such cases, constitutional structure itself contributes to the ongoing erosion of legitimacy.

Measured directly against Raz's test, treaty federalism exposes the structural deficit most starkly. Table 3 summarizes the result.

Before turning to the Razian analysis, it is helpful to briefly outline the Ontario Sharia arbitration controversy, which exemplifies the fragility of Canada's approach to legal pluralism. From the early 1990s to 2006, Ontario permitted family law disputes to be resolved through private arbitration under the province's *Arbitration Act*, including by religious tribunals such as Jewish *beth din* and Catholic ecclesiastical courts. In the early 2000s, Muslim organizations sought to use the same legal framework to establish Sharia-based arbitration for family matters. Although the practice was legally permissible under the *Act*, it ignited a public backlash. Critics, often invoking gender equality concerns, warned that Sharia tribunals would lead to coercion and discrimination, despite similar concerns having gone largely unexamined in the case of other faith-based forums. In response to the controversy, the Ontario government amended the *Arbitration Act* in 2006 to prohibit all religious arbitration in family law – thereby eliminating what had previously been a recognized pluralist accommodation. This episode reveals the limits of state tolerance for minority normative systems and illustrates how uniform legal authority can be reasserted at the expense of culturally embedded forms of reasoning and dispute resolution.

This episode underscores a recurring feature of Canadian pluralism: that recognition can be withdrawn when minority frameworks challenge prevailing liberal assumptions or elicit majoritarian discomfort. It offers a particularly vivid case for Raz's service test, especially around the dependence thesis – whether directives reflect and respect the moral reasons of those subject to them.

Taken together, the next three tables apply the Raz Test to Canada's pluralism in practice. Table 4 examines Ontario's reversal on faith-based family arbitration; Table 5 turns to Quebec's visible-secularism statute (*Loi 21*); and Table 6 contrasts these failures with a partial success in *Multani*. Read as a sequence, they move from withdrawal of accommodation (Ontario), to statutory prohibition (Quebec), to a case-specific accommodation (Sikh kirpan) that passes Raz's criteria but remains narrow.

The first case shows recognition withdrawn: Ontario's decade of tolerating religious family-law arbitration ended with a blanket ban once Muslim groups sought parallel use. Table 4 assesses that episode under Raz's dependence and normal-justification theses.

Table 3: Application I of the "Raz Test": Indigenous Nations and Treaty Federalism

Raz Criterion	Assessment (Pass/Fail)	Rationale
Dependence Thesis	Fails	Numbered Treaties 1–11 were negotiated on the premise that First Nations would continue to govern their own internal affairs; the Crown promised "no interference with Indian modes of life." Subsequent federal policy recast those agreements as land cession instruments and imposed the Indian Act's band council system. Section 74 still empowers the Minister to dissolve hereditary governments and order new elections. Such unilateral authority tracks Crown convenience, not Indigenous rationales of kinship, stewardship, and nation-to-nation reciprocity – thereby failing Raz's dependence thesis.
Normal Justification Thesis	Fails	Because federal directives ignore Indigenous reasons, they rarely improve communities' ability to realize them. A stark example is the collapse of Fraser River wild salmon stocks: despite a century of federal regulation, commercial overharvest licensed by Ottawa undercut Sto·ló and Coast Salish conservation practices and eroded a core subsistence economy. When the law's outcomes frustrate the very reasons it purports to serve, normal justification evaporates.
Pre-emptive Duty	No Duty Arises	With both dependence and normal justification missing, Raz's chain of authority breaks. Indigenous nations are under no moral obligation to obey federal directives that contradict their own legal orders. Restoring legitimacy therefore requires treaty federalism: shared decision-making entrenched in both constitutional and Indigenous law, not mere consultation or delegated authority.

Source: Author's synthesis, drawing on Raz, *The Morality of Freedom*; "Indian Act," sec. cl–5, s74; Michael Asch, *On Being Here to Stay* (Toronto: University of Toronto Press, 2014), 83–87, https://utppublishing.com/doi/book/10.3138/9781442610026; Numbered Treaties 1–11; Stó·lō and Coast Salish conservation practices as discussed in Borrows, *Law's Indigenous Ethics*; Bruce I. Cohen, ed., *The Uncertain Future of Fraser River Sockeye* (Ottawa, ON: Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River, 2012), https://archive.org/details/31761116514654; and Simpson, *As We Have Always Done*.

Table 4: Application II of the "Raz Test": Sharia Law in Ontario

Raz Criterion	Assessment (Pass/Fail)	Rationale
Dependence Thesis	Fails	Ontario's Sharia arbitration episode (2004–06). For a decade, Jewish beth din and Catholic tribunals operated under Ontario's Arbitration Act. When Muslim groups sought similar recognition, public outcry prompted the province to abolish all faith-based family arbitration. What looks like neutral uniformity actually fails dependence: it sacrifices Muslim litigants' religious reasons while leaving litigants in wealthier cultural groups free to pursue costly private arbitration overseas. The blanket ban ignores Muslim litigants' reason for choosing faith-based adjudication (religious validity and community acceptance). Because the directive no longer tracks that reason – while still permitting the same parties to arbitrate overseas at far higher cost – it breaks the dependence link.
Normal Justification Thesis	Fails	Obedience does not leave Muslim families better able to realize their own aims. They must either litigate in secular courts (contrary to their religious rationale) or incur extra expense abroad. Net conformity to their preexisting reasons is therefore worse, not better.
Pre-emptive Duty	No Duty Arises	With both links severed, no pre-emptive duty arises: Muslim litigants have no Raz-grounded moral obligation to accept the province's ban, and Ontario's claim to neutral authority in this domain is merely coercive, not legitimate.

Source: Author's synthesis, drawing on Ontario *Arbitration Act*, S.O. 1991, c. 17; Marion Boyd, *Dispute Resolution in Family Law* (Toronto: Ontario Ministry of the Attorney General, 2004); Natasha Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women," *Muslim World Journal of Human Rights* 1, no. 1 (2004), https://doi.org/10.2202/1554-4419.1022; and Raz, *The Morality of Freedom*.

If Ontario illustrates revocation by policy shift, Quebec demonstrates pre-emptive restriction by statute. The move from ad hoc rollback to legislated uniformity sharpens the failure on dependence: the law elevates a majoritarian rationale that minorities do not share.

Table 5: Application III of the "Raz Test": Immigrant Communities and Conditional Pluralism

Raz Criterion	Assessment (Pass/Fail)	Rationale
Dependence Thesis	Fails	The statute elevates a majoritarian ideal of visible secularism, a reason that does not arise from the religious minorities it constrains. Because the directive is grounded in an external rationale rather than in the hijab wearer's or turban wearer's own reasons, the dependence link is broken.
Normal Justification Thesis	Fails	Compliance makes observant Muslims, Sikhs, and Jews worse at fulfilling their religious obligations (modesty, covenant, discipline) and narrows their employment opportunities. They are therefore not "better able to act on their own reasons" by obeying the ban.
Pre-emptive Duty	No Duty Arises	With both dependence and normal justification links severed, Raz's chain collapses; the province's directive is legally enforceable but lacks moral authority. Minority civil servants have no Raz-grounded obligation to obey the ban.

Source: Author's synthesis, drawing on *Loi 21: An Act Respecting the Laicity of the State*, S.Q. 2019, c. 12 (Quebec); Natasha Bakht, "Religious Arbitration in Canada: Protecting Women by Protecting Diversity?" *Canadian Journal of Women and the Law* 19, no. 1 (2007); Lori G. Beaman, *Deep Equality in an Era of Religious Diversity* (Oxford: Oxford University Press, 2017); Benjamin Berger, "Law's Religion: Rendering Culture," *Osgoode Hall Law Journal* 45, no. 2 (2007), https://doi.org/10.60082/2817-5069.1243; and Raz, *The Morality of Freedom*.

Table 5 applies the Raz Test to *Loi 21*[38], showing how a visibility rule grounded in an external ideal of laïcité breaks both dependence and normal justification for observant minorities.

These cases illustrate Raz's warning: Uniform rules can defeat autonomy when they neglect the diversity of reasons people have.

While most Canadian rulings stall before meeting Raz's full-service ideal, Multani v. Commission scolaire MargueriteBourgeoys (2006), mentioned earlier, is a standout.

[38] Loi 21 (2019), Quebec's Act respecting the laicity of the State, bars many public employees – including teachers, police, and judges – from wearing religious symbols at work, and requires that public services be given and received with uncovered faces; framed as entrenching secularism, it has been widely criticized for disproportionately burdening religious minorities.

Table 6: Application IV of the Raz Test: Multani v. Commission scolaire Marguerite-Bourgeoys (2006)

Raz Criterion	Assessment (Pass/Fail)	Why Multani passes the test (but only for Sikhs)
Dependence Thesis	Passes	The directive rests on the very reason invoked by observant Sikhs: carrying the kirpan is a mandatory article of faith. Allowing it – sealed, stitched, and concealed – tracks that religious rationale. Other faith practices (e.g., visible hijabs or turbans) were not before the Court, so their reasons remain unaddressed.
Normal Justification Thesis	Passes	Compliance lets Sikh students realize their religious duty and satisfies the school's safety goal; empirical evidence showed no greater risk than ordinary classroom objects. Students of other faiths receive no parallel benefit unless they litigate afresh.
Pre-emptive Duty	Generated	With dependence and normal justification satisfied, the judgment creates a legitimate pre-emptive duty: Sikh students must follow the safety conditions; the school board lacks moral authority to reimpose a blanket ban. Because the reasoning is case specific, no equivalent duty arises for other minorities whose symbols remain prohibited elsewhere.

Source: Author's synthesis, drawing on *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; Bakht, "Religious Arbitration in Canada"; Lori G. Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008); Benjamin Berger, "The Cultural Limits of Legal Tolerance," *Canadian Journal of Law and Jurisprudence* 21, no. 2 (2008); and Raz, *The Morality of Freedom*.

The Court accommodated the Sikh kirpan in schools under specific safety conditions, thereby passing both the dependence and normal justification theses. Yet the victory is narrow: the reasoning is tailored to Sikh obligations and does not automatically extend to other faith symbols or minority practices. The table shows how *Multani* clears Raz's bar – *and* why its protective circle remains exclusive.

Together, these applications underscore the article's claim: absent laws that track and improve people's own reasons across communities, Canadian constitutional directives are enforceable yet lack Razian legitimacy; where courts do track those reasons, legitimacy emerges but remains fragile and case-bound.

3 Raz's Theory of Legal Obligation and Its Implications for Canadian Constitutionalism

I have tried to show how Raz's legal philosophy offers a sophisticated theoretical lens for evaluating the legitimacy and moral authority of laws, especially within pluralistic and colonial contexts such as Canada. Building upon the analysis in the previous section, the following discussion explores Raz's fundamental conceptual commitments, particularly his notion of autonomy and his central innovation of "exclusionary reasons." These concepts provide robust philosophical underpinnings for the empirical tests of legitimacy detailed earlier, extending their application into broader debates around justice, reciprocity, and political morality. This theoretical depth underscores why Raz's approach uniquely illuminates the persistent legitimacy gap faced by Canadian constitutionalism.

3.1 Autonomy, Authority, and Exclusionary Reasons: Raz's Philosophical Framework

Raz's conception of legal authority revolves around an explicitly normative account of autonomy. He presents autonomy not merely as negative liberty – the absence of coercion – but as an active capacity for self-authorship and meaningful choice within social relationships.[39] Unlike classical liberal individualism, Razian autonomy is inherently relational and socially embedded, reflecting the reality that individuals' autonomous projects inevitably intersect and often conflict.[40] Raz argues that well-designed legal authorities enhance autonomy precisely by helping individuals manage conflicts and reduce errors in moral and practical reasoning.

Central to Raz's philosophical innovation is the idea of an exclusionary reason – a special kind of second-order reason that instructs an individual not to act upon certain first-order reasons.[41] A valid authoritative directive, for Raz, is thus an exclusionary reason; it functions not by overriding underlying moral or prudential reasons but by pre-empting them, replacing individual deliberation in contexts where collective, structured decision-making reliably leads to better conformity with these underlying reasons.[42] Consider again the example of

[39] Raz, *The Morality of Freedom*, 369–371.
[40] Ibid., 372.
[41] Joseph Raz, *Practical Reason and Norms* (London: Oxford University Press, 1999), 39–40, https://doi.org/10.1093/acprof:oso/9780198268345.001.0001.
[42] Raz, *The Morality of Freedom*, 46–47.

traffic signals: a red light does not invalidate the driver's reason to cross quickly but provides an exclusionary reason not to act upon it directly, enhancing safety more reliably than individual assessments could.

3.2 Raz's Two Normative Pillars: Dependence and Normal Justification Revisited in Depth

Building upon the empirical use of Raz's test introduced earlier, this deeper philosophical account clarifies why Raz's normative framework rests upon two essential theses. The first, the dependence thesis, holds that an authoritative directive gains legitimacy only when it directly reflects and respects the reasons that already apply independently to those who are governed.[43] The second, the normal justification thesis, maintains that authority is legitimate when adherence to its directives enables subjects to act more consistently and effectively on their valid underlying reasons than they would if left to act on their own.[44]

As we have seen, only if these two conditions hold does Raz grant directives pre-emptive force, meaning they can legitimately supplant individual reasoning in specific contexts. Significantly, Raz's approach thus places legitimacy in an explicitly empirical and consequentialist light: legitimacy hinges on the practical outcomes for subjects, rather than abstract notions of sovereign authority or historical continuity.

A further conceptual issue arises: can Raz's service conception be meaningfully applied to collective entities such as "Indigenous nations" or "minority communities"? While Raz's framework centres on the moral reasons of individuals, it is not limited to purely atomistic accounts of agency. In *Ethics in the Public Domain*, Raz concedes that autonomy and freedom are dependent on "options that presuppose a culture" – that is, shared norms, practices, and forms of life that confer meaning on individual choices.[45] Legal directives, then, must engage not only isolated agents but the shared frameworks within which agents' reason and act.

Accordingly, it is coherent – within Raz's theory – to speak of group-level rationalities and normative systems, especially where law purports to regulate collective life. Indigenous legal orders, for example, often articulate obligations and responsibilities that are communal, intergenerational, and relational. These

[43] Ibid., 47–48.
[44] Ibid., 53–54.
[45] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1995), 157–158, https://doi.org/10.1093/acprof:oso/9780198260691.001.0001.

shape what count as "reasons" for individuals within those communities. When the state fails to engage these collective sources of moral reasoning, it undermines both individual autonomy and communal legitimacy. Thus, the application of the Razian test to nations or cultural communities is not a category error – it reflects the embedded, relational nature of practical reasoning in pluralist societies.

This insight supports the application of Raz's framework to group-level reasoning, especially in contexts where individuals' moral reasons are constitutively shaped by communal norms, historical narratives, and collective identities. Indigenous legal traditions, for instance, ground obligation not in abstract principle but in relational and place-based responsibilities. If the state imposes legal directives that ignore or contradict these frameworks, it disrupts the very sources of moral reasoning that underwrite autonomy. In such cases, the Razian test can and should assess legitimacy at the level of the collective, insofar as the law claims authority over those who reason – and live – within shared normative worlds.

3.3 Implications for Canadian Constitutional Legitimacy: Philosophical Insights

When viewed philosophically, Raz's conception reveals profound tensions within Canada's constitutional architecture, particularly concerning Indigenous sovereignty and multicultural recognition. Raz's emphasis on the relational nature of autonomy aligns closely with Indigenous perspectives that frame sovereignty as grounded in reciprocal responsibilities and kinship obligations.[46] Indeed, Indigenous legal traditions emphasize interdependence and relational autonomy, often contrasting sharply with Western individualistic frameworks imposed through colonial law.[47] Razian theory helps expose how Canadian constitutional norms frequently fail the dependence thesis precisely because colonial directives rarely reflect the reciprocal reasons central to Indigenous governance – reasons that centre on collective stewardship, ecological sustainability, and spiritual obligations to the land.[48]

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[46] Borrows, *Canada's Indigenous Constitution*; Simpson, *As We Have Always Done*.

[47] Val Napoleon and Hadley Friedland, "An Inside Job: Engaging with Indigenous Legal Traditions through Stories," *McGill Law Journal. Revue de Droit de McGill* 61, no. 4 (June 1, 2016): 739–740, https://lawjournal.mcgill.ca/article/an-inside-job-engaging-with-indigenous-legal-traditions-through-stories/.

[48] John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016), 112–141, https://utppublishing.com/doi/book/10.3138/9781442629233.

Raz's account also challenges Canada's multicultural constitutional paradigm. Canadian multiculturalism formally endorses diversity yet maintains a fundamentally unitary legal structure that often overrides minority communities' distinct moral rationales.[49] For instance, Ontario's blanket abolition of religious arbitration in family law cases demonstrates an absence of real commitment to minority reasons, as previously analyzed.[50] This not only violates Raz's dependence criterion but erodes the conditions for legitimate authority by systematically discounting minority autonomy. Raz clarifies this ethical failure by underscoring the necessity of treating minority reasons seriously, even within overarching legal frameworks, to genuinely respect autonomy and foster genuine multicultural coexistence.[51]

3.4 Critical Engagements with Raz: Postcolonial and Liberal Objections

Raz's service conception is not without challenges. Postcolonial theorists like Coulthard and Tully argue that the Canadian state's primary intention was never genuinely to serve Indigenous or minority communities but to perpetuate colonial dominance and assimilation.[52] Raz acknowledges but strategically sidesteps the intentionality critique. His response is pragmatic: by defining legitimacy in terms of service rather than sovereign assertion, Raz provides a diagnostic tool that legitimates principled disobedience when conditions of legitimacy demonstrably fail.[53] Thus, even if colonial legal orders were historically coercive by design, Raz's theory nevertheless offers oppressed communities powerful philosophical leverage to demand structural changes grounded in reciprocal recognition.

Furthermore, some liberal perfectionists criticize Raz for placing excessive trust in institutional authority and underestimating the risk of paternalism inherent in exclusionary reasons.[54] Raz replies by emphasizing that his test for legiti-

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[49] Coulthard, *Red Skin, White Masks*, 3–4, 6–15; Tully, *Strange Multiplicity*, 33–40.
[50] Bakht, "Family Arbitration Using Sharia Law."
[51] Raz, *Ethics in the Public Domain*, 174–176.
[52] Coulthard argues that contemporary recognition-based politics in Canada reproduce rather than dismantle colonial relationships, maintaining settler access to Indigenous lands under the guise of reconciliation. See Coulthard, *Red Skin, White Masks*, 3–4, 6–15. Tully contends that constitutional recognition often masks assimilationist aims and fails to engage with Indigenous legal traditions on equal footing. See Tully, *Strange Multiplicity*, 33–40.
[53] Joseph Raz, *The Authority of Law*, 2nd ed. (London: Oxford University Press, 2009), 144–146.
[54] Steven Wall, *Liberalism, Perfectionism and Restraint* (Cambridge: Cambridge University Press, 2007), 83–87, https://doi.org/10.1017/cbo9780511583339.

macy is rigorously conditional and empirically grounded: if institutional directives fail genuinely to enhance conformity to valid reasons, they automatically lose their authority and pre-emptive force.[55] Far from inviting paternalism, Raz provides stringent conditions that authority must satisfy to maintain legitimacy.

3.5 Raz's Influence in Contemporary Canadian Debates: A Path Forward

Joseph Raz's service conception has, though rarely named, underpinned the Supreme Court's evolving jurisprudence on Indigenous and pluralist questions. In *R v Sparrow*[56], the Court introduced a duty to consult and accommodate Indigenous fishing rights, implicitly applying Raz's dependence thesis by requiring that state measures align with preexisting Indigenous reasons. In *Delgamuukw v British Columbia*[57], the Court's approach to treaty interpretation as a living instrument reflects Raz's normal justification test – treating Indigenous laws as a legitimate normative source.[58] *Tsilhqot'in Nation v British Columbia*[59] went further by recognizing Aboriginal title as requiring consent for resource development, moving toward Raz's preemption criteria by limiting unilateral Crown override.[60]

If Canadian courts were to adopt Raz's framework explicitly, they would move away from preserving unilateral state authority and toward fostering genuine shared jurisdiction grounded in reciprocal legitimacy. Concrete proposals already under discussion illustrate what such a shift might entail. John Borrows, for example, has suggested treaty-first legislation, under which Parliament would be required to obtain a treaty-compatibility certificate – issued by Indigenous nations themselves – before legislating in Indigenous territories.[61] Similarly, Will Kymlicka has advanced the idea of pluralistic arbitration frameworks, recommending the reinstatement of faith- and culture-based arbitration, subject

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[55] Raz, *The Authority of Law*, 146–148.

[56] R. V. Sparrow – SCC cases, 1 SCR 1075 (Supreme Court of Canada 1990).

[57] "Delgamuukw v. British Columbia – SCC Cases," https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/1569/index.do.

[58] Webber, *The Constitution of Canada*, 117.

[59] "Tsilhqot'in Nation v. British Columbia – SCC Cases," 2014, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

[60] Although Webber does not invoke Raz explicitly, his analysis of *Sparrow*, *Delgamuukw*, and *Tsilhqot'in* demonstrates how Canadian courts have begun to approximate Razian legitimacy tests, especially when rulings respect Indigenous rationales and acknowledge the limitations of state law as the sole normative authority. See Webber, *The Constitution of Canada*, 131–132.

[61] Borrows, *Freedom and Indigenous Constitutionalism*, 89.

to mandatory judicial review and the maintenance of public registries.[62] These mechanisms, he argues, would ensure substantive equality while still deferring to the reasons and commitments of the litigants.

By aligning state directives with the moral reasons of Indigenous and immigrant communities, these institutional changes instantiate Raz's service conception – transforming abstract moral insights into practicable reforms and pointing the way to a constitutional order that is truly responsive to Canada's pluralist reality.

4 Transformative Constitutionalism: From Raz's Service Conception to Ethical Space and Relational Accountability

The limitations of the liberal-constitutional model, even when filtered through Raz's evaluative test, become most apparent when confronting the relational foundations of Indigenous law. While Raz offers a powerful diagnostic grounded in practical reason and the capacity of law to serve individuals' pre-existing moral reasons, his framework remains tethered to a liberal ontology of the self – autonomous, self-legislating, and detachable from its context. What Raz presumes is a reasoning agent who evaluates authority from a position of relative independence, guided by instrumental or moral rationality. But this image of the subject, compelling as it is within Western frameworks, does not capture the relational and ontological[63] commitments that animate Indigenous legal traditions. In these traditions, obligation is not merely a matter of consent or reflective endorsement but of being constituted by, and responsive to, a web of kinship, land, memory, and spirit.

This ontological divergence necessitates a more capacious framework – one that can accommodate not only diverse normative systems but also different conceptions of what it means to be a subject of law. Dwayne Donald's theory of

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[62] Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (London: Oxford University Press, 2001), 45–50, https://doi.org/10.1093/0199240981.001.0001.

[63] By ontology, I mean the underlying account of what exists and what kinds of relations are primary in constituting reality and personhood. In liberal frameworks, the legal subject is typically conceived as an autonomous individual, prior to and separable from the relationships and institutions that govern them. In contrast, many Indigenous legal traditions begin from a relational ontology – where persons are constituted through their relationships with others, including ancestors, land, and more-than-human beings. This *ontological divergence* is not merely a difference in moral values or legal form, but a deeper disagreement about the nature of law, responsibility, and the self.

ethical relationality[64], grounded in the Cree concept of *wâhkôhtowin*[65], provides that alternative. It is not a supplement to Raz, nor a minoritarian correction; it is a paradigmatic reframing of what "reasons" and "authority" mean. In liberal theory, including Raz's, reasons tend to be individuated and detachable conditions for rational action that can be weighed and ranked. For Donald, reasons are not external criteria but embodied, place-based, and enacted within relationships. Law, in this view, is not imposed from above or deliberated in abstraction; it is lived through responsibilities that are genealogical, ceremonial, and ecological. Donald writes:

> Ethical relationality is an ecological understanding of organic connectivity that becomes readily apparent to us as human beings when we honour the sacred ecology that supports life and living. Thus, ethical relationality describes an enactment of ecological imagination wherein our thoughts and actions are guided by the wisdom of sacred ecology insights. Ethical relationality does not deny difference nor does it promote assimilation of it. Rather, ethical relationality supports the conceptualization of difference in ecological terms as necessary for life and living to continue. It guides us to seek deeper understandings of how our different histories, memories and experiences position us in relation to one another. It puts those differences at the forefront as necessary for wicihitowin and wâhkôhtowin to be enacted. So, ethical relationality is tied to a desire to acknowledge and honour the significance of the relationships we have with others, how our histories and experiences position us in relation to one another, and how our futures as people in the world are similarly tied together. It is an ethical imperative to remember that we as human beings live in the world together and also alongside our more-than-human relatives; we are called to constantly think and act with reference to those relationships.[66]

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[64] Dwayne Donald, "Forts, Curriculum, and Ethical Relationality," in *Reconsidering Canadian Curriculum Studies* (New York: Palgrave Macmillan US, 2012), 45, https://doi.org/10.1057/9781137008978_3; Dwayne Donald, "From What Does Ethical Relationality Flow? An 'Indian' Act in Three Artifacts," *Counterpoints* 478 (2016): 11, https://www.jstor.org/stable/45157205.

[65] Darcy Lindberg, "Nêhiyaw Âskiy Wiyasiwêwina: Plains Cree Earth Law and Constitutional/Ecological Reconciliation" (Ph.D. dissertation, University of Victoria, 2020), 138–139, http://hdl.handle.net/1828/11985. In his dissertation, Lindberg explores how wâhkôhtowin embodies the interconnectedness of relationships among people, the land, and all living beings, forming the foundation of Cree legal and ethical systems. He emphasizes that this principle is not merely about familial ties but extends to a broader ecological and spiritual kinship, guiding responsibilities and conduct within the community.

[66] Donald, "From What Does Ethical Relationality Flow?," 11. See also Lindberg, "Nêhiyaw Âskiy Wiyasiwêwina," 139–140. Lindberg presents a gloss: In Plains Cree (nêhiyawêwin), wîcihitowin

Donald's vision radically displaces the liberal notion of legal obligation as something formalized through consent or justified through functional service. Instead, legal legitimacy becomes a question of *right relationship* – of how law participates in sustaining a world of relations, including with ancestors, the land, and more-than-human beings. In this sense, Donald offers not only an alternative theory of obligation but a different metaphysics of law: a law grounded in *nêhiyaw* (Plains Cree) cosmology, where law is not created but remembered, not abstracted but storied.[67]

What Donald articulates here is not merely a moral vision but a different way of knowing – what he calls an "ecological imagination." This imagination does not reduce legal norms to codified rules or discrete interests but instead sees law as a living expression of interdependence. It is an epistemology of memory, land, and more-than-human relationships – one that views difference not as a threat to coherence but as a condition for relational vitality. In contrast to the liberal emphasis on mutual non-interference, ethical relationality foregrounds mutual responsibility as the foundational legal principle.

This has profound implications for how treaties are understood. They are not contracts, nor even just mutual recognitions of sovereignty. They are, as Donald and others have emphasized, *covenantal* in the deepest ethical sense: living relationships that bind parties through memory, responsibility, and co-existence. As Borrows and Coyle point out, Canadian law continues to treat treaties largely as transactional and finite – historical documents rather than ongoing frameworks of shared life. This "frozen rights" approach, which strips treaties of their relational logic, stands in stark contrast to Indigenous understandings where treaties are narrated, renewed, and reinterpreted through ceremony, language, and oral tradition.[68]

While Raz's framework emerges from a tradition of epistemic distance – one in which subjects assess legal directives from a position of relative independence – its evaluative logic remains useful. When adapted with care, it offers a second-order test for when authority claims fail to track the living obligations embedded in Indigenous legal traditions. When the Crown imposes legislation or asserts unilateral override powers, it fails not simply because it overreaches but

carries connotations not only of assistance but of reciprocal responsibility – especially in kinship, community, and ethical relationships. It emphasizes cooperative, mutual care and is often mentioned alongside wâhkôhtowin (kinship) as a key value in Indigenous legal and ethical systems.

[67] Lindberg, "Nêhiyaw Âskiy Wiyasiwêwina," x.

[68] John Borrows and Michael Coyle, *The Right Relationship* (Toronto: University of Toronto Press, 2017), 5–9.

because it disregards the *relational premises* of its obligations. In Donald's terms, such disregard constitutes a breach of *wâhkôhtowin* – a betrayal of the ethical space created by treaties and shared histories.

Thus, Donald's ethical relationality does more than offer a moral vision; it sharpens and deepens Raz's service conception by demanding that we ask *whose reasons*, *whose relationships*, and *whose world* the law is meant to serve. The convergence of these frameworks is not in method but in critique: both reject the legitimacy of authority grounded in abstraction, coercion, or convenience. Together, they push Canadian constitutionalism toward a model in which legitimacy is not a matter of procedural form but of ontological fidelity – of honouring the living relationships that make law possible in the first place.

It is important to acknowledge that Indigenous legal orders, like all normative systems, are internally diverse and subject to their own histories of contestation, marginalization, and reform. While this paper emphasizes the legitimacy deficits of the settler constitutional framework, it does not presume that Indigenous legal traditions are immune to critique or that they always meet Raz's tests of dependence and normal justification for all their members. As some liberal theorists have noted, hierarchical dynamics or gender-based exclusions may persist within communal norms, raising legitimate questions about internal accountability and dissent.

However, many Indigenous legal scholars and communities have long grappled with such issues through their own practices of ethical renewal and deliberative tradition. The frameworks of *wâhkôhtowin* and ethical relationality, for instance, do not prescribe static hierarchies but call for ongoing attention to the quality of relationships – human and more-than-human, intergenerational and horizontal. In this respect, Indigenous traditions often possess their own mechanisms for evaluating legitimacy and sustaining moral responsiveness. The aim here is not to idealize any legal order, but to recognize the plurality of sources from which valid legal reasons can emerge – and the necessity of treating them with the same philosophical seriousness we afford to state-based authority.

4.1 Ethical Space: Creating Conditions for Genuine Dialogue

While ethical relationality outlines the moral vision needed to reshape Canada's constitutional relationships, Willie Ermine's concept of ethical space provides a practical methodological framework for engaging across difference. Ermine, a Cree ethicist, defines ethical space as a structured, intercultural

environment explicitly designed for meaningful dialogue between divergent worldviews, moral systems, and normative orders.[69] Ethical space does not require parties to abandon or dilute their cultural or ethical commitments; rather, it offers a structured context where these distinct frameworks can genuinely encounter one another on equitable terms.

For Ermine, ethical space emerges at the boundary between two or more contrasting knowledge and legal systems. He emphasizes that genuine engagement is not merely a conversation between individual interests but a deeper intercultural negotiation between entire normative frameworks.[70] In this respect, ethical space is not a neutral arena but a carefully facilitated dialogue acknowledging power imbalances and historical injustices, explicitly designed to correct systemic asymmetries.[71]

Connecting this insight back to Raz, ethical space operationalizes his theoretical demand for legitimacy through dependence and normal justification. Ethical space ensures that directives and agreements emerging from constitutional dialogue genuinely track and serve the reasons of all communities involved – thereby satisfying Raz's empirical criteria for legitimacy. Indeed, ethical space addresses Raz's challenge head-on: it provides a structured normative space to test continuously whether constitutional norms meet his stringent conditions for authority.

4.2 Ethical Space in Constitutional Practice: Treaty Federalism and Intercultural Arbitration

Applied concretely, ethical space offers promising avenues for constitutional reform in Canada. Consider first treaty federalism: rather than unilateral Crown interpretation, ethical space requires active, sustained intercultural dialogue and co-decision processes informed by Indigenous epistemologies and governance structures. Treaty-making could thus become an ongoing intercultural process rather than a concluded historical event, precisely in line with Donald's relational perspective.[72]

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[69] Ermine, "The Ethical Space of Engagement," 194–196.
[70] Ibid., 200.
[71] Ibid., 202–203.
[72] Michael Asch, John Borrows, and James Tully, eds., *Resurgence and Reconciliation* (Toronto: University of Toronto Press, 2018), 55–61.

Similarly, ethical space could guide a renewed pluralist arbitration framework, moving beyond procedural accommodation toward robust intercultural jurisprudence. Rather than blanket prohibitions or mere toleration, intercultural arbitration processes could explicitly integrate community norms through structured ethical spaces that actively mediate between state and minority legal orders, meeting Raz's tests of both dependence and normal justification.[73]

4.3 Ethical Space as Transformative Constitutionalism: Examples and Possibilities

Ethical space aligns both philosophically and practically with the model of transformative constitutionalism successfully applied in post-apartheid South Africa, where reconciliation and intercultural dialogue underpinned institutional reforms.[74] In the Canadian context, transformative constitutionalism guided by ethical space would require explicit legislative and judicial recognition of Indigenous and minority normative systems. This recognition could take several institutional forms. One possibility is treaty compatibility certification, an Indigenous-led process that ensures legislation aligns substantively with treaty obligations and Indigenous normative frameworks. Another is the creation of intercultural judicial review panels, composed of members with expertise in Indigenous and minority legal systems and embedded within Canada's constitutional courts; such panels would enhance Razian legitimacy through reciprocal oversight. A third mechanism would be legislative autonomy impact assessments, mandatory analyses of how new legislation affects communities' capacity to live in accordance with their deeply held normative commitments.

One may reasonably ask whether ethical space, as envisioned by Ermine, functions as a genuinely intercultural framework or whether it merely displaces liberal norms with Indigenous ones. This concern is particularly acute when irreconcilable differences arise – not merely over outcomes, but over the ontological and epistemic grounds on which legal claims are made. Can ethical space serve as a neutral arbiter, or must it resolve such conflicts by privileging one tradition over another?

Ethical space does not promise a fixed meta-framework that adjudicates all conflict with finality. Instead, it offers a structured methodology for sustained, good-faith engagement across difference – one that explicitly recognizes

[73] Bakht, "Family Arbitration Using Sharia Law"; Boyd, *Dispute Resolution in Family Law*.
[74] Klare, "Legal Culture and Transformative Constitutionalism."

asymmetries of power and the histories of epistemic erasure that shape legal pluralism. It is not an alternative form of sovereignty, but a normative process for generating mutual intelligibility and reciprocal accountability. In this sense, ethical space is not a replacement for law but a condition for its legitimacy in pluralist societies.

To address the risk of perpetual indeterminacy, ethical space must be supplemented by institutional safeguards that ensure dialogue is not merely procedural but substantively inclusive. Mechanisms such as rotating intercultural panels, sunset clauses that require periodic review of shared norms, and impact assessments grounded in community-defined values can help balance the need for legal stability with the reality of ontological diversity. Ethical space, then, is neither utopian nor relativist – it is a constitutional orientation premised on humility, responsiveness, and the acknowledgment that no legal system can claim universal priority in a world of many worlds.

4.4 Ethical Space, *Relationality*, and Raz: Toward a New Constitutional Compact

One might ask whether ethical space, as envisioned by Ermine, truly offers an intercultural framework, or whether it risks simply substituting Indigenous epistemologies for liberal ones. This concern becomes particularly acute when legal or ontological conflicts appear irreconcilable – when traditions diverge not just in values, but in what they take law, obligation, or authority to be. Can ethical space mediate such foundational differences, or must it resolve them by privileging one worldview?

Ethical space does not offer a final arbitration mechanism. Rather, it deliberately avoids the premise of neutral universality that underpins much of liberal constitutional thought. Its value lies in creating a structured, reflexive zone of encounter – a space in which power asymmetries are acknowledged, ontologies made visible, and shared norms negotiated without subsumption. In that sense, ethical space is not a fixed legal forum but a jurisgenerative posture: a normative commitment to building legal legitimacy through sustained intercultural dialogue.

To guard against indeterminacy, ethical space must be institutionally scaffolded: through treaty compatibility assessments, pluralist review panels, and other mechanisms that preserve accountability without collapsing difference. Its promise is not in solving all disputes, but in enabling the constitutional order to live with normative tension – to treat conflict not as a threat to coherence, but as the very condition of pluralism.

Integrating Raz's philosophical rigour with ethical relationality and ethical space transforms Canada's constitutional project from colonial governance toward genuine pluralistic democracy. Raz provides the normative clarity and philosophical depth required to critique existing structures rigorously; Donald and Ermine offer the conceptual tools and practical methodologies for achieving the reciprocal relationships necessary to rectify those structural flaws.

Ultimately, transformative constitutionalism, understood through ethical relationality and ethical space, goes beyond mere procedural accommodation. It embraces constitutionalism as an active relational process: continuously negotiating, revisiting, and revising shared responsibilities, norms, and legal orders. This demands a deeper commitment from all parties – one built on mutual respect, sustained dialogue, and relational accountability. Through such commitments, Canada's constitutional framework can genuinely embody the reciprocity and pluralism required by both Razian legitimacy criteria and Indigenous relational ethics.

What is at stake, then, is not simply a more inclusive constitutionalism, but a different political imagination – one grounded in shared vulnerability, relational trust, and an ethics of place. Raz offers a framework for testing whether the law helps us live well with others; Donald and Ermine remind us that "others" includes the land, the ancestors, and those yet to come. This is not merely a new compact, but a renewed commitment to the ongoing work of being treaty people.

5 Conclusion: Toward a Relational Constitutional Borderland

I have argued that Canada's constitutional order, despite its liberal aspirations to justice and inclusion, remains normatively compromised. At its core, it continues to operate within a settler-colonial framework that privileges Crown sovereignty and procedural equality over relational responsibility and legal pluralism. Using Joseph Raz's service conception of authority, I have proposed a diagnostic lens to assess whether Canadian legal directives generate legitimate obligations for those they govern. Raz's framework – anchored in the dependence thesis, the normal justification thesis, and the concept of exclusionary reasons – insists that authority must be earned through demonstrable service to the governed. It is a test not of pedigree but of performance.

Applied to Canada's constitutional practices, however, this test exposes a legitimacy gap. In both treaty relationships with Indigenous nations and pluralist accommodations for immigrant communities, Canadian law frequently fails

to track the reasons of its subjects or improve their capacity to live in accordance with those reasons. As such, many legal directives fall short of generating pre-emptive moral duties. Whether through the Indian Act's persistent unilateralism, the state's transactional treatment of treaties, or the retraction of faith-based arbitration under the guise of neutrality, the Crown's authority is often directive without being genuinely authoritative. Its power is exercised, but its legitimacy is unearned.

At the same time, this paper has sought to move beyond critique. While Raz offers a compelling internal standard for liberal legitimacy, the deeper challenge comes from Indigenous thinkers such as Dwayne Donald and John Borrows, whose work calls for a reorientation of constitutional thinking altogether. Donald's theory of ethical relationality, grounded in the Cree concept of *wâhkôhtowin*, reframes obligation not as consent to a social contract but as responsibility within a living network of human and more-than-human relations. Treaties, on this view, are not instruments of delegated sovereignty but ceremonies of shared stewardship – ethical compacts grounded in memory, land, and intergenerational reciprocity.

This Indigenous relational paradigm deepens and recontextualizes Raz's service conception. Where Raz begins from a vision of self-authoring agents capable of moral error, Donald begins from a vision of interdependence and ecological accountability. Yet the two converge in their insistence that legitimacy must be earned through reason-giving and relational fidelity. Both frameworks reject the view that authority inheres in the state as such. Instead, they ask: does the law serve those it claims to bind? Does it honour the reasons – spiritual, cultural, subsistence-based – that animate life within and across communities? And if not, what must be transformed to make space for genuine legitimacy?

It is here that the concept of the constitutional borderland becomes most apt. Canada's legal and moral order is not a settled domain but a contested terrain – a borderland where Indigenous law, settler constitutionalism, and immigrant aspirations converge, overlap, and sometimes collide. Borderlands are not merely frontiers; they are spaces of tension and translation, where multiple sovereignties, identities, and worldviews come into contact. In this borderland, legal authority cannot rest on a single normative foundation. It must be renegotiated continually through relationships that respect difference while cultivating shared obligations.

From this insight arises the idea of transformative constitutionalism: not merely a revision of statutes or a broader interpretation of rights, but a reimagining of the foundational relationships that constitute political community.

Inspired by the South African and Latin American contexts, but adapted to Canada's specific pluralism, transformative constitutionalism demands recognition of Indigenous legal orders as coequal, not derivative. It calls for constitutional practices grounded not only in procedural fairness but in ethical space – what Willie Ermine describes as the interstitial zone where distinct worldviews can meet, engage, and generate shared norms without subsuming one another.

This vision is not utopian. Elements of it already exist – in Supreme Court jurisprudence, in treaty negotiations, in grassroots practices of intercultural governance. But they remain fragmented, partial, and often symbolic. To move forward, Canada must adopt institutional reforms that embed relational accountability at the constitutional level. These include, as proposed earlier, treaty-first legislation, pluralist arbitration frameworks with safeguards for substantive equality, and autonomy impact statements that evaluate laws against the reasons and capacities of those most affected.

Ultimately, the shift from authority-as-command to authority-as-stewardship is not merely a legal adjustment. It is a philosophical and ethical transformation. It requires Canadians – settlers, Indigenous peoples, and immigrants alike – to rethink what it means to share a legal and political order. Not as co-inhabitants of a singular national project, but as participants in a dynamic constitutional borderland: one where obligations are not given but earned, where authority is not presumed but justified, and where law is not imposed but lived. Raz's framework, with its insistence on service, can take us part of the way. But it is through Indigenous jurisprudence – through *wâhkôhtowin*, through treaties as living relations, and through ethical space – that we learn how authority must not only serve but belong.

Canada's Constitution, viewed this way, is not a finished document. It is a contested borderland. And its legitimacy, like its future, depends on our willingness to dwell in that space – with humility, imagination, and an unwavering commitment to justice.[75] For Indigenous nations, law begins with the land – with

[75] This argument is not an indictment of Canadian sovereignty, but a defense of its moral and philosophical renewal. In a moment of intensifying geopolitical uncertainty – exacerbated by recent threats to democratic norms and legal stability in the United States of America – it is more crucial than ever that Canada articulate a sovereignty rooted not in colonial fiat but in relational legitimacy. The form of sovereignty envisioned here is neither fragile nor fragmented; it is plural and principled. It draws strength not from uniformity, but from reciprocity across the legal and cultural differences that define Canada's social fabric. To build a constitutional order that genuinely includes Indigenous legal orders and immigrant moral frameworks is not to weaken Canada's sovereignty, but to inoculate it against precisely the forms of authoritarianism, legal erosion, and monocultural nationalism now surfacing in many parts of our world. Sovereignty that is earned through shared

memory, relation, and place. But newcomers, more often than not, settle here for words: for rights promised, for freedoms narrated in law, for the language of belonging. To settle on words, then, is to accept the burden of conceptual labour – of working through the language of justice, so that land might once again become something more than possession.

stewardship, rather than imposed through historical inertia, is not only more just – it is more durable in the face of external pressure. This paper, then, offers not a critique from without, but a constitutional affirmation from within: a vision of a stronger Canada, bound not by the assertion of power, but by the authority of relationship.