CONSTITUTIONAL CHANGE AND THE RULE OF RECOGNITION

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University College

Thesis submitted to the Faculty of Law at the University of Oxford for the degree of

Doctor of Philosophy

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Abstract

This thesis has two objectives. The first is to reflect on the social foundations of legal change, and of change in constitutional law in particular, by developing HLA Hart's account of ultimate rules of recognition. It argues that any change in accordance with pre-existing ultimate rules of recognition should be viewed as meaningfully coming from within a legal system. This is so even if the change in question is not a result of an exercise of a legal power to make law. Thus, rules of recognition provide an independent ground of lawfulness of legal change. However, as customary social rules, they also open the law to change that does not obey any pre-existing legal conditions of change. Such change cannot happen through an exercise of a legal power to make law, but it is here argued that an alternative notion of a 'legal ability' to influence change should be used. The thesis also argues that such change of ultimate rules ought to be seen as revolutionary in some, but not all, instances.

Second, the thesis applies the jurisprudential framework of rules of recognition to the debates about constitutionality of constitutional change (but only in respect to change in constitutional law). It argues that some kinds change in constitutional law, perceived as normal by participants of legal practices, cannot be understood as 'constitutional' on a prominent view which identifies constitutionality of change with it being a result of an exercise of a legal power to effect the change. This 'powers view' is deficient because it does not appreciate the role of ultimate rules of recognition in grounding lawfulness of legal change. The thesis analyses the complex nexus of amendment powers, pretended powers ('pious fictions'), and rules of recognition, thus giving a jurisprudentially sophisticated picture of constitutional change.

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PREVIOUS PUBLICATIONS

Significant parts of chapters II and III were previously published as:

M. Barczentewicz, 'The Illuminati Problem and Rules of Recognition' (2018) 38 Oxford Journal of Legal Studies 500–527.

Parts of chapter II were previously published as:

M. Barczentewicz, 'The Social Basis of Ultimate Legal Rules: Hayek Meets Hart' in Peter J. Boettke, Jayme Lemke, Virgil Storr (eds), *Exploring the Political Economy & Social Philosophy of F.A. Hayek* (Rowman & Littlefield 2018).

I. INTRODUCTION

Constitutional law is an especially fertile ground for philosophical reflection. Many doctrinal debates in constitutional law quickly turn to philosophical arguments about the source and the grounds of ultimate legal rules, the constitutive relationship between the law and other social phenomena or about the boundaries of what the law governs, to name just a few. This is also true of the field of comparative constitutional law which has a strong focus on constitutional change. The questions about the connection, if any, between 'constituent powers' and the law, or about the legal limits and 'constitutionality' of constitutional amendment cannot be answered in a general way without serious engagement with general philosophical (jurisprudential) theories of the law. My overarching purpose in this thesis is to develop one such theory – the Hartian positivist model of foundations of legal systems.[1] Developing the Hartian model, I place 'constitutionality' of constitutional change, 'constituent power' and 'amendment power' in a theory of law, which is both positivist and general. It is positivist, because it is focused on law as it is as a matter of social fact, not as it should be. It is general because, on one hand it is not limited to any particular legal system and on the other hand it is not limited to codified

[1] By the 'Hartian' model I mean a framework based on the work of HLA Hart, but later developed by many others. It is not my main purpose to provide an exegesis of what Hart (or anyone else) said or would have said and to the extent I do so, I do it instrumentally. Some of the key works I benefited from the most are HLA Hart, *The Concept of Law* (3rd edn, OUP 2012); John Finnis, 'Revolutions and Continuity of Law', *Philosophy of Law: Collected Essays Volume IV* (OUP 2011); Joseph Raz, *The Concept of a Legal System* (OUP 1980); Joseph Raz, *Practical Reason and Norms* (OUP 1999); Matthew H Kramer, *In Defense of Legal Positivism: Law Without Trimmings* (OUP 1999); Matthew H Kramer, *Where Law and Morality Meet* (OUP 2008); John Gardner, *Law as a Leap of Faith* (OUP 2012); Matthew H Kramer, *H.L.A. Hart: The Nature of Law* (Polity Press 2018).

constitutions, or even to legal rules grounded in texts, but it is centred on law-as-practiced, irrespective of the form.

There has been a good deal of confusion regarding the notions of 'positive' law and of 'positivism' (and Hartian positivism in particular).[2] For example, it is common in the literature to identify 'positive' (constitutional) law with legal texts[3] or to see 'positivist' accounts of legal change as limited to intentional action aimed at making such change.[4] The important point is that such lack of clarity distracts from the invaluable insight that positive law is fundamentally based in social practices and may not fully correspond to any specific legal texts, despite pretence. Positivism in the Hartian tradition is in no way wedded to text-centrism, will-centrism or any other kind of formalism.[5] However, critics of positivism sometimes mischaracterise it as having such associations. For example, Trevor Allan in a famous article on parliamentary sovereignty in the United Kingdom dismissed 'inadequate, positivist jurisprudence' (referring to the Hartian framework) because – on his view – it fails to allow for the possibility of legal arguments about the content of ultimate legal

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[2] See eg John Gardner, 'Legal Positivism: 5½ Myths', *Law as a Leap of Faith* (OUP 2012).

[3] See eg Yaniv Roznai, *Unconstitutional Constitutional Amendments* (OUP 2017) 136; Oran Doyle, 'Constraints on Constitutional Amendment Powers' in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) 74.

[4] See eg Nicola Lupo, 'Two Examples of Quasi-Constitutional Amendments from the Italian Constitutional Evolution - A Response to Richard Albert' (2017) 65 Buffalo Law Review 1039, 1054; Reijer Passchier, 'Quasi-Constitutional Change Without Intent - a Response to Richard Albert' (2017) 65 Buffalo Law Review 1077, 1084.

[5] Gardner, 'Legal Positivism: 5½ Myths' (n 2).

rules.[6] Allan was right to stress that possibility but wrong to think that there is something in the Hartian model that precludes it. To be fair, the relationship between the foundations of the law and other elements of social reality is complex and it requires a good deal of nuance to establish when legal change is law-governed and when it is not. Even some followers of Hart claimed, I believe incorrectly, that arguments 'for or against' ultimate legal rules 'are necessarily extralegal'.[7]

Thus, my work is in a similar spirit to Neil MacCormick's who has written (responding to Allan):

> There certainly were and are flaws in Hart's account of legal structures … But the answer is not to abandon the enterprise on which they embarked, nor to indulge in put-downs about 'inadequate positivist jurisprudence'. It is to try to achieve a more thorough and satisfactory analysis that gets to the root of the problem about 'pedigree tests', that is in more sober language, 'criteria of recognition', and the extent of constitutional power to change those criteria within this legal system as it exists now.[8]

Those questions are among the key questions I tackle in this thesis. One of my conclusions is that MacCormick made significant errors in his answer,[9] but this only strengthens my point that there is still a need for a careful examination of the relationship between constitutional change and the Hartian jurisprudential framework both MacCormick and I adopted.

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[6] TRS Allan, 'Parliamentary Sovereignty: Law, Politics, and Revolution' (1997) 113 LQR 443, 444, 448.

[7] Richard S Kay, 'Preconstitutional Rules' (1981) 42 Ohio State Law Journal 187, 193.

[8] Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (OUP 1999) 91–92.

[9] See ch VIII.1. and ch X.

My central argument is that on the Hartian positivist view more of the change that takes place in constitutional law is law-governed than usually admitted. While developing that argument, I also aim to achieve the goal of dispelling some of the confusion around key aspects of general theory of constitutional change, like the notion of 'constitutionality' of constitutional change and the issue of legal powers to amend a constitution (amendment powers) and their limits.

Before I move on to a chapter-by-chapter overview of my thesis, I want to give a concise list of the key insights:

- As I develop it, the Hartian positivist approach to change in legal constitutional rules is not formalist – to the contrary, it allows for a realistic account of what social facts determine such change. This account is not limited to explicit (textual) change or to change due to formal authorization rules (eg from a codified constitution) (chapter IX).
- What sort of social facts determine ultimate legal rules (are at the foundations of law) affects what is the content of the law, especially in constitutional law. This illustrates how answers to seemingly abstract jurisprudential questions have serious consequences for constitutional law (chapters II, III, IX, X).
- One such question, about what is the role of non-officials in constituting the foundations of law, may lead to an unorthodox but arguably realistic picture of constitutional law (chapter III).
- Another such question, about what thoughts or actions of legal officials constitute the content of the law, led me to conclude that there may be widespread divergence between what is the law's 'official story' – for example, about the limits of legal powers of constitutional change – and what the law really requires (chapters II, VII).

- The law enables us to do things with it (achieve changes in legal situations), but not all of the enabling that the law does is through conferring legal powers (ie by recognizing volitional or intentional acts) (chapters V, VIII, X, XI).
- Through rules of recognition, the law may confer 'legal abilities' to change the law even in the absence of legal powers of law-making (chapters V.1, VIII).
- Thus, the lawfulness of legal change through, for example, adjudication does not necessarily depend on the correct answer to the question whether judges have legal powers to change the law through precedent (chapters VII, IX).
- There is a scope for legal arguments (and legal reasons) for or against particular rules of recognition (chapter X).
- Constituent powers (non-legal powers of constitutional change) may be exercised lawfully or unlawfully (chapter VI, IX, X).
- The notion of a revolution in a technical legal sense should be reserved for cases when a change in the law obtains due to a change of rules of recognition, which was not meaningfully law-governed (ie provided for by pre-existing rules of recognition) (chapter X).

There are two major limitations of the scope of this thesis. The first is that I adopt and develop the Hartian positivist jurisprudential framework, but it is not my goal to compare it to or to engage with rival theories. The Hartian framework is so prominent both in legal philosophy and in doctrinal and comparative constitutional law that I believe that my exclusive focus on it is warranted. A broader project than mine would be either less analytically deep or more complex and voluminous. This is not to say that such broader project would not be worthwhile, but only that it would be very different.

The second limitation of the scope of my thesis is that it is a work in jurisprudence (legal philosophy), not in doctrinal or comparative constitutional law, but also not in intellectual history. I aim to provide the best account of the

philosophical concepts I focus on, not the history of their use. Furthermore, whenever I discuss any particular legal systems, I do so instrumentally to illustrate the jurisprudential argument. Even though I often discuss problems in US and UK constitutional law, this is not a work on US or UK law – it is meant to apply to any modern municipal legal system. It is also not my main aim to advance original doctrinal claims in US and UK law. However, I do hope to contribute to developing the philosophical foundations that scholars of US and UK law, as well as of other legal systems, will find useful.

That said, I want to stress that I appreciate the comparative and empirical research undertaken by scholars of constitutional change. My thesis would have been much poorer, if not impossible, without the benefit of relying on it.

1. OVERVIEW OF THE THESIS

The thesis is divided into three parts (excluding this introduction). The first part (chapters II-III) develops the Hartian model of foundations of legal systems focusing on the nature of rules of recognition. The second part (chapters IV-VII) is devoted to the role of legal powers in legal change, and in change in constitutional law in particular. The third part (chapters VIII-X) connects the insights of the first two parts and offers an account of lawfulness and of constitutionality of constitutional change.

My substantive argument begins later on in this introduction (chapter I.3) with a discussion of the methodology for theorizing the foundations of law. The question of method is important for a proper understanding of the Hartian project. Hart himself aimed to give a philosophical account of law that would make sense of the

perspective of those who treat legal rules as guidance for their conduct (the 'internal' perspective).[10] I present Hart's distinction between internal and external perspectives on law, but I do so by embedding it within a clearer classification (practical versus theoretical) proposed by Scott Shapiro.[11] Shapiro was right to stress that the theoretical perspective of a philosopher is on Hart's view an external one because it is not itself a perspective of a committed participant of a legal practice. However, it is an external perspective directed at understanding the practical perspective of a committed participant.

Chapter II, 'The nature of ultimate rules of recognition as social rules', sets out the key features of the Hartian model of the foundations of law. I discuss there the nature of social rules in general and what follows from it for rules of recognition. I begin by noting the special significance of the concept of rules of recognition to Hart's project: it was his answer to the question what ultimately makes it legally the case that any given legal rule is a part of the legal system in question? Within the Hartian framework rules of recognition are, in a sense, at the very end of every chain of explanation of legal validity of any legal rule (eg what makes it the case that statutes are law in the UK when we know that no statute or case law plays that role).[12] In chapter II, I focus in particular on the normative attitude of acceptance of a rule, which is how individuals contribute to the existence of social rules, including rules

[10] See eg Hart, *The Concept of Law* (n 1) 90.

[11] Scott Shapiro, 'What Is the Internal Point of View?' (2006) 75 Fordham Law Review 1157, 1158–1161.

[12] I say 'in a sense', because I argue that there can be meaningful legal arguments for or against some changes of rules of recognition, see ch X. However, this does not affect the fact that ultimate rules of recognition are not themselves valid legal rules, ie there is no need for another rule providing for validity of any ultimate rule of recognition.

of recognition. My novel claim is that acceptance has to be genuine, not merely pretended, which may have consequences in situations where the 'official story' of the law diverges from systematic rule-guided practices of legal officials (like in a case of the 'telephone justice' rule in the Soviet Union). I also stress that rules of recognition are indispensable and distinct from rules of change and rules of adjudication, which was questioned by some legal philosophers (eg Jeremy Waldron).

Chapter III, 'Officials vs subjects: who grounds the foundation of law?', deals with the question whose thoughts and action constitute the law at its most fundamental level. I show that even though the Hartian view is usually presented as recognizing only the legal officials as having a constitutive connection with the law, this is not quite right even on Hart's own terms as he viewed general conformity with the law on the part of law-subjects as a necessary part of a constitutive explanation of the law's existence. I go beyond Hart in taking seriously the possibility that non-officials could in fact have a constitutive relationship with the law and I reject several counterarguments to such view, including the argument given by Hart. I suggest that in some circumstances (eg due to the operation of some kinds of referendums), non-officials may have a meaningfully authoritative role in the legal system and as such should count in a constitutive explanation of the foundations of law. The issue 'who counts' matters for change in constitutional law because the actions and attitudes of non-officials towards such change may diverge from the attitudes of officials. Hence,

in some circumstances 'who counts' affects 'what the law requires' by affecting the conditions of lawfulness of constitutional change.[13]

In Chapter IV, 'Constitutions and constitutional change', I specify what sense of 'constitutions' and 'constitutionality' I am concerned with in this thesis, a perspective I call 'constitutional positivism'. On my view, the content of any constitution is exhausted by its rules and all constitutional rules are constituted by social facts. By 'constitutional positivism' I do not mean a distinctive conception of constitutions to rival any formal or substantive account and I aim for my account to be consistent with a possibly broad array of views on what constitutions are. In this chapter, I also discuss the relationship between constitutions and rules of recognition, arguing (against some voices to the contrary) that strictly speaking no codified constitution is a rule of recognition. However, rules of recognition are on my view constitutional rules in a broader sense. Finally, I distinguish between 'explicit' and 'implicit' constitutional change, ie change that is or is not a result of a change in some canonical constitutional text. I go back to this distinction later on in the thesis when I show how my account of lawfulness and constitutionality constitutional change works both for implicit and explicit change, whereas some prominent rival accounts only consider explicit change.

Chapter V, 'Legal powers and legal change', dispels some of the confusion over legal grounds of legal change, and specifically, of change in constitutional law. Such conceptual clarity matters not only for general jurisprudence, but also for doctrinal

[13] One example I discuss in chapter III is the claim that if ordinary citizens in the US believe that to change the US Constitution it is enough to have a nationwide referendum and if they would accept the result of such referendum as law, then this could supersede any other argument on what kinds of constitutional change are lawful in the US based in the constitutional text or in the practice of legal officials.

and comparative debates about constitutional change (as I show in chapter VI). I show what is common to all major conceptions of legal powers (volitional control over a legal effect) and what is contested. I also emphasize that legal change may happen without anyone exercising any legal powers, even though in such a case it may be proper to attribute to someone a *legal ability* (quasi-power) to bring the legal change about. The notion of a legal ability, or quasi-power, to change the law is an important part of my argument that legal change (and change in constitutional law) is more often law-governed than usually admitted. In this chapter, I also show that because ultimate rules of recognition are essentially based in social practices there cannot be a legal power to change such a rule. Finally, I discuss the possibility of legal powers to change the law to be recognised ex post and argue that this should be seen as a legal fiction.

In chapter VI, 'Powers of constitutional change', I introduce the notion of a non-legal constituent power (*pouvoir constituant*) and argue that exercises of that power can be lawful, but this need not be the case. I also discuss legal powers of constitutional amendment (amendment powers, constituted powers) and legal limits on legal powers of constitutional change. My discussion engages with the broader doctrinal and comparative literature on constitutional change which often merges legal and non-legal considerations in a way that has a high potential for confusion. I aim to contribute a philosophical foundation for such doctrinal and comparative projects, helping to clarify the relationship between the law, constituent powers and amendment powers. I claim in particular that exercises of constituent power may be, though of course need not be, lawful.

Chapter VII, 'How constitutions change (without amendment powers)', serves to illustrate the broad array of cases of constitutional change which are best not seen

as lawful if lawfulness is to be identified with an exercise of a legal power of constitutional change (amendment power). I thus look at adjudication and the mechanisms through which it can influence constitutional law: binding constitutional review, custom and precedent. I show some of the difficulties with the question whether, in any given legal system, the courts have a legal power to change the law. I do so partly to stress that it would be helpful to be able to sidestep some of those difficulties for the purposes of ascertaining whether any court-led legal change was in fact lawful (and this is precisely what my account from part 3 delivers). I also discuss legal change due to executive practice, ordinary legislation, giving domestic effect to foreign or international law and constitutional desuetude.

Chapter VIII, 'What legal change is law-governed (powers and abilities)', contrasts two views on lawfulness of legal (and constitutional) change. The first view, represented by Neil MacCormick, Jeremy Waldron, and – for different reasons – Hans Kelsen, is that law-governed (lawful) legal change happens only due to exercises of legal powers of law-making. That view is deficient because it fails to account for lawfulness of much of the perfectly ordinary legal change discussed in chapter VIII. In particular, it cannot account for lawfulness of change in legal custom without abandoning the standard concept of legal powers discussed in chapter V (or at least what is common to the major modern conceptions of legal powers).

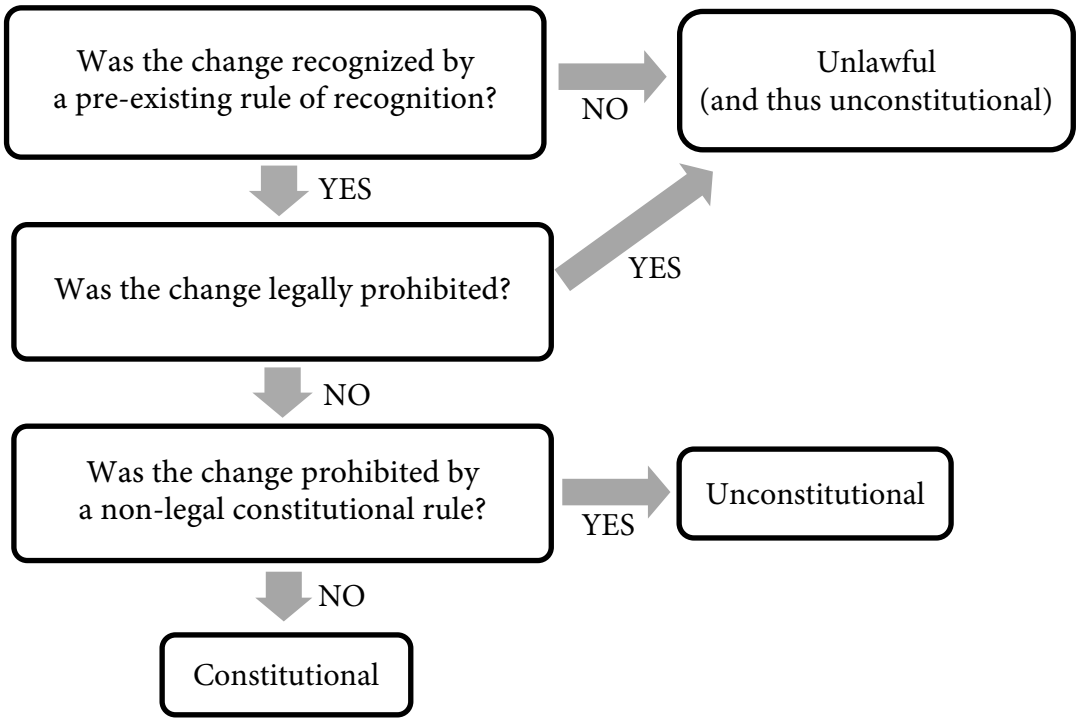
My own view – 'the abilities view' – is that legal change is law-governed whenever the change takes place according to pre-existing rules of recognition. Whatever new legal content is identified by pre-existing rules of recognition, such content meaningfully comes from within the legal system. Rules of recognition may give law-changing effect to someone's actions, even when there is no legal power at play. I label the latter case one of a 'legal ability' to change the law.

In chapter IX, '"Constitutional" and "unconstitutional" constitutional change', I develop the abilities view, focusing on how it affects constitutionality of change in constitutional law. I claim that a constitutional change is unconstitutional if:

1) it is unlawful, ie
    a. is not recognized by a pre-existing rule of recognition or
    b. it violates some legal prohibition (legal duty to forbear),
2) or if it violates some non-legal constitutional rule.

The table below illustrates my account of constitutionality of constitutional change.

Table 1 Constitutionality of constitutional change (of legal constitutional rules)



Even though my main goal in this thesis is to account for how *the law* governs constitutional change, I think that unconstitutionality due to a violation of a *non-legal* constitutional rule is sufficiently prominent in legal discourse (eg in Canada and in the United Kingdom[14]) that it would be odd to talk of a constitutional constitutional change in such case (despite its lawfulness).

In that chapter, I also stress two key features of my view of constitutionality of constitutional change: (1) that it accounts for both powers and abilities to change the law (hence it can see some of the cases from chapter VII as constitutional constitutional change) and (2) that it is not limited to explicit 'formal' change (eg textual changes or changes in an interpretation of a constitutional text). Furthermore, I discuss the possible legal consequences of unconstitutionality of a constitutional change.

Chapter X, 'Revolutions and changes of ultimate rules of recognition', focuses on lawfulness (and constitutionality) of changes of ultimate rules of recognition. I first show that not every change of the criteria of validity provided by an ultimate rule of recognition entails a change of an ultimate rule of recognition. I then discuss how is it possible for a change of an ultimate rule of recognition to be lawful (and constitutional) even though it is impossible for such change to take place through an exercise of a law-making power. Finally, I propose to use the notion of a (constitutional) 'revolution' in a technical legal sense to refer only to cases of unlawful change among ultimate rules of recognition.

Chapter XI concludes.

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[14] See ch IV.1.A

2. SITUATING THE THESIS IN THE LITERATURE

The question to what extent constitutional change is law-governed and lawful figures prominently in several debates in constitutional theory and in doctrinal and comparative constitutional law. Perhaps the most obvious example is the doctrine of so-called 'unconstitutional constitutional amendments', present in the constitutional orders of Germany, India, and South Africa, but also debated in the United States[15] and in Ireland.[16] According to this doctrine, procedurally proper constitutional amendments may be deemed unconstitutional when they exceed some substantive limitations (eg the perpetuity clauses in the German Basic Law). The possibility of unconstitutionality of constitutional change has been puzzling and exciting legal scholars for a long time. Today, the notion of 'unconstitutional constitutional amendment' is among the hottest topics in constitutional theory and in comparative constitutional law.[17] As Yaniv Roznai has shown in his magisterial work, many constitutional orders adopted explicit legal provisions for unamendability of some

[15] Walter F Murphy, 'Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995); John R Vile, 'The Case against Implicit Limits on the Constitutional Amending Process' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995).

[16] Aileen Kavanagh, 'Unconstitutional Constitutional Amendments from Irish Free State to Irish Republic' in Geert de Baere and Elke Cloots (eds), *Federalism and EU Law* (Hart Publishing 2012).

[17] See eg Yaniv Roznai, *Unconstitutional Constitutional Amendments* (n 3); Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017).

constitutional rules.[18] Unsurprisingly, the basic terms of this debate, for instance 'unconstitutionality' and 'constituent power', are being constantly contested. This is being done from many perspectives: domestic legal doctrine, history of ideas,[19] political philosophy and democratic theory,[20] and their various combinations. My contribution to this debate is to bring in the voice of general jurisprudence (legal philosophy) in the tradition of HLA Hart, even if sometimes questioning some of the key claims made by Hart himself.

The second debate concerns the issue of exclusivity of the amendment procedures specified in codified constitutions. In the United States this is a problem of constitutional change beyond the bounds of Article V of the US Constitution.[21] American literature supplies a particularly rich variety of accounts of constitutional change not according to the codified rules. Perhaps the best known is Bruce Ackerman's dualist account describing the process of 'higher lawmaking' in which sweeping constitutional change happens through an interaction of law and politics.[22] Also well known is the view held by Akhil Reed Amar, according to whom an

[18] Roznai (n 17).

[19] See eg Andrew Arato, *The Adventures of Constituent Power: Beyond Revolutions?* (Cambridge University Press 2017); Mikolaj Barczentewicz and Alice Schneider, 'Review of Andrew Arato, *The Adventures of the Constituent Power*' (2019) 67 American Journal of Comparative Law 219.

[20] See eg Richard Albert, 'Four Unconstitutional Constitutions and Their Democratic Foundations' (2017) 50 Cornell International Law Journal 169; Joel I Colón-Ríos, 'On Albert's Unconstitutional Constitutions' (2017) 50 Cornell International Law Journal 17; Doyle (n 3).

[21] Sanford Levinson, 'Introduction: Imperfection and Amendability' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995).

[22] Bruce Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 Yale Law Journal 1013.

ordinary majority of American citizens could petition the Congress to call a convention to draft a change in the Constitution and then the same majority could ratify the change in a referendum (this is clearly not the procedure provided for in the text of the Constitution).[23]

The third debate, which partially overlaps with the second, focuses on the role played by the judiciary in changing constitutions and especially, to what extent judges are legally authorised to exercise this role. This question is being discussed also in countries that do not have codified constitutions with textually specified procedures of amendment. A good example is the vigorous and still on-going debate over the constitutional impact of joining the European Communities (now the European Union) by the United Kingdom. Cases like *Factortame*[24], *Thoburn*[25] and more recently *HS2* [26] have fuelled old controversies over the doctrine of parliamentary sovereignty, its scope and the role of judges in its creation and change. Some, like Sir William Wade, believe that there has been a revolutionary change in constitutional law brought about by the House of Lords in *Factortame*.[27] Others

[23] Akhil Reed Amar, 'The Consent of the Governed: Constitutional Amendment Outside Article V' (1994) 94 Columbia Law Review 457.

[24] *R v Secretary of State for Transport, ex p Factortame (No 2)* [1991] 1 AC 603.

[25] *Thoburn v Sunderland CC* [2002] EWHC 195 (Admin); [2003] QB 151.

[26] *R (Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; [2014] 1 WLR 324. See Mikolaj Barczentewicz, '"Constitutional Statutes" Still Alive' (2014) 130 LQR 557.

[27] HWR Wade, 'Sovereignty--Revolution or Evolution?' (1996) 112 LQR 568.

disagree and see the change as happening within the UK legal system, without any revolution or unlawfulness.[28]

The fourth debate is perhaps currently not as lively in the literature as the previous two, but it is no less important, especially considering the recent constitutional developments in Egypt and Ukraine, among many other cases. This debate deals with constitutional consequences of political revolutions and coup d'état. A significant part of this literature was written in response to constitutional changes in Commonwealth countries in the second half of the twentieth century. Perhaps the best known contributions come from Eekelaar and Finnis.[29] However, all the writing on the topic has been influenced by earlier works of Kelsen and his general theory of continuity of constitutional orders. Kelsen's theory has provided a justification for a number of judicial opinions considering the circumstances of political revolution.[30] Among the great legal philosophers, it was Kelsen who devoted the most attention to the problem of unlawful (or revolutionary) change of law. I will discuss his views later in this work (chapter VIII).

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[28] Allan (n 6).

[29] JM Eekelaar, 'Principles of Revolutionary Legality' in AWB Simpson (ed), *Oxford Essays in Jurisprudence* (Clarendon Press 1973); Finnis, 'Revolutions and Continuity of Law' (n 1).

[30] Mahmud Tayyab, 'Jurisprudence of Successful Treason: Coup d'Etat & Common Law' (1994) 27 Cornell International Law Journal 49. See also Hans Kelsen, *General Theory of Law and State* (Anders Wedberg tr, Russel & Russel 1961); Hans Kelsen, *Pure Theory of Law* (Max Knight tr, University of California Press 1967).

3. METHODOLOGY OF THEORIZING THE FOUNDATIONS OF LAW

Even though it is not among my chief aims in this thesis to advance original arguments in the methodology of legal philosophy, it will be useful at this stage to discuss the key feature of the methodological stance that I adopt and that is common within the Hartian tradition. This methodological stance sees proper understanding of the perspective of a committed participant of a legal practice as central to the jurisprudential endeavour. In this section, I first introduce Hart's own distinction between 'internal' and 'external' perspectives on the law and show its deficiencies. I then follow Scott Shapiro in embedding Hart's dichotomy in a clearer classification in terms of 'practical' and 'theoretical' perspectives on the law.

A. *INTERNAL* AND *EXTERNAL* PERSPECTIVES

Hart distinguishes two perspectives one might have when talking about law: *internal* and *external*.[31] It was a feature of legal positivism before Hart that it defined law using only its external aspect, that is through some type of externally observable action like sanctioning or commanding.[32] Hart proposed an alternative theory of law, which

[31] Hart, *The Concept of Law* (n 1) 56–57.

[32] As will become apparent later, a perfectly (or extremely) 'external' perspective could not account for commands and sanctions, because distinguishing these types of human action requires at least minimally teleological approach; see PMS Hacker, 'Hart's Philosophy of Law' in PMS Hacker, Joseph Raz and HLA Hart (eds), *Law, Morality, and Society: Essays in Honour of H. L. A. Hart* (Clarendon Press 1977) 13.

includes not only certain patterns of conduct, but also 'a distinctive normative attitude to such patterns of conduct'. This attitude, called by Hart 'acceptance',

> … consists in the standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may [*sic*] legitimate demands and various forms of pressure for conformity.[33]

Individuals, who exhibit this normative attitude towards a rule, take the internal perspective on that rule. An external perspective is the perspective of an observer who does not take the internal perspective, hence it is defined negatively and as there is some controversy as to what exactly the relevant internal perspective entails, it is also not obvious what is the external perspective.[34] One important feature of the external perspective seems to be that it is descriptive, ie it does not have any normative commitments.

Thus, we can have two types of statements about law: internal (made from an internal perspective) and external (made from an external perspective). However, it is also possible for someone to observe and report on other people's internal views (which include a normative attitude), without endorsing them, and though such a project can be considered as descriptive, it is not external in Hart's sense (we can call such statements 'third-person internal statements' or 'reported internal statements').[35]

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[33] Hart, *The Concept of Law* (n 1) 255. On acceptance of social rules see ch II.2 below.

[34] Hart is somewhat inconsistent in his use of 'external', see Brian Bix, 'H.L.A. Hart and the Hermeneutic Turn in Legal Theory' (1999) 52 SMU Law Review 167, 179.

[35] Hart, *The Concept of Law* (n 1) 243; Bix (n 34) 178. This possibility is denied by H. Hamner Hill, who uses the controversial work of Peter Winch; see H Hamner Hill, 'H.L.A. Hart's Hermeneutic Positivism: On Some Methodological Difficulties in The Concept of Law' (1990) 3 Canadian Journal of Law and Jurisprudence 113.

Raz introduced yet another category, of 'detached legal statements' (statements 'from a point of view'), which are statements 'of law, of what legal rights or duties people have', but are not internal statements, because by uttering them the speaker is not committed to the normative view, which is the content of the statement.[36] Even though 'privately' they may share the internal perspective, legal scholars in their academic work and lawyers advising their clients typically make statements of this third type, argued Raz.

The example of ultimate rules of recognition will let us see some further problems with the distinction between 'internal' and 'external'. Ultimate rules of recognition, like all other rules, may be viewed from all of these perspectives. As Hart has written:

> … the ultimate rule of recognition may be regarded from two points of view: one is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law.[37]

From the external perspective ultimate rules of recognition seem to be patterns of behaviour of legal officials. On an extremely external view (involving only descriptions of 'physical behaviour') it would be impossible to give a plausible account of ultimate rules of recognition.[38] By excluding any intentionality we would

[36] Joseph Raz, *The Authority of Law* (OUP 2009) 153.

[37] Hart, *The Concept of Law* (n 1) 112.

[38] Hacker (n 32) 13.

be unable even to identify the basic types of relevant human action like adjudication, sanctioning or law making.[39]

Some movement towards 'increased complexity in description of rule-governed behaviour' is necessary.[40] This complexity will involve explanations in terms of beliefs and attitudes of the agents involved. However, the question when, in the case of ultimate rules of recognition, the external perspective ends and the internal perspective begins is not an easy one to answer. One important controversy concerns the issue of what does the attitude of 'acceptance' entail. Does it suggest a genuine belief in moral obligatoriness of the rule on the part of the legal officials? Or merely that the officials, in their law-identifying and law-applying capacity, are disposed to guide their conduct by that rule and criticise others for non-conformity? In this work I follow Raz and Hart (at least in *The Concept of Law*) in accepting the latter interpretation, as I explain in more detail in chapter II.[41]

B. PRACTICAL AND THEORETICAL PERSPECTIVES

Scott Shapiro proposed a very useful classification of different points of view within Hart's project.[42] He first distinguished between *practical* and *theoretical* perspectives. Practical perspective is taken by someone who is an actual or potential user of the

[39] Unless we are able to give an account of intentionality in purely physical terms, but the science is nowhere near that point – even assuming that such project is at all conceptually possible.

[40] Hacker (n 32) 13.

[41] See ch II.2.A. See also Raz, *The Authority of Law* (n 36) 155. To be precise, Raz believes that the legal officials *present* the law as morally obligatory, but it does not follow that they necessarily believe that the law is morally obligatory.

[42] Shapiro, 'What Is the Internal Point of View?' (n 11) 1158–1161.

law; theoretical perspective is taken by someone who reports on how the given legal system works. Depending on how internalised are one's disposition to guide one's conduct by the rules of the system and to criticise others for non-conformity, Shapiro distinguished between *acceptance* and *nonacceptance*. Acceptance characterises the internal perspective; nonacceptance the perspective of a *bad man* whose reasons for following the law are solely prudential or of anyone else who does not accept the law in Hart's sense. On the theoretical side there is the *hermeneutic* perspective taken by Hart himself in *The Concept of Law* and the *behavioristic* perspective of someone with an extremely external view. Using Hart's own distinction between internal and external perspectives, only the acceptance perspective is an internal one. The following table should help to illustrate the classification: [43]

[43] ibid.

Table 2 Shapiro's classification of points of view within Hart's project

Practical		Theoretical	
Acceptance (Internal)	Nonacceptance (Bad Man)	Hermeneutic (Hart)	Behavioristic (Extreme)
Internal	External		

For any legal rule and for any user of the legal system there may be *legal* reasons for conformity and *non-legal* reasons for conformity.[44] Legal reasons combine the facts of the existence of rules that identify the purported rule in question as a valid legal rule and other relevant facts, like eg actions of lawmakers or judges.[45] It is not enough to know the content of a legal rule of change (eg 'the Queen in Parliament has a legal power to make law'), one has to know as well that the document he has in front of him was in fact enacted by the Queen in Parliament. Non-legal reasons include all other reasons for conformity with a legal rule, ie all moral and prudential considerations.[46]

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[44] For those who have the internal perspective, the legal reasons constitute reasons for compliance, not merely for conformity. On the distinction between conformity and compliance, see Raz, *Practical Reason and Norms* (n 1) 182.

[45] I wish to stay agnostic on the issue of the moral content of the law. The account presented here is compatible both with exclusive and inclusive versions of positivism. This is so because the 'other relevant facts', which co-constitute legal reasons may be facts about morality.

[46] It is a separate issue what reasons one has to follow the law in general. I agree with Grant Lamond that it is best not to single out ultimate rules of recognition as a separate object of acceptance (from which acceptance, acceptance of all other legal rules follows), but to think in terms of systemic acceptance of the legal system, including of ultimate rules of recognition. However, even if one accepts the legal system as a whole, she will still have to use legal reasons as defined above as *auxiliary* reasons, to ascertain what the general

The practical perspective of a user of the law (like a judge, but also a criminal) should not be confused with the theoretical perspective taken by someone thinking about the law not as a user, ie the perspective of someone who reports on how the law works. We should be very cautious not to take for theoretical statements, statements that really belong to the practical discourse. Judges, in their judicial capacity (not just extra-judicially), tend to make statements that seem to belong to the theoretical discourse. For example, they might say what the content of the rule of recognition is in their legal system.[47] But just because they say so, it does not mean that their statements should be considered (without additional argument) as theoretical statements about the law.

Also, there can be no presumption that their theoretical views on law are, in a sense, complete. This is to say, that when using seemingly theoretical concepts they are fully aware of the context in which these concepts are used in the theoretical discourse and that they apply a similar sort of theoretical rigour in their thinking on

acceptance of the law actually entails. The reason for general acceptance of the law is the *operative* reason. In practice people tend to consider non-legal reasons for conformity (and non-conformity) with individual legal rules, even when they accept the legal system as a whole. In other words, the operative reason often competes with the non-legal reasons for non-conformity, but usually prevails. Grant Lamond, 'Legal Sources, the Rule of Recognition, and Customary Law' (2014) 59 American Journal of Jurisprudence 25, 31–36.

[47] See eg *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2017] 2 WLR 583 [60]. See also Mikolaj Barczentewicz, 'Uses and Misuses of the Rule of Recognition in *Miller*' (*UK Constitutional Law Blog*, 12 January 2017) <https://ukconstitutionallaw.org/2017/01/12/mikolaj-barczentewicz-uses-and-misuses-of-the-rule-of-recognition-in-miller/>.

the issue.[48] Thus, as I will argue later, I see the risk of inconsistency between the theoretical account of constitutional change and the practical statements made by judges and other lawyers (qua judges and qua advocates) as much less of an issue than some other authors.[49] Also, as Brian Bix has argued, there could even be a persistent 'global error' among legal officials on 'theoretical or ontological claims *about* law'.[50]

It is not a failing for someone taking the practical perspective not to be a good theorist.[51] Someone may be an excellent judge, without caring too much for theoretical reflection on the law. Judicial virtue, or virtue of an advocate, is not the same thing as virtue of a legal theorist. A hypothetical Kelsenian judge provides a good illustration. As I will argue later, Kelsen believed that every constitutional order contains a rule according to which a legal norm once accepted as valid, remains valid (and constitutional) as long as it is not invalidated by a proper organ (eg a constitutional court).[52] This is so even when it is clear that the legal norm in question was enacted in a way violating the legal rules governing legal change. Hence, if the norm had not yet been invalidated, a lower court judge without competence to rule

[48] See also Joseph Raz, 'Two Views of the Nature of the Theory of Law: A Partial Comparison' in Jules Coleman (ed), *Hart's Postscript: Essays on the Postscript to 'The Concept of Law'* (OUP 2001) 32–34.

[49] See also ch IX.7 and Mikolaj Barczentewicz, 'The Illuminati Problem and Rules of Recognition' (2018) 38 Oxford Journal of Legal Studies 500.

[50] Brian Bix, 'Global Error and Legal Truth' (2009) 29 OJLS 535, 541. Bix gives a hypothetical example of a widespread belief in John Austin's command theory of law.

[51] Similarly Raz, 'Two Views of the Nature of the Theory of Law' (n 48) 33.

[52] Or, naturally, as long as it is not repealed by the normal legislator. If there is no organ competent to rule on unconstitutionality, then it makes no sense to speak about 'unconstitutional' statutes, according to Kelsen; see ch VIII.1.A.

on unconstitutionality ought to treat the norm as constitutional. This is what her role of a judge requires of her. A legal theorist, on the other hand, may at the same time consider the norm in question as unconstitutional. But his view does not entail criticism of what the lower court judge does.[53]

The Hartian methodological stance means that theorists taking an external-hermeneutic perspective must be very careful not to contradict important features of that practical perspective. Yes, John Finnis was right that philosophy of law is not lexicography[54] and philosophers, including Hart, develop accounts of concepts which are always to an extent reformist compared to the ordinary usage. Nevertheless, it would have been a problem (at least prima facie) if, for example, Trevor Allan had been right that the Hartian model cannot account for the possibility of legal arguments about the content of ultimate legal rules – which clearly is an important feature of how committed participants think and talk about the law.[55] I thus aim to find the balance between clarifying concepts and making them coherent on one hand, and being faithful to how the concepts are used by non-philosophers on the other. I see Hart's theory as achieving that balance quite well, whereas I view Hans Kelsen's theory as going too far in the first direction.[56]

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[53] It may constitute criticism if at the same time the theorist disagrees with Kelsen and believes that there is no rule requiring lower court judges to abstain from checking whether a purported norm was validly brought into being (beyond checking that the norm is to be found in an officially published legal act, like a statute).

[54] John Finnis, *Natural Law and Natural Rights* (1st edn, OUP 1980) 4.

[55] I respond to this concern in ch X.

[56] On Kelsen's theory see ch VIII.1.A.

Part 1 The Foundations of Law: Rules of Recognition

II. THE NATURE OF ULTIMATE RULES OF RECOGNITION AS SOCIAL RULES

My central argument in this thesis is that on the Hartian positivist view more of the change that takes place in constitutional law is law-governed than usually admitted. By analysing how law governs legal change, I also aim to dispel some of the confusion around key aspects of general theory of constitutional change, like the notion of 'constitutionality' of constitutional change and the issue of powers to amend a constitution (amendment powers) and their limits. This first part of the thesis tackles the most fundamental level of how law governs legal change, looking at the foundations of legal systems through the lens of the Hartian model of the law as a union of primary and secondary legal rules.[57] In particular, I elucidate the concept of rules of recognition. The present chapter covers the nature of ultimate rules of recognition as social rules. The following chapter III investigates who are the people whose thoughts and actions ground ultimate rules of recognition. It does so by taking seriously the possibility that a much larger group of people than just legal officials play this role. The discussion of rules of recognition continues in the second part of the thesis where I focus on constitutional change.

On Hart's account, two kinds of legal rules may be said to govern legal change: rules of recognition and rules of change.[58] Rules of recognition are distinct from rules

[57] Hart, *The Concept of Law* (n 1) chs V-VI.

[58] ibid 96–106.

of change, though they often work in tandem.[59] Rules of change confer legal powers specifically to change the law.[60] Rules of recognition confer on legal officials duties to recognize what meets certain criteria ('criteria of validity') as valid law of the system in question. [61] Perhaps they also empower officials to 'engage in authoritative

[59] ibid 96.

[60] ibid 95–96.

[61] ibid 94–95, 105–106.

acts of law-identification' as Matthew Kramer argued.[62] The important point is that rules of change and rules of recognition are distinct and have distinct jobs.[63]

[62] Matthew H Kramer, 'In Defense of Hart' (2013) 19 Legal Theory 370, 379–380; Matthew H Kramer, 'Power-Conferring Laws and the Rule of Recognition' (2019) 19 Jerusalem Review of Legal Studies 87. The same is suggested by John Finnis in Finnis, 'Revolutions and Continuity of Law' (n 1) 419, but see fn 38. Giorgio Pino argues that this follows from Hart's classification of the rule of recognition as a secondary rule, see Giorgio Pino, 'Farewell to the Rule of Recognition?' (2011) 5 Problema: Anuario de Filosofía y Teoría del Derecho 265, 276. But pace Pino, Finnis and Kramer, I will follow the established tradition of considering ultimate rules of recognition as only duty-imposing, see Raz, *The Authority of Law* (n 36) 93; Grant Lamond, 'Legal Sources, the Rule of Recognition, and Customary Law' (n 46) fn 24; Ezequiel Monti, 'Two Views of the Rule of Recognition' (2019) 19 Jerusalem Review of Legal Studies 100. However, this choice does not affect my main argument, because Kramer also does not claim that rules of recognition confer powers to change the law, so the key distinction between rules of change and rules of recognition is preserved on either view.

Relatedly, Ezequiel Monti argued against Kramer's view partly by denying that rules of recognition impose a duty to *identify* certain norms as law, claiming instead that rules of recognition impose a duty to '*apply* the norms that satisfy certain criteria of validity (norms which are, in virtue of this fact, *legal* norms)'; ibid 100–103. Monti believes that legal officials do not have a general duty to identify valid legal rules correctly, because they do not have that duty if they are not at the same time authoritatively applying the law. In contrast, I claim that even though this duty may not reach purely private situations, whenever a legal official is stating in an official capacity his or her view on what is the content of the law, they are under a duty (imposed by a rule of recognition) to do so correctly. Not every action in an official capacity is a case of authoritative law-application. For example, an attorney general issuing an advisory (non-binding) opinion is, on my view, bound by a general duty to identify the law correctly, even though this action may be not authoritative in the sense that the attorney's determination is not binding on anyone. As social rules of legal officials, rules of recognition emerge from a broader array of actions than merely acts of authoritative law-application. A judge who makes a legal mistake speaking *obiter* or an attorney general who errs in a non-binding opinion are normally subject to criticism for getting the law wrong, just like they are criticised for erring when making a binding determination. (Note, the fact that non-binding law-identification is also regulated by rules of recognition conflicts with Kramer's view that rules of recognition confer powers to identify the law authoritatively.) Furthermore, Hart clearly distinguished law-identification and law-application when writing, for example, about 'the law-making, law-identifying, and law-applying operations of the officials or experts of the system' and 'the law-identifying and law-applying operations of the courts'; Hart, *The Concept of Law* (n 1) 61, 256. The first Hart

The key significance of ultimate rules of recognition is that they provide the final answer to the question: what makes it legally the case that any given legal rule is a part of the legal system in question?[64] For example, it is clear that a piece of delegated legislation enacted pursuant to rules of some statute is law because of those statutory rules – they are the legal ground for the validity of the delegated law. In countries with express legal rules regarding primary legislative powers, usually to be found in a codified constitution, we will likely be able to tell easily what is the legal ground for any statute (eg Article 1, Section 8 of the US Constitution).

But what makes it legally the case that those rules about enactment of statutes are law? Or, continuing the US example, what makes it legally the case that the Constitution is law? For every chain of explanation of this sort there will inevitably be a moment where explanation runs out. The issue is what stands at the end of such a chain, ie what is at the foundation of a legal system? For Hart, that role is played by ultimate rules of recognition. The fact that anything counts as a law of any given legal system can necessarily be traced back to some rule of recognition of that legal system. To explain properly how the Hartian model of the foundations of legal systems accounts for lawfulness of legal change (and thus of change in constitutional law) considerably more detailed analysis will be helpful, which I offer in Parts 2 and 3 of this thesis.

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quote is particularly apposite, because it suggests that law-identification is something that can be done by non-officials ('experts of the system'), hence there must be a possibility of doing it not-authoritatively. Thus, in this thesis I say that rules of recognition impose a duty to identify as laws of the legal system in question whatever meets the criteria of validity.

[63] Gardner, *Law as a Leap of Faith* (n 1) 105; Kramer, 'In Defense of Hart' (n 62) 379–380.

[64] Hart, *The Concept of Law* (n 1) 100–107. See also Kramer, *H.L.A. Hart* (n 1) 91–92.

The argument in this chapter is structured in the following way. First, I explain why I prefer to refer to 'rules of recognition', plural, instead of 'the rule of recognition' (sec. 1). Then, in sec. 2, I give an account of social rules in general, with a particular emphasis on the concept ACCEPTANCE (sec. 2.A). Also in sec. 2, I discuss the social aspect of social rules (sec. 2.B), distinguishing them from personal rules, as well as considering the 'external' aspect of social rules. In sec. 3, I look at ultimate rules of recognition as a kind of social rules. I distinguish them from rules of change and adjudication (sec. 3.A), argue that they are not conventions in the philosophical sense of that term (sec. 3.B), and look at the issue of whether they are propositional (have canonical propositional content) (sec. 3.C).

1. 'THE RULE' OR MANY RULES?

A reader of Hart may be surprised by my reference to 'rules of recognition', plural. Hart, and much of the later literature, tend to refer to *the* rule of recognition, or more precisely to the *ultimate* rule of recognition.[65] There are three reasons why I prefer the plural description, even though I think that when used with sufficient precision the two ways of speaking can be equivalent.

First, legal systems often have more than one criterion of validity.[66] The criteria may be hierarchically structured (for instance, statute trumps common law in the

[65] Hart stood by this convention even in his later works; see, eg, HLA Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 360. John Gardner is an exception, see Gardner, *Law as a Leap of Faith* (n 1) 101 fn 28.

[66] Hart, *The Concept of Law* (n 1) 105–106.

UK).[67] Hart preferred seeing them as several criteria within one ultimate rule of recognition.[68] I prefer describing them as individual rules.

Second, Hart focused on the *ultimate* criteria of validity. That is, on the criteria of validity not grounded in any valid law. For instance, the criterion that makes it the case that the common law is law in the UK – no statute, no codified constitution provides for that. One may be tempted to say that the common law 'just is' law, but Hart developed a more satisfactory account in terms of 'the *ultimate* rule of recognition'.

But if we agree with Hart that every valid rule of the legal system is a valid rule of that system because some rule provides specifically for that, then it follows that whenever the legal system contains 'lower-level' legal rules (eg subordinate legislation enacted due to a power granted in a statute) the legal system also contains *non-ultimate* rules of recognition.[69] Non-ultimate rules of recognition provide for the validity of 'subordinate' or 'secondary' laws (like statutory instruments in the UK).[70] Just like some ultimate rule of recognition may ground the validity of a statute, a statutory non-ultimate rule of recognition could ground the validity of statutory instruments created pursuant to statutory authorization. Ultimate rules of

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[67] Kramer, *H.L.A. Hart* (n 1) 86.

[68] Kramer defended Hart's choice in ibid 87.

[69] It is not enough that there are legal powers (conferred by rules of change) to make those subordinate laws – the roles of rules of change and of rules of recognition are distinct and a rule of recognition always accompanies a rule of change (though the reverse is not always the case), see ch II.3.A.

[70] Raz, *The Authority of Law* (n 36) 95; Gardner, *Law as a Leap of Faith* (n 1) 101 fn 28. Kramer prefers not to consider those rules as rules of recognition; Kramer, *H.L.A. Hart* (n 1) 91–92.

recognition are essentially social rules (they cannot cease to be customary).[71] Non-ultimate rules of recognition are valid laws and just like all other valid laws are dependent on ultimate rules of recognition. For the sake of simplicity, in what follows by 'rules of recognition' I will mean ultimate rules of recognition.

Finally, though Hart's way of speaking stresses the important role that the set of ultimate rules of recognition typically has in unifying the legal system,[72] it is nevertheless possible that it will fail to play this role. Hart himself describes one historical example when that happened (*Harris v Dönges*).[73] This is a sufficient reason to think, following Raz and Finnis, that unity of legal systems is ultimately grounded in something other than one unified ultimate rule of recognition.[74]

Also, ultimate rules of recognition do not ultimately provide for continuity of legal systems, because legal systems may be continuous over even radical changes in ultimate rules of recognition. Both unity and continuity of a legal system are ultimately grounded in the unity and continuity of the community it is law of.[75] I accept the criticism Finnis and Raz voiced against Hart's idea that ultimate rules

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[71] Hart, *The Concept of Law* (n 1) 111.

[72] Kramer, *Where Law and Morality Meet* (n 1) 107–108; Kramer, *H.L.A. Hart* (n 1) 84–85.

[73] Hart, *The Concept of Law* (n 1) 122. See my discussion in ch IX.6.A.

[74] Raz, *The Concept of a Legal System* (n 1) 209–211; Raz, *The Authority of Law* (n 36) 100; Finnis, 'Revolutions and Continuity of Law' (n 1) 428–29. See also Gerald J Postema, 'Melody and Law's Mindfulness of Time' (2004) 17 Ratio Juris 203, 221–225.

[75] For a comprehensive discussion, see Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada, and New Zealand* (OUP 2005); Benjamin Spagnolo, *The Continuity of Legal Systems in Theory and Practice* (Hart Publishing 2015).

of recognition itself could provide for the legal system's diachronic persistence.[76] I think that, at least broadly speaking, Finnis and Raz are correct in claiming that persistence of legal systems is tied to the continued existence of the communities they are the law of.[77] Hence, to really know whether some individual legal rule still is valid law or not, we first need to check whether continuity of the community obtains – this will tell us whether there is continuity of the legal system. Only then can we proceed to ask the specifically legal questions in which the current ultimate rules of recognition will direct us.

2. SOCIAL RULES IN GENERAL

Rules of recognition are social rules and to understand how rules of recognition are constituted, it is helpful to look into how social rules in general are constituted. The account of social rules accepted here draws significantly on *Explaining Norms* by Geoffrey Brennan and others.[78] Just like Brennan and others, I am heavily indebted

[76] Raz, *The Concept of a Legal System* (n 1) 209–211; Raz, *The Authority of Law* (n 36) 100; Finnis, 'Revolutions and Continuity of Law' (n 1) 428–429. See also Postema, 'Melody and Law's Mindfulness of Time' (n 74) 221–25. With the modification proposed by Finnis and Raz, the picture of a momentary legal system is coherent, contrary to what Postema claims. Of course, it is not the only perspective of the law and temporally extended processes ought not be disregarded. However, every temporally extended process (eg change in customary law) happens over many time-slices. At any point in time it may be useful to know whether, for example, a customary legal rule is undergoing a change, but what often really matters in juridical contexts is not where the law is going, but where it is *at the moment* (or where it was when the state of affairs the current adjudicative process is concerned with took place).

[77] Richard Ekins, 'Constitutional Principle in the Laws of the Commonwealth' in John Keown and Robert P George (eds), *Reason, Morality, and Law: The Philosophy of John Finnis* (OUP 2013) 397–98.

[78] Geoffrey Brennan and others, *Explaining Norms* (OUP 2013).

to HLA Hart's analysis of social rules in *The Concept of Law*. However, there are aspects in which I go beyond Hart and Brennan and others.

The following discussion responds to Mark Greenberg's challenge that: 'As a general matter—outside the legal arena—a case has not been made that Hartian dispositions have explanatory potency.'[79] Though I should note that, as will be soon apparent, I have a slightly different understanding of the 'dispositions' Greenberg refers to than Hart. This does not change the fact that I consider my response as a Hartian one.

In short, I claim that

> a social rule exists in a given community if and only if
>
> a sufficient proportion of the members of the community have the internal attitude of acceptance towards the rule (accept the rule) and
>
> a sufficient proportion of the members of the community believe that a significant proportion the members of the community accept the rule.

There are two elements of the account I want to stress. On my account, for a social rule to exist the members of the community need to accept it both as (A) 'a social *rule*' and as (B) 'a *social* rule'.

[79] Mark Greenberg, 'Hartian Positivism and Normative Facts: How Facts Make Law II' in Scott Hershovitz (ed), *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (OUP 2006) 273.

A. A SOCIAL *RULE*: THE CONCEPT OF ACCEPTANCE

According to HLA Hart, his account of social rules

> treats the social rules of a group as constituted by a form of social practice comprising both patterns of conduct regularly followed by most members of the group and a distinctive normative attitude to such patterns of conduct which I have called 'acceptance'.[80]

The idea of a normative attitude of acceptance as a ground for social rules continues to inspire legal and social philosophers.[81] There are several features of acceptance of a rule that are common ground among Hartians:

1. It is an attitude, ie a mental state or a set of mental states.
2. It does not entail moral endorsement of the rule in question (in particular, it does not entail a belief that one *morally ought* to follow the rule).
3. It is somehow directed towards the rule.[82]
4. It is somehow connected with dispositions to use the rule as a guide for one's actions, to criticise others for non-conformity with the rule, to accept criticism of one's own non-conformity as valid and perhaps some other dispositions.

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[80] Hart, *The Concept of Law* (n 1) 255.

[81] See, eg, Brennan and others (n 78) 28–29; Adam Perry, 'The Internal Aspect of Social Rules' (2015) 35 OJLS 283.

[82] I will not try to resolve here the controversy as to what sort of thing acceptance is directed to. One view is that acceptance is directed to propositional contents of social rules; see Perry (n 81) 296–97. Another view is that acceptance is directed to 'patterns of conduct', which suggests non-propositional mental representation of social rules (perhaps as motor simulations); see Hart, *The Concept of Law* (n 1) 255. On non-propositional representations of reasons, see eg Markus E Schlosser, 'Taking Something as a Reason for Action' (2012) 41 Philosophical Papers 267, 288–89.

Recently, Adam Perry developed the concept of ACCEPTANCE inspired by philosophy of action.[83] I will follow Perry in claiming that to accept is to have a belief-independent attitude.[84] To accept a rule that one 'ought to F', one does not have to *believe* that one 'ought to F'. To accept is to acts *as if* one had a belief. In the case of accepting a rule it means to take the rule as a reason for action of a special kind.[85]

Rules are general standards of behaviour (or patterns of behaviour, if one prefers Hart's own view). If one takes a rule *as a rule,* then she will recognize some residual normative pull of the rule even if background justifications of the particular rule are removed from the picture.[86] Think about a request of a gunman (secured by a threat of shooting you). If you know that you are somehow invincible or incapable of being killed, then that knowledge eviscerates any reason-giving force of the request. There is nothing left.

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[83] Perry (n 81). See also, for instance, Jonathan Cohen, 'Belief and Acceptance' (1989) 98 Mind 367.

[84] Perry (n 81) 292.

[85] However, for a social rule (or any other norm) to exist and for it to be 'genuinely normative' are distinct matters. I follow Scott Shapiro in adopting a weaker notion of a 'norm,' to mean only 'any standard … that is supposed to guide conduct and serve as a basis for evaluation or criticism.' Scott Shapiro, *Legality* (Harvard UP 2011) 41; see also David Plunkett, 'A Positivist Route For Explaining How Facts Make Law' (2012) 18 Legal Theory 139, 176. Such standards may exist even if they are not morally obligatory, not even pro tanto. Pace Greenberg, I believe that evil or repugnant social rules may and, alas, do exist ('obtain'). Contrast with Greenberg (n 79) 273. As Greenberg himself anticipates, my point is that whether they are 'all-things-considered binding' is a different matter; see ibid 274.

[86] See eg Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (OUP 1991) 120–26.

On the other hand, when one accepts a morally bad social rule, for instance a rule that people of different races ought not to share bathrooms, it could be that the agent rejects all the specific background justifications of this rule, but there will still be some 'ruleness' left (perhaps because the agent believes that undermining social rules would lead to disintegration of the society).[87] For the sake of completeness, perhaps it could be that people accept rules in a stronger fashion, as final reasons, without any background justifications.[88] I also view this as a proper instance of acceptance.

Accepting a rule does not equal following it. Rules have different weight and they may be overridden by other considerations, some rules more often than others.[89] To accept a rule and to be guided by it is to treat it as a reason.[90] But it does not follow that all rules provide conclusive reasons for action.[91] Few rules, if any, purport to be absolute.

i. Genuine vs pretended acceptance: the Illuminati example

I go beyond Perry's account of ACCEPTANCE in stressing the connection between acceptance of a rule and associated normative dispositions. I note, what Perry does

[87] On the notion of 'ruleness', see ibid 102–04.

[88] I am not committed to the view that all rational action is conducted under the 'guise of the good'; see Kieran Setiya, *Reasons Without Rationalism* (Princeton UP 2007). But see Veronica Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (Hart Publishing 2014); Ori J Herstein, 'Book Review: Law and Authority Under the Guise of the Good' (2016) 125 Mind 1213.

[89] Schauer, *Playing by the Rules* (n 86) 103–09, 121–22.

[90] ibid 120.

[91] ibid 113. See also Raz, *The Concept of a Legal System* (n 1) 202.

not,[92] that there is a difference between *real* (*genuine*) acceptance and pretended acceptance.[93] Even if someone appears to act as if they accept a rule, it does not follow that they really (genuinely) accept, they could be merely pretending to. To use a familiar jurisprudential example, anarchist judges may genuinely accept ultimate rules of recognition, but they also may just pretend to accept.[94]

Perry discussed the following two examples:

> The judge is like an actor in a play. Just as an actor may take the point of view of his character for greater verisimilitude, the judge chooses to participate in the internal aspect of the rule of recognition to advance his anarchist ends. When the play is over, the actor will shrug off his persona. Likewise, when the time is right, and he determines that not applying the law will maximally damage the legal system, the anarchist judge will act from conviction.[95]

For Perry, both an anarchist judge and an actor exhibit the attitude of acceptance as long as they outwardly appear to be doing so. I stress that it is not necessarily the case

[92] Perry (n 81) 293.

[93] Hart considered the issue of genuineness of acceptance in *The Concept of Law*, see Hart, *The Concept of Law* (n 1) 139–41. He was right to insist that acts of rule-following do not require conscious, concurrent thought about the rule. He was also correct about the best evidence we may have of whether someone genuinely accepts a rule. Importantly, Hart did not claim that it is conclusive or direct evidence. For instance, I think Hart would agree that a person may be disposed to respond to why-questions by reference to a reason, but it does not follow that the person is disposed to guide their actions by that reason; see Schlosser (n 82) 287. By allowing the possibility of pretence in rule-following, Hart's account is consistent with what I develop here in more modern terms.

[94] See eg Kenneth M Ehrenberg, 'The Anarchist Official: A Problem for Legal Positivism' (2011) 36 Australian Journal of Legal Philosophy 89, 102. On the other hand, pace Ehrenberg, not every official who is motivated to undermine the legal system fails to accept.

[95] Perry (n 81) 293.

that they accept in a relevant way (genuinely), even when they appear to do so to an observer.

If someone genuinely accepts a rule, they also have some associated dispositions.[96] Among them are: dispositions to act in accordance with the rule,[97] dispositions to have a reactive attitude of blame towards rule-breakers, normative expectations that others (rule-addressees) conform, and so on.[98] If someone fails to have the appropriate dispositions, then they do not accept (genuinely).[99]

For example, even while seeming to act like any other judge, an anarchist judge could at the same time fail to have genuine normative expectations that others conform. Similarly, they could fail to have dispositions to form a reactive attitude of blame (although they may have dispositions outwardly to pretend they blame).

Those who do not accept a rule but merely pretend to do so, are like actors on a stage who *merely* recite a script: they do not treat the rule as a reason for action of

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[96] I do not want to commit myself here to a definite view on what exactly is the connection between acceptance and those dispositions (eg whether acceptance is identical with the dispositions, whether it is grounded in them, whether it is a set, etc.). I merely claim that if some relevant dispositions are absent in a person's mind, the person does not accept a rule (genuinely), but they still may be pretending to accept. See also Kramer, *H.L.A. Hart* (n 1) 47; Kramer, 'Power-Conferring Laws and the Rule of Recognition' (n 62) 88–89.

[97] Only if they are an addressee of this rule; as I argue below, rules may be accepted by other members of the group than those whose actions the rule purports to regulate, see ch III.2.A. For the non-addresses, acceptance of the rule does not entail a disposition to conform with the rule but does entail other dispositions.

[98] Here 'to expect' is used in the sense of normatively 'calling for' or 'requiring' in one's own mind. Not in the sense of 'predicting', and not in the sense of doing anything externally observable. This is distinct from a disposition to criticise (by speech, non-verbal communication, etc.).

[99] As I said in n 97, a disposition to conform is only appropriate for rule-addressees, a normative expectation that others conform is appropriate for all who accept a rule.

the relevant kind and they do not have the mental states entailed by acceptance.[100] For instance, a liberal actor playing a slave-owner could fail to have a disposition to have a genuine reactive attitude of blame (in their own mind) towards fugitive slaves (or actors playing them). This means that this particular actor does not genuinely accept the rules directed to slaves.[101]

The difficulty is that we may be unable to distinguish by external observation whether someone accepts a rule or not; one's behaviour may be consistent with both hypotheses.[102] Merely conforming to a rule (as distinguished from complying with it),[103] criticising others' non-conformity and so on – all that may be consistent with not accepting the rule. In particular, it may be consistent with accepting a different rule that is mostly co-extensive with the first rule but has a different content.

The following thought-experiment from William Baude provides a helpful illustration:

> Suppose we lived in a world whose judicial system looked, to most legal observers, exactly like ours: Judges issued opinions based on the Constitution,

[100] I do not want to deny that other actors may be more psychologically involved with the roles they play, doing more than merely to recite their lines.

[101] To use another of Perry's examples, the same may apply to spies: they could just be pretending to accept the rules of groups they infiltrate; Perry (n 81) 292.

[102] I thus disagree with Kenneth Himma who claimed that '[e]ach feature constituting a social rule is empirically observable'. Kenneth Himma, 'Understanding the Relationship Between the U.S. Constitution and the Conventional Rule of Recognition' in Matthew Adler and Kenneth Himma (eds), The Rule of Recognition and the U.S. Constitution (OUP 2009) 99.

[103] On the distinction between compliance (acting for a reason) and mere conformity (acting in a way consistent with a reason, but not necessarily for that reason), see Raz, *Practical Reason and Norms* (n 1) 178–79.

> the U.S. Code, the common law, and various precedents interpreting them. But suppose a few canny professors figured out that the judges were all secretly part of an Illuminati conspiracy, ruling entirely for the benefit of their secret overlords and just pretending they were following the Constitution and these other sources. Would we say that actually the Illuminati instructions *are the law* because they describe the secret practice of the judges? Or would we say that the judges were part of a widespread conspiracy to *subvert the law*? I would say the latter, and I think many others would as well.[104]

On one interpretation of the Illuminati story the following question is key: if the officials tell us that they follow a rule X, but in their own practical reasoning they act because of Illuminati orders that are mostly co-extensive with the rule X, do the officials *really* accept the rule X? It is at least possible that they do not accept X.

Two clarifications are in order. First, the issue here is not that some officials sometimes intentionally act not according to the law.[105] This is a common phenomenon in all legal systems and as such does not create confusion as to the content of the law. The key question arises only when there is some systematic practice of officials, guided by general rules, which is inconsistent with the 'official story' of the law that officials sell to the public.[106]

Second, the issue is not whether the officials in question make distinctions between 'Illuminati-rules' (or 'the black telephone rule' as in the Soviet example – see immediately below) and 'the law'. As John Finnis noted, jurisprudence is not

[104] William Baude, 'Is Originalism Our Law?' (2015) 115 Columbia Law Review 2349, 2388.

[105] See Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to the Law' (2011) 24 Canadian Journal of Law and Jurisprudence 305.

[106] The notion of an 'official story' of the law in the sense I use it here was introduced by Stephen E. Sachs in his 'Originalism as a Theory of Legal Change' (2015) 38 Harvard Journal of Law and Public Policy 817, 870. See also William Baude and Stephen E Sachs, 'Grounding Originalism' (2019) 113 Northwestern University Law Review 1455.

lexicography.[107] Just because officials describe something as 'the law', it does not preclude the possibility that law as understood in Hartian general jurisprudence merely overlaps with what those officials call 'the law'. Once jurisprudence begins with the conceptual basis – seeing law as a systematic, rule-guided practice with authoritative institutions – then we can go out and look for such practices in the world. Parts of those practices will already be called 'the law', but parts may not be so called by the participants.

ii. Why the issue of genuineness of acceptance matters?

To motivate why the problem of genuineness of acceptance matters for real legal systems I will consider two examples: the debate over positive originalism in US constitutional law and the role of the rules and practices of the Communist party in Soviet law.

Positive originalism in US law

This thought experiment was introduced in the context of Baude's advocacy for 'positive originalism,' a view on US constitutional law developed by Baude and by Stephen Sachs. [108] In short, according to positive originalism, contemporary

[107] Finnis, *Natural Law and Natural Rights* (n 54) 4.

[108] Sachs, 'Originalism as a Theory of Legal Change' (n 106); Baude (n 104); see also Richard Primus, 'Is Theocracy Our Politics?' (2016) 116 Columbia Law Review Sidebar 44; Charles L Barzun, 'The Positive U-Turn' (2017) 69 Stanford Law Review 1323; Mikolaj Barczentewicz, 'The Limits of Natural Law Originalism' (2018) 93 Notre Dame Law Review Online 101.

American legal practice is committed (as a matter of the current rule of recognition) to the proposition that there has been no unlawful change in American law since the US Constitution was enacted. This is not supposed to be a correct historical description of the American constitutional past; it may very well be a fiction. The point is that the current US ultimate rules of recognition require justifying every departure from the law as practised at the end of the 18th century by reference to the methods of legal change accepted at that time.

The problem of genuineness of acceptance and the content of rules of recognition comes into play when positive originalists respond to a seemingly obvious objection that a significant group, if not the vast majority, of contemporary US legal officials do not feel so constrained in practice. There are piles of non-originalist court judgments, or so it would seem.[109] This leads theorists like Larry Alexander, Fred Schauer, Brian Leiter, and others, to conclude that the real ultimate rules of recognition are inconsistent with the official story of US law, as identified by Baude and Sachs.[110] On such view, the rule of recognition of US law could be ultimately 'whatever five Justices of the Supreme Court decide'.[111]

However, if Baude and Sachs are correct about the Illuminati case, then it is open to them to point out, as they do, that the same legal officials publicly avow the content of the rule of recognition their actions appear to violate. On this view, the 'official

[109] Baude disputes this claim in Baude (n 104).

[110] See eg Larry Alexander and Frederick Schauer, 'Rules of Recognition, Constitutional Controversies, and the Dizzying Dependence of Law on Acceptance' in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009); Brian Leiter, 'Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature' (2015) 66 Hastings Law Journal 1601.

[111] Alexander and Schauer (n 110) 190.

story' of US law is an originalist one. Acting in contravention of the official story, the officials are 'subverting the law,' not making it the case that the law 'turns non-originalist.'[112]

Law in the Soviet Union

Even if someone is not convinced that the problem of genuineness of acceptance is of practical relevance in the US context, it still has practical and theoretical importance. In fact, I believe that the story told by Baude does illuminate an important feature of positivist general jurisprudence and how it allows for an accurate picture of legal systems like that of the Soviet Union or of communist China.

Aleksandr Solzhenitsyn has famously written:

> In his mind's eye the judge can always see the shiny black visage of truth - the telephone in his chambers. This oracle will never fail you, as long as you do what it says.[113]

However incredible this may sound to a Western reader, significance of 'telephone justice' is a well-documented aspect of communist and post-communist legal systems.[114] The phrase refers to a widespread judicial practice of following directions

[112] Naturally, a critic could take the battle into the positive originalists' turf and argue that what the officials publicly say cannot be interpreted the way the positive originalists argue it should be. But this line of criticism is outside the scope of the present paper. For arguments partly along these lines, see Jeffrey Pojanowski and Kevin C Walsh, 'Enduring Originalism' (2016) 105 Georgetown Law Journal 97; Primus (n 108); Barzun (n 108). For further jurisprudential discussion, see Barczentewicz, 'The Limits of Natural Law Originalism' (n 108).

[113] Aleksandr Solzhenitsyn, *The Gulag Archipelago*, vol III (Harper & Row 1974) 521.

[114] See eg Stephen Breyer, 'Judicial Independence: Remarks by Justice Breyer' (2007) 95 Georgetown Law Journal 903, 904–05; Kathryn Hendley, '"Telephone Law" and the "Rule

from party officials as to how to decide a particular case. Naturally, telephone justice was not part of the 'official story' of Soviet law.

Telephone justice is far from being the only systematic way in which Soviet legal practice diverged from the official story. Even without express 'suggestions' how to decide particular cases, Soviet judges acted within a complex framework of formal and informal rules (ie rules coming from other sources than the 'formal' sources of law). There were secret directives of the Communist Party of the Soviet Union addressed to legal officials, rules of hierarchical dependence and of goals and measures of judicial performance, and so on.[115]

To the extent those practices were inconsistent with the official story, were they just undermining the law? If so, then we are at risk of concluding that 'the law' the officials were undermining had little in common with the law that guided actions of both law officials and law-subjects. Just like in Baude's Illuminati example a question arises: which actions of legal officials constitute the content of law and which do not? Where is the boundary between law and non-legal (or 'informal') practices of legal officials?

I chose the Soviet example because it is relatively uncontroversial. However, the phenomenon is not merely of historical interest. There are reasons to think that

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of Law": The Russian Case' (2009) 1 Hague Journal on the Rule of Law 241; Peter H Solomon, 'Authoritarian Legality and Informal Practices: Judges, Lawyers and the State in Russia and China' (2010) 43 Communist and Post-Communist Studies 351; Alena Ledeneva, 'Telephone Justice in Russia: An Update' [2011] The EU-Russia Centre Review <http://www.eu-russiacentre.org/wp-content/uploads/2008/10/EURC_review_XVIII_ENG.pdf>.

[115] See eg Peter H Solomon, 'The Case of the Vanishing Acquittal: Informal Norms and the Practice of Soviet Criminal Justice' (1987) 39 Soviet Studies 531, 544.

contemporary Russian law shares some of the discussed features of the Soviet system, though to a lesser extent.[116] Also, similar things are being observed in China.[117]

One feature of the Soviet case distinguishes it in an important way from Baude's Illuminati story. Namely, the discrepancy between the official story and the rules the officials actually followed was widely known.[118] In the USSR, that widespread knowledge likely contributed to law subjects' feeling of alienation from the law. However, if Baude and Sachs are correct that a discrepancy between what officials say and what they do obtains in US constitutional law, then the Soviet case illustrates that such discrepancy may be sustainable even when it is not a secret.[119] Hence, the following discussion is not about secret laws, but about such discrepancy, even if widely known.

iii. How do we know who really accepts a rule?

It could be the case that Illuminati-officials genuinely accept the rules they publicly profess to apply. Hence, when they act inconsistently with those rules, they are

[116] See eg Hendley (n 114); Solomon (n 115); Ledeneva (n 114).

[117] See eg Perry Keller, 'Sources of Order in Chinese Law' (1994) 42 American Journal of Comparative Law 711; Solomon (n 115); Randall Peerenboom, 'Social Foundations of China's Living Constitution' in Tom Ginsburg (ed), *Comparative Constitutional Design* (CUP 2012); Chien-Chih Lin, 'Constitutions and Courts in Chinese Authoritarian Regimes: China and Pre-Democratic Taiwan in Comparison' (2016) 14 ICON 351.

[118] Solomon (n 114) 359.

[119] One reason why the discrepancy may be acceptable to the American public is because they like the substantive results of nonoriginalist precedents so much that they arezq not worried about departures from the original law, even if those departures are unlawful.

subverting the law. To the extent the rules that are part of the official story of the law regulate actions of legal officials and to the extent the officials *conform*[120] to those rules, it is psychologically plausible that it would be a strain on the officials not to accept those rules.[121] This is not an analytical claim, but an empirical generalization (prediction).

Even though there are large parts of the official story of any legal system that officials very likely accept, it need not be true of entire official stories. It is not difficult to see how, for instance, pragmatic Soviet legal officials unfailingly kept reciting the official story of the Soviet law, while not accepting at least some parts of it as rules guiding their actions. Especially, it would not be a big psychological strain on officials not to accept rules that are very rarely of practical relevance to them. Hence, an abstract rule of judicial independence, publicly professed by legal officials, is less likely to be truly accepted by them than a more concretely action-guiding rule like 'decide cases according to what your black phone tells you'.

Another issue is that even if legal officials accept the rules they profess, in Baude's example they also plausibly accept secret rules regarding the supremacy of Illuminati-directives. In that sense, they genuinely act as if they believed in a rule that the Constitution is the highest law (most of the time), but whenever they receive a directive from the Illuminati, they act as if they believed in a rule that Illuminati orders are supreme. What would such apparent contradiction mean for the content of law?

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[120] On the notion of 'conforming' with a rule, see n 44 above.

[121] Brian Tamanaha is correct that there are many rules that judges, could not but to 'internalize' (eg 'referring to oneself in the third person object form – "the Court finds that…"'). See Brian Z Tamanaha, *Realistic Socio-Legal Theory* (OUP 1997) 182.

Here, the external aspect of social rules could come to the rescue.[122] If, in cases where the Constitution and the orders of the Illuminati require incompatible actions, the officials act in accordance with the latter, it strongly suggests that this is the 'higher-order' rule to which the officials are more fundamentally committed.[123] And in that case, if we do not have a standard external to the officials, like a meta-recognitional social rule of the whole society (see chapter III.1), then we would have to conclude that from the legal perspective, Illuminati orders are ultimate law and any conflicts with inferior legal rules (like the Constitution) are to be resolved on the terms of Illuminati orders.

Finally, as Richard Primus' response to Baude's paper illustrates very well, epistemology of ultimate legal rules is very difficult.[124] So far as those rules are grounded in social practices, a serious problem is that any set of facts is consistent with infinite descriptions in terms of rules, as famously noted by Wittgenstein.[125] When Illuminati-officials act *as if* they accept that the Constitution is the highest law, they at the same time act *as if* they accept that the Illuminati directed them to say the Constitution is the highest law and to act consistently until further notice, and so on.

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[122] Hart, *The Concept of Law* (n 1) 56.

[123] Matthew H Kramer, 'Is Law's Conventionality Consistent with Law's Objectivity?' (2008) 14 Res Publica 241, 247; Stephen E Sachs, 'The "Constitution in Exile" as a Problem for Legal Theory' (2014) 89 Notre Dame Law Review 2253, 2262.

[124] Primus (n 108).

[125] Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, MacMillan 1953) §§ 177-202; Sail Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP 1982); Jules Coleman, *The Practice of Principle* (OUP 2001) 79–80; Christopher Kutz, 'The Judicial Community' (2001) 11 Philosophical Issues 442, 450; Matthew H Kramer, *Objectivity and the Rule of Law* (CUP 2007) 22.

A way out of this quandary is to focus on facts which are consistent with one hypothesis, but not with another. However, the debate between Sachs, Baude, and their critics shows how contentious it is to classify facts of law-application as consistent with one rule-hypothesis and not another.[126]

Concluding, I began this section by adopting a broadly Hartian account of social rules according to which such rules are constituted by their *acceptance* in a relevant social group. I set out the features of acceptance, which are common ground among Hartians. I then introduced Adam Perry's developed concept of acceptance as a belief-independent attitude (acting *as if* one had a belief that one ought to do what the rule requires). My key contribution was to show how acceptance of a social rule has to be genuine, not merely pretended, and why this matters not just in theory, but also to practical questions about how to distinguish between law and non-legal practices of legal officials. I did so using the examples of positive originalism in US constitutional law and of Soviet law.

B. A *SOCIAL* RULE

There are three remaining aspects of how social rules are constituted that are less salient to the main argument in this work, hence I will treat them in less detail than the issue of acceptance. First, I will show what differentiates personal and social rules. Then, I will sketch the requirements of belief that others accept and of a regularity of conforming behaviour.

[126] See, eg, Baude (n 104); Primus (n 108); Barzun (n 108).

i. Personal and social rules distinguished

Not all rules that people accept are social rules. We also accept personal rules, moral rules and other kinds of rules as well. In the case of moral rules, we usually do not think that their existence is constituted by our acceptance. On the other hand, personal rules are uncontroversially very much like social rules in that they only exist if someone accepts them. What makes them different?

One answer is that social rules require acceptance by many individuals to exist, whereas personal rules exist for individuals if and only if those individuals accept them – it does not matter what anyone else thinks.[127] How many individuals have to accept a social rule for it to exist? There is no general answer to how large a 'critical mass' within a community has to be for a social rule to emerge (or change).[128] In principle, the 'significant proportion' is less than everyone, but it is likely to be 'nearly everyone' as Philip Pettit suggests.[129] I will say more on that point in respect to rules of recognition later.

Beyond that, social rules and personal rules also have different propositional contents. A personal rule necessarily refers only to what *one* ought to be doing. A social rule necessarily refers to what *others* should be doing. Note that it is not necessary that every person who accepts a social rule accepts it as regulating their own actions.[130] Also, one may conform to a rule in behaviour without accepting the

[127] Perry (n 81) 291–92.

[128] Similarly, Brennan and others (n 78) 30 (emphasis added).

[129] Philip Pettit, 'Virtus Normativa: Rational Choice Perspectives' (1990) 100 Ethics 725, 729.

[130] PMS Hacker, 'Hart's Philosophy of Law' (n 32) 15; Grant Lamond, 'The Rule of Recognition and the Foundations of a Legal System' in Luis Duarte d'Almeida, James

rule. Of course, many, if not most, social rules are general in a way that they purport to regulate actions of all members of the community, but not all social rules are.

ii. Belief that others accept

In principle, I agree with Brennan and others that for a social rule to exist there is necessity that

> [a] significant proportion of the members of G [the community] *know that* a significant proportion of the members of G have P-corresponding normative attitudes [ie that they accept the social rule].[131]

Brennan and others stress that there is no requirement of 'common' knowledge in the sense this term is usually understood in the literature.[132] In other words, there is no necessity that the members of the community know that other members of the

Edwards and Andrea Dolcetti (eds), *Reading HLA Hart's 'The Concept of Law'* (Hart Publishing 2013) 108–110.

Take, for example, any social rule that only regulates actions of women. Men can still accept that rule. They can accept that women should follow it, be disposed to criticize women who fail to follow the rule and so on. It could be that no women accept the rule but it is still a social rule because a sufficient number of members of the group (eg all men) accept it (assuming that there are very few women in that group). Nick Barber claims that this would be a 'potential social rule' that 'is not yet operative'; Nick Barber, *The Constitutional State* (OUP 2010) 62. I am inclined to disagree because on my view social rules do not have to be effective (operative) to exist, so I would not call such a rule a mere 'potential' rule. See also text to n 238.

[131] Brennan and others (n 78) 29.

[132] ibid 31.

community know that they accept the social rule in question.[133] Some social rules may be Lewis-type conventions, but this is not necessary.[134]

To be a bit more precise about this condition, it may be too strong to speak of necessity of *knowledge* that others accept. In terms of mental states, what is required is *belief* that others accept. A constitutive explanatory account of social rules need not include any considerations of whether this belief is justified, or even true. Now, of course, if a social rule exists then any belief that a significant proportion of the group's members accept the rule will be necessarily true. But the fact that the belief that many others accept is true (as distinguished from the fact that many others accept) does not do any independent work in the constitutive explanatory account of social rules. Even more strongly, I see no reason why the fact that the belief that others accept is justified (in the epistemological sense) would be part of the constitutive explanatory account of social rules. Hence, in what follows I claim that for a social rule to exist it has to be the case that a significant proportion of the members of the community *believe* that a significant proportion the members of the community accept the rule.

[133] ibid.

[134] On social rules as conventions and the requirement of common knowledge, see eg Pettit (n 129) 750–53.

iii. Regularity of behaviour

Understandably, social-science oriented accounts of social norms see a regularity of rule-conforming behaviour as necessary for a social rule to exist.[135] On the other hand, Brennan and others argue that a regularity of behaviour is not only not constitutive of social rules *in general*, but they even express scepticism that there are any *special* kinds of social rules about which that would be true.[136] They arrive at this conclusion by way of a thought experiment of a social rule prohibiting urination in public swimming pools that is widely accepted in the community and just as widely disregarded in practice.[137] I am not entirely convinced by this and I prefer to allow the possibility that a particular kind of a social rule – like, perhaps, rules of recognition – could have a constitutive requirement of an actual regularity of behaviour. However, this does not mean that Brennan and others deny the importance of how regularities of behaviour figure in the normative attitudes that do ground social rules.

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[135] For example, Philip Pettit, while acknowledging the possibility of 'regularities' which are not exhibited in conforming behaviour, insists on calling them 'social standards,' reserving the label of 'social norm' for regularities 'with which people generally conform.' Pettit is right in saying that '[i]f we want to identify a society's norms, then … the best way is surely by studying what people do there.' But his conclusion ('… that means that a norm is a regularity with which most people in the society must conform') is a *non sequitur*. Pace Pettit, just because something is difficult to observe or measure it does not follow that it does not obtain. See ibid 728.

On this issue, in following Brennan and others, I disagree with Timothy Endicott, whose account of social rules is in other respects similar to the one proposed here, see Timothy Endicott, 'Are There Any Rules?' (2001) 5 The Journal of Ethics 199, 215.

[136] Brennan and others (n 78) 20–21, 32. To clarify, Brennan and others use the term 'social practice' to refer to approximately the same thing I mean by a 'regularity of behaviour'. In what follows I translate their terminology into mine.

[137] ibid 20–21.

In fact, Brennan and others believe that the normative attitudes constitutive of social rules are essentially 'practice-dependent'.[138] What they mean is that the normative attitudes in question are grounded in *presumed* regularities of behaviour.[139] Participants of a practice in question may be mistaken as to whether a relevant regularity of behaviour actually obtains, but for a social rule to emerge they must at least accept that it obtains. Additionally, an actual regularity of behaviour may be necessary for a social rule to be 'effective' in a Hartian sense, but ineffective rules may exist in a meaningful way.[140] I agree with Brennan and others and I take the presumption of a regularity of behaviour as an element of the normative attitude of acceptance. In what follows I will simply refer to 'acceptance'.

On a related note, I reject that the Hartian external 'manifestations' or 'displays' of the internal aspect are at all necessary for a social rule to exist.[141] I said before that what may be entailed by acceptance is that those who accept are *disposed* towards certain 'manifestations.' However, a social rule may exist even if the members of the group who accept the rule, even though disposed to do so, in fact fail to exhibit the Hartian 'manifestations' of acceptance. For example, it is enough that they are disposed to criticize others for breaking the rule even if they do not in fact do express

[138] ibid 58–59, 76–81.

[139] ibid 58–59, 76–81.

[140] Hart, *The Concept of Law* (n 1) 59, 103–04, 294–295.

[141] ibid 57.

such criticism (eg because they are too shy or because they consider criticism to be impolite).[142] As Adam Smith has famously remarked:

> We are pleased, not only with praise, but with having done what is praise-worthy. We are pleased to think that we have rendered ourselves the natural objects of approbation, though no approbation should ever actually be bestowed upon us: and we are mortified to reflect that we have justly merited the blame of those we live with, though that sentiment should never actually be exerted against us.[143]

All this is not to say that an actual regularity of rule-conforming behaviour, a regularity of criticism of non-conformity and so on are not in practice important for social rules to emerge and persist. They certainly are. But such regularities are not a part of a constitutive explanatory account of social rules in general.

3. ULTIMATE RULES OF RECOGNITION AS A KIND OF SOCIAL RULES

To summarize my account of social rules as presented so far: for a social rule to exist in a given community it has to be genuinely accepted (in a belief-independent way) by a significant proportion of the members of a community. The rule must be accepted as a social rule, ie the rule must purport to regulate the actions of other people than the accepting person and that acceptance is grounded in presumed regularity of rule-conforming behaviour. It also must be the case that a significant proportion of the members of the community believe that a significant proportion

[142] Pettit (n 129) 746.

[143] Adam Smith, *The Theory of Moral Sentiments* (6th edn, A Millar 1790) III.I.12. Pettit employs this passage in support of his attitude-based account of social norms, see Pettit (n 129) 740–50. In general, Pettit's 'attitude-based derivation' supports the account proposed here even though Pettit's own definition of a norm is narrower than mine.

of the members of the community accept the rule. I will refer to those conditions taken together as the 'social practice of normative acceptance of a rule'.

Someone may want to argue that rules of recognition are a kind of social rules that exist only in case of actual, not merely presumed regularity of rule-conforming behaviour. As long as this view is combined with a requirement of genuine, not merely pretended normative acceptance as I defined it earlier, my argument is not affected by this issue and I will not pursue it further.

I claimed that every social rule is constituted by combined mental states of acceptance of the rule possessed by a sufficient number of members of the community and mental states of belief that others accept it. Depending on the kind of the social rule and on the circumstances of the agent, acceptance will entail other mental states (normative expectations, dispositions to reactive attitudes, etc.) and if such mental states are absent it follows that acceptance is absent as well. As I noted, it may be very difficult in certain circumstances to establish whether a social rule exists and what is its content.

Ultimate rules of recognition are *essentially* social rules. They are grounded in a special kind of patterns of thought and behaviour of a certain group of people ('recognitional community'[144]). It follows that as long as an ultimate rule of recognition exists it cannot change into an enacted rule, a case-law rule or any other sort of non-social rule. This is a necessary feature of all customary rules as long as

[144] To my knowledge, the term 'recognitional community' was introduced by Matthew Adler in 'Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?' (2006) 100 Northwestern University Law Review 719, 726.

they stay customary. The difference between an ultimate rule of recognition and an ordinary legal custom is that the latter may be superseded by non-customary rules (eg replaced by a statute). An ultimate rule of recognition cannot be so replaced. Whenever there is a legal system, there is at least one ultimate rule of recognition and that rule is always a social rule. This way, rules of recognition can play the role of a final explanation (or final ground) of the validity for all legal rules of a given system.[145]

What do ultimate rules of recognition do? They impose a duty on the legal officials to recognize certain norms as valid law (of their legal system).[146] For example, one of the ultimate rules of recognition of the United Kingdom legal system can arguably be represented in the following way:

> the United Kingdom legal officials have a duty to recognize as law of the United Kingdom whatever the Queen in Parliament enacts as law.[147]

Drawing on the general account of social rules introduced above, the rule of recognition is grounded in a social practice of normative acceptance of a rule imposing a duty on the legal officials to recognize certain norms as law.

[145] See text to n 64.

[146] See n 62.

[147] This is a more precise version of Hart's example 'Whatever the Queen in Parliament enacts is law'; see, eg, Hart, *The Concept of Law* (n 1) 102, 107, 111. For Matthew Kramer's version, see Kramer, 'Power-Conferring Laws and the Rule of Recognition' (n 62) 95.

A. RULES OF RECOGNITION DISTINGUISHED FROM RULES OF CHANGE AND ADJUDICATION

Rules of recognition are distinct from rules of change and rules of adjudication.[148] Rules of change confer legal powers on individuals or bodies to change the rules of the legal system.[149] Rules of adjudication confer legal powers on individuals or bodies to adjudicate.[150] Rules of recognition confer on legal officials a duty to recognize norms that meet certain criteria ('criteria of validity') as valid law of the legal system in question.[151]

Non-legal constitutional rules also regulate legal change (eg some constitutional conventions) and may have great practical significance in this sphere. For instance, in the United Kingdom there is a convention that the monarch will act as his or her ministers advise, arguably also in matters of assent to legislation passed by the House of Commons and the House of Lords (but this has been doubted).[152] I discuss

[148] As Gardner has written on the secondary rules:

> They cannot but cross-refer, and hence depend on each other for their intelligibility, yet each has its own normative force. Each regulates different actions, or different agents, or the same actions of the same agent in a different way. Each is therefore a distinct rule.

John Gardner, 'Can There Be a Written Constitution?' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law: Volume 1* (OUP 2011) 178.

[149] Hart, *The Concept of Law* (n 1) 95–96.

[150] ibid 96–97.

[151] ibid 94–95, 105–106. See n 62.

[152] Nick Barber, 'Can Royal Assent Be Refused on the Advice of the Prime Minister?' (*UK Constitutional Law Blog*, 25 September 2013) <https://ukconstitutionallaw.org/2013/09/25/nick-barber-can-royal-assent-be-refused-on-the-advice-of-the-prime-minster/> accessed 24 August 2019; Adam Perry and Adam

non-legal constitutional rules in chapter IV, but I stress that non-legal rules are not a chief concern of this thesis.[153]

As I already mentioned, there are both ultimate and non-ultimate rules of recognition.[154] My main focus in this thesis is on ultimate rules of recognition as they form the foundation of a legal system. However, we should not forget that non-ultimate rules of recognition play an important role. Non-ultimate rules of recognition are valid legal rules, ie they are law due to being recognised directly or indirectly by ultimate rules of recognition. But their job is the same as that of their ultimate 'parents', they impose a duty to recognise certain norms as law. Not every legal rule is directly recognised as law by an ultimate rule of recognition (eg legal rules coming from a statutory instrument), but it must be recognised by some rule of recognition.

Hart himself noted that there is naturally a relationship between rules of recognition and the rules of change and adjudication.[155] There are three aspects of that relationship. First, just like all other legal rules, all rules of change and rules of adjudication have to be recognised as law by some rule of recognition (ultimate or non-ultimate). Second, to the extent acting pursuant to rules of change (and even

Tucker, 'Top-Down Constitutional Conventions' (2018) 81 Modern Law Review 765, 769.

[153] See ch IV.1.

[154] See ch II.1.

[155] Hart, *The Concept of Law* (n 1) 95–97; Gardner, 'Can There Be a Written Constitution?' (n 148) 178; Kramer, *H.L.A. Hart* (n 1) 97–99.

rules of adjudication) has law-changing effects, this must be provided for by some rules of recognition.[156] As Hart has written:

> Plainly there will be a very close connection between the rules of change and the rules of recognition: for where the former exists the latter will necessarily incorporate a reference to legislation as an identifying feature of the rules …[157]

What follows is that every rule of change is matched by a correlate rule of recognition. In fact, by two rules of recognition – one to recognize the rule of change as law and another to recognize the effects of exercises of the power conferred by that rule of change as law. However, pace Neil MacCormick, there is no necessity for a converse relationship – for 'reciprocal matching'.[158] Rules of recognition are capable of recognizing law-changing effects of events not involving an exercise of any legal power.[159]

As I discuss in detail in chapter V, change in customary law is the chief example of legal change which can be recognised by rules of recognition and cannot be directly due to an exercise of a law-making power (conferred by a rule of change) under almost any realistic scenario.[160] This is so because on any view of legal powers,

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[156] Gardner, 'Can There Be a Written Constitution?' (n 148) 176–177.

[157] Hart, *The Concept of Law* (n 1) 96.

[158] MacCormick, *Questioning Sovereignty* (n 8) 85. I criticize MacCormick's view in ch VIII.1.

[159] See ch VIII.2.

[160] One could postulate the existence of legal powers to change customary law held and exercised by the relevant communities that have the custom in question ('customary powers'). I am highly sceptical that this argument could ever work, and even when it could, it would be applicable only to highly unusual circumstances, not relevant in the context of constitutional law. See ch V.

a legal power to *X* exists only if the power-holder has volitional control over *X*.[161] However, custom does not work that way. In the case of custom no one can directly, normatively make it the case that the custom changes.[162]

Jeremy Waldron argued that there could be a fundamental legal custom conferring a power to make law (a sort of an ultimate rule of change) and if that is the case then ultimate rules of recognition are redundant.[163] I concur with John Gardner and Matthew Kramer that such a customary rule of change would not make rules of recognition redundant.[164] There are three key reasons for that. First, rules of change only confer powers to make rules, they do not confer on anyone any duties to recognise as law effects of exercises of those powers. A rule of change not accompanied by a rule of recognition is 'incomplete to the point of unintelligibility'.[165] And if there is a fundamental custom that both confers relevant powers and imposes relevant duties, then by definition we have both a rule of change and a rule of recognition.

The second reason is that (customary) rules of change cannot regulate customary legal change. This phrasing may suggest a paradox, but this impression is easily dispelled. As I just discussed, and will discuss in more detail in chapter V, arguably

[161] This is what all the sundry views on legal powers have in common. They differ on whether there are any other conditions and what those conditions are. See ch V.

[162] The distinction between normative (direct) and merely causal influence on legal change is explained in chapter V.

[163] Jeremy Waldron, 'Who Needs Rules of Recognition?' in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009).

[164] Gardner, 'Can There Be a Written Constitution?' (n 148) 177–178; Kramer, *H.L.A. Hart* (n 1) 101–103.

[165] Gardner, 'Can There Be a Written Constitution?' (n 148) 177.

there can be no legal power to effect a customary legal change (at least in contexts relevant to constitutional change), because custom is not under anyone's volitional control. Hence, Waldron's purportedly fundamental rule of change could not regulate an important aspect of legal change. We can imagine a legal system without rules of change – where all legal change happens through custom or by adopting foreign law,[166] but we cannot imagine a legal system without a rule of recognition. This certainly casts doubt on postulating the existence of a fundamental rule of change.

Finally, at least on Hart's view, no rule (other than a rule of recognition) can be a part of a legal system if it is not recognised by some rule of recognition. Hence, this must also be true of any purportedly ultimate customary rule of change. On the level of fundamental customary rules this is a distinction between (1) custom that legal officials accept they have a legal duty to recognize as law and (2) all other custom. If the legal officials do accept such a legal duty in respect to some customary rule of change, then this means that there is a rule of recognition recognizing that rule of change. This way we may resist the idea that Waldron's customary rule of change is really fundamental, because there is something else (a rule of recognition) which makes it the case that the rule of change belongs to that legal system.

Leaving Waldron aside, I should also note that exercises of powers conferred by rules of change and rules of adjudication may indirectly affect rules of recognition themselves.[167] For instance, an Act of Parliament in the UK could abolish the

[166] On adopting foreign law, see ch VII.4.

[167] See ch V.4 and ch X.

common law as a source of law, even though common law is a source of law not because of any statute but because an ultimate rule of recognition so provides. Strictly speaking, such abolition would only take place once the social practice that grounds the rule of recognition changes appropriately but given the already-recognised supreme status of Acts of Parliament in UK law, though not direct (automatic), it would likely be instantaneous. This kind of change cannot be a direct effect in respect to ultimate rules of recognition (there can be no legal power to change an ultimate rule of recognition[168]), but non-ultimate rules of recognition are amenable to ordinary modes of legal change (eg statutory rules on what counts as delegated legislation can be directly changed by legislation).

As to the rules of adjudication, Hart has written:

> … a system which has rules of adjudication is necessarily also committed to a rule of recognition of an elementary and imperfect sort. This is so because, if courts are empowered to make authoritative determinations of the fact that a rule has been broken, these cannot avoid being taken as authoritative determinations of what the rules are.[169]

This is a controversial statement when applied to legal systems that do not recognise judicial precedent. I would be more cautious and say that it is contingent whether rules of recognition in fact recognise judicial determinations as a source of legal change.[170]

It is also an interesting question for the present discussion whether it is possible for judges to act within their powers under rules of adjudication and for their

[168] See ch V.4.

[169] Hart, *The Concept of Law* (n 1) 97.

[170] On this I agree with Monti; Monti (n 62) 106. See also Kramer's critical notes on Hart's suggestion in Kramer, *H.L.A. Hart* (n 1) 98.

determinations to be accepted as affecting the content of general legal rules, but at the same time for the judges not to have a legal power to effect such change under the rules of change. I believe that this is a plausible explanation of some of the cases of legal change I discuss later in this thesis.[171]

B. ARE THEY CONVENTIONS?

As I noted earlier, some social rules may be social *conventions* in the philosophical sense. Are ultimate rules of recognition conventions? Julie Dickson has characterized the problem in the following way:

> … to hold that the rule of recognition is a conventional rule is to make a claim about the reasons why it is accepted and followed. If the rule is conventional, the reasons for accepting and following it must include the fact that others follow it too, ie there must be a common practice of following the rule which is reason-giving.[172]

I agree with Dickson that ultimate rules of recognition are not such rules.[173] In other words, I claim that any particular ultimate rule of recognition may be treated as conventional by the members of a particular community, but the rule could emerge and persist even if it was not so treated. I do so for two reasons: (1) acceptance by other people is not reason-giving (is not a real, justifying reason) and (2) acceptance by other people is not necessarily taken in fact as reason-giving (it is not always a

[171] See ch VIII.2.

[172] Julie Dickson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27 OJLS 373, 375. For a contrary view, see Andrei Marmor, *Philosophy of Law* (Princeton University Press 2011) 73–83.

[173] Dickson (n 172) 380–81, 401–02. See also Gardner, *Law as a Leap of Faith* (n 1) 73–74.

motivating reason). Regarding the first point, 'conventionalism' is not a successful account of law's normativity – it is clearly not sufficient that other people follow a rule for that rule to be genuinely normative.

As to the second point, there may be an ultimate rule of recognition even if the members of the recognitional community do not accept it for the reason that other people accept it but do so exclusively for entirely unrelated reasons. As Dickson argued:

> The fact that other judges adopt a given set of recognition practices in common is thus indeed relevant to … judge's deliberations about what she should do in order to identify the law in her jurisdiction, but it is relevant in allowing her to *identify* what is the rule of recognition in that legal system, rather than in giving her reasons why she should accept and follow that rule so identified.[174]

Perhaps it could even happen that the members of the recognitional community would not in fact need to look at the common practices of legal officials and that practical coordinating role would be played by some third party. For example, the officials could accept a rule of recognition because they think it was commanded by God or because it was enacted in a special super-majoritarian process (eg a constitutional convention and a referendum). This is not to say that an ultimate rule of recognition may ever be an enacted rule.[175] It is only that, for any particular member of the recognitional community, her personal reason for acceptance of the rule may be linked to some exercise of a legal power to make law. An enactment may have a causal connection with a change in a customary rule of recognition.

There is no requirement that the recognizers know about the theoretical concept of a rule of recognition or even that they think that there is some social rule of

[174] Dickson (n 172) 396.

[175] See also ch V.4.

recognition at the foundation of their legal system. They may be convinced that the ultimate rule imposing on legal officials a duty to recognize certain norms as law is in their legal system an enacted rule. From the theoretical perspective, we may claim that they are mistaken about the nature of the rule, but this mistake does not affect the rules of recognition in any way.[176] Individual recognizers may also be mistaken as to the precise content of the rule. This may mean that the actual ultimate rules of recognition are much thinner (more abstract or vague) than any individual participant of the legal practice thinks. The reason for that is that ultimate rules of recognition are constituted by an overlap of attitudes of the relevant people. Issues over which there is widespread disagreement among the recognisers, cannot be part of any ultimate rule of recognition.

C. ARE ULTIMATE RULES OF RECOGNITION PROPOSITIONAL?[177]

Some theorists of social rules hold that such rules, either necessarily or contingently, somehow exist without being represented in a propositional form, and especially

[176] A different kind of mistake as to the rule of recognition described by Greenberg is a case where legal officials come to accept at some later time that they were previously mistaken as to the content of an ultimate rule of recognition; Greenberg (n 79) 281–82. Greenberg wants his readers to admit that it is possible that the officials are correct that they were in the past mistaken. My impression is that Greenberg's thought experiment is a simple test of personal philosophical intuitions as to whether one is a legal positivist or an antipositivist. No positivist will say that it is possible, but some antipositivits will admit that it is. I am with Brian Bix in viewing such 'global error claims … more like paradox or nonsense than any sort of deep insight'; Bix (n 50) 540.

[177] Previously published in Mikolaj Barczentewicz, 'The Social Basis of Ultimate Legal Rules: Hayek Meets Hart' in Peter J Boettke, Jayme Lemke and Virgil Storr (eds), *Exploring the Political Economy & Social Philosophy of F.A. Hayek* (Rowman & Littlefield 2018).

without having any canonical formulations.[178] The account of social rules given by F. A. Hayek is an interesting example. Hayek argued that from the perspective of an individual person, a rule may be a mere 'propensity or disposition to act or not to act in a certain manner' manifested as a 'practice or custom'.[179] Rules may be therefore 'unconscious'.[180] It does not follow that all rules are unconscious or that no rule may be specified (expressed) in words. Hayek only insisted that 'we are not in fact able to specify *all the rules* which govern our perceptions and actions'.[181] He claimed that tacit knowledge ('knowledge how') relates to 'rules of conduct' and he described such knowledge as a 'habit' and a 'skill'.[182]

Are Hartian ultimate rules of recognition Hayekian rules of conduct? Are ultimate rules of recognition unconscious (at least sometimes or in part)? There is a tendency, especially in less philosophically-minded legal writing, to present rules of recognition as simple propositional standards fitting neatly into slogans like 'whatever Queen-in-Parliament enacts is law.' Hayek himself appears to have fallen into the trap of such simplistic reading of Hart.[183]

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[178] Jeremy Waldron, 'All We Like Sheep' (1999) 12 Canadian Journal of Law and Jurisprudence 169, 177–178.

[179] FA Hayek, *Law, Legislation and Liberty, Vol. 1: Rules and Order* (University of Chicago Press 1973) 75.

[180] FA Hayek, *Studies in Philosophy, Politics and Economics* (University of Chicago Press 1967) 56. See also Gerald F Gaus, 'Hayek on the Evolution of Society and Mind' in Edward Feser (ed), *The Cambridge Companion to Hayek* (Cambridge University Press 2006) 248.

[181] Hayek, *Studies in Philosophy, Politics and Economics* (n 180) 60 (emphasis added).

[182] FA Hayek, *The Fatal Conceit* (University of Chicago Press 1988) 78.

[183] Hayek explicitly refers to Hart's concept of the rule of recognition in *Law, Legislation and Liberty, Vol. 1: Rules and Order* (n 179) 135. On Hayek's view a rule that 'defines the formal properties which a law must possess in order to be valid' ('a definition of rules of just conduct') is not itself a rule of conduct. The rule of recognition only enables 'the

Hart provided several reasons to think that ultimate rules of recognition are not, at least not straightforwardly, conscious and (fully) specifiable.[184] He claimed that ultimate rules of recognition are not 'stated', but their 'existence is *shown*' in how they are used to identify valid laws.[185] Ultimate rules of recognition must be shared and used 'as a public, common standard of correct judicial decision'.[186] But at the same time

> there are certainly situations in which questions as to the precise content and scope of this kind of rule, and even as to its existence, may not admit of a clear or determinate answer.[187]

Nevertheless, Hart clearly considered it possible to provide useful propositional accounts of ultimate rules of recognition. He himself is often cited for the slogan about the Queen-in-Parliament that I mentioned before.

It is a separate question to what extent such accounts can adequately represent the full reality of practices of recognition. Hayek's warnings about our capacity to understand such practices are relevant here.[188] Several commentators stressed Hart's

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courts to ascertain whether particular rules possess those [formal] properties'. Hayek misunderstood Hart in thinking that the concept of ultimate rules of recognition is an 'attempt to articulate conceptions underlying an existing system of norms' by legislation (eg by enacting a rule of recognition in a codified constitution). Hayek entirely missed Hart's main point that rules of recognition are essentially social rules and they cannot be 'attempts' of persons or organizations.

[184] See also Kramer, *H.L.A. Hart* (n 1) 92.

[185] HLA Hart, *The Concept of Law* (n 1) 101, 108.

[186] ibid 116.

[187] ibid 109.

[188] Hayek, *The Fatal Conceit* (n 182) 75–85.

intellectual debt to Peter Winch, who advocated a very similar conception of rule-guidance of human action to Hayek's.[189] Consider this characteristic statement of Winch's position:

> the test of whether a man's actions are the application of a rule is not whether he can *formulate* it but whether it makes sense to distinguish between a right and a wrong way of doing things in connection with what he does. Where that makes sense, then it must also make sense to say that he is applying a criterion in what he does even though he does not, and perhaps cannot, formulate that criterion.[190]

Even if Hart wasn't as influenced by Winch as some suggest, on Hart's account ultimate rules of recognition are in essence implicit social rules that can be more or less correctly represented in propositional form.

What stems from this is a lesson of humility regarding how much knowledge of the content of ultimate rules of recognition we can hope to gain. Even though Hart noted that ultimate rules of recognition exist in how they are being used and that it is problematic to provide their canonical formulations, he decreed that 'whatever Queen-in-Parliament enacts is law' was the UK rule of recognition of his time. This was probably too quick.[191] Hart did not do a serious empirical study of the social practice, instead relying on his intuition as its competent participant and observer.

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[189] See Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (Routledge 1958); Jules Coleman, *The Practice of Principle* (OUP 2001) 80–81; Richard H Fallon, 'Precedent-Based Constitutional Adjudication, Acceptance, and the Rule of Recognition' in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 56–57; Waldron, 'All We Like Sheep' (n 178) 177–178.

[190] Winch (n 189) 58. But see Denis Galligan, *Law in Modern Society* (OUP 2006) 98.

[191] Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (2011) 31 OJLS 61.

Hayek's notion of following rules as a skill not necessarily connected to propositional knowledge casts doubt on Hart's conclusion. Competent participants of legal practices may be able to identify what counts as valid law within the practice, but it does not follow that they can reliably give satisfactory propositional accounts of the rules governing what counts as valid law. In fact, 'the process of articulation of pre-existing rules will . . . often lead to alterations'.[192] This may seem suboptimal—after all, should we not be able to know the content of all legal rules? The Hayekian response would be that sophisticated emergent social orders can only exist if they have some degree of unknowability. Like a market economy, a legal system may function without anyone having a God's eye view.

I want to stress that my argument in this thesis does not rely on the answer to the question of how tacit in practice are rules of recognition. Nevertheless, it is a worthwhile question, because it needs to be addressed by anyone who aims to apply the theoretical framework developed in this thesis to try to uncover what are the rules that regulate legal change in any concrete legal system.

[192] Hayek, *Law, Legislation and Liberty, Vol. 1: Rules and Order* (n 179) 78.

III. OFFICIALS VS SUBJECTS: WHO GROUNDS THE FOUNDATIONS OF LAW?

Ultimate rules of recognition are social rules and are therefore constituted by patterns of thought and behaviour of some people. To understand what those rules are in general and to be able to ascertain the content of any particular rule, we need to know which group of people it is. Different answers to this question may lead to different accounts of the content of ultimate rules of recognition in any given legal system. Do only legal officials count or is there also a role for non-officials in co-constituting the foundations of law?[193] If the latter is the case, then one may want to conclude that law-subjects 'delegate' identification of law's content to legal officials in a conditional way.

This matters for constitutional change because, as I argue in this thesis, lawfulness of change of legal constitutional rules depends ultimately on rules of recognition. If thoughts and actions of ordinary citizens co-constitute the truly ultimate rules of the legal system, we may expect those rules to reflect what we now see as *mere* public opinion. For example, on that view, if ordinary citizens in the US believe that to change the US Constitution it is enough to have a nationwide referendum and if they would accept the result of such referendum as law, then this could supersede any other argument on what kinds of constitutional change are lawful in the US based in the constitutional text or in the practice of legal officials.

[193] In what follows, I adopt a terminological convention of using 'non-officials' and 'law-subjects' interchangeably, setting aside the issue that in a sense legal officials are also law's subjects.

This is not a straw man; 'deep popular constitutionalism' is seriously discussed in US constitutional scholarship.[194]

HLA Hart famously argued that even though it is possible for non-officials (law-subjects) to have an appropriate mental attitude of acceptance towards ultimate rules of recognition, this is not necessary – it is not a general truth about law.[195] Thus, recognitional communities need not include non-officials.[196] This is right, though Hart's argument requires improvement. The need for amendment is in line with the fact that, as Leslie Green noted, 'the most misunderstood part of Hart's view is the way in which law is, and is not, related to social consensus'.[197]

However, before I turn to consider both good and bad arguments defending my Hartian position, I will make the case for the opposite view. I will argue that there is a sense in which thoughts and actions of the public at large have a constitutive relationship with the content of the law on the most fundamental level of ultimate rules of recognition.

My argument in this chapter proceeds as follows. First, I set out the role of legal officials in grounding of ultimate rules of recognition according to Hart and other authors (sec. 1.A). Then, I notice that even for Hart non-officials have an important constitutive role in the existence of any legal system that includes non-officials – the

[194] See eg Adler (n 144) 798; Sachs, 'Originalism as a Theory of Legal Change' (n 106) 883.

[195] Hart, *The Concept of Law* (n 1) 59, 117.

[196] Adler (n 144) 733.

[197] Leslie Green, 'The Concept of Law Revisited' (1996) 94 Michigan Law Review 1687, 1700.

non-officials need to conform to the law in a non-coincidental way (sec. 1.B). But why not say that thoughts and actions of non-officials may also ground the *content* of the law, not just the existence of a legal system in general?

I then sketch two arguments in that direction. First, the meta-recognitional view, according to which there may be a meta-practice of recognition of law among all law-subjects, not just legal officials, a practice that may ground the content of the law in a more fundamental way than official rules of recognition (sec. 1.C.i). Second, a view that ultimate rules of recognition themselves are grounded in a social practice of more than just legal officials (sec. 1.C.ii).

In response, I consider three counterarguments, which I view as bad ones. An argument that officials are the only addressees of ultimate rules of recognition, which fails because social rules may be grounded by social practices of those to whom they are not addressed (sec. 2.A). An argument that legal officials count because they know most about the law, which fails because many non-officials know more than many officials and in any case this argument begs the question of what is there to know in the first place (sec. 2.B). And finally, an argument that an account of the foundations of law must allow for law-subjects to be alienated from it, which also fails, because this is not incompatible with my tentative proposals.

I end the chapter with a plausible counterargument, which focuses on the institutional rule of legal officials as a conceptual matter (sec. 3). However, I leave open the possibility that non-officials could have a relevantly similar authoritative role in law-identification and in legal change to non-officials. This may in principle be possible if a given community and its legal system give certain kinds of referendums a special sort of weight (sec. 3.A).

1. LAW-SUBJECTS COUNT TOO!

A. LEGAL OFFICIALS IN THE HARTIAN MODEL

Hart gave us a picture of the foundations of law, which privileged the group of people engaged in authoritative identification, making, and application of law – legal officials.[198] It does not matter what those people call themselves in any given society (ie whether they use the label 'officials').[199] There must be, among officials, a social rule (an ultimate rule of recognition) according to which the group's members have a duty to identify certain norms as elements of a specific body of rules (the law). In that body of rules there must be, at least, some rules (rules of adjudication) conferring on certain members powers to settle disputes authoritatively according to the rules. The body of rules will likely also include rules (rules of change) empowering some members to change rules.[200]

Who exactly counts as a legal official in the Hartian model? Hart suggested that it is the group of all legal officials of the system in question,[201] but subsequently he

[198] It may even be said that on Hart's view there could be legal systems in communities consisting only of legal officials. See Coleman (n 125) 100–101; Kutz (n 125) 462; Adler (n 144) 733.

[199] See, eg, Gardner, *Law as a Leap of Faith* (n 1) 290–291.

[200] Hart himself would have probably said that rules of change are just as crucial as rules of adjudication. In seeing rules of change as not necessary, I follow Raz; see, eg, Raz, *The Authority of Law* (n 36) 105; Gardner, *Law as a Leap of Faith* (n 1) 257.

[201] Hart, *The Concept of Law* (n 1) 117.

lapsed into speaking about the courts only.[202] There are several options on the table. Grant Lamond suggested that the group is wider than just the judges.[203] Jeffrey Goldsworthy argued that the group includes more than judges, but not all legal officials – merely the senior ones.[204] Joseph Raz presented an even broader concept PRIMARY LAW-APPLYING INSTITUTIONS.[205] Finally, some are inclined to say that at least in the case of the United States all citizens form the recognitional community (or one of the recognitional communities, in Matthew Adler's case).[206] My own view is closest to Raz's. However, what is important for the present argument is that most people in large societies are not legal officials in the relevant sense.

B. LAW-SUBJECTS IN THE HARTIAN MODEL

Hart made the point that it was a strength of John Austin's account that it had a realistic picture of how non-officials interact with the law: through 'habitual obedience to orders backed by threats'.[207] According to Hart, non-official acquiescence towards law is a 'relatively passive aspect of the complex phenomenon

[202] In the Postscript to *The Concept of Law*, Hart has written: '… the rule of recognition, which is … a form of judicial customary rule existing only if it is accepted and practised in the law-identifying and law-applying operations of the courts'; ibid 256.

[203] Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 130) 112.

[204] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001) 238–43.

[205] Raz, *The Authority of Law* (n 36) 108–111.

[206] Adler (n 144) 726; Baude (n 104) 32. See also Ronald Dworkin, *Law's Empire* (Harvard UP 1986) 34.

[207] Hart, *The Concept of Law* (n 1) 61.

which we call the existence of a legal system.'[208] However, it would be too quick to end the discussion here – there remains an important question of the content (or direction) of that 'passive' relationship non-officials have with the law.

Hart specified two conditions for the existence of legal systems of the sort he was interested in (municipal law):

(1) acceptance of rules of recognition, change and adjudication (secondary rules) by legal officials and

(2) general conformity with the law on the part of law-subjects.[209]

On a common reading of Hart, the content of ultimate legal rules (rules of recognition) is exclusively determined by thoughts and actions of legal officials.[210] The only constitutive relationship that non-officials have with law is that if they do not conform with it most of the time, the legal system ceases to exist for that society.

General conformity by non-officials is therefore a necessary part of a constitutive explanation of the law's existence in any community that includes a significant number of non-officials. Now, what does general conformity entail? Could it consist of a pattern of actions by non-officials, compatible with what the law requires, but where the non-officials do not realise that they are acting in conformity with the

[208] ibid.

[209] ibid 116.

[210] See eg Kenneth Himma, 'Making Sense of Constitutional Disagreement: Legal Positivism, The Bill of Rights, and the Conventional Rule of Recognition in the United States' (2003) 4 The Journal of Law in Society 149, 154; Adler (n 144) 733.

law?[211] John Gardner suggested that this would not be enough. On his reading of Hart, which I share, general conformity must be non-accidentally related with the law.[212] The law (even in a very simplified way) and legal officials (even just the ones that people directly interact with) must figure in non-officials' practical reasoning adequately often or else the legal system does not exist for those non-officials.[213]

It is then not quite true that 'it does not matter what each individual citizen's reasons for compliance are'.[214] There is only no necessity that *canonical contents of individual legal rules* figure in law-subjects' practical reasoning. However, *the law* and *legal officials*, as the ones who say what the law requires, must figure in it. Otherwise it would have been possible for general non-official conformity with law to be coincidental.[215]

For instance, it is enough that part of a driver's motivating reasons for driving within what the law sets as speed limit is her vague belief that the law requires driving safely or with a reasonable speed. Why does she believe so? Maybe because of what a police officer said when rebuking her previous speeding. In this case, the law plays a non-coincidental role in the driver's conformity with the law. However, it is not

[211] Matthew Noah Smith, 'Officials and Subjects in Gardner's *Law as a Leap of Faith*' (2014) 33 Law and Philosophy 795.

[212] Gardner, *Law as a Leap of Faith* (n 1) 284; see also John Gardner, '*Law as a Leap of Faith* as Others See It' (2014) 33 Law and Philosophy 813, 838.

[213] How often is adequately or sufficiently often? Joseph Raz provided a useful discussion in his Raz, *The Concept of a Legal System* (n 1) 203–205.

[214] Stephen Perry, 'Where Have All the Powers Gone?' in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 300.

[215] This is consistent with the claim that a non-official's grasp of what lawyers perceive as the content of the law (eg canonical propositional representations of legal norms) may be very thin or even non-existent.

necessary that the driver has any beliefs (or other mental states) about correct legal statements like 'it is prohibited to drive above 70 miles per hour on a motorway.' She *may* have such beliefs. If she does, this will make it more likely that she will, in fact, conform to the law. But this is not essential adequately to account for non-coincidental conformity. Also, it is even more clearly not necessary that the driver has any beliefs on textual contents of statutes, regulations and so on, which ground the truth of the correct legal statement.

To be precise, *some* non-official conformity with the law may be coincidental. For a legal system to exist, it is only necessary that non-officials conform non-coincidentally sufficiently often.

If the preceding discussion is correct, as I believe it is, then law-subjects count a great deal in a constitutive explanatory account of law. Whenever legal officials *as a group* lose the ability to guide actions of non-officials, they will cease to be legal officials of the legal system of the whole society. Assuming, for now, that the recognitional community (the group whose social practice constitutes ultimate rules of recognition) consists of officials, then the recognitional community's status as the recognitional community (of the legal system of the whole society) is partly dependent on non-officials.

True, in a legal system like, for instance, that of the contemporary United States, we identify officials by what valid (non-ultimate) legal rules say about who counts as an official and by facts of how those rules were applied (eg facts of appointment of

judges). In this sense, one is only an official if her role is legally recognised.[216] However, who counts as an official in the jurisprudential sense is, at least in principle, a distinct question from the question whom positive law designates as 'an official'.[217] In other words, the issue is not about who is called 'an official' in practice, but about who performs the legally significant role that is referred to as 'official' in general jurisprudence. Positive law may appear to be unconcerned with how the people it designates as officials are perceived by the society at large. But general jurisprudence supplies an additional necessary condition for officials as a group to acquire and retain their role (in the jurisprudential sense): a condition of having the ability to guide action of non-officials.

A significant advantage of this argument is that it does not rely on any claims on robust normativity of law, viz. on how law creates genuine reasons for action for its subjects. The constitutive connection between non-officials and the existence of the law in a society is established merely by looking into whether the law figures in ordinary citizens' practical reasoning. There is no requirement that the people are normatively correct in following law in this way, that they *really should* do so. It is also not required, unlike in Postema's elaborate coordination account, that legal officials are *obligated* to make and apply laws in a way that is accessible to the public or that is consistent with non-officials' expectations.[218] Without being inconsistent

[216] For a helpful discussion of 'legal institutions' and 'organisations', see Denis Galligan, *Law in Modern Society* (OUP 2006) 126.

[217] Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 130) 110–112.

[218] Gerald J Postema, 'Coordination and Convention at the Foundations of Law' (1982) 11 The Journal of Legal Studies 165, 186–196.

with those other arguments, the one made here is simpler and demands fewer controversial assumptions.

C. WHY NOT GO FURTHER?

Denis Galligan is right that even taking the above into account, 'Hart relegates citizens to the sidelines'.[219] Hence, one might be tempted to go further and say: if official practices of recognition (that ground ultimate rules of recognition) are partly dependent on thoughts and actions of non-officials, then why would we take official practices as *ultimate* in a constitutive explanatory account of law? Perhaps Lord Hope of Craighead was close to the mark when he said in *Jackson* that '[the rule of recognition] depends upon the legislature maintaining the trust of the electorate'.[220] An ultimate place of officials would have been obvious had our object of explanation been the *law-among-officials* (eg in a community that consists only of officials). But even Hart seems to have been interested in the *law-in-society* instead. Otherwise, why include the condition of general non-official conformity at all?

I will note here two possibilities of reforming the Hartian account to give a more significant place to non-officials:

(1) what I call 'the meta-recognitional view' according to which the true ultimate social rule at the foundation of law is a social rule of the whole society, and

[219] Galligan (n 216) 121.

[220] *Jackson v Attorney-General* [2005] UKHL 56; [2006] 1 AC 262 [126].

(2) including at least some non-officials in the recognitional community (in the social group that gives rise to the rule of recognition).

i. The meta-recognitional view

The situation that would pose the most direct challenge to Hart's own view would be that of the existence of an all-society social rule of conditional conformity. For instance, in some society, people at large could have dispositions to conform to law only as long as 'the law is what officials publicly say it is'.[221] Or, perhaps more realistically, they might conform conditionally on the law not being extremely barbaric. I will assume for the sake of argument that such a social rule of conditional conformity is possible (but not that it is necessary), even if the conditions over which peoples' attitudes overlap are very hard for a legal system to violate.[222]

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[221] My thanks to William Baude for inspiring this line of argument.

[222] Matthew Kramer is right that there could be a 'harshly repressive regime' where officials 'adopt or condone myriad noxious forms of behavior which the citizens detest.' He is also right that

> As soon as we move down to the level of concreteness at which the norms of a regime are apt to be formulated, there is ample room for significant divergences between the basic proscriptions contained in those norms and the basic proscriptions favored by the citizenry. … Agreement at an abstract level on the need for certain fundamental proscriptions can be accompanied by far-reaching disagreement at the more concrete level where the proscriptions are spelled out.

Kramer, *In Defense of Legal Positivism* (n 1) 213–214. What follows is that these sorts of social rules are likely to be very minimally constraining. This is consistent with the observation that rebellions happen very rarely.

It may be too quick to follow Dennis Galligan in giving significant weight to the cultural significance of the ideas of constitutionalism in contemporary Western societies like, eg, '[t]he idea that [officials] have no powers other than those conferred by law; that the powers they have must be exercised reasonably, proportionately…'; see Galligan (n 216) 131–132. Just because those ideas are prominent in non-official elite imagination, it does not follow that they are accepted as a social rule in entire societies and even if they are,

This would be consistent with the people delegating day-to-day identification of law to an official practice of recognition,[223] but such delegation could be conditional. 'The law is what officials publicly say it is' is just one possible condition. There could be others, both regarding specific subjects or overall 'disregard of popular opinion [that] reaches truly outrageous proportions', as Kent Greenawalt suggested.[224]

For this to be a challenge to Hart, one also needs to accept that it is not necessarily the case that a social practice of officials is fundamentally constitutive of law as law of the whole society. What is really fundamental, is the existence and the content of *some* social practice, amounting to a social rule, specifying – likely in very broad terms – what counts as law and what social group counts as legal officials. Perhaps, in some, or even many, actual societies this social practice exists only among legal officials.[225] It is a mistake to argue that just because legal officials feature in *all* legal

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that this rule has enough specificity to constrain any actual official action. This remains a vital empirical question.

[223] See, eg, Galligan (n 216) ch 7.

[224] Kent Greenawalt, 'How to Understand the Rule of Recognition and the American Constitution' in Matthew Adler and Kenneth Himma (eds), *The Rule of Recognition and the U.S. Constitution* (OUP 2009) 163.

[225] This is analogous to the problem of different degrees of acceptance or knowledge between different legal officials. One cannot just assume that one tier of legal official counts because they know more – what is there to know is the very question (see sec. 6.B(ii)). And this is not the Hartian approach to general jurisprudence: we do not start with the content of law and work backwards to decide who are the people who know and accept the sources of what we first identified. Had that been our method we would only have been able to claim our conclusion to be true of the legal systems we did this exercise for. We first decide, through a conceptual argument, who counts and then claim that their practices constitute the law at the ultimate level. Depending on how we carve the underlying social practices, we may end up with different contents of the law.

systems, they are the only ones whose thoughts and behaviour ground the content of *every individual* legal system (at least on the fundamental level).

After all, every legal system of a society with a significant number of non-officials is partly constituted by those non-officials. This is part of Hart's view. Hence, if those non-officials have a social practice of rule-guided conditional conformity to law, then it may seem plausible that the content of this social rule partly determines (constrains) the content of law (as the law of the whole society).

How would the meta-recognitional rule manifest itself? Just like any social rule, we would see it in action, eg, in social pressure on those who do not conform. If those in charge of the legal system transgress against whatever the conditions are, the non-officials could seek rectification of the situation, through elections, referendums or through non-legal (but lawful) forms of social pressure (protest, ostracism, etc.).

ii. Broadening the recognitional community itself?

For Hart, non-officials did not count as members of the recognitional community. Ronald Dworkin claimed otherwise, but he was mistaken as a matter of exegesis.[226] But what if Hart was wrong? This is a distinct argument from the one I just sketched. Before, I argued that there may be a 'meta-recognitional' social rule that is a part of Hart's second condition of the existence of law (that of non-coincidental general conformity by non-officials). Now, I will suggest broadening the recognitional community itself. That is, that the social group whose thoughts and behaviour ground ultimate rules of recognition may include at least some non-officials.

[226] Dworkin (n 206) 34; see also Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 New York University Law Review 1035, 1700–02; Kramer, *H.L.A. Hart* (n 1) 79.

Irrespective of the issue whether in all legal systems any non-officials accept ultimate rules of recognition,[227] what about the law-subjects who *do* accept?[228] Hart himself states that it is possible for non-officials to accept ultimate rules of recognition.[229] If law-subjects accept, then why should their acceptance not be considered as contributing to the grounding of ultimate rules of recognition on an equal basis with that of the officials?[230]

This matters because we might get different content of a rule when we count the 'acceptance-votes' of legal officials and if we count 'acceptance-votes' of everyone who accepts some rule of the proper form (that does the job of an ultimate rule of recognition: ie imposes on legal officials duties of recognition).[231]

Why not go this way? I will first consider several bad counterarguments, but in the end, I conclude that there is a convincing reason to endorse the officials-only

[227] Hart, *The Concept of Law* (n 1) 117; Green (n 197) 1700–02; Smith (n 211); Gardner, '*Law as a Leap of Faith* as Others See It' (n 212) 837–42.

[228] Michael A Wilkinson, 'Is Law Morally Risky? Alienation, Acceptance and Hart's Concept of Law' (2010) 30 OJLS 441, 461–62; Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 130) 108–117.

[229] Hart, *The Concept of Law* (n 1) 114.

[230] Why say that 'this would amount at most to a *separate* social rule'? Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 130) 116–117.

[231] The discrepancy is precisely what makes it very attractive for Baude and Sachs to adopt the broader view of the recognitional community. To put it simply, it seems that the general public in the US is more originalist than US legal officials. Hence, if one wants to say that positive originalism is required by ultimate rules of recognition, one's argument will be stronger, *ceteris paribus*, if the 'acceptance-votes' of the public count for determining the content of ultimate rules of recognition than if they do not.

view. The following discussion applies to both the meta-recognitional argument and to the argument for broadening the recognitional community.

2. BAD COUNTERARGUMENTS

A. OFFICIALS ARE THE ONLY ADDRESSEES OF RULES OF RECOGNITION

Hart allowed for the possibility of a legal system where non-officials accept ultimate rules of recognition.[232] There is little that is necessarily different in attitudes of officials and of non-officials regarding ultimate rules of recognition.[233] Both officials and non-officials can accept any kind of rule: primary or secondary, duty-imposing or power-conferring.

However, perhaps the only people who can be in a constitutive relationship with an ultimate rule of recognition are its addressees.[234] Ultimate rules of recognition impose on legal officials duties to identify certain norms as law.[235] According to Matthew Kramer, they also confer powers to 'engage in authoritative acts of law-identification.'[236] The point is that whatever they require, allow or empower, they address only legal officials.

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[232] Hart, *The Concept of Law* (n 1) 114.

[233] Galligan (n 216) 128–130.

[234] For an argument that seems implicitly to assume this, see Perry (n 214) 302–303.

[235] Hart, *The Concept of Law* (n 1) 94–95, 105–106.

[236] Kramer, 'In Defense of Hart' (n 62) 378–380. See also n 62.

To the extent this argument is supposed to stem from the nature of social rules in general, it fails. A social rule may be grounded in a social practice of those who could not be directly guided by what the rule requires.[237] A rule that men ought to take their hats off in church may be a social rule of the whole society, including women.[238] This is so because women can still genuinely accept it, even if this will manifest only in dispositions to criticise those men who do not conform and in normative expectations that they will conform.[239] You do not have to be an addressee for your acceptance to be a part of the social practice that grounds it.

Ultimate rules of recognition could be a special kind of social rules, for which it is true that they can only be constituted by a social practice of those to whom they are addressed. But that needs to be established by a different argument, because it does not follow from their nature as duty-imposing (or power-conferring) social rules.

B. THE KNOWLEDGE ARGUMENT

Hart has written:

> the reality of the situation is that a great proportion of ordinary citizens-perhaps a majority-have no general conception of the legal structure or of its criteria of validity.[240]

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[237] Hacker (n 130) 15; Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 130) 108–110.

[238] cf Kramer, *H.L.A. Hart* (n 1) 90.

[239] Here 'expect' is not a synonym of 'predict,' but of 'require,' 'call for' and so on.

[240] Hart, *The Concept of Law* (n 1) 114; see also ibid 60–61.

Naturally, Hart did not claim that non-officials cannot possess the same knowledge about the content and the sources of law that officials have. He expressly mentions lawyers as 'experts of the system.'[241] However, it may be tempting to say that only those who know the sources of law can be in a constitutive relationship with them. This argument fails.

Whose thoughts and behaviour count in grounding the foundations of law (either in the recognitional or the meta-recognitional way) cannot depend on relatively greater knowledge of the content and of the sources of law for two reasons.

First, unless we restrict the group of officials only to sophisticated judges of highest appellate courts, then at least some officials who authoritatively say what the law is (eg police officers) will differ little from many non-officials in how much they 'know' about the sources of law. And even if we restrict the group of officials just to senior judges, some non-officials like lawyers and legal academics know more than most legal officials. If it is about knowledge, the legal experts should count as members of the recognitional community. But this is almost trivial compared to the second argument.

Second, using relatively greater knowledge as an argument against the meta-recognitional view or against broadening the recognitional community is question-begging. In an inquiry like this, one must first establish what is the object of knowledge. Only then one can properly ask who possesses that knowledge. We do not have the luxury of perfect knowledge of the content of law in any legal system that would allow us to work backwards to who possesses it. To some extent, this is a matter of controversy in every legal system.

[241] Hart, *The Concept of Law* (n 1) 60.

In fact, if one wants to argue from the content of rules to who generated them, then one should more readily conclude that the recognitional community is very broad. Why? Given disagreement and indeterminacy, a non-arbitrary way to proceed is to start with prevalent agreement at least among those who purport to be legal experts (full unanimity may be too strong). If one is rigorous in that inquiry, then the result is likely to be a strikingly bare-bones picture of law (at least at the top). For instance, some parts of what, according to some, counts as constitutional law, may not figure in it.

When it comes to ultimate rules of recognition, the object of knowledge will differ depending on how widely we cast our net. We are likely to get more detailed, sophisticated content if the recognitional community consists of high-level judges and very sparse, shallow content if we make the group much broader. More importantly, we may get *inconsistent* results.

The problem with the knowledge argument is even more pronounced when we contrast it with the meta-recognitional view. Perhaps the bulk of non-officials can never be relied on to have any beliefs (or attitudes) regarding Hartian secondary rules.[242] Hence they will not have an internal point of view towards them.[243] But why simply assume, for instance, that Hartian criteria of validity ('whatever Queen-in-Parliament enacts is law') are really fundamental? Perhaps what is fundamental is

[242] Adler (n 144) 734.

[243] Hart, *The Concept of Law* (n 1) 117.

how non-officials identify the group of officials as officials of the legal system of the whole society?

True, the content of any meta-recognitional social rule is likely to be very thin and to condition conformity only on seemingly extreme transgressions of legal officials. But once this is admitted, then it is a hypothesis arguably consistent with empirical observations. It is no less suspect than a univocal set of ultimate rules of recognition. This goes to show that deciding between the different views I presented may not be possible through looking at historical instances of law, however tempting such 'realism' is.

C. INCOMPATIBILITY WITH ALIENATION FROM LAW

General jurisprudence should not preclude the possibility for law-subjects to be alienated from the law.[244] There may be a worry that either accepting the meta-recognitional view or broadening the rule of recognition would be incompatible with this conclusion.

For some, this worry may stem from an implicit assumption of a normatively robust, moralized notion of acceptance that neither I, nor Hart, use. If someone genuinely uses a rule to guide her behaviour, or at least to criticise others for

[244] See ibid 208–09; Jeremy Waldron, 'All We Like Sheep' (n 178) 175–77; Adler (n 144) 734; Green (n 226) 1052–54, 1057; Wilkinson (n 228).

As Jeremy Waldron put it:

> … considering what positive law actually is, its existence in a society raises a real and serious prospect that it will be used to facilitate injustice and to confuse and mystify many of those who are subject to that injustice and who have no choice but to live their lives under its auspices.

Waldron, 'All We Like Sheep' (n 178) 181.

non-conformity and so on, then she accepts the rule. Hence, even if someone believes a legal rule to be unjust but she uses it in this sense, then she accepts.

A more serious challenge concerns 'confusion and mystification'.[245] What if law-subjects are being deceived about, or for some other reason are prevented from knowing, the content of law? Non-coincidental conformity is required only most of the time for law to exist. Conversely, it could be that some people systematically are prevented from staying on the right side of the law. If this situation is too prevalent, then it would threaten the law's existence-in-society, in accordance with the second condition of the law's existence. Hence, some alienation in this sense is possible, and perhaps, inevitable. Too much and the law would cease to exist (for the society as a whole).

There is space for that even on the meta-recognitional view. The levels of alienation we observe in real-life instances of law, both in terms of perception of injustice of law and in terms of unknowability, do not lead people to stop conforming to the law, but they do give rise to different forms of social protest.

Of course, this is also consistent with the hypothesis that people conform to law in an unconditional way. That people did not rebel in Nazi Germany or in Soviet Russia can also be explained in several ways. To some extent, the true iniquity of those legal systems was hidden through disinformation. Hence, the law-subjects may have been factually mistaken that their conditions of conformity were satisfied. Also, whatever we may like to think about ourselves, it seems that people do not rebel so

[245] See n 244 above.

easily even if they know that they are acquiescing to an iniquitous system.[246] In this sense, the cases of alienation show how minimally constraining the meta-recognitional practice is.[247] But this does not mean that it does not obtain.

3. A PLAUSIBLE COUNTERARGUMENT: INSTITUTIONAL ROLE OF OFFICIALS

Legal systems are institutionalized normative systems. Leslie Green argued that this entails that 'the only consensus necessary for law is a consensus of elites.'[248] Joseph Raz claimed that it is:

> … reasonable to take the law to consist of those norms, rules, and principles, that are presented to individuals as guides to their behaviour by the body of legal institutions as a whole.[249]

He also stated that law-applying institutions have priority among all legal institutions, because 'they have final authority to declare what is law.'[250] Stephen

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[246] As Galligan noted:

> … it is hard to think of historical examples of a [legal] system where citizens merely obeyed and only officials accepted. The more we learn about those [legal systems] qualifying as the most repugnant of recent times, the Germany of Hitler, Soviet Union of Stalin, or the China of Mao, the clearer it becomes that they had not just the obedience but the positive support of large sections of the population. If examples of regimes that lacked popular support could be found, the chances are their life was short, rendering them a pathological rather than normal case of a legal system.

Galligan (n 216) 128.

[247] See also n 222 above.

[248] Green (n 197) 1702. See also Waldron, 'All We Like Sheep' (n 178) 180–81.

[249] Raz, *The Authority of Law* (n 36) 88.

[250] ibid.

Perry challenged this argument rightly pointing out that the way Raz presented it, it appears question-begging.[251] Perry noted that who has the final authority Raz speaks of 'would seem to be a question of law within the particular legal system' and not something that general jurisprudence could settle.[252]

If seen as empirical statements regarding the *content* of actual legal systems, Raz's claims are implausible. They would not be a proper response to someone who prefers to see all citizens as possessing law-defining authority in the relevant, constitutive sense. It is not incoherent to have a 'deep popular constitutionalist' view, to use Matthew Adler's term,[253] accepting meta-recognition or a broad rule of recognition.

The better argument is conceptual. Consider the methods that non-officials can use to affect what is the content of law even on the folk concept of law. They can participate in elections of law-officials. They can also exert social pressure on officials, eg by lobbying or by protest. However, in both types of cases, the effect of actions of non-officials on the content of law (again, even on the folk concept) is mediated by officials. Non-officials do not exercise legal authority in those situations, which is the distinctly legal method of interacting with the law.[254] One important

[251] Perry (n 214) 321.

[252] Perry's second point was that in some legal systems there are legal norms that the courts are barred from applying; see ibid.

[253] Adler (n 144) 798.

[254] As Scott Shapiro rightly put it: 'The business of law is the creation and exercise of authority, and its participants are the officials who operate the levers of legal power.' Scott Shapiro, 'Law, Plans, and Practical Reason' (2002) 8 Legal Theory 387, 418.

piece of evidence for this understanding of our concept of law is that both officials and non-officials in their attempts to determine issues of ultimate criteria of validity '[regard] as relevant' 'the views of other officials', but not those of non-officials.[255] Whatever non-officials can do does not count as direct influence over the law.

As Hart has written, the officials' interaction with the law is the 'relatively active aspect' of the law's existence, while the non-officials' interaction is the 'relatively passive aspect'.[256] Austin's concept of law, at least on Hart's rendition, privileged the passive aspect of habitual obedience to orders backed by threats of coercion. Hart's concept of law privileged the active aspect of 'the law-making, law-identifying, and law applying operations of the officials or experts of the system'.[257] If we accept Hart's concept of law, then to show a direct constitutive connection between non-officials and the content of law, we would need to establish that they directly play such active role.

However, to establish that the conceptual argument is conclusive requires more than space allows to offer in this paper. A full argument must show why authoritative interactions with law (like legislating and adjudicating) should be privileged in a constitutive account of law to the extent of excluding other kinds of interaction.[258] It could still be argued that, like with games, the role played by the 'scorer' is not the one that matters ultimately to constituting the game – something that Hart seems

[255] Lamond, 'The Rule of Recognition and the Foundations of a Legal System' (n 130) 112.

[256] Hart, *The Concept of Law* (n 1) 61.

[257] ibid.

[258] Other than as a binary condition of the existence of legal systems as I argued in sec. 1.A above.

not to have addressed sufficiently. If law is special in this respect, that should be adequately justified.

A. REFERENDUMS

Even assuming the conclusion of the conceptual argument, what about referendums? A referendum could be a method for changing even the highest laws (eg a codified constitution). A legal system may allow for referendums to be called and organized entirely without involvement of 'ordinary' officials, like members of the established branches of government. In that sense, there would be no official intermediation. Raz would likely respond that this is a method of law-creation, not of authoritative determination of the content of law (while applying the law). Hence, whatever the referendum result, it would still be subject to the final authority of the courts. The courts will get to say what the referendum result means. But, as I said, without further justification, this is question-begging. It could be that the courts are in some important sense bound by referendum results. For instance, that they could not declare a referendum invalid. Also, just because the courts may have final authority it does not follow that they cannot err as to what the law requires.

If, pace Raz, law-application is not privileged in our concept of law over law-creation,[259] then the following conclusion appears to have some force. Whenever the people at large possess authority to change the law in such an unmediated way, their social rule of identifying the law and delegating further law-identification to some group of legal officials is at the constitutive foundation of law. Ultimate official

[259] See also Stephen E Sachs, 'Finding Law' (2019) 107 California Law Review 527, 556.

custom (practice) of recognition is then derivative. Importantly, this means that the legally-relevant content of the official practice of recognition could be constrained by the meta-recognitional social rule of non-officials.

There remains an issue of what makes it legally the case that a referendum is a referendum. A counter to the last argument may stress that this is likely to be defined in a law grounded in merely official practice. However, it is possible to have a popular sovereigntist view according to which it is always open to the people at large to self-organise in referendums or constitutional conventions and make laws, irrespective of whether this method of law-making is otherwise provided for by the law.[260]

While not being entirely convinced by Raz's privileging of law-application, I am also not convinced that the situation of the public at large possessing an unmediated legal ability to determine or to change the law is enough of a focal case to warrant revision of the more standard view that I defended in this chapter.

4. CONCLUSIONS

I thus tend to think that Hart was right that it is a social practice of legal officials that lies at the foundation of every legal system, though not for the reasons Hart himself gave. In other words, legal officials form the recognitional community, which gives rise to ultimate rules of recognition of a legal system. Naturally, what officials 'can

[260] After all, this was an argument self-consciously relied in the process of making of the US Constitution. See eg Gordon S Wood, *The Creation of the American Republic, 1776-1787* (Norton 1972) 342; Bruce A Ackerman and Neal Katyal, 'Our Unconventional Founding' (1995) 62 University of Chicago Law Review 475, 568; Richard S Kay, 'Original Intention and Public Meaning in Constitutional Interpretation' (2009) 103 Northwestern University Law Review 703, 707.

get away with' is causally constrained by what non-officials think and do, but history teaches us that this is not as strong a constraint as we might hope.

My discussion suggests that law does have an inherent capacity to alienate non-officials and that this problem cannot be alleviated on the level of general jurisprudence. Note that the understandings of 'alienation from law' are likely to be different in socio-legal and in jurisprudential inquiry. Non-officials could know and even enthusiastically accept *the official story of the law*. But if I am right, this would be consistent with them rejecting or being in the dark about *the content of law* to some extent. However, this should not be overstated. There is still the requirement of non-coincidental conformity of non-officials for law to exist as law-in-society (not just law-among-officials) and this requirement brings jurisprudential and socio-legal perspectives closer.

However, I also noted that one attractive way to combat alienation, in the jurisprudential sense, is to turn non-officials into officials. In other words, to give non-officials legal tools, like participation in a referendum, to influence the content of law without intermediation of 'full-time' officials. Take, for instance, a legal system that recognizes citizen-administered referendums with power to change any law and not subject to judicial scrutiny (at least to the extent legislative proceedings of UK Parliament are non-justiciable). It is open to argue that in such legal system the relevant social practice grounding the foundations of law is that of all citizens, not just 'full-time' officials (what I called the 'meta-recognitional' practice). However, I am not convinced that this remote possibility calls for a radical departure from the revised Hartian view I defended in this chapter.

Part 2 Constitutional Change and Legal Powers

IV. CONSTITUTIONS AND CONSTITUTIONAL CHANGE

In the first part of this thesis, I developed an account of foundations of legal systems in terms of Hartian rules of recognition. I discussed how rules of recognition are constituted and the role of legal officials and of non-officials in forming ultimate rules of recognition. This second part of the thesis brings the discussion to the field of constitutions and constitutional change. Over the next four chapters I give a general account of constitutions and constitutional change in terms of the theory of the foundations of law from the first part of the thesis and of the jurisprudential and doctrinal notion of legal powers.

I devote the present chapter firstly to specifying what sense of 'constitutions' and 'constitutionality' I am concerned with, a perspective I call 'constitutional positivism' (sec. 1). I also set out the connection between constitutions and rules of recognition (sec. 2). In particular, I show the difference between ultimate rules of recognition and constitutional conventions. I end the chapter, in sec. 3, by distinguishing between 'explicit' and 'implicit' constitutional change.

Later in this part of the thesis, in chapter V, I elucidate the concept of a legal power to change the law and show its boundaries. With the concept of a legal power in hand, in chapter VI I distinguish between primary constituent powers and amendment powers (legal powers to change the constitution). Finally, in chapter VII, I consider several different ways in which constitutions may change without anyone exercising an amendment power.

1. 'CONSTITUTION' AND 'CONSTITUTIONAL'

Many meanings tend to be associated with the terms 'constitution' and 'constitutional'.[261] I prefer to adopt an approach as ecumenical as possible in this respect, but it is still necessary for me to make some clarificatory points, which I do in sec. 1.B. below. First, however, I will give a brief overview of the spectrum of modern views of constitutions to put in context the notion which I adopt.

A. THE SPECTRUM OF MODERN VIEWS OF CONSTITUTIONS

It is common to contrast formal and substantive conceptions of constitutions. Formal accounts focus on features like writenness, codification, the source of the constitutional rules or their hierarchical relationship with ordinary legal rules.[262] Substantive accounts on the other hand 'try to identify the main principles and institutions which constitute the core of constitutional regulation'.[263] In other words, substantive accounts focus on the content of constitutions.

[261] For a sample of overviews of the relevant debates, see eg Barber, *The Constitutional State* (n 130) ch 5; Stephen Holmes, 'Constitutions and Constitutionalism' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012); Stephen Gardbaum, 'The Place of Constitutional Law in the Legal System' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012); Mark Tushnet, 'Constitution' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012); David Dyzenhaus, 'The Idea of a Constitution' in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (OUP 2016); Rainer Grote, 'Definition of Constitutions' in Rainer Grote (ed), *Max Planck Encyclopedia of Comparative Constitutional Law* (OUP 2018) <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e2>.

[262] Grote (n 261) [9]-[13].

[263] ibid [12].

The simplest and often very useful formal conception of constitutions is the one that identifies codified constitutions (like the US Constitution or the German Basic Law) and contrasts them with the UK constitution. However, its popular sibling that focuses on mere writenness is somewhat more problematic.[264] If a 'written constitution' is to mean anything more than just a 'codified constitution', then it is not clear how it could exclude the UK constitution or any other modern constitution (on any view the UK constitution is partially grounded in written legal acts, like the Bill of Rights). The usefulness of that conception would then have to lie in distinguishing different types of constitutional rules within one constitutional order – those grounded in some written document and others.

Hans Kelsen's broad ('material') view of constitutions is among the most famous formal accounts even though it uses the term 'constitution' in a significantly different meaning from that adopted by other authors. I discuss Kelsen's position in more detail in chapter VIII. Here I will only note that according to Kelsen the constitution in a material sense is comprised of 'rules regulating the creation of general norms'.[265] Hence, Kelsen saw material constitutions as consisting only of something like Hartian rules of change. This is a formal view because it defines constitutional rules by their hierarchical (or rather: norm-creating) relationship with other legal rules. Kelsen distinguished the constitution in a 'material' sense from the constitution in a 'formal' sense, which is also a formal view of constitutions. Kelsen has written:

[264] Gardner, 'Can There Be a Written Constitution?' (n 148).

[265] Kelsen, *General Theory of Law and State* (n 30) 124.

> The constitution in the formal sense is a certain solemn document, a set of legal norms that may be changed only under the observation of special prescriptions, the purpose of which it is to render the change of these norms more difficult. … The formal constitution, the solemn document called "constitution," usually contains also other norms, norms which are no part of the material constitution.[266]

What distinguishes the 'formal' constitution is that 'enactment, amendment, annulment, of constitutional laws is more difficult than that of ordinary laws'.[267] Kelsen noted that there can be constitutional orders without a constitution in the formal sense (eg the United Kingdom), but not without a constitution in a material sense.[268]

Moving on to substantive views of constitutions, one of the most influential ones was offered by Carl Schmitt.[269] As Lars Vinx has put it, according to Schmitt:

> … a constitution is not to be identified with the constitutional laws that are contained in the written constitutional text. Rather, a constitution, first and foremost, is a 'concrete' social order or 'positive constitution', which is put in place by an exercise of constituent power and which embeds a number of fundamental social values. The written constitution, in Schmitt's view, is no more than an attempt to codify this antecedent concrete social order endorsed by the popular sovereign.[270]

The real, positive constitution consists of 'the core constitutional identity of a democratic political order', which means that it regulates 'the form of government, the State's structure, and society's highest principles and symbolic values'.[271] This is

[266] ibid.

[267] ibid 125.

[268] ibid.

[269] Grote (n 261) [5].

[270] Lars Vinx, 'Introduction' in Lars Vinx (ed), *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law* (CUP 2015) 10.

[271] Roznai (n 17) 109.

a substantive account because the constitution is defined here by reference to its content.

An example of a more recent substantive view of constitutions is the one advocated by Nick Barber.[272] According to Barber, a constitution may be seen as 'the whole assemblage of rules that define the structure of the state'.[273] Barber presented his account as a criticism of Kelsen's formalist approach, showing how difficult it is to give an adequate account of a constitution in formal terms due to the possibility of a plurality of domestic legal orders and due to the existence of non-legal constitutional rules.[274]

Some authors writing on related topics use 'formal' and 'substantive' in different senses than the ones I have been using so far in this overview. David Dyzenhaus suggested that there are two rival conceptions of what is a constitution:

> Is it a set of *formal authorization rules* that authorize legislators, judges, and other legal officials to make, interpret, and implement the law or is it a set of *substantive principles* that materially limit what certain officials are permitted to do, for example, by entrenching individual rights against the state as in a bill of rights legal order?[275]

The question posed by Dyzenhaus seems to be a question about the distinctive *content* of constitutional rules, ie a question within the broadly *substantive* family of views of constitutions in the sense that I have been using. However, we can see

[272] Barber, *The Constitutional State* (n 130) ch 5.

[273] ibid 174.

[274] ibid ch 5.

[275] Dyzenhaus (n 261) 13–14.

similarities between a substantive conception of constitutions according to which constitutional rules are 'formal authorization rules' and a formal conception like Kelsen's defined by a relationship between constitutional rules and other legal rules. This suggests that depending on emphasis some conceptions of constitutions may look more formal or more substantive.

B. MY 'CONSTITUTIONAL POSITIVISM'

I do not offer here a distinctive conception of constitutions to rival any formal or substantive account. For the purposes of this thesis I adopt the working notion of 'constitutional positivism', by which I mean merely that whatever constitutional rules there are, they are positive, ie grounded in social facts. On my view, the content of any constitution is exhausted by its rules and all constitutional rules are constituted by social facts. To be clear, there may be non-positive principles of (or the ideal of) constitutionalism, just like there may be non-positive principles of (or the ideal of) legality, that are an external standard by reference to which we can criticise any actual constitution and which may causally influence the development of any constitution. However, just like the ideal of legality does not feature in a positivist constitutive explanatory account of law,[276] the ideal of constitutionalism does not feature in my constitutive explanatory account of constitutions.

By a 'rule' I mean any kind of a norm (normative standard). For my purposes there is nothing sufficiently different about 'principles', even assuming this category is useful in some other contexts, to justify treating them separately from other

[276] In other words, there may be law without legality, though I have sympathy towards the view that, in a sense, it would be a 'non-paradigmatic' case of law; see John Gardner, *Law as a Leap of Faith* (n 1) 29–34, 190–194, 217, 224–226; John Gardner, '*Law as a Leap of Faith* as Others See It' (n 212) 839.

rules.[277] Thus, I take rules to be the units of content of both constitutions and of legal systems.

Even though in this thesis I explicitly refer only to state constitutions, I think that other kinds of political communities also may have constitutions. If any such non-state political community has a its own distinct legal system, then my analysis could apply to it as well.

This positivist approach in no way entails that constitutions are limited to 'formal authorisation rules' or to rules grounded in codified constitutional documents. I reject categorically David Dyzenhaus' puzzling claim that 'legal positivism in its constitutional theory register' is 'insistent that the constitution ought to contain only formal authorization rules of the kind one finds in a parliamentary legal order'.[278] In fact, it is very much possible on my view for a constitution to contain '*substantive principles* that materially limit what certain officials are permitted to do'.[279] The only kind of principles (rules, norms) that my account excludes are any alleged non-positive (moral, political) principles that are not grounded in what, as a matter of social fact, given political community accepts.

It is a contingent matter exactly what constitutional rules will there be in any given constitutional order, but I tend to think that both categories identified by

[277] See also Hart, *The Concept of Law* (n 1) 261–262; Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale Law Journal 845; Marmor (n 172) 85–92.

[278] Dyzenhaus (n 261) 23. Dyzenhaus' claim is rather perplexing, given that legal positivism is a very specific thesis about the nature of legal validity, not about the nature of constitutions; see Gardner, 'Legal Positivism: 5½ Myths' (n 2).

[279] Dyzenhaus (n 261) 13.

Dyzenhaus ('formal authorisation rules' and 'substantive principles') are likely to be found in modern constitutions. Importantly, any constitution is very likely to consist of both legal and non-legal rules and I will say more about how rules belonging to each of those categories can be constitutional rules later on in this chapter (see sec. D).[280]

I am not advancing here an exhaustive definition of a constitution. However, I do think that – at minimum – all rules that directly regulate constitutional change are constitutional rules. I also hold that all supreme and ultimate rules of the legal system are constitutional rules.[281] I take those claims as relatively uncontroversial.

Furthermore, two distinct senses of the adjective 'constitutional' feature prominently in my argument. By 'a constitutional rule' I mean a rule that is a part of the content of a constitution (an element of the set of rules that form the content of that constitution). However, I also talk of 'constitutional' (and 'unconstitutional') constitutional rules and changes. In this second register, a constitutional constitutional change is a change of a constitution that happens in accordance with that constitution. Conversely, an unconstitutional constitutional change somehow violates the constitution. A constitutional constitutional rule is a rule of the constitution brought into being through a constitutional constitutional change (and conversely with unconstitutional constitutional rules). It is one of the key aims of this thesis to interrogate what it takes for a constitutional change to be in accordance

[280] See also Barber, *The Constitutional State* (n 130) 81–82.

[281] It is not necessary for a legal system to have a hierarchy of legal rules except for the fact that ultimate rules of recognition are ultimate legal rules, see below sec. 2.

with a constitution and I have a great deal more to say about that, especially in chapters IX and X.

C. LEGAL CONSTITUTIONAL RULES

For any rule to be a legal *constitutional* rule, it first needs to be a *legal* rule. Legal rules come in legal systems. Whether a rule is a (valid) legal rule of the particular legal system depends on whether it is identified as such directly or indirectly by the system's ultimate rules of recognition.[282] Ultimate rules of recognition are social norms (social rules) that emerges in the social group of legal officials, and their essence is that they impose duties (and perhaps powers) to identify certain norms as valid rules of the legal system. I build here on Hart's account of the rule of recognition, with some clarifications introduced by other authors, especially by John Gardner, Matthew Kramer, and Grant Lamond.[283] Though not uncontroversial, it is a canonical framework and it provides a good basis for the following discussion.[284]

To identify a legal rule as a constitutional rule, two additional criteria may be helpful: legal entrenchment and hierarchical superiority in respect to other legal rules. Not every constitutional rule is entrenched, and constitutional rules may also

[282] Hart, *The Concept of Law* (n 1) ch 6. I will say much more on rules of recognition later in Part 3.

[283] Kramer, *Where Law and Morality Meet* (n 1) ch 4; Gardner, *Law as a Leap of Faith* (n 1); Grant Lamond, 'Legal Sources, the Rule of Recognition, and Customary Law' (n 46). For my detailed discussion see Part 3.

[284] For a recent critique of Hart's discussion of the rule of recognition see Shapiro, *Legality* (n 85) ch 4. See also Waldron, 'Who Needs Rules of Recognition?' (n 163).

not be hierarchically superior to other rules of the legal system, but a rule that has either of those features is more likely to be a rule of the constitution. In fact, if there is a hierarchy of legal rules, then the rules at the very top are constitutional rules ('[c]onstitutional law is as high as the law goes').[285] This is consistent with the possibility that constitutional rules derived from a codified constitutional document will not be held legally supreme or even enforceable by the courts (like, for example, in the Netherlands).[286]

Legal constitutional rules may come from a variety of sources, even when there is a canonical legal document like 'the United States Constitution'. They may come from statutes, judicial decisions or from custom. In the account developed here I strongly reject the alleged formalism, or text-centrism, of a straw man version of legal positivism that non-philosophers tend to criticise.

D. NON-LEGAL CONSTITUTIONAL RULES

As I mentioned, I accept that non-legal constitutional rules are constituted by social facts, just like legal rules. Those facts are likely to be similar to the ultimate rules of recognition that underlie any legal system. However, in this thesis I do not consider this issue systematically as my focus is on the foundations of law. That said, my discussion of the nature of ultimate rules of recognition also touches on the

[285] Gardner, 'Can There Be a Written Constitution?' (n 148) 179.

[286] Richard S Kay, 'Comparative Constitutional Fundamentals' (1991) 6 Connecticut Journal of International Law 445, 459., On a broader view of constitutional rules (not limited to rules grounded in a codified constitutional document), even in the Netherlands the ultimate rules of recognition are both ultimate legal rules and constitutional rules. For my discussion of rules of recognition as legal and constitutional rules see below sec. 2.

hypothesis of broader and perhaps more fundamental social rules (meta-recognitional rules), which can be seen as non-legal constitutional rules (chapter III).

'Constitutional conventions' in the United Kingdom are a paradigmatic example of non-legal constitutional rules.[287] Adam Perry and Adam Tucker have argued that there are both 'bottom-up conventions' and 'top-down conventions'.[288] Bottom-up conventions are social rules, which means that they are grounded in special social practices, just like customary rules or ultimate rules of recognition (for example, the UK convention 'that requires the monarch to do as her ministers advise').[289] Top-down conventions are 'prescribed' rules, that is rules created through exercise of normative powers (for example, 'the rules the [UK] Prime Minister adds to the [Ministerial] Code').[290] But normative powers have to come from somewhere. According to Perry and Tucker, those powers are conferred by bottom-up conventions (in the case of the UK Ministerial Code, there is a bottom-up convention that Ministers have a duty to follow the Code[291]). Thus, on their view, all non-legal constitutional rules are either social rules or are created through exercises of powers conferred by social rules.[292]

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[287] See eg Geoffrey Marshall, *Constitutional Conventions* (OUP 1984); Farrah Ahmed, Richard Albert and Adam Perry, 'Judging Constitutional Conventions' 2017 <https://ssrn.com/abstract=3043190>.

[288] Perry and Tucker (n 152).

[289] ibid 765, 767–770.

[290] ibid 776. On normative powers see ch V.

[291] ibid.

[292] ibid 770–774.

I think this is right, but there is one aspect in which that picture is incomplete. Just like in the case of the interaction between rules of change (rules conferring powers to change the law) and rules of recognition (rules imposing duties to recognise certain norms as law), here too there is a need for correlate duty-imposing rules.[293] One can only successfully create a duty through an exercise of a normative power if there is not only a rule grounding the power, but also a distinct rule grounding the duty.[294] In other words, there must be relevant bottom-up conventions not only conferring powers to make top-down conventions, but also imposing on some people or institutions duties to recognise and apply top-down conventions.

Could a change of such non-legal rules be deemed 'unlawful' or 'unconstitutional'? Perhaps, but 'unconstitutionality' of change in non-legal rules is not as central in legal discourse as that of change in legal rules. Hence, I choose to leave the issue of change of non-legal rules for another time.

Another way in which non-legal constitutional rules may matter for constitutional change is by governing change of both legal and non-legal constitutional rules. Three prominent examples are to be found in the famous Canadian *Patriation Reference*, the Indian *NJAC* judgment and in the *Miller* (Brexit) litigation before the UK Supreme Court.[295] In the *Patriation Reference*, it was argued

[293] See ch II.3.A above.

[294] Gardner, 'Can There Be a Written Constitution?' (n 148) 176–177.

[295] *Re Amendment of the Constitution of Canada (Nos 1, 2 and 3)* [1981] 1 SCR 753; *Supreme Court Advocates-on-Record Association v Union of India* [2015] SCC OnLine SC 964 ('NJAC'); *R (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5. In the *Miller* case, the Supreme Court refused to apply a political convention, even without enforcing it, saying: 'Judges (…) are neither the parents nor the guardians of political conventions; they are merely observers.' For a similar approach of

that a constitutional convention required the consent of the Canadian provinces before a certain kind of change in Canadian constitutional law could take place.[296] In *NJAC*, the validity two Indian Acts of Parliament was challenged on the grounds that they violated a constitutional convention, which formed part of the 'basic structure' of the Indian constitution.[297] In *Miller*, the Scottish government argued that a constitutional convention required the consent of the devolved Scottish legislature before UK Parliament could legislate in a way affecting the constitutional relationship between Scotland and the United Kingdom.[298] *NJAC* is different from the other two cases, because there the Supreme Court of India decided to legally enforce a convention and to do so by striking down statutes.[299] However, I want to stress that this is not a core concern of the present work. My aim is to elucidate how *legal* rules constrain constitutional change.

E. LEGAL AND POLITICAL CONSTITUTIONALISM

There are two main reasons why I avoid the language of 'legal' and 'political' constitution or constitutionalism, instead focusing on legal or non-legal constitutional *rules*. First, the concepts of legal and political constitutionalism are

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the Privy Council, see *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645; [1968] 3 WLR 1229, 723. See also Ahmed, Albert and Perry (n 287) 12–24.

[296] Marshall (n 287) ch 11; Peter C Oliver, *The Constitution of Independence* (n 75) ch 7.

[297] Ahmed, Albert and Perry (n 287) 22–23.

[298] *Miller* (n 295) [136]-[151].

[299] Ahmed, Albert and Perry (n 287) 23.

notoriously controversial and contested to the extent that to employ them unnecessarily would make it even more difficult for me to achieve my aim to clarify the debate on the foundations of law and legal change. Second, there is no necessity for me to do so, because those concepts belong to a different debate with rather different goals. That other debate is prescriptive; it is concerned with how polities *should* be organised, what sort of legal or non-legal institutions or procedures *should* there be.[300] Should there be strong judicial review of constitutionality of statutes, as legal constitutionalists tend to claim? Or should the polity rely on political (non-judicial) mechanisms to address disagreement, as political constitutionalists prefer? Such questions are outside of the scope of this thesis.

My focus on how constitutional change can be law-governed should not be mistaken for a view on what kind of such legal regulation should there be. Or in other words, for a view on how 'legal' or how 'political' any constitution should be.[301] However, the contribution to constitutional theory I make in this thesis is helpful also for the political constitutionalism debate. By shedding light on the extent to which constitutional change is law-governed and, more broadly, on the boundary between law and non-law (chapters IX-X), as well as on constitutive relationships between the polity and the legal system (chapter III), I make it possible to introduce more precision in the political constitutionalism debate.

[300] See eg Graham Gee and Gregoire Webber, 'What Is a Political Constitution?' (2010) 30 Oxford Journal of Legal Studies 273.

[301] David Dyzenhaus rightly noted that political constitutionalists are not entirely against legal constitutions, they just support legal constitutions of a certain kind ('limited to a particular kind of formal authorization rule'), see Dyzenhaus (n 261) 21–22.

2. IS THE CONSTITUTION THE RULE OF RECOGNITION?

The relationship between rules of recognition and constitutions is a source of confusion. Some claim that their constitution is their rule of recognition.[302] Joseph Raz responded that the constitution simply cannot be the rule of recognition.[303] And to make matters worse, that they may all be correct. I will now try to discern to what extent the disagreement here is real. This will help to ground my later discussion of the relationship between constitutional change and rules of recognition.

Why did Raz claim that the constitution cannot be the rule of recognition? First, it is crucial to note that Raz used a legalistic notion of the constitution as a superior law, with canonical formulation, meant to endure for long time but amenable to legal amendment (which is typically more difficult than amending ordinary laws).[304] Rules of recognition, on the other hand, are grounded in a normative practice of officials in a given legal system identifying what counts as a part of this legal system. Contrasted with the notion of the constitution presented by Raz it is easy to see that

[302] See, eg Henry P Monaghan, 'Our Perfect Constitution' (1981) 56 New York University Law Review 353, 384; Larry Simon, 'The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation' (1985) 58 Southern California Law Review 603, 612.

[303] Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries', *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 333–334.

[304] ibid 324–325.

the two are simply different kinds of things and conflating them would be a category mistake.

However, a lawyer referring to his country's constitution as the rule of recognition may still be right in a sense. As Matthew Kramer has helpfully pointed out, the rule of recognition often has two modes.[305] On the 'foundational' level it exists 'as a set of normative presuppositions that underlie and structure the law-ascertaining activities of the system's officials.'[306] It may function on this level without being ever fully articulated. However, in many legal systems it seems that the rule of recognition is manifested also on the 'epiphenomenal' level (or, as Kramer labelled it later, the 'codified' level[307]) by having some parts of its content 'formulated and codified as constitutional provisions or statutory enactments.'[308]

The epiphenomenal manifestations of rules of recognition, especially in a stable constitutional order, may serve as a proxy for the 'real thing' for those who are trying to establish its content. Also, there may be a causal connection between changes in constitutional texts and changes in the rule of recognition. If legal officials accept a textual change that contradicts the previous content of a rule of recognition, then the rule of recognition changes. It may happen almost instantaneously. But this should not mislead us into believing that the change of the constitutional text is the same thing as change in the rule of recognition (on the real, foundational level). They are still different sorts of things, as Raz claimed.

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[305] Kramer, *Where Law and Morality Meet* (n 1) 110–111; Kramer, *H.L.A. Hart* (n 1) 92–97.

[306] Kramer, *Where Law and Morality Meet* (n 1) 111.

[307] Kramer, *H.L.A. Hart* (n 1) 92–97.

[308] Kramer, *Where Law and Morality Meet* (n 1) 111.

What characterizes the rule of recognition (and other customary rules), according to Hart, is that it exists 'only if it is accepted and practised in the law-identifying and law-applying operations of the courts'.[309] Other (non-customary) legal rules may exist from the moment of enactment simply in virtue of being identified by the rule of recognition. In the case of rules of recognition it would seem that such an avenue of change is not open, for in this case the existence condition is tied with the practice of the courts (or more accurately – of the recognitional community, whatever its membership). Before the practice of the courts itself changes, there is no change in rules of recognition. Even if the legal officials in a given legal system accept the system's rules of recognition because they recognize someone's authority to make such a rule (this is their reason for accepting the rule of recognition), that authority's pronouncement will not become a part of the system's rules of recognition until the legal officials start practicing identifying and applying law in accordance with the changed rule of recognition (the foundational level of its existence). [310] Following authority is not necessarily a legal consideration; the authority in question may not be recognized by the legal system.

Kramer's discussion is more sophisticated than Hart's own scant remarks on the matter. Raz in *The Concept of a Legal System* read Hart as suggesting that if a constitution works like a rule of recognition in practice, then it 'seems a needless reduplication' to postulate another rule above it.[311] It is not obvious that Hart meant

[309] Hart, *The Concept of Law* (n 1) 256.

[310] See ch X.

[311] Hart, *The Concept of Law* (n 1) 293, fn 3; Raz, *The Concept of a Legal System* (n 1) 198.

this to apply to his own view, considering that the passage cited by Raz is taken from Hart's discussion of Kelsen's *Grundnorm*. Raz concluded that:

> The constitution, in such cases, should presumably be regarded as created both by legislation and by custom, a position which is perhaps not impossible, but needs some explaining.[312]

Assuming that 'the constitution' Raz referred to here is a less legalistic concept then the one implicated in his later work discussed above, Raz's view seems consistent with Kramer's.

Agreeing with the foregoing argument, I think that there is another potential layer of complexity to the discussed relationship. Rules of recognition are not rules of any constitution understood as canonically formulated (or even codified) and legally amendable. But is this all there is to the legal part of the constitution? Rules of recognition have some characteristics that make them good candidates for constitutional rules. By definition they are supreme (or ultimate) within any legal system.[313] And, as John Gardner has written, '[c]onstitutional law is as high as the law goes'.[314] Rules of recognition are Hartian secondary rules, rules about other rules, what may be considered to be an important, though not distinctive, quality of constitutional rules. The big remaining question is whether rules of recognition are really *legal* rules?

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[312] Raz, *The Concept of a Legal System* (n 1) 198.

[313] I am following here my convention of referring to ultimate rules of recognition as simply 'rules of recognition' – see ch II.1. I only make the distinction between ultimate and non-ultimate rules of recognition when it is appropriate and there is no need for that here.

[314] Gardner, 'Can There Be a Written Constitution?' (n 148) 179. However, Gardner does not believe that the rule of recognition is a legal rule or that it is a constitutional rule.

Grant Lamond has recently convincingly argued for the thesis that the rule of recognition is properly speaking law, as opposed to some atypical strange law or no law at all.[315] According to him, rules of recognition are a part of customary law of the courts. Why do we have reasons to think that any rule of recognition is not like other legal rules? As Lamond noted, there are three areas of potential divergence: '(1) the grounds for its acceptance; (2) the basis for its membership in a legal system; and (3) its mode of existence.'[316] Addressing those concerns, Lamond argued that first, it is more plausible to think that rules of recognition and other rules of the legal system have common grounds of acceptance (rules of recognition are not itself grounds for acceptance of other rules).[317] Second, rules of recognition belong to the legal system because they are considered as legally binding and because every such rule 'constitutes other standards which are indubitably law as parts of the legal system' – it is not a problem that they are the ultimate rules of the system.[318] Third, rules of recognition are not unique in that they are amenable to change through unconstitutional means; in principle all legal rules are amenable to such change. Also, at least from the perspective of legal officials, 'the rule of recognition is treated as a binding law that may be subject to legal alteration or clarification'.[319] This last statement should be understood in the light of Kramer's distinction between

[315] Lamond, 'Legal Sources, the Rule of Recognition, and Customary Law' (n 46).

[316] ibid 7.

[317] ibid 11.

[318] ibid 14–15.

[319] ibid 18.

foundational and epiphenomenal existence of the rule of recognition. With that qualification, Lamond's discussion is consistent with the account that I offer in this thesis. Lamond's arguments show that rules of recognition are very much alike customary law and can be plausibly considered as legal rules, even though they retain some unique characteristics.

If rules of recognition are properly legal rules, then considering their supreme status in any legal system, they are arguably constitutional legal rules. In a sense, they are constitutional rule *par excellence* because they establish the foundation of the legal system.

A. THE DIFFERENCE BETWEEN ULTIMATE RULES OF RECOGNITION AND CONSTITUTIONAL CONVENTIONS

Constitutional conventions are non-legal constitutional rules (see sec. 1.D above). If ultimate rules of recognition are legal rules, then by definition they are not constitutional conventions. But there are good reasons to think that ultimate rules of recognition are not constitutional conventions even if they are not legal rules.

The best account of constitutional conventions, already discussed earlier, comes from Adam Tucker and Adam Perry.[320] They distinguish bottom-up conventions, which are social rules, and top-down conventions which are rules created in exercise of normative powers conferred by bottom-up conventions. Clearly, ultimate rules of recognition could only belong to the former category, of bottom-up conventions. However, ultimate rules of recognition likely fail the two necessary conditions that Perry and Tucker identified.

[320] Perry and Tucker (n 152).

First, rules of recognition may not have a 'constitutional character' because they apply to all legal officials and it is dubious whether we can really classify all legal officials as 'constitutional actors' (are police officers really constitutional actors?) without depriving that concept of its meaning.[321] On the other hand, ultimate rules of recognition are arguably of 'constitutional importance'. Even though theoretically there could be an ultimate rule of recognition with trivial content (identifying as law a single specific legal rule without much importance), this is extremely unlikely. We are rather safe to assume that all ultimate rules of recognition provide crucial architecture for the legal system, which I think counts as 'constitutional importance'.

Second, ultimate rules of recognition not only apply to all legal officials but are also grounded in a social practice of all legal officials, not just the subset that may be plausibly seen as 'constitutional actors'.[322] This is Perry's and Tucker's condition of 'ownership' and I think it tips the balance against seeing ultimate rules of recognition as constitutional conventions.

Finally, I want to stress that the question whether ultimate rules of recognition are *constitutional* conventions is entirely distinct from the question whether they are conventions in a philosophical sense. I discussed the latter issue earlier (see chapter II.3.B).

[321] ibid 766.

[322] ibid 766–767.

3. EXPLICIT AND IMPLICIT CONSTITUTIONAL CHANGE

I will now provisionally adopt a distinction proposed by a constitutional economist Stefan Voigt. According to him we can distinguish between 'explicit' and 'implicit' constitutional change: '[e]xplicit change occurs when the text of the constitutional document is modified',[323] whereas implicit change 'implies that the meaning of the constitution changes although the constitutional document itself remains unchanged'.[324]

Explicit change is easy to identify. There is a natural baseline in the form of a previous version of the constitutional text. In practice, explicit change usually takes the form of an ordinary constitutional amendment, but may also happen through a special constitution-making process (for example, the making of the United States Constitution) or through unilateral revolutionary acts (for instance, a dictator imposing a new constitution).

Change in the constitutional text does not have to have any dramatic consequences. In fact, it may have no legal consequences whatsoever (for instance, a change in a non-justiciable preamble).[325] Explicit change may also fail to bring the

[323] Stefan Voigt, 'Positive Constitutional Economics: A Survey' (1997) 90 Public Choice 11, 34. Compare an analogous distinction between 'formal' and 'informal' constitutional change made by Richard Albert in his 'How Unwritten Constitutional Norms Change Written Constitutions' (2015) 38 Dublin University Law Journal 387, 388–389.

[324] Stefan Voigt, 'Implicit Constitutional Change—Changing the Meaning of the Constitution Without Changing the Text of the Document' (1999) 7 European Journal of Law and Economics 197, 198.

[325] Naturally, a non-justiciable preamble might still be legally significant, as it is, for instance, in Poland and in the United States, where the preamble is used to aid in interpretation of

change in constitutional rules desired by its engineers. Controlling the text does not equal controlling its use and interpretation.[326] This means that explicit change as defined by Voigt only amounts to constitutional change to the extent that it affects the rules of the constitution. It may be tempting for a social scientist to focus on explicit change because it is easy to operationalize and normally it is a good signal that actual constitutional change is taking place. But for a constitutional theorist it is too crude. That is why I propose a modified version of Voigt's definition:

> **Explicit constitutional change** takes place when a change of a constitutional rule is a result of a change in a legal document (for instance, a codified constitution or a statute) that is a basis for the rule.

An important feature of my definition of explicit constitutional change is that it is not restricted to changes in texts of codified constitutions.[327] What counts is any

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the rest of the constitution. Also, an initially non-justiciable preamble may become justiciable with time.

There may be other examples of such legally inconsequential textual change. Sanford Levinson suggests a possibility that some of the formal amendments to the US Constitution have in fact merely codified previous constitutional custom or judicial precedent, introducing no change into the rules of constitutional law; see Sanford Levinson, 'How Many Times Has the United States Constitution Been Amended?' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995) 27–30. A similar argument may be made in respect to European Union law, where the analogue of codified constitutional law, the treaties, have been gradually amended with an aim (among other aims) to codify the law as already developed by the Court of Justice of the European Union (as it now is).

[326] Adam M Samaha, 'On the Problem of Legal Change' (2014) No. 13-87 New York University School of Law Public Law & Legal Theory Research Paper Series 12 <http://ssrn.com/abstract=2389037> accessed 15 February 2014.

[327] My approach is thus broader than that of Yaniv Roznai who, when talking about 'explicit constitutional unamendability' uses 'explicit' to mean based in a text of a codified constitution; Roznai (n 3) 15.

change of a constitutional rule, which is a result of a change in an underlying legal act. Hence, there may be an explicit constitutional change due to a change in a formally ordinary statute, which nevertheless happens to ground constitutional rules.[328] This includes, but is not necessarily limited to, statutes recognised as 'constitutional statutes' or 'super-statutes'.[329] Thus, there may be explicit constitutional change in the United Kingdom. On a popular view, the enactment of the European Communities Act 1972 which gave direct effect to European Community (now 'Union') law in UK law is an example of such change by statute.[330]

Implicit change may be more difficult to observe and even to model theoretically. Voigt talks about changes in 'the meaning of a constitution', but this is potentially confusing. Not all that a constitution 'means' is part of its rules (for instance, a constitution may be taken as an expression of a nation's will to overcome its colonial past). In a legal context, it is more precise to talk about changes among the rules of a constitution.

A modified definition should help to clarify the matter:

> **Implicit constitutional change** takes place when a change of a constitutional rule is not a result of a change in a legal document that is a basis for the rule.

There is no shortage of examples of implicit constitutional change. Constitution-changing adjudication is a one big class of cases. Among the most prominent in US constitutional history are the definition of the scope of judicial

[328] See also ch VII.3.

[329] William N Eskridge, Jr. and John Ferejohn, 'Super-Statutes' (2000) 50 Duke Law Journal 1215; Barczentewicz, '"Constitutional Statutes" Still Alive' (n 26); Farrah Ahmed and Adam Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (2014) 73 CLJ 514; Farrah Ahmed and Adam Perry, 'Constitutional Statutes' (2017) 37 OJLS 461.

[330] See ch VII.4.A and ch X.

power in the US Supreme Court decision *Marbury v Madison* [331] and the interpretation of the standard of equal protection under the 14th Amendment in the US Supreme Court decision *Brown v Board of Education*.[332] However, implicit constitutional change can also take place through executive practice. I discuss this in more detail in chapter VII.

My definitions taken together neatly divide the realm of possible constitutional change in two. Implicit change happens whenever there is change, which was not explicit. This includes any change of constitutional rules, which do not have their ground in some canonical document, but in another source (ground) of law, like custom or precedent.

The explicit-implicit distinction I made differs from the formal-informal distinction often made in comparative constitutional law. 'Formal amendment', as defined by Richard Albert, is not only explicit (textual), but also 'in conformity with the amendment rules entrenched in the text of the constitution'.[333] For my purposes, it is useful to conceptually disentangle the textuality of constitutional change from its conformity with *codified* amendment rules. This is because I want to stress that constitutional change may be lawful and law-governed even when it does not adhere to such codified rules. Also, I see it as important to distance my positivist account

[331] *Marbury v Madison* 5 US 137 (1803).

[332] *Brown v Board of Education* 347 US 483 (1954).

[333] Richard Albert, 'Constitutional Disuse or Desuetude: The Case of Article V' (2014) 94 Boston University Law Review 1029, 1060.

from any suggestions of formalism and conflating the too is a common misconception.

V. LEGAL POWERS AND LEGAL CHANGE

One of my main aims in this thesis is to help dispel the confusion over legal grounds of legal change, and specifically, of change in constitutional law. Such conceptual clarity matters not only for general jurisprudence, but also for doctrinal and comparative debates about constitutional change. The questions of the existence and of the scope of powers to bring about constitutional change are key to issues of constituent powers, amendment powers and (unconstitutional) constitutional amendments (see chapter VI). And it is easy to be confused given that there is a wide array of different views on what legal powers are and on their role in legal change and in constitutional change more broadly.

In this chapter, I show what is common to all major conceptions of legal powers (volitional control over a legal effect) and what is contested. I also emphasize that legal change may happen without anyone exercising any legal powers, even though in such a case it may be proper to attribute to someone a *legal ability* (quasi-power) to bring the legal change about. The notion of a legal ability, or quasi-power, to change the law is an important part of my argument that legal change (and change in constitutional law) is more often law-governed than usually admitted.

This chapter is structured as follows. I begin by sketching what is common to major modern conceptions of legal powers. Then, in sec. 1, I discuss what distinguishes those different views – focusing on the aspect of intentionality of exercises of legal powers. In sec. 2, I come back to the common view of legal powers and argue, following Raz, that exercises of legal powers have normative, not merely causal, effect on normative (legal) change (sec. 2). I then show that this precludes,

under most circumstances, the possibility of a legal power to change a customary rule (sec. 3). Like custom, ultimate rules of recognition are essentially based in social practices and this is why, as I argue in sec. 4, there cannot be a legal power to change such a rule. In sec. 5, I discuss the possibility of legal powers to change the law to be recognised ex post and argue that this should be seen as a legal fiction. Section 6 concludes.

In general, a legal power to change the law allows an agent to create, remove or otherwise modify laws (legal rules). Legal powers turn what are typically inconsequential actions (like signing one's name on a piece of paper, uttering specific words, etc.) into actions with 'magical' significance. Exercises of legal powers are not just actions, they are 'acts-in-the-law'.[334] The 'magic' is that of changing legal situations of some people or bodies. This can be described more generally as an instance of normative change or as an instance of change in an institutional fact.[335] The law constitutes (grounds) the connection between some people doing something and that fact being an exercise of a legal power.

Importantly, it is not the case that whenever an action has a law-changing effect, that action is an exercise of a legal power.[336] Even in that case there is a need to show that the law sees the action as an exercise of a legal power. It will be a recurrent theme in this work that from a fact that a change in the law took place, we cannot infer that

[334] Hart, *The Concept of Law* (n 1) 28.

[335] Raz, *Practical Reason and Norms* (n 1) 103; Neil MacCormick, 'Powers and Power-Conferring Norms' in Stanley L Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999) 495–496.

[336] And in general: 'not all abilities to change someone's normative position, even abilities to do so knowingly and intentionally, are normative powers'; John Gardner, 'Justification under Authority' (2010) 23 Canadian Journal of Law and Jurisprudence 71, 87. See also Joseph Raz, *Practical Reason and Norms* (n 1) 98–99.

the change was a result of an exercise of a pre-existing legal power to make the change. Neil MacCormick was right to stress the importance of Hart's insight that, in MacCormick's words: '[l]aw has as much to do with enabling as with obligating.'[337] Nevertheless, sometimes the law enables by merely recognising human action as law-affecting, without involving legal powers. It is a mistake to believe that all the enabling that the law does, is done by vesting agents with legal powers. This mistaken intuition seems to me to be quite common.[338]

Legal powers are more than abilities to bring about effects in the physical world (like my power to move this glass in front of me) or 'powers-in-fact' (like influence, social power or political power).[339] Being able to exercise a legal power may require having those other powers, but they are distinct.[340] It does not help that even those who focus on the law often equivocate between those different kinds of powers.

Moreover, legal powers are not reducible to, do not require, or entail any legal rights, legal permissions or legal duties. One can have a legal power to *X* without

[337] MacCormick, 'Powers and Power-Conferring Norms' (n 335) 496.

[338] See ch VIII.1.

[339] MacCormick defined the latter as 'power actually to change the factual situation so that another's interests are affected and thereby his or her reasons for action or inaction altered'; MacCormick, 'Powers and Power-Conferring Norms' (n 335) 495. See also Raz, *Practical Reason and Norms* (n 1) 103; Christopher Essert, 'Legal Powers in Private Law' (2015) 21 Legal Theory 136, 141–142.

[340] Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed, Yale UP 1923) 58; MacCormick, 'Powers and Power-Conferring Norms' (n 335) 497; Lars Lindahl and David Reidhav, 'Legal Power: The Basic Definition' (2017) 30 Ratio Juris 158, 163.

having a legal right or permission to *X* (also when doing *X* is legally prohibited).[341] Joseph Raz gave the following example to illustrate this:

> In Israel, Jews and Muslims have power to contract polygamous marriages. If they perform the marriage ceremony their polygamous marriage is valid. But they have no right to contract such marriages and indeed they commit a criminal offence if they do so.[342]

As in Raz's example, if an apparent exercise of a legal power has valid legal effects despite being prohibited, this suggests that it is a case of an exercise of a legal power and not merely that of a right or a permission.[343] Relatedly, one can have a legal power to *X* without being under a duty to *X* – it is a perfectly normal thing that I may have a power to sell a book I own, even though I am under no duty to do so.[344]

1. 'QUASI-POWERS' AND THE SPECTRUM OF CONCEPTIONS OF LEGAL POWERS

What I said so far is common to all major modern conceptions of legal powers.[345] One other notion that those conceptions share, at least implicitly, is that a legal power

[341] Hohfeld (n 340) 58; Joseph Raz, 'Voluntary Obligations and Normative Powers' (1972) 46 Proceedings of the Aristotelian Society, Supplementary Volumes 59, 82; HLA Hart, 'Bentham on Legal Powers' (1972) 81 Yale Law Journal 799, 816; Eugenio Bulygin, 'On Norms of Competence' (1992) 11 Law and Philosophy 201, 205–206; Lindahl and Reidhav (n 340) 163; Luis Duarte d'Almeida, 'Fundamental Legal Concepts: The Hohfeldian Framework' (2016) 11 Philosophy Compas 554, 559.

[342] Joseph Raz, 'Voluntary Obligations and Normative Powers' (n 341) 82.

[343] See also Bulygin (n 341) 215–216.

[344] What is more, having a power by itself provides no reason for action (no reason to exercise the power), see Raz, *Practical Reason and Norms* (n 1) 106; Gardner, 'Justification under Authority' (n 336) 78–79.

[345] I discuss Hans Kelsen's views separately in ch VIII.1.A. because of his idiosyncratic understanding of legal norms and the view that legal powers are only for creation and application of legal norms (as understood by Kelsen); Norberto Bobbio, 'Kelsen and Legal

is an ability to change someone's legal situation by a volitional act (in Wesley Hohfeld's famous formulation: 'some superadded fact or group of facts which are under the volitional control of one or more human beings'[346]). This arguably excludes acts of non-human animals and quite clearly excludes acts of nature.[347] Crucially, this also excludes any legal effect (like a change in the law) of a fact which is also not meaningfully under the 'control' of a human being. Within the discussion of legal change there is an obvious example of this sort: change in customary law. I consider the consequences of this in the following three sections.

Here, I will only note that an ability to bring about a legal effect (eg legal change) without a volitional act is a useful category. There is no widely accepted label for that ability, because this category is usually barely noticed.[348] Reportedly, Matthew Kramer's preferred name for it is 'quasi-power'.[349] I will follow Kramer and use the notion of quasi-powers interchangeably with that of a legal ability to bring about a

Power' in Stanley L Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999).

[346] Hohfeld (n 340) 50–51.

[347] Visa Kurki argued that both animals and infants can hold legal powers on a proper construction of the Hohfeldian position as they can act with volition; Visa AJ Kurki, 'Legal Competence and Legal Power' in Mark McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017) 46.

[348] One author to do so was John Gardner in his 'Justification under Authority' (n 336) 87 ('... not all abilities to change someone's normative position, even abilities to do so knowingly or intentionally, are normative powers.').

[349] Kurki reported that Kramer suggested this name in private correspondence; Kurki (n 347) 44.

legal effect without exercising a legal power ('legal ability' for short).[350] This category is useful in accounting for, eg, agency (eg of a legislature) in the process of changing ultimate rules of recognition or agency of appellate judges in changing the law in legal systems where they can do so by influencing legal custom.

I will now say more about what the major conceptions of legal powers *disagree* on. I do not propose to resolve this disagreement, though I will indicate which of the views I see as most plausible. My argument in this thesis does not, for the most part, hinge on choosing any of the following positions and when it does, I indicate that clearly.

Wesley Hohfeld's notion of legal powers, which I just cited, is the broadest major conception. As long as a fact grounding the legal effect is under human volitional control, we are dealing with a Hohfeldian legal power. What follows, is that people exercise legal powers by actions like committing crimes or committing suicide.[351] Even if, together with Matthew Kramer,[352] we appreciate the analytical rigour and the corrective (not lexicographical) ambition of Hohfeld's conceptual engineering, there is clearly a rather large gap between Hohfeldian powers and how the notion of

[350] I recognize that there are other uses of the term 'legal ability'. For example, Gardner in one of his papers used 'ability' as a broader notion including both 'capacity' and 'opportunity' (ie conducive external circumstances); John Gardner, 'Reasons and Abilities: Some Preliminaries' (2013) 58 American Journal of Jurisprudence 63, 67. However, I decided to opt for an 'ability' given that (1) terms like 'capacity' and 'competence' have more established technical legal meanings than 'ability' and (2) that whenever the phenomenon I am referring to is discussed it is being referred to as an 'ability'.

[351] Matthew H Kramer, 'Rights Without Trimmings' in Matthew H Kramer, Nigel E Simmonds and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (OUP 2000) 104; Kurki (n 347) 43–44.

[352] Kramer, 'Rights Without Trimmings' (n 351) 22–23, 35, 104.

legal powers is used today both in ordinary legal discourses and in academic legal writing. Despite the defences from Kramer and others,[353] I think it tends to be more confusing than useful to refer to Hohfeldian powers as 'legal powers' simpliciter.

HLA Hart did not offer a clear definition of legal powers as such that would show what is distinctive about them.[354] According to Kramer: '… he appeared to confine the category of powers to Hohfeldian powers that are normally beneficial for the people who are endowed with them.'[355] Hart has written that legal rules that confer legal powers 'provide individuals with *facilities* for realizing their wishes'.[356] Joseph Raz took a somewhat similar route to Hart in focusing on desirability of legal effects to be brought by exercises of legal powers.[357] One of Raz's attempts to formulate a definition of a legal power was as follows:

> An act is the exercise of a power only if the reason for recognizing it as affecting norms and their application is that it is desirable to enable people to affect norms and their application in such a way if they desire to do so for this purpose.[358]

[353] See also Kurki (n 347) 45.

[354] See also Maris Köpcke, *Legal Validity: The Fabric of Justice* (Hart Publishing 2019) 15–17.

[355] Kramer, *H.L.A. Hart* (n 1) 37.

[356] Hart, *The Concept of Law* (n 1) 27.

[357] See also Köpcke (n 354) 20–23.

[358] Raz, *Practical Reason and Norms* (n 1) 102. For a discussion of different version of Raz's test, see Köpcke (n 354) 33.

This desirability is to be viewed from the perspective of the law.[359] The question is 'whether the law … deems it' desirable for people to be able to change legal situations deliberately.[360] As Maris Köpcke has shown, this is confused:

> Taken at face value, it entails that, for example, home moves and construction works sometimes amount to exercises of legal power and sometimes they do not. They amount to exercises of legal power insofar as they fit with policies or goals deemed by the law – by the powers that be – to be socially desirable. It is not uncommon, after all, for governments to attach legal incentives, such as tax breaks or subsidies, to certain forms of conduct in order to encourage their performance.[361]

Neil MacCormick gave the following definition of a legal power:

> Power is conferred by a rule when the rule contains a condition that is satisfied only by an act performed with the (actual or imputed) intention of invoking the rule.[362]

By 'invoking' a rule, on MacCormick's view, an agent means:

> Not only do I intend my act as an act fulfilling a condition set in the rule. I intend that the other party recognize that I intend my act as an act fulfilling a condition set in the rule.[363]

Even though this may seem like a sensible account, a number of objections has been offered. Andrew Halpin argued that in many ordinary situations (eg consumer sales) we cannot reasonably impute to an average customer that they intend to invoke a rule as even that minimal level of legal consciousness seems unrealistic.[364] Maris

[359] Raz, 'Voluntary Obligations and Normative Powers' (n 341) 81; Köpcke (n 354) 21.

[360] Köpcke (n 354) 21.

[361] ibid 22.

[362] Neil MacCormick, *H. L. A. Hart* (2nd edn, Stanford UP 2008) 98.

[363] ibid 97.

[364] Andrew Halpin, 'The Concept of a Legal Power' (1996) 16 OJLS 129, 142 fn 61. Maris Köpcke made a similar point in her (n 354) 64.

Köpcke objected that 'the agent's intended goal is to achieve a normative result, not to "invoke the rule" for its own sake'.[365] Finally, Visa Kurki noted that MacCormick appears to exclude the possibility of legal powers not conferred by rules.[366]

Köpcke's own account of legal powers focuses on a manifestation of an intention to change some legal position.[367] She dealt with the issue of contracts by reliance (ie contracts where at least one party did not *intend* to enter the contract, but is taken by the law as having manifested intent to enter and thus is legally bound by the contract) by explaining that it 'does not take an intention to manifest an intention'.[368] She also stressed that '[a] valid say-so can invoke a legal regime beyond what is ostensibly in the mind of the sayer' – so it is not required that, for instance, a customer will know much (anything?) about the law of contract.[369]

Lars Lindahl and David Reidhav offered a definition which seems compatible with Köpcke's, but makes some of the relevant issues more explicit:

> Let X be a physical person, *B* a specific behaviour, and *C* a legal result. We say that, in a situation *S*, *X* has the immediate power to achieve *C* by doing *B*, if *B* is such that in situation *S*:
>
> (D I.1) *X*'s behaviour *B* is a legal ground for the legal result *C*,

[365] Köpcke (n 354) 64.

[366] Kurki (n 347) 34. Kurki further claimed that MacCormick's account is unsuitable to situations like when a customer deals with an automated vending machine – Kurki doesn't think the customer intends then for anyone to recognize his or her intention; ibid.

[367] Köpcke (n 354) 59.

[368] ibid.

[369] ibid.

> (D I.2) *X*'s behaviour *B* manifests that *X* intends to achieve legal result *C* by *B*, and
>
> (D I.3) *X*'s behaviour *B* not manifesting that *X* intends to achieve legal result *C* by *B* is a legal ground for *C* not to follow from *B*.[370]

On their view, even if for a particular legal power a merely imputed intent is sufficient, it is still the case that an indication to the contrary entails that the legal power was not exercised.[371] For example, this may be the case when someone expressly claims they are merely testing a pen and have no intent to enter a contract, while doing what otherwise appears to be signing a contract.

Cases of clear contrary indication are *not* cases of leading or inducing a reasonable observer to believe that someone exercises a legal power. Whenever the law ascribes legal consequences to voluntary action despite even the clearest protestations from the agent in question that she intends not to incur such consequences, we are not dealing with an instance of a legal power. If someone (voluntarily) moves to a new city and the law thus applies local tax rules to this person and if it is irrelevant whether she intends this legal consequence – she is not exercising a *legal power* to incur a new set of tax liabilities.[372] Another example of an action with legal effects, which is not an exercise of a legal power, is when a person who kills intentionally incurs legal liability irrespective of whether she intends to incur that liability. The issue is thus not whether the law considers *some* intentionality or voluntariness as relevant to ascribing legal consequences to an action (for instance, in the case of murder it does), but whether it takes as relevant

[370] Lindahl and Reidhav (n 340) 169.

[371] ibid 170–173.

[372] Raz, *Practical Reason and Norms* (n 1) 103.

expressed lack of intent specifically to create those particular legal consequences (in the case of murder, it does not).[373]

Visa Kurki, following Kramer, preferred to refer to Hohfeldian powers as 'legal powers', but he also introduced a narrower concept of 'legal competence', which tracks more closely the ordinary legal use of the concept of legal powers.[374] Kurki distinguished two situations in which someone may be exercising a legal power ('competence' in his parlance). On the basic scenario, someone has a legal power if their intention while acting to achieve some legal effect is 'minimally sufficient' to bring that legal effect about.[375] However, Kurki also believed that agents may exercise legal powers when their intent to do so is legally irrelevant. For that to be the case it must also be that the same agent is capable of bringing about the same legal effect through the basic scenario (ie when their intention matters legally).[376] This way Kurki was able to account for contracting by reliance without having to postulate that the agent in such case has any intent regarding the contract. On the other hand, he could exclude the case of committing crimes (even with intent to bring criminal liability on oneself), because the law does not (ever?) make it a condition of criminal

[373] I do not deny that sometimes it is possible to exercise a legal power insincerely, see Kimberly Kessler Ferzan, 'The Bluff: The Power of Insincere Actions' (2017) 23 Legal Theory 168. The issue I focus on here is whether it is possible to have a legal power when one's sincere and clear indication of not intending to bring about some legal effect is irrelevant to whether that legal effect occurs.

[374] Kurki (n 347).

[375] ibid 38.

[376] ibid 39.

liability that the would-be criminal intends to attract criminal liability (so there is no basic scenario).

In presenting his view of unintentional exercises of legal powers, Kurki did not confront Lindahl and Reidav's major point about the necessary legal relevance of contrary indications (clear indications of no intent to exercise a legal power). This is a reason to be sceptical of Kurki's account. Kurki suggested that taking someone to have exercised a legal power unintentionally can be justified (morally) in the following way:

> By not questioning whether an individual has actually intended the legal consequences his or her act effects, we also abstain from questioning that individual's moral agency.[377]

It is difficult to see how this justification applies to situations where the individual clearly indicates that they do not intend to bring about certain legal consequences. If anything, we show less respect to the individual's moral agency by imputing to them an intent they clearly indicate they do not have. Lindahl and Reidav's account deals with this in a much more straightforward way.

Finally and on the opposite side of the spectrum from Hohfeld is the narrowest conception of legal powers (the real will theory), represented by Andrew Halpin.[378] For Halpin, someone exercises a legal power to *X* only if their decision to exercise that legal power is a legal condition of the legal effect *X*.[379] Halpin bites the bullet on contracts by reliance, where real will to contract is absent – he does not see them as

[377] ibid.

[378] Halpin (n 364).

[379] ibid 145.

exercises of legal powers.[380] I tend to see that as an unhelpful departure from the ordinary legal usage of 'legal powers'.

Simplifying a great deal, the spectrum of views may be presented in the following way – an action counts as an exercise of a legal power to *X* if that action results in a change *X* of a legal situation (legal position) and this action is…

1. volitional (Hohfeld, Kramer);
2. volitional and desirable from the perspective of the person exercising the legal power (Hart);
3. with intention to *X* and desirable from the perspective of the legal system (Raz);
4. manifesting an (actual or imputed) intent to use the law to *X* (MacCormick, Köpcke, Lindahl and Reidav);
5. with intention to *X* or without (but in the latter case only if the agent's intention would have been 'minimally sufficient' for similar legal effect in other similar situations) (Kurki);
6. with a (legally crucial) decision to exercise a legal power to *X* (real will theory) (Halpin).[381]

Overall, I think that the fourth category (MacCormick, Köpcke, Lindahl and Reidav) contains conceptions of legal powers that are most plausible and helpful for discussions of legal (and constitutional) change. Of course, these are not all the conceptions of legal powers available in the literature. But it is fair to say that,

[380] ibid 146–147.

[381] See also Adam Reilly, 'Is the "Mere Equity" to Rescind a Legal Power? Unpacking Hohfeld's Concept of "Volitional Control"' (2019) (forthcoming) OJLS.

Hohfeld and Kramer notwithstanding, it is a dominant view that exercises of legal powers necessarily manifest (communicate) an intent to achieve the result of an exercise of the power.[382] For some legal powers, like the power to contract, a merely imputed intent may suffice: there is no necessity for the agent to actually have the intent ('real will').[383]

How does this matter for constitutional change? Consider a change in legal rules of a constitution initiated by a court. Given the popular intuition that there is a legal power to make law behind every effective legal change, many may be tempted to simply conclude that the court in question exercised such a power and legally *made* the change. However, what if the court expressly disclaimed any law-making power and went to some pains to present its decision as (1) not departing from the law as it was before or as (2) not intended to have any legal effect beyond the case before the court (inter partes)? As I show in chapter VII, these sorts of claims are made routinely by courts in many legal systems. On some of the views presented here, such clear indications of no intent to exercise a law-making power strongly suggest that the law-changing effect happened without an exercise of a law-making power.[384]

Nonetheless, one should not be too quick in taking what judges say at face value. There may be situations when there are good reasons to discount apparent indications of no intent. Such statements may be mistaken, even without being

[382] See also Torben Spaak, 'Explicating the Concept of Legal Competence' in Jaap C Haage and Dietmar von der Pfordten (eds), *Concepts in Law* (Springer 2009); Essert (n 339) 147–148.

[383] Essert (n 339) 153–154; Lindahl and Reidhav (n 340) 173–175.

[384] To say with Andrei Marmor that '[w]hether they recognize it as such or not, judges have the power to change the constitution' is to use 'power' in a broad Hohfeldian sense – or perhaps even beyond Hohfeld, see Andrei Marmor, *Interpretation and Legal Theory* (2nd edn, Hart Publishing 2005) 142.

insincere.[385] That is, there may be reasons to believe the law has a different standard for effective indications of no intent than it may seem.[386] For instance, it could be the case that some ritual claims of judicial restraint are legally irrelevant, but some kinds of technical expressions of intent not to change the law are actually legally effective – thus allowing for a possibility that the judges in question do have a legal power specifically to change the law not only on the broadest Hohfeldian view of legal powers.

A question remains whether it has to be possible to cancel the implication of intent to exercise a law-making power while still effectively exercising a power to adjudicate. What if a legal system could confer on some judges a legal power to change the law by creating binding precedents, while at the same time treating almost any published judgment as having precedential force?[387] It could perhaps then be that only a court's decision not to publish its judgment or to publish something that is clearly not a judgment (but, for instance, a cooking recipe), would count as not exercising the power to set a precedent. One way to look at that is to see it as insensitivity of legal consequences (of setting a precedent) to intent to bring them about and thus not a case of a legal power to set a precedent. Nothing a court could

[385] In general, for the court to be an authority means that its decisions bind even if they are mistaken and even if they do not change the legal situation, Raz, *Practical Reason and Norms* (n 1) 135–136. However, the issue here is that the law may deem some things said by the courts as not authoritative.

[386] Kimberly Kessler Ferzan discusses a case where 'where a father claimed that creditors could not take furniture that his son had used as collateral because the father had never actually intended to give the furniture to the son, just to let the son use the furniture'; Kessler Ferzan (n 374) 180.

[387] I thank Kenneth Ehrenberg for pressing me on this point.

try to do *specifically* to prevent setting a precedent (like saying clearly that this is what they want to avoid), would matter legally. They could only refuse to adjudicate altogether (or at least to adjudicate in a way somehow departing from previous case law).

To use a concrete example, the US Supreme Court in its landmark *Bush v Gore* decision employed a tactic Josh Blackman labelled as 'unprecedent'.[388] The Court has written: '[o]ur consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.'[389] The idea of unprecedent is simply that a court tries to avoid setting a precedent, which later courts would follow. In other words, that a court aims to limit legal effects of the present judgment to the parties involved. The problem is that it is doubtful whether even the US Supreme Court can successfully impose such a limitation.[390] Or, more precisely, whether the Court can simply say its present decision is not a precedent, as opposed to trying to use other techniques of framing the judgment in such a way as to make it less likely it would be followed.[391] Similarly, in some legal systems judges (especially judges of the highest courts) control which judgments get published and may decide not to publish a judgment formally, but at the same time

[388] Josh Blackman, 'The Unprecedent' (*Josh Blackman's Blog*, 4 April 2013) <http://joshblackman.com/blog/2013/04/04/the-unprecedent/> accessed 11 September 2017.

[389] *Bush v Gore* 531 US 98 (2000) 109.

[390] Josh Blackman, 'Justice Thomas Cites The Bush v. Gore "Unprecedent" in Arizona Dissent' (*Josh Blackman's Blog*, 17 June 2013) <http://joshblackman.com/blog/2013/06/17/justice-thomas-cites-the-bush-v-gore-unprecedent-in-arizona-dissent/> accessed 11 September 2017.

[391] The latter is less like an exercise of a legal power and more like trying to predict something the Court does not have direct control over; conf. the distinction between normative and causal influences on normative change later in this section.

be unable to stop, for example, the parties from making the judgment public. It could be that such informally published judgments are treated in the legal system as just as authoritative as the formally published ones.

If later courts treat purported unprecedents (or informally published judgments) like they treat precedents, then this may suggest that in the legal system in question there is no legal power to make precedents (on a mainstream view of legal powers that requires at least imputed intent). There is no legal power because clear indications of no intent to exercise the purported power are not determinative of whether the legal effect obtains. Instead there may be a legal power to adjudicate and a legal duty for judges to treat certain past court decisions as precedents.[392]

Importantly, some legal powers do require actual, and not merely imputed, intent. As John Gardner argued, this is true in the case of making of legislated law (legislating).[393] It is a separate issue of how robust the intent regarding the content of

[392] See also Grant Lamond, 'Do Precedents Create Rules?' (2005) 11 Legal Theory 1, 25.

[393] Gardner, *Law as a Leap of Faith* (n 1) 59–62. Gardner has written:

> 'An agent acts intentionally inasmuch as it does what it does for (what it takes to be) reasons. Those who legislate, whether they be human beings or institutions, must do so for (what they take to be) reasons for and against changing the law. If they did not, there would be no sense in having legislative debates, in which supposed reasons for and against changing the law are presented, weighed, and challenged. Indeed, there would be no sense in having wider public debates about legislative policy, nor the general elections in which these debates are brought to a head. Such debates make sense only on the footing that whoever it is that legislates will, in legislating, respond to at least some supposed reasons for and against changing the law. These debates make sense, in other words, only on the footing that legislation intentionally effects legal change, exactly as the prayer in UK Acts of Parliament would have us believe it does.'
>
> Gardner, *Law as a Leap of Faith* (n 1) 62.

the legislative choice can be and need be, but there is clearly a requirement of an intent to change or at least to restate (authoritatively) the law of this legal system.[394] This is not trivial, as sometimes legal systems give effect to, or even recognise as law, legislation coming from bodies, which did not act with an intent to change the law for those 'receiving' legal systems. Such 'giving' bodies do not exercise law-making powers in the 'receiving' legal systems. The historical practice of the Vatican adopting Italian legislation is an excellent illustration (I consider it in detail in chapter VII.4.B).

2. 'VOLITIONAL CONTROL' – NORMATIVE AND CAUSAL EFFECTS ON LEGAL CHANGE

Setting aside the differences between major conceptions of legal powers, I will now focus on what I think they have in common. A key element implicit in Hohfeld's 'volitional control' and in other accounts focused on intent of a power-holder was put by Joseph Raz in terms of 'causal' and 'normative' effects on normative situations. In his discussion of what it means to have a normative power (of which legal power is a species), Raz said that 'the exercise of normative power affects the existence or application of a norm normatively and not causally'.[395] To effect a change of a norm normatively, an act or its result has to affect the existence or application of the norm.[396] But not every act that affects a norm in a normative way is an exercise of a

[394] For a comprehensive account of legislative intent, see Richard Ekins, *The Nature of Legislative Intent* (OUP 2012).

[395] Raz, *Practical Reason and Norms* (n 1) 103. See also Raz, 'Voluntary Obligations and Normative Powers' (n 341) 80, 93–94.

[396] Raz, *Practical Reason and Norms* (n 1) 103.

normative power. The final condition, according to Raz, is that such an act 'must be recognized as affecting a norm for reasons of a special sort'.[397] In the case of legal powers, those reasons are the reasons the legal community has 'for recognizing the normative effects of the act'.[398] Adam Perry and Adam Tucker helpfully rephrased Raz's view in the following way: 'your act must be recognised as creating a rule because it is expected that, if it is so recognised, then you will tend to perform that act only when you intend to create a rule.'[399]

Raz's final condition is not a self-contained solution to identifying instances of exercises of law-making powers, but it points where to look for the answers. Namely, the question becomes: as a matter of social fact, does this legal community accept that their *legal reason* (or *legal ground*) for recognising this particular legal change is an intentional exercise of a law-making power by this particular agent? Thanks to Raz, we also have a preliminary test that will allow to reject some cases. The test whether a legal change is a normative or merely a causal result of the action in question.

Similarly to Raz, Lindahl and Reidhav stressed that exercises of legal powers are to be seen in terms of 'characteristic legal consequence'. That is, 'that a legal result ensues in the case in which the person acts in a specified way'.[400] Importantly, the law-changing result has to be meaningfully *in the case* where the purported holder of

[397] Raz, 'Voluntary Obligations and Normative Powers' (n 341) 94.

[398] ibid.

[399] Perry and Tucker (n 152) 772.

[400] Lindahl and Reidhav (n 340) 161–162.

the legal power acts. Or, in other words, the 'requirement is that it is the behaviour of the power-holder that must be the legal ground for achieving the legal result'.[401]

Applied to legal change, this means that an act of an exercise of a law-making power must result in, or must end in, a change in the law. This is not a trivial requirement. It excludes all the cases where an apparent law-maker merely influences someone else who then changes the law or when she contributes to a bottom-up process of legal change where no one can take the credit, legally speaking, for making the change.[402]

Consider the first type of cases, those of influence. A simple example is that of an agent who convinces a power-holder to exercise their power.[403] For instance, a lobbyist who convinces a local authority to enact some regulation. Clearly, the action of the lobbyist is not a legal ground for that regulation. This is so even when the information that the lobbyist brings engages a legal duty of the local authority to enact the regulation (perhaps the authority has a legal duty so to act whenever it is informed of a certain kind of environmental risk).

Going back to the issue of unprecedent, depending on what precedent means in the legal system in question, it could be that a judgment of a high court merely activates a duty of other courts to deem it as correctly decided on the facts, but the high court has no legal power specifically to control whether and how it sets a

[401] ibid 160.

[402] Conf. ibid 177–178; Raz, 'Voluntary Obligations and Normative Powers' (n 341) 80.

[403] See Raz, 'Voluntary Obligations and Normative Powers' (n 341) 80; Lindahl and Reidhav (n 340) 177–178.

precedent.[404] As I noted above, the high court may try to use the language like the US Supreme Court used in *Bush v Gore* to influence the lower courts in not taking the judgment as precedent, but in that it is akin to the lobbyist trying to convince the local authority.

Moreover, it could also be that one authority (for instance, a parliament) has a legal power to impose a duty on someone else to exercise their legal power to *X*.[405] However even in that situation, it would still be the case that the former authority is not exercising a legal power to *X*, but a different legal power. A parliament may impose a duty on businesses to enter into a specific contract. A business may then do so, or fail to do so, but its action of entering into the contract is clearly a distinct event from the legislative decision of parliament. True, a parliament may also have a power to make it the case that some businesses are legally deemed to have entered some contract. Even then there would be a conceptual difference between a business actually entering a contract and a presumption or legal fiction created by parliament, but there may be little or no difference in legal effect.

3. GROUP ACTION AND CHANGE IN A CUSTOM

As I just discussed, exerting influence over some power-holder is not the same as exercising the power in question. There is another class of cases with similarly causal,

[404] For an argument that something like this is the case in English law, see Grant Lamond, 'Do Precedents Create Rules?' (n 393). For my discussion of precedent, see ch VII.1.

[405] On the distinction between power-conferring rules and duty-imposing rules see also Gardner, 'Can There Be a Written Constitution?' (n 148) 175–179.

not normative, effects on legal (normative) situations. These are the cases where legal change happens through a process in which many agents are involved. True, some such changes are results of exercises of legal powers. A complex group like a parliament can be vested with a legal power and can act jointly to exercise such legal power.[406] But the same cannot be said of most, if not all, changes in customs and conventions – that is, in social rules.[407] A change of a social rule obtains in the virtue of a change in an underlying social practice.[408] For a social rule to change, thoughts and actions of a sufficient number of the members of the relevant group regarding the social rule have to actually change.

Sometimes, such change happens almost instantaneously and in response to an action by a single agent. A king, or a religious leader, or anyone else with social power, may be able to influence the community to change some social rule. But the crucial thing is that this influential person does not exercise a *normative* power to change the rule. They have a merely 'causal' effect on normative change, to use Raz's terminology. The same is the case with legal custom (customary law). To the extent any legal rule is customary, it is most likely not a product of an exercise of a legal power to make the rule.

This is quite different from legal change through an exercise of a legal power to change the law, like a law-making power of a legislature. A legal power to change the law, when exercised, may have immediate and – in a sense – automatic law-changing effects. There is no need to wait and see whether anyone knows about the change,

[406] For a detailed discussion of how legislatures act jointly to make law, see Ekins, *The Nature of Legislative Intent* (n 395).

[407] See ch II.2.

[408] ibid.

accepts the change, or adjusts their actions to it (although such conditions could be part of some power-conferring norms).

Could it not be said that members of a group act jointly to exercise a normative power to change a social rule? After all, it is possible to come up with an account of joint (group) action that is permissive enough to accommodate such bottom-up processes. This will not do, at least not for virtually all relevant cases. Normally, an intent that could be plausibly attributed to such a group agent could not be specific enough to constitute relevant power-exercising intent.[409] In a typical situation of a change in custom, the change is hard to grasp, almost imperceptible. It is hard to know, even for a member of the group in question, when the process of change starts and when it is concluded. Not uncommonly, members of the group are not aware of taking part in the change and would be surprised (or even in denial), when informed that they are.[410]

In situations like that, the intent that could be attributed to the group members is an intent of some higher-order: to live together, to undertake some project (for instance, to construct a building). And on that basis, one could try to say that the group together intends to exercise a power to change the custom. But the explanatory gap is too wide, the analogy (with an individual or an institutional group agent) too distant. As John Gardner said about custom (in the context of ultimate rules of

[409] See Gardner, *Law as a Leap of Faith* (n 1) 72–73.

[410] See also ibid 70–72.

recognition): '[t]his customary law is not the work of many working as one. It is the work of many acting as many.'[411]

My objection may not apply as forcefully to customary changes within a group that is more cohesive (for example, within one organisation) and where the group members are both aware of the past content of the customary rule and clearly intend to change it. In such circumstances, it might make sense to attribute to the group a joint intent to exercise a legal power to change the custom, and to accept that the group exercised the power. However, when it comes to change in customary parts of constitutional law, these conditions will rarely, if ever, obtain.

And to the extent they do not, I suspect the chief motivation for positing the existence of 'customary powers' (legal powers to change custom) is the already mentioned misguided intuition that it just must be the case that any effective change in the law is a result of an exercise of a legal power to make the change.[412] The good news is that there is an alternative account, and there is no need to put so much strain on the concept of a legal power.[413]

[411] ibid 73–74; Perry and Tucker (n 152) 783.

[412] The notion of 'customary powers' was used in this context by Norberto Bobbio in his (n 345) 446. Interestingly, Bobbio concluded that Kelsen never articulated a position on this issue, so it is unclear whether he thought that custom changes by exercises of legal powers.

[413] See part 3.

4. THERE CAN BE NO LEGAL POWER TO ALTER ULTIMATE RULES OF RECOGNITION

It will be useful for the later discussion to consider whether there can be a legal power to alter an ultimate rule of recognition. We already know that ultimate rules of recognition are essentially social rules.[414] This is their nature, they cannot cease to be social rules.[415] One of the important differences between ultimate rules of recognition and other forms of customary law is that normally custom can be superseded by legislation or by judicial decision. After such an intervention, a rule that was previously a customary rule becomes a statutory rule or a case-law rule (or even: a customary rule ceases to be and its place is taken by a new rule, of a different kind). If we want to discover what is the content of the rule thereafter, we first look into the statute or the judicial decision and only after we establish that they have not repealed the customary rule entirely, we can consult the custom (to the extent not altered by the intervention).

However, with ultimate rules of recognition such attempts must necessarily fail.[416] This is not to say that acts of intentional law making cannot influence ultimate

[414] See ch II.3.

[415] Hart has written about the rule of recognition: 'Even if it were enacted by statute, this would not reduce it to the level of a statute; for the legal status of such an enactment necessarily would depend on the fact that the rule existed antecedently to and independently of the enactment. Moreover, as we have shown in the last section, its existence, unlike that of a statute, must consist in an actual practice.' Hart, *The Concept of Law* (n 1) 111.

[416] Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' (n 303) 333–334.

rules of recognition, they certainly can and do.[417] What is crucial is that even after a purported intervention, to be able to ascertain the content of an ultimate rule of recognition, we will have to examine the social practice. The content of the legislated rule, which – to use Matthew Kramer's term - may be an epiphenomenal proxy of the rule of recognition, remains something else than the rule of recognition.[418]

As I mentioned in sec. 2 above, Joseph Raz provides a helpful discussion of the problem of what it means to have a normative power (of which legal power is a species).[419] According to Raz 'the exercise of normative power affects the existence or application of a norm normatively and not causally'.[420] To affect a change of a norm normatively, an act or its result has to affect the existence or application of the norm.[421]

The difference between a direct result and a merely causal effect seems readily applicable to ultimate rules of recognition. It is a normal element of a law-making act that the norm it purports to change is in fact changed. There is no need for 'causal' intermediation here. However, in the case of ultimate rules of recognition (or more broadly – in the case of customary rules, as long as they stay customary), there will always be such intermediation. What the lawmaker can do is influence legal officials and they in turn will (or will not) adjust their behaviour and attitudes. Similarly, high courts can influence the general practice of the courts by establishing or changing a

[417] For a discussion of changes in ultimate rules of recognition see ch X.

[418] I discuss Kramer's view in ch IV.2.

[419] Raz, *Practical Reason and Norms* (n 1) 98–104.

[420] ibid 103.

[421] ibid.

precedent. This process can be almost instantaneous in practice, but it does not follow that the change in an ultimate rule of recognition is a direct result of the act of law making or of one judicial decision.[422] There is nothing strange about normative changes brought about by something else than an exercise of a normative power.[423] Remember Raz's example of a person relocating to a different town and therefore becoming subject to different local tax laws: the act of moving is not an exercise of a normative power and yet it does result in a change of the person's normative situation.[424]

It is true that there could be a legal power to impose on all the legal officials a duty to identify something as law, outside of the current scope of the rule of recognition.[425] But ultimate rules of recognition are not a sum of legal duties of all legal officials to identify something as law irrespective of their source; ultimate rules of recognition are grounded in the officials' actual normative practice of recognizing as law norms that satisfy the criteria of legal validity. Hence, even if such a valid command or a valid enactment imposing duties that contradict (or supplement) the current content of ultimate rules of recognition is instantaneously effective, issuing it is still a distinct thing from changing any of the ultimate rules of recognition. With custom there are always two steps.

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[422] Lamond, 'Legal Sources, the Rule of Recognition, and Customary Law' (n 46) 17.

[423] Raz, *Practical Reason and Norms* (n 1) 102; Lamond, 'Do Precedents Create Rules?' (n 393) 25.

[424] Raz, *Practical Reason and Norms* (n 1) 102. See also sec. 1 above.

[425] Conf. Raz, 'Voluntary Obligations and Normative Powers' (n 341) 84–85.

Raz gives the following example, which I think is a good illustration of an analogous situation:

> … bullying somebody to promise to do *A* with the consequence that he does make the promise is causally effective in creating the norm that he ought to do *A*, but only his act of promising affects this norm normatively.[426]

Similarly, one can have a legal power to impose a duty to change the law on someone who can do that (irrespective whether by an exercise of a legal power or not) – it does not follow that the former has a legal power to change that law.[427] In both cases change in the legal rules is a causal, and not a normative effect of the legal power to impose duties. There is no point in bending the notion of a legal power to say that there is a legal power to change an ultimate rule of recognition, which is merely ineffective until the change in the actual practice of the officials. As I show below, such change can be accounted for without involving the notion of legal powers. Legal custom (if it is to stay customary) and ultimate rules of recognition are just not amenable to change that is a normative effect of a legal power.[428]

Consider an analogy: a legislature enacts a statute purporting to change an existing social practice of drinking tea at 3pm. According to the statute the social practice from now on is that tea is to be had at 1pm. It may very well be that the law-subjects adjust their attitudes and behaviour in response to the new statute and they actually start having tea at 1pm. Does this mean that the legislature has changed the

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[426] ibid 94.

[427] Wade makes a similar point in HWR Wade, *Constitutional Fundamentals* (Stevens & Sons 1980) 26.

[428] For similar view, see eg Gardner, 'Can There Be a Written Constitution?' (n 148) 174; Stefan Sciaraffa, 'The Ineliminability of Hartian Social Rules' (2011) 31 OJLS 603, 609–610. Sciaraffa extends this conclusion also to the rules of change, but I do not think this is correct as they do not need to be customary.

social practice? Not in a normative sense, as it is understood from the theoretical perspective presented above. It is clearly the case that the enactment of the statute itself had no immediate, direct effect on the social practice. Had the statute been ignored by the public, the statute would not have achieved what it purported to achieve (ie to change the social practice). This is not how enactments change non-ultimate legal rules – such rules are altered by the very fact of enactment.

A possible objection to this argument is that it is too 'external', because it potentially ignores genuine beliefs and attitudes of legal officials.[429] Will the answer to the question about the possibility of a legal power to change an ultimate rule of recognition differ from the perspective of a participant of the legal practice? Both Lamond and Kramer appear to suggest that. As Lamond has written:

> In the operation of a legal system the rule of recognition is treated as a binding law that may be subject to legal alteration or clarification, but not to modification simply at the will of officials.[430]

At the same time Lamond recognised the argument on impossibility of directly effective legal change of an ultimate rule of recognition presented above.[431] Neil MacCormick presented an even stronger view than Lamond, stating explicitly that it is possible for a legislature to have a legal power to change the rule of recognition.[432] Kramer stated that it is possible that the rule of recognition will include conditions

[429] I discuss the internal and external perspectives (as well as theoretical and practical perspectives) in ch I.

[430] Lamond, 'Legal Sources, the Rule of Recognition, and Customary Law' (n 46) 18.

[431] ibid 17.

[432] See MacCormick, *Questioning Sovereignty* (n 8) 86. This view was criticized in Oliver, *The Constitution of Independence* (n 75) ch 12, fn 71.

of its own change, or more precisely – that, for example, there will be criteria of validity, 'which direct the officials to attribute binding force to the statutory provisions that contain the new standards for legal validity'.[433] In other words there may be 'criteria in the foundational Rule of Recognition which lead officials to treat the epiphenomenal Rule of Recognition as something to be heeded'.[434]

Perhaps, in the United Kingdom the courts recognise Parliament's legal power to change the limits of its own legislative power or even to reconstitute itself. And whenever Parliament decides to do something of the sort, the courts will feel duty-bound to give effect to such change.[435] Thus, from the perspective of the judges qua committed participants of the legal practice, any Parliament-led change of ultimate rules of recognition is binding from the moment of enactment. In other words, the judges believe they have legal reasons to follow the will of Parliament even when that would seem to modify their previous practice constituting ultimate rules of recognition. Whether this has actually happened in UK history is a matter of debate. The example of the Parliament Acts of 1911 and 1949, referred to by Lamond, is highly controversial.[436] It may also be that the nature of Parliament's power is not

[433] Kramer, *Where Law and Morality Meet* (n 1) 112.

[434] ibid 114.

[435] See Oliver, *The Constitution of Independence* (n 75) ch 12, fn 71. Oliver is commenting critically on MacCormick's account of change in the rule of recognition. MacCormick claims that it is a contingent matter for any constitutional order whether the rule of recognition can be amended by an exercise of a legal power to do so. Although I agree with MacCormick that the rule of recognition is a legal rule and a constitutional rule, I believe that he is mistaken in saying that as a constitutional rule, the rule of recognition should be (even if only in principle) viewed as legally amendable. See Neil MacCormick, *Questioning Sovereignty* (n 8) 86.

[436] See, for example, Richard Ekins, 'Acts of Parliament and the Parliament Acts' (2007) 123 LQR 91.

legal, but belongs to some other realm like morality or politics. Judges could still feel duty-bound to give effect to such change for non-legal reasons. Being judges, however, we would expect them to provide legal justifications, even if not very convincing ones.

Setting this empirical problem aside, it seems that from the perspective of a participant of a legal practice, we indeed can speak of something like a legal power to change ultimate rules of recognition.[437] On the other hand, it is still true that without satisfying the 'external aspect' of actually changing the practice of legal officials, there can be no change, and thus there can be no legal power to change ultimate rules of recognition. As I argue later in this thesis, even though there cannot be a legal power, there can be a legal ability (quasi-power) to change even ultimate rules of recognition, which means that such change may be meaningfully law-governed.[438]

Does that mean that the legal officials who believe that in their legal system there is someone with a legal power to effect changes in law that amount to change of ultimate rules of recognition are necessarily mistaken? I think that Kramer's distinction between two modes of ultimate rules of recognition provides a way out from this conundrum.[439] There may indeed be a legal power to change an epiphenomenal manifestation of an ultimate rule of recognition (eg a power to

[437] The example of the hypothetical moral or political power of Parliament to limit its own powers shows that from the internal perspective there may be a non-legal authority to change the rule of recognition as well.

[438] See chs IX-X.

[439] See ch IV.2.

amend the codified constitution, to the extent it copies elements of an ultimate rule of recognition). And it is to be expected that the legal officials will have legal duties to accept the change correlated with the legal power of the lawmaker to change the law. Hence, the legal officials may be under a legal duty to change their individual behaviour and attitudes that in aggregate constitute the social practice underlying ultimate rules of recognition (on its foundational level).

5. EX POST LEGAL POWERS AND TIMEFRAMES FOR ASSESSING CONSTITUTIONALITY

Hart famously noted that sometimes courts can get away with initiating legal change without having a legal power to do so, while claiming that they have such power. Hart has written:

> One form of 'formalist' error may perhaps just be that of thinking that every step taken by a court is covered by some general rule conferring in advance the authority to take it, so that its creative powers are *always* a form of delegated legislative power. The truth may be that, when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they *get* their authority to decide them accepted after the questions have arisen and the decision has been given. Here all that succeeds is success.[440]

He proposed that in some circumstances, where a certain constitutional change is particularly controversial within a society, 'judicial disposition' will not be successful. But, on the other hand,

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[440] Hart, *The Concept of Law* (n 1) 153. Also:

> The manipulation by English courts of the rules concerning the binding force of precedent is perhaps most honestly described in this last way as a successful bid to take powers and use them. Here power acquires authority *ex post facto* from success.

ibid 154.

> where less vital social issues are concerned, a very surprising piece of judicial law-making concerning the very sources of law may be calmly 'swallowed'.[441]

Why such constitutional change effected by the courts may be 'swallowed'? On Hart's view,

> what makes possible these striking developments by courts of the most fundamental rules is, in great measure, the prestige gathered by courts from their unquestionably rule-governed operations over the vast, central areas of the law.[442]

This is not an explanation in terms of legal authority (legal power), but in terms of social capital of confidence in, or even perception of moral authority of, the power of the courts. Hence, the explanation is compatible with the situation being properly seen as unconstitutional and unlawful.

But judges do not tend to present their actions as unlawful. Instead, as Hart has written:

> Where this is so, it will often in *retrospect* be said, and may genuinely appear, that there always was an 'inherent' power in the courts to do what they have done. Yet this may be a pious fiction, if the only evidence for it is the success of what has been done.[443]

Thus, the question arises when such retrospective account in terms of an exercise of a legal power is: (1) a mere 'pious fiction', (2) a full-bloodied legal fiction (truth as a matter of the law, but only after the fact), and (3) when is it an apt statement of the state of the law at the time of the change?

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[441] Hart, *The Concept of Law* (n 1) 153.

[442] ibid 154.

[443] ibid 153.

I will begin with the third option: that the account is not a fiction at all, but a correct description of what the law was at the time of change. One might argue that if a high court did something that it usually does (in a jurisdictional sense): for instance, it resolved a dispute between two constitutional organs (and resolving such disputes lies in its jurisdiction), then there is no point in second-guessing the content of the resolution. But even if someone disagrees with that view, it is not easy to prove that purportedly legal justification given by a court is a fiction (of either sort). Given the often vague and ambiguous nature of constitutional texts (similarly with precedent, custom and conventions), it is not that difficult to write a judgment that would pass muster as a good faith attempt at textual interpretation or at following an established precedent.

On the second possibility (proper legal fiction), there is also a legal basis for justifying a past legal change in terms of an exercise of a legal power to make the change. But it is easy to be confused here. The pivotal aspect of this sort of situation is that the law introduces a legal fiction that some past legal change was made through an exercise of a legal power. The legal fiction means that the proposition *X* ('the legal change *A* was made through an exercise of a legal power') is legally true. So, *after* the legal fiction is introduced, it is true as a matter of law that the legal change was made this way (*X* is legally true).

Now, it becomes very important from which time-standpoint we ask the question whether *X* is true or not. If we ask the question from the standpoint of before the legal fiction is established, then *X* is false. And that historical truth does not change even after the legal fiction is established. *X* is true only from the standpoint of after the legal fiction is established. How and why might this happen?

Raz claimed that it is possible for a legal power to make a legal change to be recognised by the law ex post, after the change took place. His example was the

Declaration of the Establishment of the State of Israel, proclaimed on 14 May 1948 by the members of the Jewish People's Council.[444] The Declaration was an 'original law', 'ie a law created by a person or group who were not authorized by law to create it'.[445] However, on Raz's view, the reason why the Declaration was accepted as law, was that the people accepted it as an exercise of a law-making power by the Jewish People's Council. And this is sufficient to make it the case that, as a matter of law, it is the case that the Jewish People's Council exercised the law-making power.

Raz has written in terms of a legal system recognising legal powers not conferred by pre-existing legal powers.[446] He did not consider sufficiently the temporal aspect of truth-value of statements like *X* from my example. Raz only gave a half of the solution: either through custom or statute or some other source, the law may recognise a legal power supposedly exercised before this recognition. I propose that to best make sense of that, one needs to see this as establishment of a legal fiction. Thus, the act of recognition of the legal power, and its relationship to the truth-value of statements like *X,* cease to be mysterious.

Seeing this as a legal fiction, allows intelligibly to criticise as unlawful the sort of legal changes that are 'results' of legal powers non-existent at the time of change and only 'added' (recognised) later by the law. Also, a critic may want to resist the

[444] 'Declaration of Establishment of State of Israel 1948' <http://www.mfa.gov.il/mfa/foreignpolicy/peace/guide/pages/declaration%20of%20establishment%20of%20state%20of%20israel.aspx>; Raz, 'Voluntary Obligations and Normative Powers' (n 341) 84–85.

[445] Raz, *The Concept of a Legal System* (n 1) 194–195.

[446] Raz, 'Voluntary Obligations and Normative Powers' (n 341) 84–85.

conclusion that a legal fiction of the right sort was in fact established. After all, it is easy to jump to a conclusion that a legal power was at play if one believes that this is how all legal changes take place. However, as I argue, this intuition is mistaken. It may thus be that someone understanding the role of rules of recognition in giving effect to legal change will be less likely to see legal fictions of legal powers filling purported explanatory gaps, which are not there (see chapter VIII).

Finally, as Hart noted, an ex post account of a legal change as an exercise of a legal power may be a mere fiction, false even as a matter of law. Just because judges say something, it does not make it correct as a matter of law. Also, it does not even make it authoritative – not every part of a judgment is always (equally) legally binding. Much more needs to be showed about judges' ability to affect the content of the law before mere 'pious fictions' ought to be accepted as legal fictions of the sort I just considered.

6. CONCLUSION ON LEGAL POWERS IN GENERAL

In my discussion of legal powers, I raised several points that will be significant for what follows. I stressed that the incorrect but popular intuition that there is a legal power behind every effective change in the law (including constitutional law) is in tension with the best understanding of legal powers. Legal powers to make (change) law are highly unlikely to be involved in cases of changes in legal custom (due to lack of group agency) and they may also not be at play in cases of legal change initiated by the courts (especially if the courts deny exercising a law-making power). Moreover, having causal influence over a change in the law, as may be the case with some executive action and with unconstitutional legislation accepted by legal officials, is not the same as exercising a legal power. And even when the law deems

some past legal change as an instance of a proper exercise of a legal power, this may be an ex post legal fiction.

All this does not mean that we should now see unlawfulness and unconstitutionality lurking around every corner. Lawfulness (and thus constitutionality) of many of such legal changes can be accounted for on a different basis – through the rules of recognition (and legal abilities or quasi-powers). This is the object of the parts 3 and 4 of this thesis. Before I turn to that, I still need to provide more groundwork.

VI. POWERS OF CONSTITUTIONAL CHANGE

Now that it is clearer what legal powers are and what they are not, it is time to consider the place of legal powers in constitutional change. Given the interests of many of those who write about constitutional change, it is not surprising that they are not exclusively, and sometimes even chiefly, concerned with *legal* powers. This is particularly visible in the literature on 'constituent power', 'constituted power' or 'amendment power'.[447] One risk here is that one may easily slip into equivocations and category errors. In this chapter, I discuss to what extent those powers are, or can be, legal powers. By doing so, I identify which of the various powers of constitutional change considered in the literature are within the scope of my project.

I want to stress that this thesis concerns the relationship between legal systems and change of legal constitutional rules. Hence, the only notions of authority, legitimacy and power that are of direct relevance, are those grounded in the law. This is why I mostly forego referring to 'legitimacy', and why – outside of this section – I use 'authority' and 'power' interchangeably to mean 'legal power'.[448]

This chapter is structured in the following way. In sec. 1, I introduce the notion of a primary constituent power and argue that exercises of that power can be lawful, but this need not be the case. Then, in sec. 2, I discuss amendment powers

[447] Roznai's work provides one good example; Roznai (n 3) 105–133. See also eg Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 Yale Journal of International Law 1; Doyle (n 3).

[448] Compare Roznai (n 3) 123.

(constituted powers) and, in sec. 3, legal limits on legal powers of constitutional change.

1. PRIMARY CONSTITUENT POWER (*POUVOIR CONSTITUANT*)

Let us begin with the most general, or fundamental, 'power' of constitutional change, the famous *pouvoir constituant*. 'Primary constituent power', as used by Yaniv Roznai in his influential book on constitutional change, means a specific kind of a power to make a new constitution or to alter the current one.[449] 'Constituent authority' is a sometimes-used synonym.[450] Constituent power is said to be unlimited 'at least in the sense that it is not bound by previous constitutional rules and procedures'.[451] On a currently fashionable view, it is a power possessed only by 'the people'.[452]

Constituent power is not simply a power to make a new constitution, because that can plausibly be provided for under pre-existing constitutional rules, as Roznai admits.[453] Hence, it must be a kind of power that cannot be limited by any

[449] ibid 122.

[450] For instance, Richard S Kay, 'Constituent Authority' (2011) 59 American Journal of Comparative Law 715; John Finnis, 'Introduction', *Philosophy of Law: Collected Essays Volume IV* (OUP 2011) 12; Roznai (n 3) 118.

[451] Roznai (n 3) 109.

[452] ibid 122. See also Arato (n 19); Barczentewicz and Schneider (n 19).

[453] Roznai (n 3) 122.

pre-existing rules, even when such rules purport to regulate replacement of the current constitution. To put it in other words, it must be a power that cannot by conferred by a pre-existing rule, or at least by a rule that belongs to the constitutional order being changed (replaced).

My best interpretation of Roznai's view is that he considers primary constituent power to be a kind of a moral or political power. It is a kind of normative power that is not a legal power and is not constituted by any legal power. But it is a power *de jure*, not merely *de facto*. Hence, it is at least in principle possible to identify who holds it and how it can be exercised, before any attempt of doing so. This is important for Roznai, because it gives hope for a legalistic distinction between (unlimited) primary constituent powers and (limited) amendment powers. A distinction that can be used, for example, by a constitutional court to view some purported constitutional change as an attempted exercise of an amendment power outside of the limits of that power and thus to hold it as invalid (unconstitutional).

Richard Kay offered an alternative way of looking at constituent powers as *de facto* powers (what he called 'practical' authority).[454] From this perspective, we can only really know whether a constituent power exists after it is successfully exercised. That is, when we observe destruction of an old constitution's identity and an emergence of a new constitution which ends up being 'regarded as binding for an extended period'. [455] For Kay, this requires a change of the ultimate rule of

[454] Richard S Kay, 'Constituent Authority' (n 451) 720. I discuss Roznai and Kay here not because of their influence, but because they provide reasonably clear accounts of alternative ways of thinking about constituent powers, which are representative for broader literature on the topic.

[455] ibid 720, 732.

recognition.[456] An attempt of a legitimate (*de jure*) exercise of a constituent power will fail to be an exercise of a constituent power on Kay's view, if it does not succeed to create a new constitution. By definition, there can be no unsuccessful exercises of constituent powers here. We can call this a 'revolutionary' view of constituent powers.

A. EXERCISES OF CONSTITUENT POWERS MAY BE LAWFUL

Kay's is a coherent and plausible conception of constituent powers. However, we could also think of constituent powers more broadly, as capable of being exercised without breaking continuity of constitutional orders and also in a perfectly lawful manner. This is easier on *de jure* view of constituent powers, where we can potentially identify their holders and methods of genuine exercise in the abstract, or at least before any actual exercise.[457] For instance, if a constitution provides that it may be changed by a referendum and if this kind of referendum is a genuine exercise of a primary constituent power, then it could very well be that resulting constitutional change will be constitutional and lawful, and it will also be a genuine exercise of a constituent power.

On this broader conception of primary constituent power, lawfulness of any constitutional change tells us nothing about whether that change was a result of an exercise of a constituent power. However, *unlawfulness* also tells us nothing. The law

[456] ibid 732. Note that a change among ultimate rules of recognition is not necessarily a change that destroys the identity of the old constitution, it is not necessarily 'revolutionary', see ch X.

[457] I do not have a good idea of how this could be done on a pure *de facto* view.

is simply irrelevant to our assessment of whether a constituent power was exercised or not. What is, independently, an exercise of a primary constituent power, may also happen to be a lawful or unlawful. An exercise of a constituent power may involve exercises of amendment powers, but whether it does is of no consequence on whether it counts as a genuine exercise of the constituent power.

As I argue in part 3 of this thesis, there are two ways in which legal change (and thus any change in legal constitutional rules) may be law-governed (lawful): it may be an exercise of a pre-existing legal power to change the law or it just may be recognized by a pre-existing rule of recognition.[458] Both grounds of lawfulness of legal change may apply to constitutional changes which also, independently, happen to be genuine exercises of primary constituent powers. This is true even of constitutional change involving change of ultimate rules of recognition.[459]

This broad account of constituent powers makes sense of Richard Albert's claim that that codified constitutions can 'attempt to direct how constituent power can be validly exercised'.[460] His example is one of the procedures for constitutional change from Article V of the US Constitution, a method he sees as similar to the one used for adoption of the Constitution itself (simplifying: a proposal to be made by a constitutional convention, then to be ratified by three-quarters of US states in conventions). Article V seems straightforwardly to ground both a legal power to change the constitution (amendment power) and a non-ultimate rule of recognition

[458] See ch VIII.

[459] See ch X.

[460] Albert, 'Constitutional Amendment and Dismemberment' (n 448) 22.

imposing a duty to accept the changes as law. Could it be a genuine exercise of a constituent power?

On a narrower view of constituent powers, this could only be if the relevant actors somehow manage to exceed the scope of the legal power from Article V. A mere violation of some legal duty would not be enough, because legal powers can be effectively exercised while violating legal duties (only legal disabilities block effectiveness of legal powers).[461] The question is then whether the Article V power somehow contains limitations other than the requirement of following one of the procedures it expressly provides (eg that it does not allow a creation of a new constitution)? As I say in the next section, I am skeptical of claims about such implicit limitations. And if there is no such limitation, then even a wholesale constitutional replacement through Article V means would count as an exercise of an amendment power, and thus not an exercise of a constituent power.

However, on the broader view of constituent powers, Albert can be perfectly correct in saying:

> The four procedures in Article V give political actors the tools to exercise the full scope of powers to change the Constitution … also from outside the constitutional order, in order to found a new constitution that leads to legally discontinuous constitutional change.[462]

Even if Article V really gives 'the full scope of powers', then there is space for constituent power to be genuinely manifested when Article V is properly used. Any such change could then be seen as both coming from within the constitutional order

[461] See ch V.

[462] Albert, 'Constitutional Amendment and Dismemberment' (n 448) 23.

and from outside (as an exercise of a primary constituent power, which is more fundamental than the constitutional order).

B. NOT EVERY EXERCISE OF CONSTITUENT POWER IS LAWFUL

As Joseph Raz argued regarding the foundation of the state of Israel, the existence of legal powers to make even the most basic constitutional laws may be recognised ex post. [463] Whenever this is alleged, it is important to pay attention to the time-perspective from which such ascriptions of legal powers to past events are made, as I did in the previous chapter.[464] As I argued, Razian ex post-recognised legal powers are only legal powers as a matter of legal fiction. Such recognition does not change the fact that at the time the constitution changed, this happened not due to an exercise of a legal power. For Kay, when it comes to genuine exercises of constituent power, legal justifications are always a mere façade.[465] Though this need not be the case on the broader account of *de jure* constituent powers, it *can* be that a genuine exercise of a *de jure* constituent power will be ex post given a merely fictional legal justification.

Also, it is likely that many exercises of constituent powers are not recognised by rules of recognition of various modern legal systems. Quite plausibly, even if the legal officials in a given legal system do subscribe to the theory that 'the people' can undertake any constitutional change whatever, they may at the same time not accept that such change could happen by legal means. This may be even if the same officials

[463] See above ch V.5.

[464] Ibid.

[465] Kay, 'Constituent Authority' (n 451) 732–735.

see any such constitutional change as morally legitimate and all-things-considered desirable.

In fact, actions seen by some as exercises of constituent power may be not only not recognised as effective, but expressly prohibited, even criminalised, by the law. The recent events around the Catalan unilateral declaration of independence provide a vivid illustration of how a legal system (Spanish law) may see it as sedition or even treason for a group of its subjects to purport to exercise constituent power to secede.[466] Success of Catalan independence, in the current legal context, would involve emergence of a new, independent political community, with a new legal system and new ultimate rules of recognition.

To be precise, as I argued in chapter III, the recognitional community – the group whose social practice grounds ultimate rules of recognition – is much narrower than 'the people'. Hence, it is not the case that a shift of an ultimate rule of recognition in itself is an exercise of a constituent power. Nevertheless, perhaps such

[466] See eg Zoran Oklopic, 'Constitutionalize This: Catalan Referendum as Political Surprise and Theoretical Disruption' (*I·CONnect*, 6 October 2017) <http://www.iconnectblog.com/2017/10/constitutionalize-this-catalan-referendum-as-political-surprise-and-theoretical-disruption/> accessed 5 November 2017; Milena Sterio, 'Catalonia: Is There a "Right" to Secession?' (*I·CONnect*, 10 October 2017) <http://www.iconnectblog.com/2017/10/catalonia-is-there-a-right-to-secession/> accessed 5 November 2017. See also Zoran Oklopic, 'Drafting Independence: The Catalan Declaration of Sovereignty and the Question of the Constituent Power of the People in Context' (*I·CONnect*, 11 February 2013) <http://www.iconnectblog.com/2013/02/drafting-independence-the-catalan-declaration-of-sovereignty-and-the-question-of-the-constituent-power-of-the-people-in-context/> accessed 5 November 2017.

a shift may be influenced by an exercise of a constituent power, and thus allow 'the people' to claim authorship in a sense (see chapter X).

Exercises of constituent power may also lead to change among ultimate rules of recognition less radical than that accompanying creation of a new legal system. However, on the *de jure* account of constituent powers there can be constitutional change which is neither a result of an exercise of an amendment power, nor a result of an exercise of a constituent power. Not all constitutional change happens either through constituent power or through amendment power. The third category is heterogeneous. It includes morally illegitimate constitutional changes, for instance, through military coup d'états.[467] But it also includes all the cases of more ordinary change in constitutional law, for instance through judge-made law, whenever the agents of change are not vested with an amendment power.[468]

2. AMENDMENT POWER AND RULES OF CHANGE

Unlike primary constituent power, amendment power (or constituted power) is a kind of legal power in the sense I introduced earlier in this chapter.[469] Amendment power is a legal power to change the constitution. Importantly, as I use the term, amendment powers are not only powers to change the text of a codified constitution. Instead, amendment powers are powers to change any constitutional rule, which may in some legal systems include, for instance, statutory rules of election law and

[467] See ch X.

[468] See chs IX-X.

[469] See also Roznai (n 3) 122.

so on. In Hartian terms, amendment powers are conferred by rules of change, ie legal rules that confer legal powers to change the law.[470]

Some think that constitutional (lawful) constitutional change takes place only if it is a result of an exercise of a pre-existing amendment power (a version of the 'powers view' I discuss in chapter VIII). I dispute this later on in this work (see chapters IX-X). However, I do agree that Raz's ex post-recognition solution does not affect the fact of whether a constitutional change took place due to an exercise of a legal power. Without a *pre-existing* power, a change is not legally authorised at the moment it takes place. This is so even if the law later begins to deem the change, through a legal fiction, as having been an exercise of an amendment power.

What grounds amendment powers? Or in other words: what makes it the case that a given amendment power is available in law at a given point in time? As with all law, this is ultimately due to ultimate rules of recognition of the legal system.[471] Just like other laws, amendment powers may, in principle, come from codified constitutions, statutes, custom, case law, and any other source identified by an ultimate rule of recognition.

One possible, though very controversial in many constitutional orders, example of an amendment power is the legal power of judges to change the law. Also, in some constitutional orders there may be other non-codified constitutional norms empowering constitutional change in certain circumstances, like the principle of

[470] See ch II.3.A.

[471] See part 1.

necessity, but their existence and applicability has so far been doubted, especially in Commonwealth countries.[472]

Some amendment powers may be rather unexciting. For instance, if a given constitution includes rules of election law grounded in an ordinary statute, then the ordinary law-making power of the national legislature is an amendment power in respect to those constitutional rules. Nevertheless, things certainly do get exciting in cases of purported *unamendability*, to which I now turn.

3. LEGAL LIMITS OF CONSTITUTIONAL CHANGE

One feature of constitutional rules that is particularly relevant to the issue of constitutional change is that they are often – if not typically – legally protected from change to some extent, for instance, by super-majoritarian procedures of constitutional amendment or through perpetuity clauses (as in the German Basic Law). In other words, they are legally entrenched or even unamendable. Entrenchment is considered nowadays to be among the paradigmatic characteristics of constitutions, one that constitutions need to be able to serve as stable foundations for government and the rule of law.[473]

[472] See eg Nick Barber, 'The Doctrine of State Necessity and Revolutionary Legality in Fiji' (2001) 117 LQR 370, 410.

[473] See eg Elai Katz, 'On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment' (1996) 29 Columbia Journal of Law and Social Problems 251. However, it is also true that some constitutions are much less entrenched and change more often than others, see Mila Versteeg and Emily Zackin, 'Constitutions Unentrenched: Toward an Alternative Theory of Constitutional Design' (2016) 110 American Political Science Review 657.

Constitutional rules may be entrenched in a non-legal way as well. There may be social norms against initiating change of rules recognised as constitutional. Also, recognition of a new rule as a part of the constitution, especially in a legal system with a non-codified constitution (like in the United Kingdom), may be a lengthy process, because of a naturally conservative attitude of legal officials to constitutional change.[474] Aside from the issue of what is the content of the settled law regulating constitutional change in a given legal system, it may be said that, usually, constitutions figure in reasoning about law as more exclusionary then other rules.[475] That is, a committed participant of the legal practice will accept fewer considerations (both legal and non-legal) as validly counting in favour of acting contrary to the settled content of the constitution. For a (non-anarchist) legal official, reasoning in her capacity as a legal official, only extreme grounds like the ones covered by the doctrine of state necessity or considerations of survival of the legal order will figure as proper reasons to act on in contravention of the constitution.

However interesting extra-legal considerations are, my focus is on how the law governs constitutional change. Two features of legal regulation of constitutional change are particularly salient for entrenchment and unamendability: (1) limits of amendment powers and (2) prohibitions from engaging in some kinds of constitutional change.

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[474] Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' (n 303) 350–352. But it may be very quick as well, if the legal officials recognize someone's authority to effect constitutional change, as the United Kingdom officials probably recognize such authority in the Westminster Parliament.

[475] I thank Grant Lamond for this observation.

Are there any general limits of amendment powers stemming just from their nature as legal powers conferred by legal rules? The only such limit is that the conditions for an exercise of the power, specified in the legal rule conferring the power, need to be met in order for an action to count as an exercise of the power.[476] Only actions recognised by the law as law-changing have that effect, outside of what is so recognised there is only legal nullity.[477] Some, like Yaniv Roznai, argue that there are other limits on amendment powers, which are both more specific and present in all constitutional orders.[478] I do not discuss them here because arguments for their existence are arguments about moral and political legitimacy of constitutions and constitutional change, and hence outside of the scope of this work.[479]

One thing that is easily missed is that just because one may be legally prohibited from doing something, it does not follow that they lack a legal power to do it.[480] Conversely, if someone lacks a legal power to do something, it does not follow that they will breach any duties by attempting to do it. In law, an attempt to do something one has no legal power to do has only the consequence that the action will not be recognised as having a legal effect that an exercise of a legal power would have had. (However, the same attempt may be effective in bringing about the intended legal change due to rules of recognition, even in the absence of a relevant legal power.)

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[476] See my discussion of legal powers above in ch V. Compare Roznai (n 3) 136–137.

[477] Hart, *The Concept of Law* (n 1) 30–31.

[478] Roznai (n 3) 105–134. See also eg Doyle (n 3).

[479] For instance, Roznai considers amendment powers in terms of delegation, a form of trust, where holders of amendment powers are mere 'trustees of 'the people' in their capacity as a primary constituent power'; Roznai (n 3) 133.

[480] See ch V.

Another error is not to look beyond legal texts. At least in principle, just because the text of a codified constitution states that it provides an exclusive way to amend the constitution, it does not follow that this is the correct legal position – although it very well could be. For example, Australia's Constitution in its Section 128 states that 'This Constitution shall not be altered except in the following manner (…)'.[481] Similarly, the German Basic Law in Article 79 provides that 'This Basic Law may be amended only by a law expressly amending or supplementing its text.'[482]

Both of those constitutions uncontroversially establish amendment powers, with specific conditions on how the powers can be exercised. The conditions may be both procedural and substantive. Just like with all legal powers, in case of action failing to satisfy the conditions, the power-conferring rule will not ground the legal effects it would otherwise ground in case of an action that satisfies the conditions. This is all that follows from the nature of the amendment powers as legal powers.

However, the two constitutions just cited also seem to say that there is no other way by which the constitution in question may be amended.[483] One way to read such provisions is to take them as grounding a general prohibition against actions that would result in changing constitutional rules. In other words, grounding a duty not to take such action. Even if changing the constitution is somehow possible another

[481] Commonwealth of Australia Constitution Act, art 128.

[482] Basic Law for the Federal Republic of Germany, art 79(1). See also the wealth of examples provided by Roznai in his book; (n 3) 235–274.

[483] Note that, plausibly, both constitutions refer to change of only a subset of all constitutional rules. That is, to change of constitutional rules directly grounded in the codified texts. Though perhaps not only by changing those texts. For instance, they may also be taken to restrict judicial change of those rules.

way, it will happen through a breach of the duty. This will make such change unlawful and unconstitutional on my view (which I present in chapters IX and X).

A different reading of those constitutions, compatible with the previous, would be that – on top of instituting a prohibition – they also provide that no purported constitutional change by other means is valid. This would be a *disability*-imposing rule.[484] Presumably, because of the hierarchical supremacy of the codified constitution, any amendment power created by a lower-level source of law would be in conflict with this rule and as such ineffective (or perhaps even invalid).[485] It may then appear that any constitutional change not through the amendment power from the codified constitution would be unconstitutional. However, the matters are not this simple.

Even though legal rules grounded in a codified constitution may be 'as high as the law goes', it does not follow that they are alone on that highest level.[486] An ultimate rule of recognition may identify, for instance, customary constitutional law and give it the same hierarchical place as the codified constitution (or perhaps even a higher one!). The question then arises whether there are any such legal rules grounding amendment powers that are not displaced by hierarchical superiority of the codified constitution.

A possible example is a power for judges to change constitutional rules that are directly grounded in a codified constitution. If we can observe that legal officials in a given legal system recognize that courts can authoritatively interpret the

[484] Hohfeld (n 340) 60.

[485] See also Roznai (n 3) 137–138.

[486] Gardner, *Law as a Leap of Faith* (n 1) 107.

constitution and thus that they accept judicial decisions that amount to constitutional change, then this might suggest that the judges have an amendment power.[487] Whether this is the case in any particular legal system is a contingent matter.

Amendment powers not grounded in a codified constitutional text do not necessarily owe any allegiance to the codified constitution. This means that there could be a customary amendment power to replace fully the codified constitution irrespective of what the latter says. True, there is a sense in which 'the constitutional amendment power cannot be used in order to destroy the constitution', as Roznai argues.[488] But it is important to be very precise what one means by 'the constitution'. All amendment powers, including the non-codified ones, are part of a constitutional structure in a broad sense that I use in this thesis.[489] However, it does not follow that they are subservient to the narrower 'constitution' defined by the supremacy of the codified constitution. Whether the formal codified constitution really has such place in the real, broader constitution is, again, a contingent matter.

The same is true about any specific constitutional rules, including what some may see as 'the basic principles'.[490] One may offer a very attractive moral account of a constitution identifying its 'spirit' or 'core' and then argue that it would be bad for

[487] Though it could also mean that rules of recognition merely see some adjudication as having law-changing effects, but without any amendment powers involved, see below chs IX-X.

[488] Roznai (n 3) 141 (emphasis removed).

[489] See ch IV.1.

[490] Contra Roznai, see Roznai (n 3) 142–144.

such constitutional rules to be replaced. However, there is no guarantee that the law as it is, especially as determined by the fundamental custom of recognition of law (ultimate rules of recognition), reflects this moral account. Within the positivist framework, the law is determined by social facts, not by the most attractive moral (or philosophical) theory of it.[491]

Non-codified rules may also work the opposite way, to entrench constitutional rules. Non-codified rules may be both prohibition- and disability-imposing, just like codified rules. They may even provide, as a matter of law, for true unamendability of some constitutional rules. I want to stress that it is possible for a legal system to hold some constitutional rules as unamendable. This does not mean that such change is impossible in practical terms, but only that it cannot be done constitutionally (lawfully).[492]

For instance, non-codified rules could ground substantive limitations on constitutional change. The 'basic structure' doctrine in Indian constitutional law is an example of such a judicially invented substantive limitation, which bites even

[491] Stephen Sachs offered an interesting illustration:

> 'Suppose, for example, that interpretive method *A* is the only one that's philosophically correct, but the French legal system actually interprets their constitution using method *B* … French lawyers know about the philosophical debates, but they're committed to their own traditional method; committed all the way down, in principle as well as in practice. … How could the entire society be getting its own law wrong, all the way down? It'd be one thing if French law explicitly required philosophical correctness, and the lawyers mistakenly thought they were complying. In that case, the collective error would be easy to explain. But if the French practice is to ignore the philosophers and to derive legal rules by reading their own constitution in their own specific way, how can we say that this social practice is legally "incorrect"?'

Sachs, 'Originalism as a Theory of Legal Change' (n 106) 834.

[492] See ch X.

against procedurally proper constitutional amendments.[493] Even in Germany, substantive limitations on constitutional change are arguably not entirely grounded in the constitutional text and hence may be better seen as coming from a different source (judicial law-making?) identified by an ultimate rule of recognition.[494]

An additional difficulty lies in interpreting textual constitutional provisions, which do not use the sort of exclusive language present in the cases of Australia and Germany. The most famous case of that is the United States Constitution, which provides for a process of constitutional amendment (Article V) and original ratification (Article VII) without any express mention of exclusivity.[495] This does not entail that US constitutional law has no prohibition- and disability-imposing norms of the sort I just discussed, but it does raise doubts as to their existence.[496]

[493] Richard Albert, 'Nonconstitutional Amendments' (2009) 22 Canadian Journal of Law and Jurisprudence 5, 21–25.

[494] ibid 29–30.

[495] See chapters VII.5. and IX.5.

[496] Among the people who believe that the Article V is not exclusive are Bruce Ackerman and Akhil Amar, see Amar (n 23); Ackerman (n 22). However, it is likely that more lawyers believe the opposite, see eg David R Dow, 'The Plain Meaning of Article V' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995). See also Frederick Schauer, 'Amending the Presuppositions of a Constitution' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995) 146–147; Albert, 'Constitutional Disuse or Desuetude: The Case of Article V' (n 333).

4. CONCLUSIONS ON POWERS OF CONSTITUTIONAL CHANGE

My aim in this chapter was to elucidate the relationship between the law on one hand and constituent powers and amendment powers (constituted powers) on the other hand. I began by contrasting two representative views of constituent powers – *de jure* (Roznai) and *de facto* (Kay). I stressed that, on both views, constituent powers are non-legal powers that belong to the realms of morality or politics. However, I argued that what counts as an exercise of a constituent power may, independently, be a lawful legal (constitutional) change. I used the example of Richard Albert's discussion of the Article V of the US Constitution as an illustration. Naturally, not every exercise of a constituent power will coincide with a lawful change in the law.

Regarding amendment powers (constituted powers), I followed the established understanding in seeing them as legal powers to change the law. I then considered the implications of seeing amendment powers as legal powers. I noted that, on the Hartian view, amendment powers are conferred by rules of change, which means that they can come from any source of ordinary law (codified constitutions, custom, statutes, etc.). I stressed that not all constitutional change takes place due to exercises of amendment powers, because some kinds of change (eg customary change) are not the sort of thing that can be governed by legal powers (and by rules of change).

Finally, I considered the issue of legal limits on constitutional change. My key contribution was to illuminate the ways in which what may prima facie seem like legal limits on constitutional change can be non-existent (or superseded by hierarchically higher legal rules) and legally ineffective.

VII. HOW CONSTITUTIONS CHANGE? (WITHOUT AMENDMENT POWERS)

Legal constitutional rules change in many ways. In this chapter, I discuss the key mechanisms of constitutional change which may function without involving amendment powers (legal powers specifically to change legal constitutional rules). I begin with adjudication, considering when and to what extent judges have powers to change the law (sec. 1). In sec. 2, I look at constitution-changing executive practice. Then, in sec. 3, I cover ordinary legislation. Section 4 deals with giving domestic effect to foreign or international law as a possible mechanism of constitutional change without amendment powers. Finally, in sec. 5, I examine briefly Richard Albert's concept of 'constitutional desuetude'.

Even though in this chapter I focus on other mechanisms of constitutional change, I should mention perhaps the most obvious example of constitutional change that is not a proper exercise of an amendment power. That is, a purported exercise of an amendment power which somehow violates the procedural or content limitations of that power. I discussed the possible legal limits of amendment powers in the previous chapter.[497] An iconic case of this sort is Charles de Gaulle's successful 1962 gambit to change the French Constitution by using a procedure requiring only

[497] See ch VI.3.

a referendum, instead of a procedure which also required adoption of the proposed amendment by the legislature.[498]

1. ADJUDICATION

It is a common, if not universal, feature of modern legal systems that the courts can change the law. True, there may be a discrepancy between the law's official story (or ideology) of how are the judges legally constrained on one hand and what the law really is on the other.[499] The official story of the law, found in court judgments and other official texts, is likely to exaggerate the constraints and underestimate the effects of adjudication on legal change.[500] But just because the official story likely exaggerates constraints, it does not necessarily follow that legally there are no limits to judicial power and in particular that judicial power includes power to make (change) some or any law.[501] This is arguable even in common law systems.[502]

[498] See eg Jean-Philippe Derosier, 'The French People's Role in Amending the Constitution: A French Constitutional Analysis from a Pure Legal Perspective' in Richard Albert, Xenophon Contiades and Alkmene Fotiadou (eds), *The Foundations and Traditions of Constitutional Amendment* (Hart Publishing 2017) 324–325. There may be some controversy whether this case counts even as a purported exercise of an amendment power, given that it is accepted that the change was unlawful, despite its success. However, it is clear that de Gaulle did not purport to rely only on extra-legal constituent power, but expressly claimed to follow the Constitution (even if the procedure he used should not have been used for constitutional amendment).

[499] Barczentewicz, 'The Illuminati Problem and Rules of Recognition' (n 49).

[500] Jeffrey Goldsworthy, 'Raz on Constitutional Interpretation' (2003) 22 Law and Philosophy 167, 176.

[501] See eg Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010) 74.

[502] See Lamond, 'Do Precedents Create Rules?' (n 393) 25.

A perception of tension between the limits of lawful judicial power and how judges in fact affect legal (and constitutional) change is very common among modern legal systems. For instance, Alec Stone Sweet in his *Governing with Judges* showed how 'constitutionalisation' of law in several European countries in the 20th century undermined in practice the traditional European model of the separation of powers, without displacing that model from the official stories of those legal systems.[503]

The French case provides a very good illustration of this tension. As Mitchell Lasser observed, in French law there is an 'official portrait' of the judicial role and an 'unofficial' one.[504] According to the official portrait, the judge is a 'kind of mechanical mouth; he does no more than apply legislative provisions'.[505] What is more, according to Troper and Grzegorczyk, in France 'courts are never bound by precedents' and 'statutes are the only source of law'.[506] However, this is viewed as a sort of a fiction in French academic legal writing, where a much more prominent role of a judge in legal change is both admitted and endorsed.[507]

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[503] Alec Stone Sweet, *Governing with Judges* (OUP 2000) 130–133.

[504] Mitchel Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2004) ch 2.

[505] ibid 37.

[506] Michel Troper and Christophe Grzegorczyk, 'Precedent in France' in Neil D MacCormick and Robert S Summers (eds), *Interpreting Precedents* (Routledge 1997) 111, 117.

[507] ibid 112–113, 119, 126, 137–138; Lasser (n 505) 38–61.

i. The mechanisms of influence on constitutional law: binding constitutional review

Issues of constitutional law may be justiciable in other courts than specialised constitutional courts. For instance, issues of electoral law, with a basis in an ordinary statute, are in some legal systems litigated in ordinary courts (eg in Poland and Australia). However, there is a difference in perception of legal change initiated in special European-style constitutional adjudication and in other kinds of adjudication.

One obvious reason is that in certain legal systems some or all courts have a legal power to disapply or even to invalidate an unconstitutional statute. I want to stress the difference between the two types of powers. For instance, it is very much an open question in US law whether strong judicial review exercised by the US Supreme Court affects the validity of impugned statutes. Or, in other words, whether 'unconstitutional statutes are (…) struck out of the statute book'.[508] It is arguable that the US Supreme Court has merely a power not to apply unconstitutional statutes; not a power to remove norms from the legal system.[509] Similarly, in the United Kingdom, courts do not have a power to invalidate a statute, but in some circumstances, they may 'disapply' a statute inconsistent with European Union law.[510]

[508] Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale Law Journal 1346, 1355 fn 24; see also Laurence P Claus and Richard S Kay, 'Constitutional Courts as "Positive Legislators" in the United States' (2010) 58 American Journal of Comparative Law 479, 481; William Baude, 'Signing Unconstitutional Laws' (2011) 86 Indiana Law Journal 303, 318; Eric Fish, 'Judicial Amendment of Statutes' (2016) 84 George Washington Law Review 563.

[509] Jonathan F Mitchell, 'The Writ-of-Erasure Fallacy' (2018) 104 Virginia Law Review 933.

[510] See Mikolaj Barczentewicz, 'Judicial Duty Not to Apply EU Law' (2017) 133 LQR 469.

Among methods used by constitutional courts, which stop short of invalidating or disapplying a law, are: suspended declarations of unconstitutionality (giving the legislature time to amend the impugned statute and providing guidelines how to do it) and 'binding interpretations' which uphold a law as constitutional, but only if understood the way the court says it should be.[511] It is not obvious that a court that has a power to disapply or to invalidate an unconstitutional law also has a power to use those other techniques – even when it in fact uses them.

In Poland, this question caused a long-standing strife between the Supreme Court and the Constitutional Tribunal. According to the Supreme Court, the only binding part of a judgment of the Constitutional Tribunal was its determination whether a statute is constitutional or unconstitutional.[512] Anything beyond that, like an attempt to control pro-constitutional interpretation of the statute, was at most persuasive authority. Unsurprisingly, the Constitutional Tribunal consistently held that its judgments are binding *erga omnes* in their entirety.[513] Similar issues led to controversies in Italy and France.[514]

[511] Stone Sweet (n 504) 72.

[512] See eg Judgment of the Polish Supreme Court of 6 May 2003, I CO 7/03, OSNC 2004, nr 1, item 14; Resolution of a Panel of Seven Judges of the Polish Supreme Court of 17 December 2009, III PZP 2/09, OSNP, nr 9-10, item 106.

[513] See eg Judgment of the Polish Constitutional Tribunal of 8 May 2000, SK 22/99, OTK 2000, nr 4, item 107.

[514] Stone Sweet (n 504) 121–122, 124.

ii. The mechanisms of influence on constitutional law: custom and precedent (case law)

So far, I discussed the power to invalidate unconstitutional laws and the power to make binding interpretations of laws associated with review of constitutionality, present in some legal systems. A court that does not have one of those special powers, can still influence the content of the law by contributing to customary law or through case law.

If the court's influence is through its contribution to customary law, then it would be inconsistent with the all major accounts of legal powers to say that the court is exercising a legal power to change the law.[515] The way customary law works, there needs to be a convergence of thought and action in a broader community (eg of the courts) over a new custom, for any change in customary law to happen. Hence, no single agent (a court) can directly through their action make it the case that customary law changes. As I argued earlier, in situations like this, we can speak of a causal influence over a custom ('social power'), but not of a legal (normative) power to change it.[516] How much customary law there is, for example, in English common law today is controversial, but it is clear that English common law *was* customary law 'with no firm doctrine of stare decisis' for a very long time (until the eighteenth century).[517] Stephen Sachs argued recently that it is both possible and desirable for

[515] See ch V.3.

[516] See ch V.3.

[517] Gerald J Postema, 'Philosophy of the Common Law' in Jules Coleman, Kenneth Himma and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 589; see also Gardner, *Law as a Leap of Faith* (n 1) 82–85; Sachs, 'Finding Law' (n 259) 557–558.

adjudication in the US today to work more on the model of customary law ('finding' law) than that of judicial law-making.[518]

Regarding case law, John Gardner defined it as law created by judges '*solo*, and instantaneously, by making legal rulings'.[519] On his view, case law can function without the doctrine of *stare decisis*, because from the fact that the courts can depart from a legal rule set in some earlier judgment, it does not follow that the legal rule does not exist until it is changed in a later judgment.[520] According to Gardner, English judges have a legal power to make case law. As a legal power to change the law it must be conferred by rules of change. It can thus also be an amendment power, to the extent it allows for change of constitutional rules.[521]

Writing about precedent in the common law, Timothy Endicott also argued that the powers of overruling or setting a precedent are 'are instances of the power of judges to make new law'.[522] Grant Lamond disputed this view, claiming that

> the doctrine of precedent operates without giving the courts lawmaking power. What the doctrine does is this: it requires later courts to treat earlier decisions of certain courts as correctly decided. It does not give earlier courts the power

[518] Sachs, 'Finding Law' (n 259).

[519] Gardner, *Law as a Leap of Faith* (n 1) 74.

[520] ibid 84.

[521] I agree with Gardner that constitutional rules in the UK tend to be customary rules, not case law rules. It is, however, clear that the courts do from time to time try to settle constitutional issues and thus perhaps add constitutional case law to constitutional customary law. See ibid 84–85.

[522] Timothy Endicott, 'Adjudication and the Law' (2007) 27 Oxford Journal of Legal Studies 311, 316.

> to lay down legal rules, either for the cases before them or for other cases to be decided in the future.[523]

In the US context, Stephen Sachs similarly resisted the conclusion that the Supreme Court and other appellate courts can make law (understood as general legal rules applicable in the whole legal system).[524] On Sachs' view, even though sometimes lower-court judges are bound to treat Supreme Court decisions 'as if' they were law, there is still a categorical difference between 'as if' law and the law.[525] One good reason to think that was given by Caleb Nelson:

> … modern lawyers conversing about constitutional law might say something like this: "The Constitution plainly establishes Rule *X*, but the Supreme Court has interpreted it to establish Rule *Y* instead, and the Court is not going to overrule that interpretation." All modern lawyers would understand the distinction that this statement draws, and relatively few would consider it completely artificial or incoherent.[526]

According to Sachs it is not even the case that the US Supreme Court has a general power to bind all legal officials in the US, because some of its purported determinations of state law aren't 'always binding on the courts of that state.'[527] What makes this particularly interesting is that some legal philosophers tend to see it as uncontroversial that the US Supreme Court has the power to bind all legal officials in the US by its authoritative determinations of the law.[528] Matthew Kramer went even so far as to say that:

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[523] Lamond, 'Do Precedents Create Rules?' (n 393) 25.

[524] Sachs, 'Finding Law' (n 259) 561–567.

[525] ibid 561–563.

[526] Caleb Nelson, 'A Critical Guide to *Erie Railroad Co. v. Tompkins*' (2013) 54 William & Mary Law Review 921, 937; see also Sachs, 'Finding Law' (n 259) 564.

[527] Sachs, 'Finding Law' (n 259) 563.

[528] See eg Himma (n 102) 102–105; Kramer, *Where Law and Morality Meet* (n 1) 115, 134.

> Whenever the [US Supreme] Court pronounces on the validity or invalidity of some norm as a law, its ruling settles the status of that norm (as a law or not) and also settles the status of any other norm which is relevantly similar and which is thus within the precedential ambit of the ruling. No minimally credible exposition of the Rule of Recognition in the United States could fail to acknowledge as much.[529]

It seems that at least some US constitutional scholars cited earlier do not share Kramer's certainty on this point. I will not attempt to settle the debates about US or English common law here. I only wish to point out that there is a live disagreement about the scope of judicial powers to make law, even in the common law world.

Furthermore, even if judges have a legal power to change the law, it does not follow that the power is unlimited. Judge Pierre Leval argued that in the United States the power is limited to making law through holdings, but not through dicta.[530] Thus, both attempting to make law this way and accepting such attempts by other courts exceed the powers given to US judges under the US Constitution. Furthermore, even if a judicial decision is within the scope of judicial power, it may still be in breach of some duty and thus unlawful, though effective (see below for further discussion of this issue).

Leaving the common law world, decisions of the German constitutional court, the Bundesverfassungsgericht, are binding on all German state organs.[531] Some of the

[529] Kramer, *Where Law and Morality Meet* (n 1) 134.

[530] Pierre N Leval, 'Judging Under the Constitution: Dicta About Dicta' (2016) 81 New York University Law Review 1249.

[531] Though the exact scope of the bindingness is controversial, see Robert Alexy and Dreier, 'Precedent in the Federal Republic of Germany' in Neil D MacCormick and Robert S Summers (eds), *Interpreting Precedents* (Routledge 1997) 26.

Bundesverfassungsgericht's decisions are even published in the Federal Register of Statutes, which – according to Alexy and Dreier – 'extends the bindingness to all citizens'.[532] Can other German courts influence the content of German law? Yes, but not through formal bindingness of a single court judgment.[533] On one prominent view in German jurisprudence, higher German courts influence the content of the law through judicial custom (*Gewohnheitsrecht*).[534] Judicial development of law (*richterliche Rechtsfortbildung*) happens through establishment of stable lines of cases (stable interpretation or 'jurisdiction', *ständige Rechtsprechung*).[535] Or, as the Federal Court of Justice (*Bundesverfassungsgericht*) put it, by 'established jurisdiction of the highest judges' (*gefestigte höchstrichterliche Rechtsprechung*).[536]

However, the official story of German law holds that in areas of law governed by statutes, it is not judicial precedent, which is binding, but statute. As Alexy and Dreier framed it:

> precedents in Germany derive their power from the power of the formal source of law they interpret. Formally, it is the statute which binds; substantially, the precedent.[537]

When, as in German labour law, statutory law (or customary law) is not as well-developed, then the legal basis for judges to step in is in 'general foundations of law

[532] ibid.

[533] ibid 27–28, 45.

[534] This view is closer to being the official view, with a strong historical pedigree from the nineteenth century Historical School and *Begriffsjurisprudenz*, but it is not without its academic critics; See eg ibid 42–46.

[535] See eg ibid 30, 35, 50–51.

[536] ibid 30, 51.

[537] ibid 33.

(*allgemeine Rechtsgrundlagen*)'.[538] But, importantly, it is not in 'an undefined pure power of courts to create' binding precedents.[539] Hence, the official story of German law is careful not to turn judges into lawmakers.

A similar custom-like mechanism by which judicial decisions have effect on the content of the law is at work in France. According to Troper and Grzegorczyk:

> the quality of being a precedent does not arise only from the character of the decision itself, but from a collection of decisions and from their interpretation by legal dogmatics.[540]

The French equivalent of a German 'established jurisdiction' is referred to as 'persisting jurisprudence' (*jurisprudence constante*).[541] If other courts and legal academics do not like a judgment, then the judgment is not likely to have much effect on legal change.[542] However, sometimes even a single judgment is taken as *jurisprudence constante*.[543]

iii. The degree of creativity

A related question to the one whether the courts have influence over the content of the law, is the one of how creative they can be in interpreting and developing

[538] ibid.

[539] ibid 34.

[540] Troper and Grzegorczyk (n 507) 123.

[541] ibid 122.

[542] ibid 124.

[543] ibid 130–131.

constitutional law. In this sphere, there appears to be a trend in academic legal writing for endorsing a greater degree of creativity than if constitutional matters are not involved. For instance, though the French Conseil Constitutionnel presents its decisions 'not as the creation of new principles, but as the interpretation of the text of the constitution', it is seen as doing a good deal more – far from the 'official portrait' of a highly constrained civil judge.[544] And even outside of the realm of specialised constitutional courts, when other (civil, administrative, etc.) judges in France or Germany engage in constitutional reasoning, they are seen in academic legal writing as, and encouraged in, being more creative and unafraid to introduce normative novelties.[545]

However, much less frequent is endorsement of judicial interference in the part of constitutional law which is – by some accepted standard – grounded directly in a canonical constitutional text (like the US Constitution, as amended).[546] Here, the official constraint-oriented stories come back with a vengeance. The focus of the conversation shifts to what counts as settled law of the constitution, protected against judicial interference.[547] Even on the 'living constitution' view, 'the text of the Constitution must be the object of the inquiry'.[548] This may be put in a slogan version: as a judge, you get to change some constitutional law, but not the constitution. The

[544] ibid 115. See also John Bell, *Judiciaries within Europe: A Comparative Review* (CUP 2006) 97–100; Lasser (n 505) 278.

[545] See eg Troper and Grzegorczyk (n 507) 114–115, 126; Bell (n 545) 97–100, 137–143.

[546] Goldsworthy, 'Raz on Constitutional Interpretation' (n 501) 171–172.

[547] ibid 176.

[548] Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law and Jurisprudence 55, 58–60.

question is how much does 'the text of Constitution' constrain and this is a subject of controversy in many constitutional orders.

The American debate on constitutional interpretation may serve as a good illustration. The two major camps in that controversy today are the originalists and the nonoriginalists (sometimes known as 'living constitutionalists').[549] Originalists believe that the current legal content of the US Constitution is strongly constrained by its public meaning at the time the Constitution was enacted at the end of the XVIII century, or perhaps by the methods of legal interpretation and reasoning then used. Nonoriginalists dispute that. There is a considerable variety of views within both camps and the divide does not track perfectly the line, if there is one, between proponents of judicial activism and proponents of judicial restraint. For instance, a nonoriginalist Burkean minimalist may call for less judicial change of the law-as-practiced than an originalist who believes that the law-as-practiced departs from what the Constitution really requires (the Constitution-in-exile problem).[550]

From my perspective, the important thing is that even nonoriginalists frame their accounts of what judges ought to do in terms of what the Constitution already

[549] See eg Jack M Balkin, 'Abortion and Original Meaning' (2007) 24 Constitutional Commentary 291; Lawrence B Solum, 'Semantic Originalism' (2008) Illinois Public Law Research Paper No. 07-24 <http://ssrn.com/abstract=1120244> accessed 25 October 2017; Sachs, 'Originalism as a Theory of Legal Change' (n 106); Baude (n 104); Barczentewicz, 'The Limits of Natural Law Originalism' (n 108).

[550] Cass R Sunstein, 'Burkean Minimalism' (2006) 105 Michigan Law Review 353, 358; but see Solum (n 550) 162 fn 421; see also Sachs, 'The "Constitution in Exile" as a Problem for Legal Theory' (n 123).

requires.[551] For someone who holds that view, it means that the rights-granting provisions of the Constitution are on such a level of generality that they require judicial creativity in applying them to changing circumstances. Hence, even they would not say that the judges can change constitutional law clearly and directly grounded in the Constitution. The point is merely that the Constitution happens to leave many gaps to be filled and to invite the judges to do that.[552]

Naturally, each camp criticises as unconstitutional some of the court judgments that the other side endorses. An originalist may, for instance, see judicial development of the constitutional law on federal regulation of inter-state commerce as an unconstitutional departure from what the Constitution says, which puts the real Constitution in exile.[553] One seemingly attractive reason for labelling this 'unconstitutional' is that judges do not have a legal power to change the Constitution. I do not think that is enough for unconstitutionality. A critic needs to establish that this kind of judicial action is prohibited – that judges are violating some legal duty in doing so, not merely that they lack a legal power.[554]

This is not to say that finding such a legal duty would be difficult in this case. It may very well be that US judges have a duty not to participate in developing constitutional law inconsistently with the Constitution (understood in originalist

[551] See eg Ronald Dworkin, *Taking Rights Seriously* (Harvard UP 1977) 134–137; Goldsworthy, 'Raz on Constitutional Interpretation' (n 501) 179; Lawrence B Solum, 'The Fixation Thesis: Thee Role of Historical Fact in Original Meaning' (2015) 91 Notre Dame Law Review 1, 19.

[552] Goldsworthy, 'Raz on Constitutional Interpretation' (n 501) 179.

[553] Sachs, 'The "Constitution in Exile" as a Problem for Legal Theory' (n 123).

[554] I assume that given that court-led legal change seems often effective in US law, it is regulated by some rules of recognition. For a full argument, see chapters IX-X.

terms).[555] One possible ground of such a duty is in Article V of the Constitution, which according to some establishes an exclusive procedure of change of the Constitution.[556] However, just because they have such a prima facie duty, the matter does not end here. Judges, especially lower court judges, may also have duties to follow precedent, to avoid frustrating well-established expectations, and so on. And, all things considered, those other duties may outweigh the first duty. Hence, it is not obvious that all judges participating in this kind of constitutional change are acting unlawfully and unconstitutionally. More likely, only the 'original sin' in the form of a constitutionally erroneous Supreme Court precedent is unconstitutional, but even that is not a necessity.

iv. Judges and law-making powers

Endorsement by legal theory and sociology, or even by doctrinal legal literature, of the creative role of a judge in legal change, does not necessarily translate to endorsement of such role by the official story of the law as presented in court judgments and other normative texts. In fact, there is no shortage of accounts of tensions between official stories and what is perceived to be happening in practice.

No doubt in many contemporary legal systems there is a good deal of novelty coming from the courts in the sphere of constitutional law. This is so despite being sometimes in tension with the official story of the legal system in question. The

[555] See also ch IX.5.

[556] Exclusive at least in respect to actions of government agents, see Amar (n 23); Eric J Segall, 'Constitutional Change and the Supreme Court: The Article V Problem' (2013) 16 Journal of Constitutional Law 443, 445.

official story which may be endorsed in the same judgment that appears to depart from it.

Is this kind of change in constitutional law done through exercises of amendment powers? If we take some of the official pictures of limits of the judicial role at face value, then perhaps we should conclude that it is not. This is a common strategy taken by critics of any court judgment. However, there is a need for a more systematic answer. There are simply too many cases in tension with the official stories. One response is to throw an official story under the bus and to disavow it as an outdated fiction. In other words, the strategy is to accept that the law in fact gives judges the law-making powers they seem to be already using.[557] This may be motivated by an enthusiasm towards judicial activism (or even judicial supremacy[558]) or merely by willingness to cleanse the official story of the law from features that are systematically contradicted by legal practice. A slogan version of this approach could be that if a legal change was effective, then it was legally authorised (it was a result of an exercise of a legal power to make law).

This strategy at the very least shifts the balance in the debate over the limits of judicial power – but does so in the face of the recalcitrant official stories. The fact that some official stories still heed to a picture of judicial role with more limited legal powers, suggests that those legal systems have not yet come clearly to align the law-

[557] Stone Sweet (n 504) 132.

[558] On the notion of judicial supremacy, see eg Larry Alexander and Frederick Schauer, 'Defending Judicial Supremacy' (2000) 17 Constitutional Commentary 455; Richard Ekins, 'Judicial Supremacy and the Rule of Law' (2003) 119 LQR 127; Leiter (n 110).

changing effects of adjudication with the scope of judicial law-making power. There may be very good reasons for that.[559]

Another serious problem with admitting a wide enough scope of judicial law-making powers to resolve 'the official story v practice' tension, is that there is considerable disagreement on what scope of the powers should be accepted, even aside from the general debate regarding judicial activism and judicial supremacy. One seemingly attractive solution would be to accept that all court-led legal change that happens to be effective in practice is due to legal powers to make law. But, as I argued in chapter V, this is an ad hoc answer that confuses how legal powers work.[560] There is, for one, a significant difference between causal influence on legal change, which is only effective through acceptance of the particular change by the wider community (eg by other judges and legal academics), and between having a legal power to make law – a power effective the moment it is exercised. John Gardner argued that case law (at least in English law) works through the latter mechanism – the courts exercise legal powers to make (case) law.[561] I noted earlier that this characterisation is controversial and disputed, for instance, by Grant Lamond.[562] And even John Gardner noted that UK constitutional law has a good deal of customary law, which – as long as it stays customary – must be changing otherwise

[559] See eg Ekins, 'Judicial Supremacy and the Rule of Law' (n 559); Ekins, 'Acts of Parliament and the Parliament Acts' (n 437).

[560] See ch V.

[561] Gardner, *Law as a Leap of Faith* (n 1) 74.

[562] See ch VII.1.ii above.

than through exercises of law-making powers.[563] Even if Gardner is right about English law, this does not entail that judges have law-making powers in any other legal system – this is a contingent question.

Importantly, as I argue in part 3 of this thesis, it is a normal thing in law that perfectly lawful change comes from a source not vested with a legal power to make law.[564] On my view, constitutionality of change in constitutional law is not hostage, at least not entirely, to the controversy between judicial supremacists and their opponents, or even to more specific controversies regarding the scope of judicial powers (eg how creative judicial interpretation of a constitution can be? are constitutional judges merely 'negative legislators'?[565]).

2. EXECUTIVE PRACTICE

Stand-alone influence (not expressly authorised by the law) of the executive on constitutional law may be seen as a cause of even more embarrassment from the perspective of the official stories of some contemporary legal systems. After all, it is unavoidable that the courts authoritatively determine what the law is in the cases before them. That is what adjudication is about. True, in doing its job, the executive branch also unavoidably interprets the law. But the way it interprets the law sometimes ends up changing the law, even in the sphere of high-level constitutional rules. And though unsurprising for a modern observer, this effect of executive interpretation and application of the law is not easy to square with the idea that

[563] ibid.

[564] See ch VIII.2.

[565] Stone Sweet (n 504) 135–136.

unauthorised constitutional change is unconstitutional. This is so, because the existence and scope of law-making powers of the executive is often hotly contested. In effect, it is very easy to label executive-led constitutional change as unconstitutional.

I am interested here only with direct influence of the executive. I do want to note, however, that some forms of indirect executive influence on constitutional change made by other agents (the courts, the legislature, etc.) may be prohibited by the law or by non-legal constitutional rules. For instance, there may be a constitutional principle (eg that of the separation of powers) disallowing executive strong-arming of the courts, like F. D. Roosevelt's threat of 'packing' the US Supreme Court or the unlawful capture of the Polish Constitutional Tribunal in 2015 by concerted legislative and executive action.[566] Such illicit executive influence may be a ground of unconstitutionality of constitutional change distinct from the issue of whether the direct agent of change had a legal power to make it. Hence, perhaps the court-led shift in constitutional law in Poland since 2015 should be viewed as unconstitutional. Not because the court in question does not have a legal power to change

[566] Notably, Roosevelt's threat is now considered to have failed. I use it here only as an illustration of a possible type of action. See Ackerman (n 22) 1052–1054; Mark Tushnet, 'Constitutional Hardball' (2004) 37 John Marshall Law Review 523, 544–545. On the Polish case, see eg Wojciech Sadurski, 'What Is Going on in Poland Is an Attack against Democracy' (*Verfassungsblog*, 15 July 2016) <https://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/> accessed 3 July 2018; Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 Cambridge Yearbook of European Legal Studies 3; Kim Lane Scheppele, 'Autocractic Legalism' (2018) 85 University of Chicago Law Review 545; Anna Śledzińska-Simon, 'The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition' (2018) 19 German Law Journal 1839.

constitutional law – I set this issue aside for the moment – but because of the unconstitutional executive interference in constitutional change.

The mechanisms by which the executive branch can directly influence constitutional law are threefold: (1) exercise of a law-making power expressly given in a statute or in a constitution, (2) 'executive precedent', and (3) 'executive custom'.

The first mechanism, exercise of a power to make law clearly granted by a statute or by a constitutional text, is a straightforward example of an amendment power. To the extent the limits of the power are not exceeded, it may be legally unobjectionable.

The major difference between the second and the third mechanisms, executive precedent and executive custom, is that in the former a single executive action effects constitutional change, and in the latter, there is a necessity for a customary rule to develop, which may (but does not have to) take a long time. Executive precedent can be created through an exercise of a legal power to do so, but need not be. Executive custom cannot, just like all custom.

Within the US context, Thomas Merrill used the term 'executive precedent' in his discussion of judicial deference to legal interpretations adopted by executive agencies.[567] On his view, the legal basis for that deference should be in an implied, or inherent, legal power of the executive to determine what the law is when applying it.[568] However, as I discussed earlier in this chapter, it is controversial whether a legal power to create a precedent is the same as a legal power to make (or change) a binding legal rule. For Merrill, executive precedents would not be binding on the

[567] Thomas W Merrill, 'Judicial Deference to Executive Precedent' (1992) 101 Yale Law Journal 969, 1004–1005.

[568] ibid 1005–1012.

courts, but merely establish a rebuttable presumption of correctness of executive interpretation of the law.[569]

The case of the US constitutional law on presidential power is a good illustration.[570] It is widely accepted that, in part, the legal limits of presidential power have been set by the historical practice of what the US presidents in fact have been doing. There is, however, a considerable disagreement among the law professors as to whether any legal norms regulate the executive-led development of this sphere of US constitutional law or whether this is something US presidents just got away with, legally speaking.[571] In accepting the legal limits of presidential power to be as practiced, the US Supreme Court openly relies on 'repeated exercise' and 'longstanding practice'.[572] A canonical formulation comes from Justice Felix Frankfurter:

> [A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on "executive Power" vested in the President by § 1 of Art. II.[573]

[569] ibid 1011–1012.

[570] See eg Curtis A Bradley and Trevor W Morrison, 'Historical Gloss and the Separation of Powers' (2012) 126 Harvard Law Review 411; Curtis A Bradley and Trevor W Morrison, 'Presidential Power, Historical Practice, and Legal Constraint' (2013) 113 Columbia Law Review 1097.

[571] Bradley and Morrison, 'Presidential Power' (n 571) 1099.

[572] ibid 1104–1105.

[573] *Youngstown Sheet & Tube Co v Sawyer* 343 US 579 (1952) 610–611. See Bradley and Morrison, 'Historical Gloss' (n 571) 418; Bradley and Morrison, 'Presidential Power' (n 571) 1104.

However, the Supreme Court has suggested some limits of the executive-led change of its own powers. One example is an expressed disagreement of the US Congress.[574] This is significant, as it points to the custom-like character of constitutional change by executive practice. The reason is that, as with a change in a custom, a necessary part of the discussed kind of change is acquiescence by other branches of government.[575] We can also infer from this that the constitutional law on presidential power is, at least in part, a custom of all three branches of the US government. An executive precedent would not be sufficient to change it.

This mode of change in US constitutional law is criticised by some as unlawful. As Bradley and Morrison point out, originalists may claim that historical practice cannot lawfully change the original meaning of the US Constitution.[576] Non-originalists may argue on other grounds that, for instance, the constitutional principle of the separation of powers is thus violated – especially given that the courts often abstain from hearing challenges to the limits of presidential power.[577]

To the extent we are talking about customary law with its specific mode of change it means that there are no amendment powers at play. But even more specifically, it does seem rather odd to classify the mere doing something by the executive as an exercise of a legal power to change the law. Notably, as Bradley and Morrison observe, public justification of controversial exercises of presidential

[574] Bradley and Morrison, 'Presidential Power' (n 571) 1105.

[575] Bradley and Morrison, 'Historical Gloss' (n 571) 432.

[576] Bradley and Morrison, 'Presidential Power' (n 571) 1115; Bradley and Morrison, 'Historical Gloss' (n 571) 424–425.

[577] Bradley and Morrison, 'Presidential Power' (n 571) 1115.

powers are styled as already relying on historical practice, not as changing it, and definitely not as changing constitutional law.[578]

3. LEGISLATION

Legislatures uncontroversially have some legal powers to change law, including, in many cases, at least parts of constitutional law. For instance, even if the UK Parliament does not have an entirely unconstrained law-making power, there uncontroversially are many aspects of constitutional law that Parliament can change by statute. This is distinct from the issue whether Parliament has a legal power specifically to make so-called 'constitutional statutes', but if Parliament does have such power then it is a special case of its general power to change the UK constitution.[579] Of course, just because Parliament has a legal power to make a change, it does not follow that there are no non-legal constitutional restrictions.

Historical legislatures have clearly been responsible for unconstitutional or even revolutionary legal changes, on any account of unconstitutionality. Legislatures can be responsible for constitutional change without properly exercising an amendment power if they exceed the limits of their law-making powers and if the effects of such activity are accepted as valid, without much controversy. It can also happen that an ordinary statute, passed within the limits of the legislature's legal powers, later gains

[578] See eg ibid 1100.

[579] See eg Barczentewicz, '"Constitutional Statutes" Still Alive' (n 26); Ahmed and Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (n 329); Ahmed and Perry, 'Constitutional Statutes' (n 329).

special constitutional significance without anyone exercising any amendment powers.

The legislature may not have a power to change the text of a codified constitution (eg when this requires a special procedure) but change of the content of constitutional law grounded in the constitution may be treated as a normal thing. Such change may be as innocuous as change in how a canonical constitutional text is interpreted, due to enactment of statutes regulating related, 'downstream' issues. Legal practice may resist framing this as constitutional change – or at least as change of the constitution-level norms. But this may just be a pious fiction.

The law-making powers of many legislatures are legally limited from going against some parts of the constitution and it does sometimes happen that legislation outside of those limits is accepted as effective and valid. For instance, according to some commentators, such unconstitutional legislation was enacted on several occasions by the Polish parliament since 2016.[580]

Rules coming from statutes properly enacted through ordinary procedures may gain constitutional significance in many ways similar to that of rules grounded directly in a codified constitution. [581] Eskridge and Ferejohn described the phenomenon of such 'super-statutes' in US law.[582] The Sherman Act of 1890 is a 'classic' example according to the authors. This statute met with attacks in the form

[580] See eg Pech and Scheppele (n 567); Scheppele (n 567); Śledzińska-Simon (n 567).

[581] See eg Eskridge, Jr. and Ferejohn (n 329); Albert, 'Nonconstitutional Amendments' (n 494) 17–18; Ahmed and Perry, 'The Quasi-Entrenchment of Constitutional Statutes' (n 329).

[582] William N Eskridge, Jr. and John Ferejohn, 'Super-Statutes' (2000) 50 Duke Law Journal 1215.

of 'ill-advised congressional amendments' and 'the Supreme Court's early decisions refusing to give the law a proper breadth', but such measures have been later narrowed or reversed.[583] Its special status is seen also in the fact that it seems to be given priority of application before other, later statutes.[584] The 1890 Act also significantly affected how the Commerce Clause of the US Constitution has been applied.[585]

4. GIVING DOMESTIC EFFECT TO FOREIGN OR INTERNATIONAL LAW

Not uncommonly, legal systems give effect to or even 'copy' rules from other legal systems and from international law. Both options are sometimes refer to as 'incorporation', which is a good reason not to use that term[586] as this inconsistent use may obscure the distinction between our law (legal system) giving effect to a rule of foreign law and our law adopting (copying) a rule of foreign law and thus creating an identical rule of our law. Can either of those scenarios include amendment rules conferring powers to change domestic constitutional law?

[583] ibid 1232–33.

[584] ibid 1235.

[585] ibid 1236.

[586] Mikolaj Barczentewicz, '*Miller*, Statutory Interpretation, and the True Place of EU Law in UK Law' [2017] Public Law (Brexit Special Issue) 10.

A. EU LAW IN UK LAW

For instance, as I argued at length elsewhere, UK law – through the European Communities Act 1972 – gave effect to some, but not all, directly effective law of the European Union.[587] The 1972 Act may have constituted constitutional change in UK law, but I am now concerned with a different kind of change. I have in mind change that comes from abroad, from the new rules made by the foreign or international source of law. If any of the EU legal rules that UK law gave effect to can be seen as constitutional rules (perhaps, for instance, the rules regulating elections to the European Parliament or to local governments in the UK), then EU legislation is a source of constitutional change in the UK. If that is the case, does it mean that EU legislative bodies have any UK-law legal power conferred by UK-law rules of change? They do not have a UK-law legal power to change UK legal rules, because no UK legal rules are changed by EU legislation. As I said, UK law merely gives effect to EU law, it does not copy EU rules and make them UK rules.[588] Neither do EU legislative bodies have a UK-law legal power to change EU law.

However, EU legislative bodies may have a limited UK-law legal power to change EU rules effective in UK law. Given that the UK is a member of the EU, we can accept the EU legislative bodies, whenever they make law applicable in the UK (eg regulations, decisions addressed to the UK), intend to make law that will be given effect in UK law. In addition, the mechanism of giving effect to some EU law established in the European Communities Act 1972 can be seen as a mechanism of

[587] Barczentewicz, 'Judicial Duty Not to Apply EU Law' (n 511); Barczentewicz, '*Miller*, Statutory Interpretation, and the True Place of EU Law in UK Law' (n 587).

[588] According to the European Union (Withdrawal) Act 2018, when the UK leaves the EU, some EU law now given direct effect in UK law will be indeed, for the first time, copied into UK law (so-called retained EU law).

normative, nor merely causal, change in what is effective in UK law, made by EU legislative bodies. That would be the common requirement to the major accounts of legal powers I discussed earlier – the requirement that the legal effect of an exercise of a legal power is direct (normative), not intermediated (causal).[589]

This is not a power conferred by a UK rule of change, because UK rules of change confer powers to change rules of UK law and that does not take place in this situation. Also, the effect of EU law in UK law is not provided for by any UK rule of recognition, because rules of recognition identify laws of the legal system they are part of and here we have a situation of giving effect to non-domestic law (to rules that are not at any point part of the UK legal system). Both the UK-law power of EU legislative bodies and the UK-law effect of EU law are provided for by some other secondary rules of UK law, not named by Hart (perhaps we could call the latter 'the rules of recognition of non-domestic law' or 'the rules of application of non-domestic law').

B. ITALIAN LAW USED BY THE VATICAN CITY STATE

The relationship of membership between the UK and the EU makes this case significantly different from the case of the Vatican City State, which applies some of the law of the Italian Republic. Here, there is clearly no legal power conferred on the Italian law-maker by the Vatican City State.

One of the key constitutional laws of the Vatican City State is the Law of the Sources of the Law (*Legge sulle fonti del diritto*), which as its name suggests, specifies

[589] See ch V. See also MacCormick, *Questioning Sovereignty* (n 8) 87.

the sources of the law.[590] The old version of the Law, from 1929, stated that 'laws promulgated by the Kingdom of Italy', as well as 'the general regulations and local regulations of the province and government of Rome', are applicable in the Vatican City State to the extent they do not conflict with the canon law of the Roman Catholic Church and other superior laws of the Vatican City State.[591] This meant that new laws passed by the Italian parliament, automatically became law in the Vatican City State. This setup was reformed in 2008 (effective from 2009) and the current rules identify only specific Italian statutes (like the criminal code) as applicable in the Vatican City State.[592] The only amendments and changes to those Italian statutes that are now law in the Vatican City State are the ones adopted by the Vatican City State's own legislature.

Even in the pre-2009 situation, it is clear that the law of the Vatican City State did not confer any powers on the Italian legislature. The best interpretation is that the Law of the Sources of the Law contained a (non-ultimate, legislated) rule of recognition of Vatican law according to which new Italian laws were recognised as binding Vatican law (with the exceptions I mentioned earlier). There was no Vatican-law legal power (and no rule of change), because adoption of Italian law was entirely insensitive to any real or imputed intent of the Italian legislature. The Italian parliament legislated for the Italian Republic and it was not their business that a small

[590] Stephen E Young and Alison Shea, 'Separating State from Church: Researching the Legal System of the Vatican City State' (2007) 99 Law Library Journal 589.

[591] Law of the Sources of the Law (June 7, 1929) as cited in ibid 594.

[592] Legge sulle fonti del diritto (1° ottobre 2008) <http://www.vatican.va/roman_curia/labour_office/docs/documents/ulsa_b16_1_it.htht>. See also Beepa Babington, 'Vatican Ends Automatic Adoption of Italian Law' (*Reuters*, 31 December 2008) <http://www.reuters.com/article/2008/12/31/us-italy-vatican-idUSTRE4BU3BD20081231> accessed 17 October 2018.

country that happened to be in the middle of Rome decided to use as their law what the Italian parliament made as law for Italy.

5. CONSTITUTIONAL DESUETUDE

The last example I want to consider is what Richard Albert labelled 'constitutional desuetude'.[593] It is not a case of change in the legal content of a constitution, because the rules affected by it remain 'entrenched and unchanged'. On Albert's view:

> constitutional amendment by constitutional desuetude occurs when an entrenched constitutional provision loses its binding force upon political actors as a result of its conscious sustained nonuse and public repudiation by preceding and present political actors.[594]

This kind of change only applies to constitutional rules grounded in written instruments, paradigmatically in codified constitutions.[595] Another way of describing constitutional desuetude is as 'establishment of a new constitutional convention' not to follow some textually grounded constitutional rule.[596] However, given that desuetude as understood by Albert is not, strictly speaking, a change in the legal content of a constitution, it is not the kind of a case that an account of change among legal rules need to cover.

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[593] Richard Albert, 'Constitutional Amendment by Constitutional Desuetude' (2014) 62 American Journal of Comparative Law 641; Albert, 'Constitutional Disuse or Desuetude: The Case of Article V' (n 333).

[594] Albert, 'Constitutional Amendment by Constitutional Desuetude' (n 594) 643–644.

[595] ibid 644.

[596] ibid 644–645.

That said, Albert discusses Hart's concept of the rule of recognition suggesting that desuetude happens by a change in what legal officials accept as binding.[597] It seems that Albert misapprehends Hart, because if desuetude really happens this way, it means that it is a mechanism of change of the content of the law. Hart himself mentioned the possibility of desuetude working on the level of rules of recognition while considering Kelsen's view.[598] The rules that are considered as non-binding on the level of ultimate rules of recognition cease to be legal rules. Hence it could not be that they remain 'unchanged and entrenched' as Albert also maintained. In any case, ultimate rules of recognition are unlikely to deal with individual legal rules (as opposed to more general sources of law and legal change) and even less likely to deal with rules which are unused (at least as long as desuetude of a rule goes in hand with forgetting about the rule – for anything to be part of an ultimate rule of recognition it has to be present in minds of legal officials).[599]

However, as Hart stressed, it is very much possible for any legal rule (including legal constitutional rules) to cease to be effective in practice, while remaining valid and unchanged.[600] This must be a situation where the rule in question is still properly grounded in rules of recognition, which likely means that the officials still recognize that the source of the rule as a source of valid law.[601] A rule could then cease to be

[597] ibid 654–655.

[598] Hart, *The Concept of Law* (n 1) 103, 295.

[599] See the discussion of ultimate rules of recognition in part 1.

[600] Hart, *The Concept of Law* (n 1) 103.

[601] I say 'likely' because there are other ways rules of recognition can recognize valid legal rules, including the *eo nomine* option of recognizing individual rules directly, and not their source. See HLA Hart, 'The Morality of the Law' (1965) 78 Harvard Law Review 1281, 1295; Finnis, 'Revolutions and Continuity of Law' (n 1) 423–424.

effective because the officials forget about it or are somehow mistaken regarding whether it was properly repealed. In particular, the officials could be mistakenly thinking that there is a customary or judge-made rule of change in their legal system according to which 'conscious sustained nonuse and public repudiation' of a legal rule is a way of changing or repealing the rule. 'Mistakenly' because if they are correct that there is such a rule of change, then it is likely no longer the case that ineffective rules stay 'unchanged and entrenched'. It is conceptually possible for this sort of rule of change to exist and be in conflict with some other rules entrenching, for example, codified constitutional rules. However, I doubt that this situation is very likely.[602]

[602] But see Sachs, 'The "Constitution in Exile" as a Problem for Legal Theory' (n 123); Baude and Sachs (n 106) 1465, 1468–1477.

Part 3 Powers, Abilities, and Rules of Recognition

VIII. WHAT LEGAL CHANGE IS LAW-GOVERNED? POWERS AND ABILITIES

In the first two parts of this thesis, I focused on three main themes: rules of recognition (Hartian foundations of legal systems), legal powers to change the law, and how constitutions change (with or without any powers, legal or otherwise). I showed what constitutes rules of recognition, why they are indispensable and distinct from other kinds of legal rules, and why they cannot be changed by an exercise of a legal power. I discussed what is common to all major modern conceptions of legal powers and how many kinds of changes of legal constitutional rules do not happen through exercises of legal powers of constitutional change (amendment powers).

In this final part of the thesis, I offer an account of what makes legal change (and change in legal constitutional rules in particular) *lawful* (and *constitutional*), which pays very close attention to the operation of Hartian rules of recognition, rules of change, and rules of adjudication.[603] On my view, all legal change, including change of legal rules at the highest constitutional levels, can be lawful even if the change does not happen due to an exercise of a legal power to change the law (eg a power of constitutional amendment). This is so because legal changes are law-governed if they take place according to pre-existing rules of recognition. Whatever new legal content is identified by pre-existing rules of recognition, such content meaningfully comes

[603] Hart, *The Concept of Law* (n 1) chs V-VI.

from within the legal system. And, contrary to what some have suggested, there are rules of recognition which operate without any correlate rules of change (conferring legal powers to change the law). It is then a mistake to equate lawfulness of legal change with the change being an exercise of a legal power to change the law.

The present chapter contrasts two views on lawfulness of legal (and constitutional) change: 'the powers view' and my own view ('the abilities view'). Chapter IX focuses on the question of constitutionality of constitutional change and further develops my view. Chapter X deals with a special kind of constitutional change, which involves a change among the rules of recognition of the legal system. I argue that it is possible for such change to be lawful (and constitutional) due to pre-existing rules of recognition. However, when a change of rules of recognition happens *not* due to pre-existing rules of recognition, then such change should be seen as a technical legal revolution (even if not a revolution in some broader sense).

According to Hans Kelsen, but also to some post-Hartians like Neil MacCormick and Jeremy Waldron, law-governed (lawful) legal change happens only due to exercises of legal powers of law-making. I call this 'the powers view'. Acceptance of the powers view led Waldron to claim that we need not postulate anything like Hartian rules of recognition, because rules of change are all we need to account for legal change.[604] But what about customary legal change? What about change of legal rules of the constitution by adjudication? The problem with the powers view is that combined with any of the major conceptions of legal powers it would force us to see some such cases as unlawful legal change, as change not governed by the law.[605] Or,

[604] See sec. 1.

[605] See ch V.

alternatively, force us to reject all the sound and well-established standard accounts of legal powers. I argue that we should not bite either of those bullets.

Not all lawful, law-governed legal change happens due to exercises of legal powers specifically to change the law. Some legal change is law-governed just because it is recognised by rules of recognition. If somebody's actions are recognised as having a law-changing effect, that agent has what I call a legal ability (quasi-power) to change the law, even if they do not have a legal power to do so. Hence, I call my position 'the abilities view' (I could have called it 'the powers plus abilities view', because I do not deny the importance of law-making powers, but that would have been too unwieldy).

I begin this chapter with a discussion of the powers view and its deficiencies (sec. 1). I discuss the claims made by Neil MacCormick, Jeremy Waldron and John Gardner. I also contrast my account with that of Hans Kelsen. I then introduce the notion of a legal ability (quasi-power) to change the law (sec. 2).

1. THE POWERS VIEW

As I argued earlier in the chapter on legal powers, it is an important feature of law that it enables those subject to it to do certain things they could not do without the law.[606] We can only enter into (legally recognised) contracts, because there is a law of contract that gives us legal powers to form contracts with others. In Raz's words, the law enables law-subjects to affect the 'existence or application' of legal norms and it

[606] See ch V.

often does so by vesting them with legal powers.[607] On a sound interpretation of all major modern accounts of legal powers, an exercise of a legal power has to be seen as the legal ground of the legal change it brought about – the legal change has to be a direct legal consequence of the exercise (without any intermediation).[608] Also, the most plausible accounts of legal powers, which I introduced earlier in this thesis, are intent-sensitive.[609] This means that if the law does ascribes some legal effect to someone's action even when it is clear that they do not intend to bring about that effect, then we are not dealing with a legal power.[610] This is why, for instance, there is no legal power to make oneself liable for murder.[611]

Those limits on what counts as a legal power mean that, as I showed in chapter VII, adjudication, ordinary legislation, as well as executive and legislative practice, all can effect change of legal (constitutional) rules without anyone exercising any legal power specifically to change the law. Despite that, some legal philosophers subscribe to what I labelled the powers view, ie the view that law-governed (lawful) legal change happens only due to exercises of legal powers of law-making. I will now briefly consider claims in that direction made by Neil MacCormick, Jeremy Waldron and (to an extent) by John Gardner. After that, I will give an overview of Hans Kelsen's perspective on how law governs legal change and address the question in what sense did he subscribe to the powers view.

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[607] Raz, 'Voluntary Obligations and Normative Powers' (n 341) 85.

[608] See ch V.2.

[609] See ch V.1.

[610] Among intent-sensitive views, the one proposed by Visa Kurki does not account for this properly, as I discuss in ch V.1.

[611] Unless one adopts an unhelpfully broad Hohfeldian view of legal powers, see ch V.

Neil MacCormick has written that as

> a necessary condition for coherence in a workable constitution for a law-state … [t]here has to be reciprocal matching between the criteria for recognizing valid law, and the criteria for validly exercising the power to enact law …[612]

MacCormick's 'reciprocal matching' means that whenever a legal change is recognized by a rule of recognition, it is a result of an exercise of a legal power conferred by a rule of change. A charitable reading of MacCormick's remark would be that it is still possible to have lawful, law-governed legal change without an exercise of a legal power to change the law, it would just make it more difficult for the constitutional order to be 'coherent' and 'workable'. Given that, as I argue, such change is rather normal even that claim seems confused and unnecessary.

Jeremy Waldron claimed that rules of change provide the criteria of validity and that rules of recognition are unnecessary because they do not have a useful function beyond what rules of change are already doing.[613] As I argued before, echoing John Gardner's response to Waldron, the second claim is incorrect, because the duty-imposing function of rules of recognition cannot be performed by power-conferring rules of change. [614] However, Waldron's first claim is independently false. This is so because it is not the case that rules of change provide all the criteria of validity needed, not even in a 'well-organized system'.[615] Again, this stems from the nature of legal powers and the fact that rules of change merely confer

[612] MacCormick, *Questioning Sovereignty* (n 8) 85.

[613] Waldron, 'Who Needs Rules of Recognition?' (n 163).

[614] See ch II.3.A.

[615] Waldron, 'Who Needs Rules of Recognition?' (n 163) 349.

legal powers to change the law. There is a good deal of legal change that happens in a way that is inconsistent with all major accounts of legal powers, hence whatever brings such change about is not a legal power.

Finally, John Gardner in his response to Waldron, with which I mostly agree, made a claim that requires clarification. He said that just like every power-conferring rule has a corresponding duty-imposing rule, '[t]he duty-imposing rule also presupposes the existence of the power-conferring one'.[616] This seems similar to MacCormick's claim about 'reciprocal matching'. The problem is that the relationship works only one way. As Hart rightly argued, rules of change go in pair with rules of recognition (whenever there is a rule of change). But the converse is not necessarily true. There are rules of recognition that recognize legal change without any rules of change at play.[617] It is possible that Gardner did not mean this as a general claim, but only as a claim about those rules imposing duties, which recognise legal effects of an exercise of a legal power. On that reading, Gardner's statement is correct. However, this example shows that given the confusion in the literature, it is advisable to provide more precision, which is what I aim to do in this thesis.

A. KELSEN ON HOW LAW GOVERNS LEGAL CHANGE

Hans Kelsen's prominent account of how 'the law governs its own creation' is a part of a very different philosophical project than that of Hartian general jurisprudence.[618]

[616] Gardner, *Law as a Leap of Faith* (n 1) 105.

[617] See ch II.3.A.

[618] Quoted after Norberto Bobbio, 'Kelsen and Legal Power' in Stanley L Paulson (ed), *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (OUP 1999) 442.

Given that I chose to work within the Hartian tradition, I do not devote much space in this thesis to a discussion of Kelsen's views. However, Kelsen's influence is likely responsible to a significant extent for the acceptance of the powers view even by those who, unlike Kelsen, use the account of legal powers which I am also relying on. Also, contrasting my approach with Kelsen's may help clarify the significance of my contributions. For those reasons I will now present, however schematically, Kelsen's view on how law governs legal change.

Looking for a coherent account of law that could be an object of disciplinarily independent legal science, Kelsen set to purge legal theory (to separate it conceptually) both from fact and from normative systems other than law (chiefly, morality).[619] He saw the law as hierarchical and logically coherent edifice ordered by a chain of validity between norms. Kelsen accepted a dynamic perspective, expressed in his famous statement that law 'regulates its own creation', which means that all cases of creation or application of norms are authorized by some other (higher) norms.[620]

For Kelsen, the constitution, in a material sense, is comprised of 'rules regulating the creation of general norms'.[621] What makes the constitution valid? Often, constitutional norms are adopted in accordance with constitutional norms

[619] It should be noted that Kelsen significantly revised some of his views in his later work. In describing Kelsen's views I will limit myself to two of his works: the *General Theory of Law and State* (1945) and the *Pure Theory of Law* (second edition from 1960); Kelsen, *General Theory of Law and State* (n 30); Kelsen, *Pure Theory of Law* (n 30).

[620] Kelsen, *Pure Theory of Law* (n 30) 71.

[621] Kelsen, *General Theory of Law and State* (n 30) 124.

previously in place. However, at some point back in time, this way of authorization ceases to work and we reach the 'historically first constitution'.[622] The historically first constitution is born either in a revolution or on a territory previously not regulated by a legal system. Nevertheless, this constitution is not an exception to the principle that every norm is valid in virtue of being authorized by some other norm. For Kelsen, this is a necessary truth about law, without which legal scientists would not be able to interpret legal norms as legal norms. Therefore, a norm validating the historically first constitution has to be presupposed. Kelsen called such norm the Basic Norm (*Grundnorm*).

Kelsen's writings on revolutions suggest that whenever there is an effective change in law that cannot be explained as valid by reference to an existing chain of validity, it means that the change was revolutionary in character and that a new Basic Norm has to be presupposed. To some extent this may be remedied by accepting that all municipal legal systems are only parts of the total legal system, which is international law. On this view, what seems to be the Basic Norm of a municipal legal system is in reality a positive norm of international law.[623] Hence, it is for the norms of international law to determine the conditions of continuity of municipal legal systems and that way even revolutions and coup d'état do not necessarily threaten continuity. The alternative is to view international law as validated by municipal law.

[622] ibid 115. Naturally, sometimes it will be hard to identify the historically first constitution, as it is the case with international law and arguably also with United Kingdom constitutional law. In such cases, Kelsen believed that the Basic Norm applies directly to the whole legal order. Miguel Galvao Teles, 'Revolution, Lex Posterior and Lex Nova' in E Attwooll (ed), *Shaping Revolution* (Aberdeen UP 1991) 72.

[623] Kelsen, *General Theory of Law and State* (n 30) 373.

Kelsen's picture is a monist one, but he himself seems agnostic between which perspective (municipal or international) should be primary.[624]

So far, at least on the national monist reading, Kelsen appears to support the thesis about necessarily system-destroying implications of constitutionally unauthorized change in law. However, Kelsen left a rather wide loophole open, which may significantly moderate the application of the stark claim about discontinuity.[625] According to him, the constitutional limitations on legal change may have 'alternative character'.[626] What this means is that

> The legislator is entitled by the constitution either to apply the norms laid down directly in the constitution or to apply other norms which he himself may decide upon. Otherwise, a statute whose creation or contents did not conform with the prescriptions directly laid down in the constitution could not be regarded as valid.[627]

Thus, if a legislature enacts a change in law and that change is effective (is considered valid), even though for some reason it looks like the legislature has violated the rules of change, in fact there has been no violation. Effectiveness of change serves as a

[624] ibid 388.

[625] G Maher, 'Custom and Constitutions' (1981) 1 OJLS 167, 172–173; Richard HS Tur, 'The Alternative Character of the Legal Norm: Kelsen as a Defeasibilist?' in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 249–251.

[626] Kelsen, *General Theory of Law and State* (n 30) 156; Eugenio Bulygin, 'Kelsen on the Completeness and Consistency of Law' in Luís Duarte d'Almeida, John Gardner and Leslie Green (eds), *Kelsen Revisited: New Essays on the Pure Theory of Law* (Hart Publishing 2013) 272–274; Tur (n 626) 249–251; BJ Spagnolo, 'Kelsen and Raz on the Continuity of Legal Systems: Applying the Accounts in an Australian Context' (DPhil thesis, University of Oxford 2014) 159–162.

[627] Kelsen, *General Theory of Law and State* (n 30) 156.

proof that the limiting rules of change did not in fact exist. Kelsen made a similar concession for law-changing activity of ultimate courts.[628] Interestingly, Kelsen claimed that this is a necessary feature of all constitutions and that '[t]he author of the constitution and the legislator may not be aware, or not fully aware, of this situation'.[629]

In a legal system where there is an organ (for example, a constitutional court) that has a power to rule on constitutionality of a change in law and strike it down, then 'unconstitutional laws' acquire some limited meaning. They are still valid as long as they are effective (Kelsen insisted that they are not really unconstitutional), but one thing differentiates them from other valid statutes: they 'may be repealed in special procedure'.[630] All this means

> … that the provisions of the constitution concerning the repeal of statutes that do not conform to the norms of the constitution directly regulating legislation have this meaning: even statutes that do not conform to these norms ought to be considered as valid until and to the extent that they are not rescinded in the manner prescribed by the constitution.[631]

The situation is slightly different when someone who is not normally constitutionally authorized to do so (a 'usurper') attempts to create a general legal norm (for example, by announcing that she has enacted a statute). If such a change in law becomes effective, especially because it is not stopped by a court or by the organ responsible for official publication of laws, then we have 'a revolutionary change of the

[628] ibid 158–159; Kelsen, *Pure Theory of Law* (n 30) 267–270; Spagnolo (n 627) 159–162.

[629] Kelsen, *Pure Theory of Law* (n 30) 273.

[630] ibid 274.

[631] ibid.

constitution'.[632] The new statute is constitutional, because what has happened was a change of the constitution that validates it (it is constitutional in reference to the new post-revolution constitution). This example shows how important for Kelsen was the thesis that there can be no laws at the same time effective and invalid (unlawful, unconstitutional). In his own words:

> … no conflict is possible between a higher and a lower norm of a legal order, which would destroy the unity of this system of norms by making it impossible to describe it in noncontradictory rules of law.[633]

The distinction between a usurper and a proper legislative organ is bound to produce confusion. Is a legislative organ, which is clearly acting beyond the bounds of its legal powers not a usurper? How insignificant would a usurpation of legislative power need to be not to result in a revolution? Kelsen did not provide us with an answer.

For Kelsen, if an unauthorised change is introduced and is effective then this is fatal to the legal system in question. In other words, it is conceptually necessary for the legal system to persist that the Basic Norm that authorises all norms otherwise not authorised (custom[634], highest order rules of change) does not change. At the same time, Kelsen set a very high bar for determining that an actual change in law brings with it a legal revolution and a new constitution.

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[632] ibid 275.

[633] ibid 276.

[634] Maher has raised the question whether an authorization of customary change in law by the Basic Norm does not render it vacuous, which seems plausible. See Maher (n 626) 172. See also Bobbio (n 619).

Comparing Kelsen's account with mine, it may seem that Kelsen firmly held the powers view. He did, after all, believe that all lawful (law-governed) legal change takes place through exercises of legal powers to change the law. However, his 'alternative character' solution brings him closer to the abilities view. Kelsen accepted that what may at any point in time seem outside the scope of any legal power, may in fact be later recognised as having law-changing effect. His solution was to insist that this means that this previous prima facie picture was mistaken and that a relevant legal power was in place. On my view, it is plausible that rules of recognition in many legal systems depart from the widely recognised rules of change, like in Kelsen's model of the 'alternative character'. However, unlike Kelsen, I do not accept that necessarily all rules of change have 'alternative character'. I agree with BJ Spagnolo that the question whether any rules of change in fact do, should be viewed as a contingent matter.[635]

Kelsen used an idiosyncratic notion of norms of competence ('constitutional' norms, which perform the function of rules of change, rules of adjudication, and rules of recognition[636]) and insisted that all (non-revolutionary) legal change is to be explained in terms of exercises of powers conferred by those norms. Setting aside the issue that I adopt the Hartian framework which disentangles Kelsen's norm of competence, the other significant difference between our accounts is that I allow the possibility that rules of change say precisely what everyone thinks they say, even when perfectly lawful change in the law happens outside of that.

[635] Spagnolo (n 627) 162.

[636] Bobbio (n 619) 448.

Finally, not sharing Kelsen's views on revolutionary consequences of unlawful constitutional change (ie that they amount to discontinuity of legal systems) and on the necessity of lack of conflict between norms in a legal system, I am less hesitant to label the kind of change in question as 'unconstitutional'. As I noted earlier, Kelsen went to some lengths to avoid labelling laws that are in operation 'unconstitutional', because for him it means the same as 'invalid'. For me there is no such necessity, as I show in the next chapter where I introduce my approach to 'constitutionality' and 'unconstitutionality' of constitutional change.[637]

2. THE ABILITIES VIEW (QUASI-POWERS)

In cases where legal powers to change the law are available and effective, the issue of (normative) authorship of a change in the law is very simple. The power-conferring rule tells us who and how has to act for the law to be changed. When this person or body acts in a proper way, legal change takes place. One instance where this route is not available, is the case of ultimate rules of recognition. One cannot effectively exercise a legal power to change an ultimate rule of recognition, even in part.[638] Another example is that of a judge who does not have a power to change the law, but who is in a situation where the legal system recognises a law-changing effect of some of her decisions.

[637] See ch IX.

[638] See above ch V.4.

However, it is possible to have a legal ability (quasi-power) to effect legal change, which is not a legal power, and when someone exercises that ability, then it may be said that she has changed the rule in question. Even though change occurs here through a different mechanism than through an exercise of a law-changing power, I believe that ascribing authorship of a legal change in cases of this sort reflects, as Lamond, MacCormick and Oliver have suggested, the talk and attitudes of those who have the practical perspective on the law.[639]

There are two important types of legal abilities (quasi-powers) to change the law without having a legal power to do so:

A. one has a standing (ex ante) legal ability (quasi-power) or

B. one's legal ability (quasi-power) is recognized only ex post.

In the first situation, some rule of recognition provides for law-changing effects of one's action before the change in question. If, in addition, the person or body did not have a legal duty of forbearance from that action, then it is all-things-considered lawful for that person or body to exercise the quasi-power. If the change in the law obtains, the change itself is all-things-considered lawful. However, one may also be capable of exercising a quasi-power to change the law even while being under a duty not to exercise it. (In this respect, a quasi-power to change the law is akin to a legal power.)[640]

[639] See also chs V, IX, and X. On the distinction between practical and theoretical perspectives on the law, see ch I.

[640] For the argument that legal powers may be effectively exercised even in breach of legal duties, see ch V.

In the second case, when a quasi-power is only recognised ex post, the change in the law is effective because there is a simultaneous change of some rule of recognition. The changed rule of recognition identifies law-changing effects of someone's action. In this case, it cannot be said that the law as it was *before* the change grounded this quasi-power. Hence, I consider both the action and the resulting legal change to be *unlawful*.[641] I do so because the source of the change (or the mode of change) was not provided for by the legal system as it was at the moment the change took place.

An exercise of a pre-existing quasi-power to change a validated legal rule (any rule other than an ultimate rule of recognition) is very similar in effect to an exercise of a legal power to change the law. In both cases, the change happens 'automatically' in the virtue of the conditions of change being satisfied. Conditions set by a rule of recognition in the case of a quasi-power, and by a rule of change (working in tandem with a correlate rule of recognition[642]) in the case of a legal power.

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[641] The case (B) should not be identified with a situation described by Barber, according to whom:

> Sometimes the social rules which empower officers to act on behalf of the state will be broad enough to include exercises of power which the legal rules of the constitution seek to exclude.

Barber, *The Constitutional State* (n 130) 113. It is possible that a (B)-type unlawful change in law will be at the same time an instance of what Barber describes, but this need not be so. (B)-type change may happen even if no social rule *empowers* officials to make such change.

[642] On the relationship between rules of change and rules of recognition, see ch II.3.A.

Because, as I discussed it earlier in chapter II, every rule of change has a correlate rule of recognition, every legal power specifically to change the law (conferred by a rule of change) has a correlate legal ability (conferred by a rule of recognition).[643] It does not mean that legal powers are legal abilities, just like rules of change are not rules of recognition. However, they will often be seen together in practice.

Why then the distinction between abilities (quasi-powers) and legal powers (at least in respect to change of other rules than ultimate rules of recognition)? The answer is in the concept of LEGAL POWER, which I discussed in chapter VI. First, on the most plausible accounts, legal powers are sensitive to clear manifestations of intent of the power-holder.[644] If a presumptive power-holder indicates clearly that they do not intend to exercise a legal power, perhaps because they claim that they do not have that legal power, and if at the same time the law pays no attention to this contrary indication, but ascribes legal effect anyways, then we are likely not dealing with a legal power. This may be the case with precedent in situations where superior courts cannot bindingly control whether they create a precedent or not. In chapter VII, I considered other cases of judicial, legislative and executive action that plausibly fit this description. To be clear, it is the law that sets the threshold for what counts as an effective indication of an intent not to bring about some legal effect.[645]

Unlike for legal powers, intent is irrelevant for legal abilities to change legal rules. An ability-holder may still act intentionally to exercise the ability. But the crucial

[643] See ch II.3.A.

[644] See ch V.1.

[645] See my discussion in ch V.1.

point is that whether they act intentionally or not is not among the conditions for the law-changing effect to obtain, set out in a rule of recognition.

Second, one can only have a legal power if their action meaningfully results in the legal effect associated with that legal power.[646] In other words, the effect has to be a 'characteristic legal consequence' of this agent's action, not of something else.[647] Admittedly, this applies to some cases of changes due only to rules of recognition (and not due to legal powers).[648] For those cases, the distinction between quasi-powers and powers lies in intent-manifestation-sensitivity of legal powers. However, in respect to changes of ultimate rules of recognition and other changes that obtain through intermediation of custom, it is clear that the second condition cannot be satisfied.

A change of any ultimate rule of recognition may, in principle, happen either due to a standing quasi-power or due to a quasi-power recognised ex post. It depends on the content and structure of the set of ultimate rules of recognition whether the legal system is open only to unlawful change of the latter type, or whether potentially lawful change of the former type is also possible. I consider this in more detail in chapter X.

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[646] See ch V.2.

[647] Lindahl and Reidhav (n 340) 161–162. Discussed above at n 400.

[648] For instance, when the law recognizes law-changing effects of adjudication without conferring legal powers to change the law on the courts. See ch VII.1.

IX. 'CONSTITUTIONAL' AND 'UNCONSTITUTIONAL' CONSTITUTIONAL CHANGE

It is now time for me to offer my account of 'constitutionality' and 'unconstitutionality' of constitutional change. Given my 'constitutional positivism' and that I consider constitutional rules as units of the content of constitutions (and of legal systems) I define 'constitutional change' in the following way: a change in the content of a constitution (constitutional change) takes place if the constitution gains, loses or suffers modifications of any of its rules, legal or non-legal, written or unwritten. In this work, I am chiefly interested in change of legal rules of a constitution and the relationship of such change to other legal rules, especially those that purport to authorize and constrain constitutional change.

The chapter is structured as follows. In this introductory section, I give a brief overview of the account and discuss its two key features: that I account for both powers and abilities to change the law and that my account is not limited to explicit (formal) constitutional change (sec. 1). In sec. 2, I deal with two objections to my account based on the role of non-legal constitutional rules. Then, I provide a typology of constitutional and unconstitutional change on my account, with examples (sec. 3). In sec. 4, I address the problem of how to set a baseline when thinking about constitutional *change*. Sec. 5 illustrates my account on the example of constitutional change in the United States. In sec. 6, I consider the legal consequences of unconstitutionality of constitutional change, both in terms of validity and effectiveness of the changed legal rules and regarding the people involved in bringing

such change about. I end the chapter with a discussion of some methodological objections to my account of constitutionality (sec. 7).

My aim in formulating this account of constitutional change was to elucidate pertinent concepts like CONSTITUTIONALITY, which are used in legal philosophy, constitutional theory, and in constitutional practice. This is needed because even theoretical discourse on the issue of constitutionality of constitutional change is sometimes confused or insufficiently general (eg by focusing exclusively on 'powers' without paying enough attention to what legal powers are or by excluding non-codified constitutions).

On my view, only *lawful* constitutional changes can be *constitutional* constitutional changes. However, I accept that some lawful changes may be *unconstitutional* constitutional changes (when they violate non-legal constitutional rules).

A change in the law (also among legal constitutional rules) can only be *lawful* (and thus *constitutional*) if it is *recognized* by a pre-existing rule of recognition. There is no need to consider *authorization* by a pre-existing rule of change (conferring a law-making power, like an amendment power) as a separate ground, because the existence of a rule of change entails the existence of a correlate rule of recognition – whatever is authorized it is also recognized.[649]

A properly recognized legal change may still be *unconstitutional* if it is either *unlawful* (done in a violation of some legal duty) or if it violates a non-legal

[649] See ch II.3.A.

constitutional rule (eg a constitutional convention). In other words, a change of legal constitutional rules is unconstitutional if:

1) it is unlawful, ie
    a. is not recognized by a pre-existing rule of recognition or
    b. it violates some legal prohibition (legal duty to forbear),
2) or if it violates some non-legal constitutional rule.

Each of the grounds of unconstitutionality is sufficient, but they may have different consequences (see chapter IX). Unlawful constitutional change does not have to be a purely procedural violation as in some constitutional orders there are substantive restrictions on constitutional amendments apart from procedural ones (for instance, perpetuity clauses).[650]

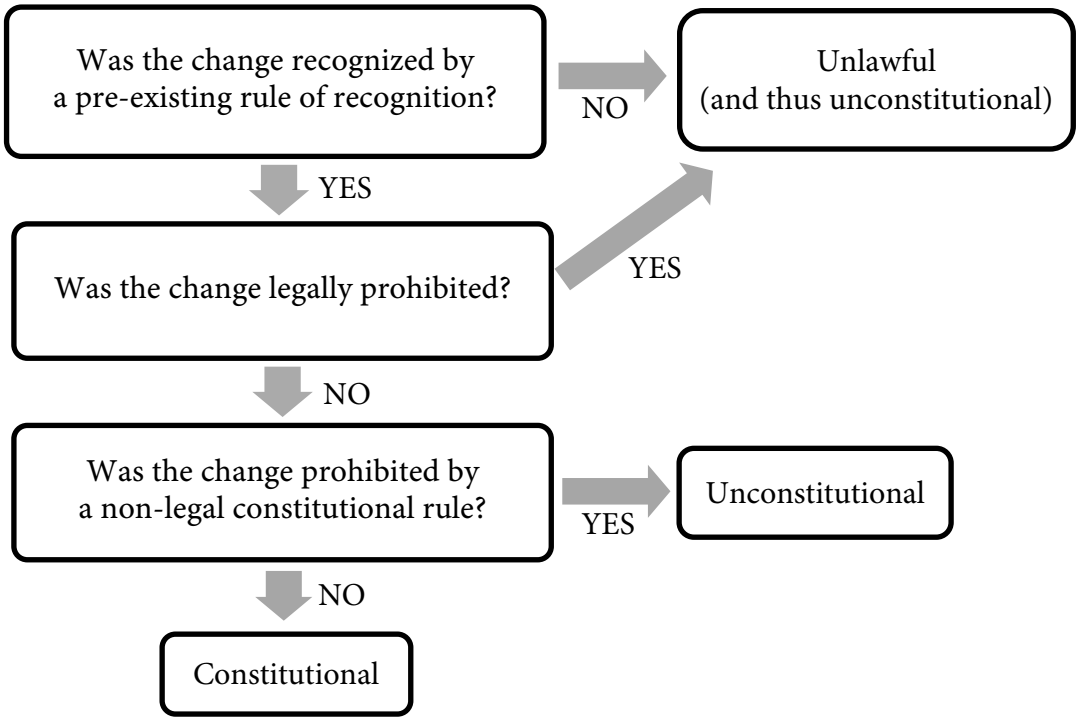
Unlawfulness is not the only ground of unconstitutionality of constitutional change. A change may happen in violation of non-legal constitutional constraints and be unconstitutional for that reason. In the previous section, I gave examples of constitutional conventions arguably governing constitutional change, in Canada, in India, and in the United Kingdom.[651] Another UK example is the twentieth century convention, now defunct, that the Westminster Parliament would only legislate to change the scope of devolution to Northern Ireland with the consent of the

[650] For a comprehensive treatment, see Roznai (n 3) chs I-III.

[651] See above ch IV.1.

government of Northern Ireland.[652] A violation of a non-legal rule only would not, by itself, have any legal consequences (this should be distinguished from a possibility of a legal prohibition on violating some non-legal rules). Given the scope of my project, in what follows my main interest will be in specifically legal grounds of constitutionality and unconstitutionality.

Table 3 Constitutionality of constitutional change (of legal constitutional rules)



[652] Marshall (n 287) 201–202; Mark Elliott, 'Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention' (2002) 22 Legal Studies 340, 357.

I do not distinguish other categories beyond 'constitutionality' and 'unconstitutionality' because I see this dichotomy as sufficient for a jurisprudential account that focuses on whether a legal change comes from within the legal system (through rules of recognition) or from outside of the system. If a constitutional change happens otherwise than due to a pre-existing rule of recognition, then it is appropriate to see it as unlawful (and thus unconstitutional), even if it does not involve anyone violating any legal duties. Whether the change is compatible with the constitution's 'spirit' or not, may however affect assessment of the change as good or bad, revolutionary or not.[653]

The framework offered here is applicable in assessing constitutionality of other kinds of cases than legal change (for instance, of executive action that does not have a law-changing effect), but in this thesis, I only consider it in the context of change in constitutional law.

1. TWO KEY FEATURES OF MY ACCOUNT

Two features of my account of constitutionality call for specific discussion. First, I take advantage of the abilities view that I developed in this thesis and argue that constitutionality of change can be grounded not only in exercises of legal *powers*, but also in exercises of legal *abilities* (quasi-powers), ie due to rules of recognition, without engaging rules of change. Second, my account is not limited to explicit (textual) change and it is not limited to 'formal' change (change according to rules

[653] See my discussion of the notion of revolutionary constitutional change in ch X.

about constitutional change provided in a codified constitution). I will now discuss those features in turn.

A. I ACCOUNT FOR BOTH POWERS AND ABILITIES

I see every change in constitutional law (among legal constitutional rules) due to an ultimate rule of recognition as it was before the time of the change as constitutional. For a change to be unconstitutional on my view, it must be the case that there was nothing in the law as it was before the change to ground the change. Rules of recognition are the most fundamental way the law may ground legal change. This is possible when rules of recognition identify some other source of change of constitutional rules than exercises of amendment powers like the paradigmatic process of textual amendment of a codified constitution.[654]

This kind of constitutional change does not entail a change of an ultimate rule of recognition. However, as I argue in more detail in chapter X, on my account, a change of an ultimate rule of recognition may also be lawful in a meaningful sense. This is the case when pre-existing rules of change or rules of recognition purport to give rule-of-recognition-changing effect to some kind of action or event. True, ultimate rules of recognition cannot change the same way all validated legal rules can. Nevertheless, I claim that a legal system may welcome a change of an ultimate rule in such a way, that it warrants classifying some changes of ultimate rules as lawful (and thus constitutional).

[654] Gardner makes a similar point in Gardner, 'Can There Be a Written Constitution?' (n 148) 188.

In other words, not all rule-of-recognition recognised change is change by 'mere validation'. Change by mere validation takes place just in virtue of the fact that some rule of recognition identifies the change itself or its source. For instance, if a rule of recognition identifies all legislation from some foreign body as valid domestic law, then whenever that foreign body legislates, the result automatically becomes domestic law. This cannot apply to ultimate rules of recognition because they do not change unless an underlying social practice changes. And yet, I do think that there may be something distinctly law-governed about change of ultimate rules (see chapter X).

I stress this in order to explain why I am careful not to say that lawfulness requires a change to be *grounded* only in a rule of recognition. By 'grounded' I mean here 'obtain entirely in the virtue of' (under a relevant description).[655] Strictly speaking, only changes by mere validation are grounded only in a rule of recognition. Once the criteria specified in a rule of recognition are met, the change in the law happens. A change of an ultimate rule of recognition may be meaningfully *due* to a rule of recognition, but the way I use 'grounding' in this context, it would be inaccurate to say that it can be fully grounded in one. Here, even if some rule-of-recognition-provided criteria for change of an ultimate rule of recognition are met,

[655] I am not committed here to a more specific philosophical notion of grounding advocated for instance in Kit Fine, 'Guide to Ground' in Fabrice Correira and Benjamin Schnieder (eds), *Metaphysical Grounding* (CUP 2012); Jonathan Schaffer, 'Grounding, Transitivity, and Contrastivity' in Fabrice Correira and Benjamin Schnieder (eds), *Metaphysical Grounding* (CUP 2012); Jon Erling Litland, 'Grounding Ground' in Karen Bennett and Dean W Zimmerman (eds), *Oxford Studies in Metaphysics: Volume 10* (OUP 2017).

it is still not the end of the road. The change does not obtain until the underlying social practice of the recognitional community shifts.

On my view, whenever the law recognizes the effects of one's actions as law-changing, undertaking such an action is at least prima facie *lawful*. Naturally, merely because the rule-of-recognition ground of constitutionality is present, it does not mean that there are no prohibitions on initiating or participating in the change. The 'prima facie' qualification is needed because it could be that the agent in question has, in some circumstances, a legal duty not to undertake an action with a law-changing effect. The legal system may still contain a general prohibition on engaging in any action leading to constitutional change by other means than through, for instance, textual amendment.

Normally, if there is such a prohibition, then any constitutional change that takes places in its violation should be seen simply as unlawful and unconstitutional. However, there may be uncertainty as to the status of the prohibition within the legal system. For example, it could be unclear whether the prohibition is not overridden by a permission established by a hierarchically higher legal rule. There may be contradictory legal rules in a legal system, and it even could be that there is not a ranking rule to resolve the contradiction as a matter of law. In such situations it may make sense to say that both grounds of constitutionality and of unconstitutionality are triggered.[656] Whether this in fact is the case in a given legal system is contingent.

[656] One way out of this conundrum is to say that whenever a constitutional change that appears to violate some legal limitation is effective, this is evidence that the apparent legal limitation is not in fact a binding legal rule, because of desuetude or some other considerations. This is the path taken (not entirely consistently) by Kelsen; see ch VIII.1.A.

This approach to constitutionality of constitutional change allows us to side-step some normatively-laden debates about the limits of judicial power in the context of constitutional change. This does not mean that such debates are not valuable. But it is also valuable for the law to provide settledness. And settledness is no less important in constitutional law than in other areas of law. By focusing on rules of recognition, my account directs attention to empirically observable social practices of recognition of certain kinds of events as producing valid legal change. It may be quite uncontroversial to observe that in some legal system, court-initiated change of parts of constitutional law is perceived as normal. Possibly much less controversial than ascertaining whether the judges have legal powers specifically to make such changes in constitutional law, as opposed to mere powers to adjudicate.

On my account, as long as we are interested in lawfulness and constitutionality of a constitutional change, then all we need to find is a standing practice of recognition of this kind of change, or change coming from this source. I do not want to exaggerate how easy it is to identify the content of an ultimate rule of recognition. The problems of epistemology of social rules are well known and the issues identified by Wittgenstein, among others, are significant.[657] But I still think that in respect to some types of constitutional change, acknowledging rules of recognition as a separate ground of constitutionality of change allows for bridging a somewhat embarrassing explanatory gap. And it allows to do that without giving up on systematic jurisprudential thinking about law in favour of radical 'realism' of the sort of 'the law is whatever judges do'. This is especially relevant in constitutional orders, where the

[657] See n 125.

official story is that the judges do not have law-changing powers, but where court-initiated change is routine.

Why not have a powers-only view of constitutionality? One could try to argue that whenever a legal change happens, it simply means that a legal power to make such change had been exercised.[658] This, in a sense, was Kelsen's view, but we should not forget that Kelsen worked with an idiosyncratic notion of norms of competence (constitutional norms) and legal powers, which are not the concepts used by constitutional theory (unless someone is specifically talking about Kelsen) and in legal practice. The best reason not to go that way is that this solution goes against clarity and coherence of legal theory (forcing the use of a special notion of a legal power leading to identification of some strange legal powers like in a case of a legal system giving effect to foreign or international law or in a case of changes in customary law). It also fails to take advantage of the insights about foundations of law and of legal change brought by the Hartian framework of rules of recognition.

B. MY ACCOUNT IS NOT LIMITED TO EXPLICIT 'FORMAL' CHANGE

I claim that constitutionality is a function of lawfulness of a change in the law. To this extent I agree with Richard Albert that: '[t]o say that constitutional change is *constitutional* is simply to make a descriptive claim about the legality—but not necessarily the legitimacy—' of the change.[659] However, unlike me, in that paper Albert takes legality (lawfulness) to be restricted to changes of 'the constitutional text or the prevailing interpretation of that text', which are 'in conformity with the textual

[658] See ch V.

[659] Albert, 'Nonconstitutional Amendments' (n 494) 7.

constitutional amendment rules'.[660] My account is broader and it covers any kind of constitutional change, including that through judicial, executive, and ordinary legislative actions. Any account, if it is meant to capture legal discourses in countries like the United Kingdom, must see the ground of lawfulness of constitutional change in its connection to an exercise of *any* legal power specifically to make constitutional change. That is, it must include legal powers based in other sources than a codified constitution (for instance, in legal custom).

True, there is some appeal in Albert's approach of using amendment procedures expressly set in codified constitutional texts as the benchmark of what kind of constitutional change is to be seen as 'constitutional'. However, this precludes the possibility of constitutional constitutional change without a codified constitution, or whenever a codified constitution does not provide a procedure for amendment. Hence, it would mean that there cannot be constitutional constitutional change in the UK. This would be an odd conclusion, given that at least some historical constitutional change in the UK has been accepted as happening in a perfectly proper manner. Why deny that such constitutional change could be constitutional?

It does not follow that all constitutional change in the UK should be seen as constitutional. It is true that sometimes constitutional change in the UK is 'calmly

[660] Albert retained this concept of 'constitutionality' in his recent work, eg when discussing 'quasi-constitutionality' in Richard Albert, 'Quasi-Constitutional Amendments' (2017) 65 Buffalo Law Review 739. To be clear, Albert also gives significant attention to other kinds of constitutional change ('informal amendment'). He stresses that what he calls 'informal amendment' 'preserve[s] continuity in the constitutional regime' – he just seems to prefer to define 'constitutionality' of a change based on what he calls 'formal' criteria; Albert, 'Constitutional Disuse or Desuetude: The Case of Article V' (n 333) 1060. See also Albert, 'Constitutional Amendment by Constitutional Desuetude' (n 594).

swallowed', while still rightly meeting with legal criticism. This happened, for instance, in respect to the 1966 Practice Statement on Precedent where the House of Lords declared that it would no longer consider itself bound by its own precedent, contrary to a previously established rule.[661] That particular change was criticised by academics as having happened outside of the legal powers of the House of Lords.[662] However, the criticism was not based on the lack of a textual basis, much less a codified one, as in the UK many legal powers on the constitutional level are not exhaustively based in any statute. The criticism focused on the lack of legal power, no matter what source, whether in a 'formal' amendment rule or not.[663]

2. WHAT ABOUT NON-LEGAL CONSTITUTIONAL RULES?

Two objections may be raised against my account on the grounds that it should give a more central role to non-legal constitutional rules. First, it may be suggested that non-legal constitutional rules can provide an independent ground of constitutionality of change in constitutional law. In other words, that my account is too narrow because it views constitutionality of change as exclusively grounded in lawfulness, in a legal part of a constitution. For instance, perhaps some constitutional

[661] Hart, *The Concept of Law* (n 1) 153. I consider this as an example of a constitutional change because of the paramount legal significance of adjudication by the highest court in the UK. See my discussion of the 1966 Practice Statement in ch X.2.

[662] Neil Duxbury, *The Nature and Authority of Precedent* (CUP 2008) 131–135.

[663] As Albert noted elsewhere: 'Formal amendment rules (…) at best provide only an incomplete account of constitutional amendment.' Albert, 'Constitutional Amendment by Constitutional Desuetude' (n 594) 642.

change outside of any legally-prescribed procedures could be constitutional in the virtue of a non-legal constitutional principle of the sovereignty of the people.

According to Nick Barber: '[s]ometimes the law does not accord a constitutional actor a power, or perhaps even prohibits its exercise, but the non-legal rules of the constitution do grant the power.'[664] One of Barber's examples is that '[j]udges can (…) possess a constitutional power to change the law which is not conferred by the law', especially in times of crisis.[665]

It is true that non-legal constitutional rules can grant a non-legal power to change the law, but I am not convinced this is prominent enough a view in legal discourse to warrant inclusion in my law-centred account. Also, even if I am wrong about this, it would not matter too much for my larger project. My aim is to elucidate how *the law* governs constitutional change, especially in ways not admitted by the powers view.

Second, and relatedly, why not say that that unconstitutionality of change is *exclusively* grounded in non-legal constitutional rules, or at least in rules that are not justiciable? It is true that at least in the United Kingdom, unconstitutionality is often distinguished from illegality or unlawfulness, to mean only a violation of a non-legal constitutional rule (a constitutional convention).[666] However, one reason not to take this narrower approach is that in countries unlike the UK, with codified constitutions

[664] Barber, *The Constitutional State* (n 130) 93.

[665] ibid.

[666] See eg Goldsworthy, *The Sovereignty of Parliament* (n 204) 190–191; Goldsworthy, *Parliamentary Sovereignty* (n 502) 315–318.

and with strong judicial review of legislation, it is commonplace to talk about 'unconstitutionality' in connection with violations of constitutional law, which are then legally policed by the courts.

Also, even in the UK, 'unconstitutionality' is used in the context of the proper scope of judicial power and the principle of the separation of powers. The best evidence that these are legal issues is that they are justiciable (a higher court may hold a judgment of a lower court to be outside of the scope of judicial power), whereas other, non-legal constitutional requirements are not considered as justiciable in the UK.[667]

Finally, on my view legal rules that regulate constitutional change *are* constitutional rules.[668] This is so even if they are not normally thought of as constitutional rules, for instance because some constitutional legal rules are not part directly grounded in the text of a codified constitution. I am against such formalism. Moreover, it is hard to resist the conclusion that a violation of a constitutional rule is a case of unconstitutionality. Hence, to the extent this usage of 'unconstitutionality' departs from some instances of how the term is used in practice, it is justified as an elucidation.

[667] See eg *R v Secretary of State for the Home Department Ex p Javed* [2001] EWCA Civ 789; [2002] QB 129 [37] (Lord Phillips MR); *Bermingham v United States* [2006] EWHC 200 (Admin); [2007] QB 727 [99] (Laws LJ).

[668] See ch IV.1.

3. TYPES OF CONSTITUTIONAL CHANGE

It is not always easy to classify a change as constitutional or unconstitutional, for various reasons. In particular, it may be difficult to know whether the law authorised a change in question or not, especially given that what legal officials (like judges) publicly say about the law may differ from the real content of the law (see eg chapter III[669]).

The following table illustrates the possible relationships between different types of constitutional change on my account.

Table 4 Types of constitutional change on my account

Type	Constitutionality		Unconstitutionality	
	Legally authorized (an exercise of an amendment power)	Only due to a pre-existing rule of recognition	Violating a legal duty	Not due to a pre-existing rule of recognition
Explicit	*(I) Textual change by an exercise of amendment power* Enactment of the First Amendment to the US Constitution[670]	*(II) Textual change due to a rule of recognition* Eg a statute having an effect of changing a constitutional rule, which the legislature does not have an amendment power	*(V) Textual change violating a legal duty* The Unilateral Declaration of Independence of Southern	*(VI) Textual change, not due to a pre-existing rule of recognition* Enactment of the US Constitution 1787 (on Akhil

[669] See also Barczentewicz, 'The Illuminati Problem and Rules of Recognition' (n 49).

[670] Adopted through a procedure specified in Article V of the US Constitution.

Type	Constitutionality		Unconstitutionality	
	Legally authorized (an exercise of an amendment power)	Only due to a pre-existing rule of recognition	Violating a legal duty	Not due to a pre-existing rule of recognition
		to change; only due to a rule of recognition[671]	Rhodesia in 1965[672]	Amar's interpretation)[673]

[671] See eg the Polish case discussed in ch VII.3.

[672] Enacted in contravention to the constitutional procedure requiring the Westminster Parliament's assent. See Tayyab (n 30) 60–61.

[673] According to Akhil Amar any restrictions on change of the Articles of Confederation were ineffective because the Articles ceased to be binding for the reason of non-compliance of some of the parties to that treaty. Amar (n 23) 465–466.

Type	Constitutionality		Unconstitutionality	
	Legally authorized (an exercise of an amendment power)	Only due to a pre-existing rule of recognition	Violating a legal duty	Not due to a pre-existing rule of recognition
Implicit	*(III) Non-textual change by an exercise of amendment power* Interpretation of the standard of equal protection under the 14th Amendment in the US Supreme Court decision *Brown v Board of Education*[674]	*(IV) Non-textual change due to a rule of recognition* Qualification of the principle that there is no appeal from the judgment of the House of Lords in *Pinochet (no 2)*[675]	*(VII) Non-textual change violating a legal duty* Effective suspension of parts of the constitution by a military coup d'état in Pakistan in 1977 (the basis for the *Bhutto* case)[676]	*(VIII) Non-textual change, not due to a pre-existing rule of recognition* The definition of the scope of judicial power in the US Supreme Court decision *Marbury v Madison*[677]

[674] *Brown v. Board of Education* (n 332). Only on the interpretation of US law according to which the US Supreme Court does have a legal powers specifically to change constitutional law.

[675] *R v Bow Street Metropolitan Stipendiary Magistrate Ex p Pinochet Ugarte (No2)* [2000] 1 AC 119. As with the other examples used, classification of this development as non-lawful change is not immediately obvious. First, was this a constitutional change? Arguably the rule establishing what is the ultimate judicial instance is a central case of a constitutional rule, but this may be disputed. Second, was this change legally unauthorised? This question goes to the general issue of whether the United Kingdom judges have a legal power to change law, and constitutional law in particular. I assume here that, in the very least, such power is not uncontroversially established. On the judgment in *Pinochet (No 2)*, see Kate Malleson, 'Judicial Bias and Disqualification after Pinochet (No. 2)' (2000) 63 MLR 119. On the issue of whether UK judges have a legal power to change law, see Lamond, 'Do Precedents Create Rules?' (n 393) 25–26.

Constitutional constitutional change is reflected in the first two columns. The key here is either presence of pre-existing amendment power or presence of a pre-existing ability to make the change in question. Such change may happen both through a textual change non-textually. Unconstitutional constitutional change takes the other two columns, even though strictly speaking there are three grounds of unconstitutionality. As I mentioned before, lack of an ability (change outside of pre-existing rules of recognition) entails lack of a legal power (change outside of pre-existing rules of change), so there is no need for a separate treatment of legal powers (amendment powers).

Admittedly, the illustrative examples I gave are potentially controversial. For instance, I assumed that at the time of *Brown v. Board of Education* there was a legal rule of change empowering judges to make constitutional changes in the United States, and hence that the change brought by this decision fits in the cell (III) (implicit, due to an amendment power). However, perhaps *Brown* should be placed somewhere else? If the US Supreme Court did not have the requisite power specifically to make the legal change, but there was a rule of recognition providing for this law-changing effect of the Court's judgment, then I would still see *Brown* as a constitutional constitutional change, just in cell (IV) (implicit, due to an ability).

Brown could also be seen as unconstitutional constitutional change. Two interpretations could lead to that conclusion. First, perhaps Article V of the US Constitution grounds a prohibition for judicially-initiated constitutional changes

[676] *Bhutto v Chief of Army Staff* 1977 PLD SCt 657 (Pakistan). The military regime did not introduce any explicit changes in the constitution, but only declared that some of parts of the constitution will be held 'in abeyance'. See Tayyab (n 30) 79.

[677] *Marbury v. Madison* (n 331). There is a similar classificatory uncertainty here as with *Brown* above.

like that brought by *Brown*. If so, then *Brown* should be placed in the second column in the cell (E) (implicit and violating a legal duty). Second, it is also possible that judges did not have an amendment power at the time, but at the same time Article V did not prohibit such change. In that case, *Brown* should go into (F) (implicit and unauthorised).

What is also possible, is that the justices in *Brown* did have a customary amendment power not disabled by Article V, but that they were under a duty not to use it – a duty perhaps grounded in Article V. Then, there would be reasons to view the change both as constitutional (because of a pre-existing legal power) and unconstitutional (because of a breach of a legal duty). We would face similar classificatory issues when considering another famous American case, *Marbury v. Madison,*[678] which established judicial review in the United States. In respect to both cases, it may be argued that the Supreme Court achieved desirable results through means of dubious legality.

It is important to remember that whether a change is to be seen as constitutional or unconstitutional may differ based on what timeframe we adopt (from what time standpoint we ask those questions).[679] For the purposes of the present discussion it makes most sense to refer to the legal system as it was at the moment of change or immediately before it.

[678] *Marbury v Madison* 5 US 137 (1803).

[679] See above ch V.5.

4. THE PROBLEM OF BASELINE

Every theoretically ambitious discussion of legal change needs to face up to the problem of baseline: against what change is to be measured to distinguish it from lack of change? As I noted while discussing the distinction between implicit and explicit change in chapter IV, it is tempting to treat the previous wording of the constitutional document as a natural baseline against which one could judge suspected change.[680] But the text is not the same as the content of the law. Hence, the problem of finding a baseline is a concern both in respect to explicit and implicit change. My situation is more difficult than that of a social scientist who may be satisfied with reasonable proxies of change. I wish to be able to say how the actual change happens.

The law could not work to guide human conduct without some degree of stability of its standards. It is important for us to be able to make a distinction between settled and unsettled law, but this presupposes that settled law is a possibility.[681] Matthew Kramer even suggests that settledness has to be a rule, not an exception, for a proper legal system to exist.[682] Does it mean that 51% of the rules of the system are uncontroversially settled, at least from the perspective of the legal officials? Not necessarily. Perhaps even if, for instance, only 30% of the rules are settled in that sense, but they are the ones that actually matter in day-to-day operation of the legal system, especially as perceived by the community at large (not just by the legal officials), then the legal system in question can function quite

[680] See ch IV.3.

[681] Raz, *The Authority of Law* (n 36) 49–50.

[682] Kramer, 'In Defense of Hart' (n 62) 398.

successfully.[683] But this should not affect my argument. What is important for the present discussion is that insofar as the law is settled, and certainly to some extent it is, identification of change is possible.

Nevertheless, as Adam Samaha has shown recently, there is no universally applicable way of measuring legal change.[684] Even court judgments that obviously bring about results different from similar cases in the past (for instance, *Lawrence v. Texas*[685], the American case on constitutionality of criminalizing sodomy, which has overruled *Bowers v. Hardwick*[686]) can be defended by arguing that they promote stability in some other dimension, for example by applying unchanged principles to changed circumstances.[687] What is more, as Raz points out 'stability is consistent with slow change, whatever its cumulative effect'.[688] Given changing circumstances, 'the law may have to change if it is to continue to have the same social or economic

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[683] I thank Grant Lamond for this point. Considering the issue of continuity of legal systems Raz has suggested that:

> Since the continuity of the legal system is fundamentally a function of the continuity of the political system, political laws are more relevant than others. Constitutional and administrative laws are, therefore, more relevant than, for example, the law of contract or torts.

Raz, *The Authority of Law* (n 36) 100. See also Hart, *The Concept of Law* (n 1) 122–123.

[684] Samaha (n 326).

[685] *Lawrence v Texas* 539 US 558 (2003).

[686] *Bowers v Hardwick* 478 US 186 (1986).

[687] Samaha (n 326) 32.

[688] Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' (n 303) 364.

effects'.[689] Depending on the viewpoint, every legal decision may be both old and new, that is instantiate both change and stability.[690]

This does not mean that we should be sceptics about legal change, either as to whether it ever obtains at all, or as to whether we can ever correctly identify it when it happens. It only means that for any inquiry into legal change in a particular legal system it will be necessary to choose a mix of potential dimensions of change and stability suitable to the particular project. By doing this we will be able to say with Joseph Raz that there are cases when sufficient evidence is available to say what the law is at one point in time and then use it as a standard to distinguish between what Raz calls 'conserving' and 'innovatory' interpretations.[691]

In stable constitutional orders, we can rely on a shared legal culture encompassing standards by which it is possible to determine the content of the law in a sufficient number of cases.[692] What these standards are in particular jurisdictions is a contingent matter. For the purposes of this work it suffices to say that we can understand such standards well enough to be able to identify (at least some) instances of change. I need not commit myself to any particular conception of such standards. Nevertheless, it will be helpful briefly to consider an interesting approach accepted by some authors interested in constitutional change.

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[689] ibid.

[690] Samaha (n 326) 43–46.

[691] Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' (n 303) 359.

[692] I thank Grant Lamond for this point.

The approach I have in mind, especially appealing in the American context, is to use the intent of the makers of the constitution as the baseline. Voigt suggests something along these lines.[693] Alec Stone Sweet writing on implicit change through judicial decisions proposes a similar approach.[694] But Stone Sweet differs from Voigt in an important way. For him a kind of radical constitutional change ('fundamental transformation') happens when two conditions are satisfied:

> First, we must be able to infer, reasonably, that the constitutional law produced by the transformation would have been rejected by the founders had it been placed on the negotiating table. Second, the outcome must alter – fundamentally – how the legal system operates, again, in ways that were, demonstrably, unintended by the founders.[695]

Stone Sweet is interested in implicit change that fundamentally alters the legal system (changing its *Grundnorm* and the rule of recognition).[696]

Both authors refer to expressed or hypothetical intent as to the content of constitutional rules, not to the communicative intent of the makers. It is better to describe the object of interest of the two authors as expectations regarding how the constitutional text will be translated into working legal rules.[697] There is no need to repeat here the nuanced criticism lodged against a similar view in constitutional

[693] Voigt (n 324) 198.

[694] Alec Stone Sweet, 'The Juridical Coup d'État and the Problem of Authority' (2007) 8 German Law Journal 915, 916.

[695] ibid.

[696] ibid.

[697] On the difference between 'original meaning' and 'original expected application', see Balkin (n 550) 293; Solum (n 550) 19–21.

interpretation.[698] It will suffice to say that it is very difficult and sometimes impossible to find out what was the makers' intent.

However, there is a more basic problem with this approach. Why should the makers' expectations be relevant? And who are the makers after all? The answer to both of these questions depends on the way the constitutional rules in question became and remain valid legal rules.[699] If the particular rule became a legal rule because someone intended this to happen, then we have a good reason to be interested in that person's intentions and use them as a baseline to track any future change. But is this how legal rules come into being? Is the author's expectation as to how his pronouncement will translate into legal rules decisive for the content of those legal rules?

What the author may have control over is the content of his text or pronouncement. She controls the words, not other people's use of those words. And she does not control the meaning of the words; this is given by the conventions ruling the language. What mediates between the author and those who will construe legal rules is the ordinary meaning of the words (supplemented by accepted terms of art, legal definitions and canons of interpretation, ie the legal context at the time of the enactment). This is the intuition behind the original public meaning version of originalism in American constitutional interpretation.[700] To the extent that we may

[698] See eg Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 Boston University Law Review 204.

[699] See Mikolaj Barczentewicz, 'Who Made the United States Constitution?' [2013] SSRN <http://ssrn.com/abstract=2323497> accessed 26 September 2014; Barczentewicz, 'The Limits of Natural Law Originalism' (n 108); Mikolaj Barczentewicz, 'I Am Not Your (Founding) Father' in Richard Albert, Nishchal Basnyat and Menaka Guruswamy (eds), *Founding Moments in Constitutionalism* (Hart Publishing 2019).

[700] Solum (n 550).

have reasons to use the original public meaning of the text as the baseline, it is at least a plausible approach. This method has an additional advantage that it avoids the pitfalls of having to identify the persons whose intentions or expectations should count.

When may we be justified in using this baseline? Only when we have no reason to believe that subsequent implicit changes have taken place or when our goal is to compare some later state of the law with its state immediately after the particular text was enacted (the explicit change that interests us). The latter case needs to be qualified. The public meaning approach will work only as long as the legal system in question recognizes that explicit change had results consistent with the public meaning. We should also not forget that not all constitutional rules are made, some have their source in custom. Therefore, there is a need for some other point of reference, which would be helpful in cases of implicit change following some other implicit change.

This example shows some of the difficulties in identifying the baseline for constitutional change. Perhaps for most constitutional orders there is no single baseline, but a mix of different considerations, like the semantic content of the text itself, the content of significant judicial precedents and consensus of legal officials on how to reconcile the two. However, this practical difficulty should not pose a problem for the theoretical case advanced here, as I do not rely on any particular account of a baseline.

5. AN ILLUSTRATION: CHANGE IN CONSTITUTIONAL LAW IN THE UNITED STATES

The Constitution of the United States contains an express provision for formal constitutional amendment in its Article V (requiring, for instance, that every amendment has to be ratified by three fourths of the states). There is little controversy that, in practice, US constitutional law changes not only through the Article V process. Yet, many argue that some such change is unconstitutional, because there is a legal rule providing exclusivity for the Article V process in respect to change of rules directly grounded in the text of the US Constitution.[701]

It is possible that ultimate rules of recognition of the US legal system are not entirely determinate as to the ranking between the Article V procedure and, for example, the recognition of judicial authority to interpret the Constitution. This is not a problem as long as it does not create too much indeterminacy when deciding particular cases. I am not entirely convinced that US rules of recognition are indeterminate. More likely, US rules of recognition have resolved the issue by simply ranking the Article V procedure lower.[702] Thus, constitutional change brought about by adjudication is straightforwardly recognized as effective by US rules of recognition. On my view this could mean that such change should be seen as constitutional constitutional change, irrespective of whether any court (eg the US Supreme Court) has a legal power specifically to change constitutional law.

[701] See eg Amar (n 23); Ackerman (n 22); David R Dow, 'The Plain Meaning of Article V' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995); Frederick Schauer, 'Amending the Presuppositions of a Constitution' (n 497); Albert, 'Constitutional Amendment by Constitutional Desuetude' (n 594).

[702] As argued, for example, by Alexander and Schauer (n 110) 190–191; Leiter (n 110).

However, even if some US rule of recognition provides for such law-changing effect of adjudication, it is still possible that US law contains other rules purporting to regulate constitutional change.[703] There may be a disability-imposing rule according to which the courts do not have a legal power to change at least some parts of the law of the Constitution. By itself, such a rule would not have any legal consequences, because the same law-changing effect is likely provided by a rule of recognition. It could also be that there is a prohibition-imposing (duty-imposing) rule making it unlawful for the courts to engage in some kinds of constitutional change. Any law-changing activity of the courts within the scope of such prohibition would be unlawful (thus making the changes unlawful and unconstitutional on my account), even though the changes could at the same time be perfectly effective (due to rules of recognition).

Claiming that there are such legal prohibitions in US law allows one to ground a constitution-in-exile argument.[704] One could argue that because the judges are violating some legal duties in engaging in some kinds of constitutional change, there is a meaningful sense in which such changes are unlawful (and unconstitutional) and this provides a legal reason to reverse those changes, despite their legal effectiveness. In a sense, such unconstitutional constitutional law is legally defective and may be criticized as such. However, it is a separate question what is the appropriate procedure for authoritative determination of this kind of legal defectiveness. It could be that no lower court or any other body within the United States is permitted to

[703] Conf. ch VI.3.

[704] Sachs, 'The "Constitution in Exile" as a Problem for Legal Theory' (n 123).

disregard a judgment of the US Supreme Court on the matter of the content of US constitutional law. Hence, it is possible that legally defective (unconstitutional) constitutional law remains just as binding as any other constitutional rule.

Bruce Ackerman's 'higher lawmaking' account, if correct, shows that constitutional change validated only by an ultimate rule of recognition has happened in the United States.[705] Ackerman's account describes sweeping change, which happens through a very public process in which the courts, the politicians and the voters are involved. According to him there are two distinct forms of political action (hence 'dualism'): normal politics and constitutional politics.[706] Through constitutional politics it is possible to effect significant constitutional change, irrespective of any legal limitations on change in constitutional law. Throughout the American history, short periods of constitutional politics have been alternating with normal politics, when such unconstitutional constitutional change is not possible (or at least it is not legitimate).

What is so significant about periods of constitutional politics is that agents of change, especially the Congress or the President or the Supreme Court, may legitimately claim to speak with the voice of the American people.[707] Hence, their power transcends legal limitations. One of the examples provided by Ackerman is the change in constitutional law brought about by capitulation of the Supreme Court in 1937 in the light of popular support (evidenced in two electoral victories) for the President's agenda, which required such significant change in constitutional rules

[705] Ackerman (n 22) 1039.

[706] ibid 1022.

[707] ibid 1027.

(before 1937, the Supreme Court was in habit of striking down New Deal legislation as unconstitutional).[708]

6. LEGAL CONSEQUENCES OF UNCONSTITUTIONAL CONSTITUTIONAL CHANGE

Unconstitutionality of a constitutional change does not necessarily entail any consequences for the rules brought into being by the change or for the people involved in bringing the change about. Such change may take place without any legal officials breaching any legal duties. Those seemingly counterintuitive conclusions stem from Hart's careful distinctions between different types of rules (eg having a *power* does not entail having a *duty* not to exceed it, the duty has to be established separately) and they fit everyday legal practice. They *seem* counterintuitive only when formulated in the abstract. I will now consider legal consequences for the (at least prima facie) legal rules and for the agents of change (eg judges, legislators or politicians).

A. CONSEQUENCES FOR VALIDITY AND EFFECTIVENESS OF THE CHANGED RULES

Beginning with effective legal rules introduced in an unconstitutional way, there are two main possibilities of how a legal system could treat them:

(1) as valid and effective,

[708] ibid 1053–1055.

(2) as valid until nullified or disapplied in an authoritative procedure.

There is also a third possibility, much more unusual, that the law could be said to treat effective legal rules introduced in an unlawful way as invalid from inception (due to a conflict of rules of recognition). It is a contingent matter which is the case in any given legal system.

Before I move on to discuss the three possible ways a legal system could treat such legal change, I want to stress that it is important not to misapprehend Hart's dictum that 'all that succeeds is success'.[709] If a change in the law is effective despite being unlawful (ie, on my view, despite violating some legal prohibition or not being recognized by any pre-existing rule of recognition) a positivist is not disarmed from criticizing the change. When the change in question is a change of a legal custom (eg of a rule of recognition), the criticism may contribute to reverting the change or even to making the case that the change does not in fact obtain (it could be that the custom underlying the rule of recognition has not yet fully shifted). When the change took place through an ordinary statute or through case law, there may be legal instruments for striking it down (a law may be effective but meaningfully voidable). That may even be the case with formal constitutional amendments.

The first situation (effective but unconstitutionally introduced legal rules are simply valid) is the default option, because it follows from the fact that those rules are accepted as effective legal rules, which means that they are recognised as valid by some rule of recognition. After all, change of legal rules happens only if it is recognized by some pre-existing rule of recognition (in concert with an exercise of a power conferred by a rule of change or alone) or if it is accompanied by a correlate

[709] See ch V.5; Hart, *The Concept of Law* (n 1) 153.

change among rules of recognition. In that limited sense, 'all that succeeds is success'[710]: if a legal change happened, then it follows that the new legal rule is now valid.[711]

But even in this scenario there may be space for authoritative recognition that what happened was unlawful or unconstitutional. For example, Ahmed, Albert and Perry suggested that UK courts could declare as unlawful an Act of Parliament enacted in contravention of a constitutional convention (a non-legal constitutional rule), without holding it invalid.[712] To be clear, by using a constitutional convention as a ground of *unlawfulness*, the court would thereby attempt to transform the convention into a *legal* rule imposing a *legal* duty. There is, of course, another possibility: '… to enforce the convention through non-legal means, a court could declare that enacting the statute was unconstitutional even though it was not unlawful.'[713] Either way, pace Kelsen, there is no contradiction between a legal rule being valid and having been created in an unlawful (unconstitutional) way.[714]

The second situation (a possibility of ex post invalidation) is like the first one in that the unconstitutionally-introduced legal rule is and remains valid. The difference is that here somebody is vested with a legal power to invalidate the unconstitutional

[710] Hart, *The Concept of Law* (n 1) 153.

[711] There is a possibility of a legal rule being considered as valid and not within the same legal system, see my discussion of the third situation below.

[712] Ahmed, Albert and Perry (n 287) 38 fn 103.

[713] ibid 38.

[714] For my discussion of Kelsen's position see ch VIII.1.A.

rule (or at least with a legal ability to do so). Paradigmatically, this could be a constitutional court, but we can imagine a special simplified legislative procedure for such purposes. Importantly, there is no necessity for such a power (or an ability) to exist in every constitutional order. The issue of its existence is separate from the issue of what limitations on constitutional change there are (eg whether there are any legal duties that could be breached by some attempts at constitutional change).

An unconstitutionally-introduced legal rule could be later held ineffective (disapplied) if the legal system provides a mechanism for such determination. According to Jonathan F. Mitchell this is as much as the Supreme Court of the United States can do regarding a federal statute.[715] The Court has only a power to refuse to apply a legal rule in a case before it, but no power to 'strike down' or invalidate it. Such a 'power' is better seen as a duty not to give effect to legal rules incompatible with some higher-order rules, like – in this case – the US Constitution. Whether such determination not to give effect to some legal rule due to unconstitutionality has any force not just between the parties to the court case at hand (eg whether it has precedential force), is a separate question.[716]

Both nullification and disapplication can be done *ex nunc* and *ex tunc*. On the first model, nullification (or disapplication) treats the legal rule as valid (effective) until the moment of the nullification. On the second model, nullification (or disapplication) treats the legal rule as invalid from the moment of inception – as if it never existed.[717] Note that even on the second model we are not really dealing with

[715] Mitchell (n 510).

[716] See ch VII.1.

[717] See Hart, *The Concept of Law* (n 1) 30. Compare Kelsen, *Pure Theory of Law* (n 30) 271–278.

invalidity from inception, after all there is something there to nullify. This is merely a case of treating the rule *as if* it had not been there, which can be seen as a kind of legal fiction. The legal system may determine which model is to be applied or leave some discretion to the body vested with the task to nullify (or disapply).

Finally, the third situation – true invalidity from inception – is only possible where there is a conflict of rules of recognition, not resolved by any conflict rules (eg rules about hierarchy of rules). This may happen, for instance, in cases of 'splits' within legal systems, where one significant part of the group of legal officials accepts some ultimate rules of recognition that other legal officials do not. It could then be that something is a valid legal rule only according to one group of legal officials and it is not just a matter of disagreement about application of commonly held ultimate rules of recognition, but true disagreement about what are the ultimate rules of recognition. The difference between this situation and the previous one (voidable rules) is that here at least some significant part of legal officials treats as non-existent (without a need of authoritative determination) some rules that another significant part of legal officials treats as valid. In the previously discussed case, there was at least an agreement on current validity (binding status) of the rules even if some legal officials think the rules should be invalidated (even ex tunc – *as if* invalid from the inception).

HLA Hart described how this may have happened in South Africa in early 1950s (*Harris v Dönges*).[718] In 1952, the Parliament of the Union of South Africa enacted a

[718] *Harris v (Dönges) Minister of the Interior* [1952] 1 TLR 1245; Hart, *The Concept of Law* (n 1) 122.

statute restricting franchise of 'non-European' voters (the Separate Representation of Voters Act 1951).[719] However, according to s. 35 of the South Africa Act 1909 such a legal change required a special legislative procedure, including an affirmative vote of 'not less than two-thirds of the total number of members of both Houses' of Parliament at a joint sitting. The 1951 Act was adopted by ordinary majority. In 1952, the Appellate Division of the Supreme Court of the Union of South Africa unanimously decided in *Harris v Dönges* that the 1951 Act was invalid.[720]

The South African government reacted to the judgment by refusing to abide by it. The government's disobedience was based merely on its conviction that the content of the Appellate Court's judgment was manifestly wrong. To remedy the situation, the South African Parliament enacted the High Court of Parliament Act, vesting itself with the powers to hear and decide appeals from decisions of the Supreme Court. The High Court of Parliament quickly reversed the Appellate Court in *Harris v Dönges*. In turn, the Appellate Court, in *Minister of the Interior v Harris*[721] invalidated the High Court of Parliament Act. Finally, the government budged and accepted both judgments of the Appelate Court. However, after the elections, they

[719] This discussion was previously published as Mikolaj Barczentewicz, 'On the Looming Split in the Polish Constitutional Order: *Harris v Dönges* in Central Europe?' (*I·CONnect*, 18 February 2017) <http://www.iconnectblog.com/2017/02/polish-looming-split/> accessed 5 November 2018. See also Erwin N Griswold, 'The Demise of the High Court of Parliament in South Africa' (1953) 66 Harvard Law Review 864; Kenneth Kirkwood, 'The Constitutional Crisis in South Africa' (1952) 28 International Affairs (Royal Institute of International Affairs 1944-) 432; DM Scher, '"The Court of Errors" - A Study of the High Court of Parliament Crisis of 1952' (1988) 13 Kronos 23.

[720] *Harris v (Dönges) Minister of the Interior* (n 718).

[721] [1952] (4) SA, 769 (AD).

found a way to achieve their original goal that was acceptable to the courts (by packing the Senate).

The South African crisis illustrates how it could be that there is a fundamental disagreement about the criteria of validity of law, within one legal system. The possibility of such disagreement is a reason why I accept the view advocated by Raz and Finnis that ultimate rules of recognition are not the ground of unity and continuity of legal systems.[722]

B. CONSEQUENCES FOR THOSE WHO BROUGHT THE CHANGE ABOUT

Turning to legal consequences for individuals responsible for unconstitutional change, I will focus on three situations: (A) there was no breach of a legal duty, (B) there was a breach of a duty, but no rule provides for legal sanction, and (C) there was a breach of a duty and there is a rule providing for legal sanction. What kind of a duty could that be and what would be its source? In the context of rules of adjudication, Hart has written:

> …. though of course there is no reason why the law should not also by special rules prohibit a judge under penalty from exceeding his jurisdiction or trying a case in which he has a financial interest, these rules imposing such legal duties would be additional to those conferring judicial powers on him and defining his jurisdiction.[723]

[722] See ch II.1.

[723] Hart, *The Concept of Law* (n 1) 29.

Hence, for judges it could be a duty not to exceed their jurisdiction. For legislators, it could be a duty not to exceed the limits of their legislative power. Perhaps a legal system could contain a general rule for all legal officials imposing a duty not to take part in unconstitutional attempts to change the law (in any of the senses). As to the question of the source of this kind of duties, it is important to note that they would have to be imposed by some primary rules. The duties under consideration could not stem directly from the rules of change or the rules of adjudication. They could also not be based in the rule of recognition, because by definition it imposes a duty only to identify as valid law the legal rules that meet certain criteria. What this means in practice, is that such duty cannot be assumed only on the basis that a rule of change or a rule of adjudication confers limited powers. Even unlawful constitutional change may happen without any legal official breaching any duties.[724] Finally, the issue of personal responsibility for unconstitutional constitutional change may be entirely divorced from the issue of the validity of effects of such change.[725]

7. CONSTITUTIONAL CHANGE FROM THE PERSPECTIVE OF A LEGAL THEORIST

In this section, I consider some methodological concerns raised by my account of constitutionality of constitutional change. Naturally, what a legal theorist qua legal theorist should be directed by when describing the state of the law are the facts that determine what was the case as a matter of law. The problem of legal theory in general

[724] When a change is not recognised by pre-existing rules of recognition and involves a change of rules of recognition.

[725] Kelsen, *Pure Theory of Law* (n 30) 275.

is that these facts are not easily observable. A theorist is bound to adopt, what I called after Hart and Shapiro, the hermeneutic perspective.[726] Such perspective relies heavily on how the participants of the social practice in question (the law) understand the practice. And here lies the source of a problem with characterising certain situations as cases of unconstitutional constitutional change. It may be that the participants of the legal practice in question do not expressly adopt the account in terms of unconstitutionality (or at least use it in a different sense than the theorist). What is more, the agents behind the change (eg judges) might go to some lengths to portray their actions as perfectly lawful (naturally, they may also sincerely believe their actions are lawful, even when this is difficult to justify).

When this is the case, any attempt by a theorist to characterise the change as unconstitutional raises several flags. First, in adopting such an account she may seem to be accusing the agents of change (judges in our example) of being disingenuous or of being incompetent. Surely, the judges and other experts should be able to recognise that they are engaging in a 'revolution', even if only a 'technical' one.[727] Second, and perhaps more fundamentally threatening to my project, there remains a methodological issue of how a theorist can claim (together with Hart) that the internal perspective is crucial to our understanding of the law (to our hermeneutic perspective on the law) and at the same time appear to disregard the evidence of the

[726] See ch I.3.

[727] For an argument along these lines in the United Kingdom context see Adam Tucker, 'Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty' (n 191) 75.

actual internal points of view of the participants in the given legal practice.[728] The objections, though serious, are not fatal to my case. I will begin by discussing the second, methodological problem.

A. METHODOLOGICAL OBJECTION

I have already introduced the distinction between internal and external, as well as practical and theoretical, perspectives on the law.[729] Someone objecting to my approach might say that I am committed to rejecting the most direct evidence on whether a change in constitutional law was lawful or unlawful and constitutional or unconstitutional. And this is a prima facie valid objection because in the methodological approach I accept (the hermeneutic approach in Hart's sense), the understanding of the practice of law comes to a large extent from the theorist's grasp of the internal perspective of the participants.

However, this objection seems to me to be grounded in a simplistic view of what should count as evidence in the process of establishing the content of the law. In stable legal orders there is at least a nexus of settled law, by which one can judge whether a change in law has happened or not.[730] The right way of ascertaining that the law is settled is by inquiring into widespread practices and attitudes of legal officials. That a supreme court said once that a certain legal rule is settled is not conclusive evidence. It is not even conclusive to observe several judgments of high

[728] On 'internal' and 'external', as well as 'practical' and 'theoretical' perspectives on the law, see ch I.3.

[729] See ch I.3.

[730] Though, of course, one should not underestimate the many real problems in measuring legal change, see ch IX.4.

courts stating the same.[731] This is so, because it may still be that the judges who have not had an opportunity to apply the alleged rule (for a lack of a right case before them) already have an attitude different from the one shared by the judges who have had such an opportunity (ie the judges who have not spoken yet may believe that there is no such legal rule). Naturally, an emerging observable pattern in respect to a legal rule is a reasonable proxy, and in some cases, especially where a certain area of law is under the jurisdiction of a small group of specialised legal officials, it may be a very strong proxy indeed. But the important point is that we should be cautious in how much weight we give to such evidence. Adopting the hermeneutic approach does not foreclose the theorist from saying that some local parts of the practice are incoherent, confused or unrepresentative. What the theorist is striving for is a global account.[732]

Another point, perhaps even more salient in the context of the present discussion, is that we should not forget that we are talking about legal *change*. Once a change in law is effective, there are very good reasons for the legal officials to take it on face value that the process of change was lawful. I will say more on that later in this chapter. Here however, I wish to point to a different issue.

Any change involves at least two states: a state before the change (t_0) and a state after the change (t_1). I propose that it is more reliable to look on the settled rules regulating change at t_0 and not at t_1 to establish whether the change in question was

[731] Brian Bix makes a similar point in Bix (n 50) 538.

[732] I thank Grant Lamond for the last point. Also, as I have already noted in this chapter, there could be a theoretical error persistent and widespread among the legal officials.

in accordance with the law at t_0. My concern is that someone might prefer to look at judicial pronouncements after the allegedly unlawful change has happened (t_1) and use the judges' expressed or implied views on the content of rules regulating legal change to argue that the change between t_0 and t_1 was in accordance with the law as it was at the time of change. The problem is that, even assuming that the judicial opinions we have available from t_1 are very reliable as evidence of the content of settled legal rules, the rules regulating legal change may themselves have changed between t_0 and t_1. A much more reliable source of evidence of the relevant rules, by which we should judge the change from t_0 to t_1, is the pattern of practices and attitudes at t_0.[733]

B. INCOMPETENCE OR DECEPTION

There remains the issue of how strongly legal officials tend to be biased towards presuming constitutionality of any effective change and to what extent that affects the reliability of what they say about constitutionality. Legal officials may have strong considerations of professional advancement, social standing or perhaps even a political agenda, not to forget about genuine moral views, which will induce them to take a particular position on constitutionality of a certain constitutional change. Also, in their role as legal officials they are expected (and most likely perceive their role as requiring them) to provide legal justifications for their decisions. It may be that legal officials internalise this requirement to such an extent that they do not even

[733] Of course, it may be contingently true that the relevant rules on legal change have not changed between t_0 and t_1 and assuming that we have reliable evidence of them from t_1, then it is reasonable to accept the ex post judicial pronouncements about lawfulness of a particular change.

have a strong internal conflict in presenting a legal pedigree for a change that from the perspective of a legal theorist was obviously a manufactured 'pious fiction'.[734]

Hence, both from their 'private' perspective and from their 'official' perspective there may be no deception and arguably also no incompetence. A legal theorist need not accuse participants of the legal practice of deception or incompetence, to be able to question the reliability of what they say for the purposes of a theoretical account of the law. It is so also for the reason, already discussed in chapter I, that good legal practitioners need not be good legal theorists and that seemingly theoretical statements made by practitioners should not be treated as reasoned theoretical positions.[735]

[734] See also ch V.5.

[735] See ch I.3.

X. REVOLUTIONS AND CHANGES OF ULTIMATE RULES OF RECOGNITION

One of the key legal reasons why a constitutional change may be unconstitutional is that it was not recognised by any pre-existing rule of recognition.[736] If a change in the law is effective, but was not recognized by a *pre-existing* rule of recognition, this means that a change among rules of recognition took place. In this chapter, I focus on constitutionality of changes of ultimate rules of recognition and in doing so I make three arguments. First, not every change of the criteria of validity provided by an ultimate rule of recognition entails a change of an ultimate rule of recognition. Second, it is possible for a change of an ultimate rule of recognition to be lawful (and constitutional) even though it is impossible for such change to take place through an exercise of a law-making power. Finally, I propose to use the notion of a (constitutional) 'revolution' in a technical legal sense to refer only to cases of unlawful change among ultimate rules of recognition. The legal conception of a constitutional revolution should be reserved for truly unconstitutional changes, changes coming from outside of the legal system - changes not grounded in pre-existing legal rules. In the latter part of this chapter I contrast my notion of a technical legal revolution with some other views on constitutional revolutions.

One particular example will serve well as an illustration of the argument I make here. In his *Questioning Sovereignty*, Neil MacCormick devoted a chapter to showing how the 1973 accession of the United Kingdom into the European Communities was

[736] The other being that the change took place in violation of some legal prohibition, see ch IX.

not a constitutional revolution in UK law.[737] I disagree with MacCormick's account in several crucial ways, beginning with his characterisation of the place of Community (and later: EU) law in UK law.[738] Nevertheless, for the sake of illustration it will be useful to assume that MacCormick was right and that somehow as a consequence of the enactment of the European Communities Act 1972, a new criterion of validity was added to the UK rules of recognition. This view has some support in the *Miller* judgment where the majority of the Supreme Court has repeatedly asserted that EU law is a 'source of UK law'.[739] The question remains what kind of a rule of recognition recognizes EU law: an ultimate rule (ie a necessarily social rule, like the rules that recognize as valid UK law statutory law and common law) or a non-ultimate rule (itself a valid rule, like statutory rules that recognize statutory instruments as valid UK law)? If it is a non-ultimate rule, then this would

[737] MacCormick, *Questioning Sovereignty* (n 8) ch 6.

[738] On my view, which I introduced in chapter VII.4.A, UK law gives effect to EU law as non-domestic law, without transforming EU law into UK law. EU law is not recognized by any of the UK's rules of recognition in the Hartian sense that I use, because rules of recognition by definition recognize valid elements of *this* legal system. The majority of the UK Supreme Court in the *Miller* judgment at one point suggested they endorse this view:

> '… we would not accept that the so-called fundamental rule of recognition (ie the fundamental rule by reference to which all other rules are validated) underlying UK laws has been varied by the 1972 Act or would be varied by its repeal.'

Miller (SC) (n 47) [60]. But see n 742.

MacCormick argued otherwise, explicitly claiming that the European Communities Act 1972 added new criteria of validity to the UK's rule of recognition as understood by Hart, recognizing the domestic validity of Community (EU) law; MacCormick, *Questioning Sovereignty* (n 8) 87–88.

[739] See eg *Miller (SC)* (n 47) [60], [65], [81], [90].

make sense of MacCormick's other claim – that the UK Parliament exercised a *legal power* to change the rule of recognition by enacting the 1972 Act.[740] Non-ultimate rules of recognition, like all valid legal rules, can be directly changed by exercises of law-making powers.[741]

However, both MacCormick and the UK Supreme Court in *Miller* made statements that strongly suggest that (1) what they had in mind is domestic recognition of EU law through an *ultimate* rule of recognition and (2) this recognition was achieved by Parliament through the enactment of the 1972 Act (ie through an exercise of Parliament's law-making power).[742] I will now show how

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[740] MacCormick, *Questioning Sovereignty* (n 8) 87–90.

[741] See ch II.1 and ch V.4.

[742] The Supreme Court in *Miller* has written, for example:

> 'So long as the 1972 Act remains in force, its effect is to constitute EU law an independent and *overriding source* of domestic law.'
>
> 'In 1972, for the first time in the history of the United Kingdom, a dynamic, international source of law was *grafted onto, and above*, the well-established existing sources of domestic law: Parliament and the courts.'
>
> [EU law as a source of UK law] 'was brought into existence by Parliament through primary legislation, which gave that source *an overriding supremacy in the hierarchy of domestic law sources*.'

Miller (SC) (n 47) [65], [90], [81] (emphasis added). MacCormick in turn explicitly defined 'the rule of recognition' in Hartian terms (without distinguishing ultimate and non-ultimate rules of recognition), saying for example that it

> 'only exist through a "complex and normally concordant practice" among judges and other officials. Its existence can thus only be a matter of social fact.'

MacCormick, *Questioning Sovereignty* (n 8) 81. If MacCormick (like Hart) used 'the rule of recognition' only in reference to ultimate rules of recognition, then it follows that his whole account refers to ultimate rules of recognition. It thus also follows that MacCormick's account was unsound as he confused the categorical difference between

it is possible to account for the role of the UK Parliament in bringing about the change of ultimate rules of recognition, even though it could not have happened directly by an exercise of a legal power (pace MacCormick[743]).

1. 'LEGAL ALTERATION' OF RULES OF RECOGNITION

Earlier in this thesis I argued that there cannot be a legal power to change an ultimate rule of recognition, because legal powers work without intermediation that would be required in the case of ultimate rules of recognition (intermediation of an actual change in the social practice underlying an ultimate rule of recognition).[744] In that discussion I noted an objection, raised by Grant Lamond and Matthew Kramer, that to deny a role of legal powers in change of ultimate rules of recognition is to fail to account properly for the internal perspective of committed participants of legal practices.[745]

directly changing valid law (possible through exercises of law-making powers) and changing ultimate rules of recognition.

[743] See the previous footnote.

[744] See ch V.4.

[745] For my discussion of the 'internal' v 'external' distinction see ch I.

I offer here an account that, without involving legal powers, makes sense of Lamond's statement:

> In the operation of a legal system the rule of recognition is treated as a binding law that may be subject to legal alteration or clarification, but not to modification simply at the will of officials.[746]

How could it then be that the rule of recognition cannot be changed normatively through an exercise of a legal power and yet at the same time is perceived as amenable 'to legal alteration or clarification'? The answer is twofold: (1) not every change of the criteria of validity provided by an ultimate rule of recognition entails a change of an ultimate rule of recognition and (2) there can be legal abilities (quasi-powers) to change ultimate rules of recognition, and the operation of such abilities can meaningfully be characterised as 'legal alteration'.[747]

A. A CHANGE OF ULTIMATE CRITERIA OF VALIDITY DOES NOT ENTAIL A CHANGE OF ULTIMATE RULES OF RECOGNITION[748]

Consider the following hypothetical example: what if the UK Parliament attempted to abolish the common law by an Act of Parliament? I will consider this hypothetical with some simplified (partially counterfactual) assumptions about the content of UK rules of recognition:

1. The supreme and ultimate criterion of validity in UK law, provided by an ultimate rule of recognition, is that Acts of Parliament are law and

[746] Lamond, 'Legal Sources, the Rule of Recognition, and Customary Law' (n 46) 18.

[747] I introduced the notion of a legal ability (quasi-power) to change the law in ch VIII.2.

[748] I thank Larry Solum for pressing me on this point and for showing that this scenario is possible.

there is no limitation on their content (Parliament can enact anything and it will be legally binding).[749]

2. There is another ultimate criterion of validity in UK law, also provided by an ultimate rule of recognition, according to which the common law is law.
3. It is clear that the ultimate rules of recognition provide for hierarchical superiority of Acts of Parliament over the common law to the extent that a statute could abolish the common law altogether.[750]

What follows from those, admittedly partially counterfactual, assumptions is that the moment the 'abolition of the common law' statute enacted by Parliament enters into force, UK law would cease to recognize the common law as law. This would happen directly through an exercise of Parliaments legal law-making power.

How would that not be a change of an ultimate rule of recognition (which cannot happen directly by an exercise of a legal power)? After all, by assumption (2) the common law is valid law in the UK due to an ultimate rule of recognition. So, if the common law at any point ceases to be valid law in the UK, would that not entail a change of that ultimate rule that provides for the common law's validity? No.

[749] This is highly controversial as it entails the *self-embracing* view of parliamentary sovereignty, disputed by the proponents of the *continuing* view of parliamentary sovereignty (ie those who think that Parliament is disabled from limiting itself), see eg Hart, *The Concept of Law* (n 1) 149–150.

[750] It is very likely not the case that there is such clarity. My own view is that UK rules of recognition are not determinate on this point. However, I make this counterfactual assumption for the sake of illustration.

No ultimate rule of recognition needs to change in this scenario because the rules of recognition as they are at the time of change already say that abolition of the common law can be achieved by statute (or at least say that Parliament can do anything, which entails this special case). In other words, the rule of recognition that provides for validity of the common law, in a sense, depends on there not being an overriding statute. No official recognizes the common law as law *simpliciter*: they recognize it as law to the extent no statute displaces it. And once a statute displaces the common law wholesale, this simply activates the negative condition in respect to the whole of the common law.

If legal officials rebel against the statute abolishing the common law, they will be rebelling against the pre-existing rules of recognition. And if such rebellion is successful, ie if the common law continues to be treated as valid law despite the statute, then *that* would entail a *change* of ultimate rules of recognition (limiting the superiority of statute over the common law).

Of course, it is more likely that there is nowhere near this level of clarity in UK law today about the limits of what Parliament can legally achieve through a statute. In other words, UK rules of recognition are likely indeterminate on the point of what would happen if Parliament attempted to abolish the common law. Some judges may be strongly inclined to refuse to accept that Parliament legally can do so. Arguments on either side would not really be arguments about the law as it is (even though they would undoubtedly be presented as such), but about in which direction the criteria of validity should change (be made more determinate). If one side succeeds and the

rules of recognition change to become clear on this point, then it could mean that a technical legal revolution took place (see below).[751]

The scenario I sketched may sound odd also for another reason. Even if someone accepts that there is no *necessity* for a change of any ultimate rule of recognition (given the assumptions), it would be strange for the common-law-recognizing rule not to change. After all, why would anyone keep recognizing the common law as valid law conditionally on it not being displaced by a statute, *after* such displacing statute enters into force? It seems rather likely that the social practice underlying ultimate rules of recognition would (quickly?) shift in effect removing criterion (2) as superfluous. This would be a kind of *desuetude* among ultimate rules of recognition and given that they are social rules they can clearly be changed this way.

The *desuetude* of the common-law-recognizing rule of recognition could not happen directly by an exercise of Parliament's legal power to make the law, even if it obtains with near-imperceptible speed. Custom does not change through exercises of normative powers. However, I believe that given that such change among ultimate rules of recognition can meaningfully be seen as provided for by the rules of recognition as they were before the change, I think that the change could be seen as lawful (coming from within the legal system). I will now sketch this view in more detail.

[751] Although it could also be that a pre-existing rule of recognition gives some actor (eg the Supreme Court) a legal ability to make rules of recognition more determinate (see the next section on legal abilities) – in that case such change could, on my view, be lawful and not a technical legal revolution.

B. LEGAL ABILITY (QUASI-POWER) TO CHANGE ULTIMATE RULES OF RECOGNITION

What explains the tendency to speak of some changes in ultimate rules of recognition as 'made' or 'effected' by someone is the fact that actions of that someone are among the reasons people have for acceptance of the rule. 'I accepted that change because parliament made it' – a legal official might say about a legal change that is, perhaps unbeknownst to the official, a change in an ultimate rule of recognition. Introduction of the notion of legal abilities to change the law allows us more fully to account for the role of reasons for acceptance of a legal change. Relying merely on the standard concept of a legal power entails treating statements like the one in the example just given as erroneous or even incoherent.

Consider, for example, the issue whether the UK Parliament has a standing ability to change at least some ultimate rules of recognition of UK law. As I defined it in chapter VIII, if one has a standing ability to change the law then the legal officials are under a legal duty to accept exercises of the ability as effecting valid legal change (a duty imposed by a rule of recognition).[752] The officials *legally should* accept the change. This, in my view, is sufficient to see even a change of an ultimate rule of recognition in response to an exercise of such an ability as meaningfully lawful (law-governed).

In that sense, an official (a member of the recognitional community[753]) can have *legal* reasons to change what they accept is the content of their duty of recognition of

[752] There is, of course, the issue of indeterminacy of the limits of Parliament's legal ability to change the law as illustrated in the previous section. Would a statute abolishing the common law be recognized as fully effective by the current UK rules of recognition? This is not clear.

[753] See ch III.

law. Arguments about such reasons may be legal arguments. Thus, it does not follow that all arguments 'for or against' ultimate rules of recognition 'are necessarily extralegal'.[754] I am not denying that it is *also* possible to make extra-legal arguments about what should be the content of ultimate rules of recognition.

It is not strange at all that lawyers talk about changes of the sources of law or of the criteria of what makes something a legal rule of their system. They do so both in terms of legal reasons (eg a formal constitutional amendment changing the legislative procedure) and extra-legal reasons (eg how the legislative procedure should change because the current rules are insufficiently democratic). For a theorist such discussions are, at least in part, discussions about ultimate rules of recognition. And there is nothing incoherent in accepting that such practical legal discourse is a part of how law can govern the change of its ultimate rules.

Sometimes, lawyers even talk explicitly about 'rules of recognition'. For instance, UK constitutional lawyers, including Supreme Court judges, tend to refer to Hart's model of the foundations of legal system and to rules of recognition of UK law in their legal arguments (often badly).[755] This is somewhat strange, given that RULE OF RECOGNITION is a theoretical concept. That said, we should not forget that explicit invocations of the theory of rules of recognition are a very small element of the much broader phenomenon of the practical legal discourse about the sources of law and criteria of legal validity.

[754] Contra Kay, 'Preconstitutional Rules' (n 7) 193.

[755] Barczentewicz, 'Uses and Misuses of the Rule of Recognition in *Miller*' (n 47).

As I discussed in detail in chapter V, because ultimate rules of recognition are *essentially* social rules, there is always a possibility that any attempt to change a rule of recognition will fail to be accepted by the recognitional community.[756] This can be the case even if the legal system in question gives someone an ability to change rules of recognition I discuss here. In general, we might say that the possibility is remote, because by definition to have an ability means that (directly or indirectly) some ultimate rule of recognition recognizes one's actions as law-changing. And ultimate rules of recognition are grounded in what the legal officials accept they have a duty to recognize as law. Hence, not to accept a change coming from someone who has an ability to change the law could, in normal circumstances, be equal to not following a legal duty one likely already accepts one has.

However, there are at least four situations when a legal official may be less likely to accept an exercise of an ability to change an ultimate rule of recognition. First, ultimate rules of recognition are not necessarily grounded in a perfect consensus among legal officials. It is possible that some small minority of legal officials do not accept some of the ultimate rules of recognition that the vast majority of legal officials accept. Hence, some officials may not accept an ultimate rule of recognition grounding the kind of ability in question. Second, legal officials may be uncertain about the content of their duty of recognition, there may be significant indeterminacy at the margins, as Hart noted.[757]

Third and relatedly, a legal ability to change an ultimate rule of recognition could come from a non-ultimate rule of recognition, perhaps from customary law of some

[756] See ch V.4.

[757] Hart, *The Concept of Law* (n 1) 147–154.

subset of legal officials (like judges). Such customary law is (ordinary) valid law, deriving its validity from an ultimate rule of recognition. Non-ultimate rules of recognition are not necessarily social rules of all legal officials. In that case, it may be even more understandable that some officials would either not know of or disagree with other officials about the content of non-ultimate rules of recognition contained in customary law.

Finally, legal officials may be unwilling to follow their legal duty for non-legal reasons (even when they have no doubts that they are under such legal duty). Going back to my previous example, if the UK Parliament ever decided to abolish the common law that would likely require a change of an ultimate rule of recognition (because, as I said, the common law is only law in the UK due to an ultimate rule of recognition and the rule on supremacy of Acts of Parliament is likely indeterminate as to the effectiveness of a potential wholesale abolition of the common law). Thus, an Act of Parliament to that effect could not, by itself, have a direct normative effect of abolishing the common law – there would need to be a shift in the official custom underlying ultimate rules of recognition. Even if unable to make a legal argument against the validity of the statute, some judges could see that course of action as so bad that they would refuse to recognise the statute in question and keep recognizing the common law as law.

True, it is unlikely the judges would openly say they are disobeying the law, even though it could be exactly what they would be doing. More likely, they would present their disobedience towards the statute as acting in accordance with some overriding legal principles, like the principle of the rule of law. On the other hand, it is also possible that they would be right in so claiming. (It would then be a case of either indeterminacy of rules of recognition or simply that the statute would not count as

an exercise of an ability to change the rule of recognition of common law as law.) Lord Hope suggested that UK judges may find themselves in precisely that sort of situation.[758]

However, I agree with Lord Hope in his judgment in the *Jackson* case that if the UK Parliament purports to exercise an ability to change a rule of recognition (Lord Hope spoke about legal powers), the courts will attach great weight to Parliament's self-understanding of the limits and nature of its abilities to change the law.[759] That is why, for the UK Parliament, the consequences of exercising a standing ability to change the law may be summarized by saying that the officials *legally should* accept the change and that they *probably will* (unless the change in question would amount to such a confrontation with the judiciary that the judges would be minded to rebel).[760]

Going back to MacCormick's account of how the European Communities Act 1972 affected the UK's ultimate rules of recognition, the concept of a legal ability to change the law enables us to offer a story of the change of ultimate rules of recognition, which gives due credit to Parliament's role and to do so without repeating MacCormick's error of misapprehending the limits of what can be achieved through an exercise of a legal power. An additional advantage of

[758] See Lord Hope, 'Is the Rule of Law Now the Sovereign Principle?' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013) 93–95; see also Alison Young, 'Parliamentary Sovereignty Re-Defined' in Richard Rawlings, Peter Leyland and Alison Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2013) 86–87.

[759] *Jackson v Attorney-General* (n 220) per Lord Hope at [125].

[760] See also, Peter Mirfield, 'Can the House of Lords Lawfully Be Abolished?' (1979) 95 LQR 36, 44.

the ability-based account is that it openly admits what could have happened alternatively – ie that the legal officials may have failed to change what they see as their duty to recognize valid law and hence that the change of the ultimate rule of recognition may not have taken place (despite the valid enactment of the 1972 Act).[761] This alternative is not even comprehensible on a powers-based view, because whenever a power is exercised, the legal change simply directly obtains.[762]

There is an important difference between having a mere 'ability to initiate modifications to the rule of recognition,' discussed by Alison Young, and having the ability discussed here.[763] For instance, it may very well be true that it is possible for the courts to initiate a successful change of ultimate rules of recognition of UK law.[764] The same may be true about the prime minister or about the Archbishop of Canterbury. However, a person or a body has the legal ability to change ultimate rules of recognition in the sense used here, only if their actions are *already identified* as a source of binding legal change by some rule of recognition. Clearly, adjudication has law-changing effects in the UK, but whether it is recognized as binding when

[761] As I have mentioned at the beginning of this chapter and in ch VII.4.A, I do in fact believe that no change of any ultimate rule of recognition took place in order to give effect to EU law in UK law. I am pursuing the contrary line of argument as I see it as a good (even if counterfactual) illustration and because it was offered by MacCormick and it has some support in the *Miller* judgment.

[762] See ch V.4.

[763] Young (n 758) 71, 86. See also Peter C Oliver, 'Abdicating and Limiting Parliament's Sovereignty - Reply to Goldsworthy' (2006) 17 The King's College Law Journal 281, 282–83.

[764] Young (n 758) 86.

purporting to change the content of one of the ultimate rules of recognition is a separate issue.[765]

Concluding, I began this section by referring to the view that a proper account of change of ultimate rules of recognition should have a place for seeing such change as law-governed and lawful (as argued by Grant Lamond and Matthew Kramer). I then clarified that not every change among the ultimate criteria of validity is a change among ultimate rules of recognition, and some such changes can happen even through exercises of legal powers (eg by enactment of a statute). My key contribution was to apply the notion of a legal ability to change the law, introduced earlier in this thesis, to the change of ultimate rules of recognition – which cannot take place through exercises of legal powers. I showed how such legal abilities (and rules of recognition grounding them) can provide legal reasons to accept what amounts to a change of an ultimate rule of recognition. On my view this is a way for a change of an ultimate rule of recognition to be meaningfully law-governed, or even lawful (when it does not violate any legal prohibitions).

2. REVOLUTIONARY CONSTITUTIONAL CHANGE

The notions 'revolution' and 'constitutional revolution' pose serious definitional challenges.[766] They are clearly connected with constitutional change and seem also to have some relationship with constitutionality (or lawfulness) of such change. Here,

[765] See eg Nick Barber, 'Sovereignty Re-Examined: The Courts, Parliament, and Statutes' (2000) 20 OJLS 131; Alison Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009) 85–87.

[766] See eg Garry Jeffrey Jacobsohn, 'Theorizing the Constitutional Revolution' (2014) 2 Journal of Law and Courts 1, 1.

I distinguish between constitutional revolutions in general and constitutional revolutions in a technical legal sense. A constitutional revolution in a general sense, following Garry Jacobsohn's definition,

> … can be said to exist when we are confronted with a paradigmatic displacement, however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity.[767]

This conception is appropriately broad. On this view, revolutions may happen with or without unlawfulness, gradually or in one intense moment, without anyone noticing or in full public view. This way of conceptualizing constitutional revolutions is distinct and independent from the issue of constitutionality (lawfulness) of constitutional change as used in this thesis. It is perfectly possible for a change unconstitutional on my view (eg because of a breach of some legal duty) to be nowhere near being a constitutional revolution on Jacobsohn's view. Notably, this includes a possibility of a change in ultimate rules of recognition (even without an ability discussed in the previous section) also not counting as a constitutional revolution. I think this is right.

While I accept Jacobsohn's general notion of constitutional revolutions, I want also to consider a distinct concept of 'technical' constitutional revolutions (in a legal sense). I borrow the term, though not its meaning, from HWR Wade.[768] For me, the key question here is whether a constitutional change in question can be considered

[767] ibid 3 (emphasis ommitted).

[768] See Wade (n 27) 574. Pace Wade judicial decisions motivated by 'political necessity' (non-legal reasons) may be identified by rules of recognition as sources of legal change and thus constitute constitutional constitutional change. Whether they are or not is contingent.

as meaningfully coming from within the legal system as it was immediately before the change. Thus, I see as technical legal revolutions only such changes in legal constitutional rules that are brought about in a way not recognised by pre-existing rules of recognition. That is, changes that not only require a change of some ultimate rule of recognition, but which also cannot be seen as a result of a pre-existing legal ability to change an ultimate rule of recognition (discussed in the previous section of this chapter). Technical legal revolutions are not necessarily constitutional revolutions on Jacobsohn's view. They do not necessarily equal discontinuity of the state, of the legal system and the constitution itself.[769]

In my discussion of powers of constitutional change in chapter VI I adopted a distinction, well-established in the literature, between (primary) *constituent power* and *amendment power*. Constituent power, nowadays often said to be possessed by 'the people', is a power, not grounded in law, to effect any constitutional change, including wholesale replacement of the constitution.[770] Amendment powers are simply legal powers to make constitutional change, conferred by rules of change.[771]

Rules of recognition may identify as law-changing some exercises of primary constituent power.[772] In that sense, 'the people' can possess an ability lawfully to

[769] Barber, *The Constitutional State* (n 130) 139–140; Raz, *The Concept of a Legal System* (n 1) 108, 187.

[770] See ch V.1.

[771] See ch V.2.

[772] See ch V.1. Hypothetically speaking, it is possible for rules of change to confer legal powers of change on the holder of the constituent power, but only if – contrary to the currently dominant view – the constituent power is held by some individual or by a body that may satisfy conditions of joint agency. For a discussion of groups as holders of legal powers, see ch V.3. Compare Ekins, *The Nature of Legislative Intent* (n 395) 148.

change the constitution.[773] Interestingly, in some constitutional orders this happens not, or not only, on the level of ultimate rules of recognition, but on the level of non-ultimate rules.[774] For instance, the German Basic Law contains what looks like such a rule of recognition in its Article 146, which states: 'This Basic Law will lose its validity on the effective date of a constitution that has been chosen by the German people in a free decision'.[775] This does not mean that constituent power is limited or created by the law. But it does mean that to the extent constituent power is recognised by rules of recognition, any legal change brought by constituent power will be meaningfully lawful and not a technical legal revolution. Such change may still be a constitutional revolution on a view like Jacobsohn's.

Hans Kelsen provided an alternative conception of technical legal revolutions, which I discussed earlier in chapter VIII.[776] His view has been influential among courts having to deal with prima facie revolutionary situations.[777] For Kelsen, a revolution happens when there is a change of the Basic Norm, which in turn happens whenever there is a change in the law not in accordance with pre-existing norms of competence (corresponding to Hartian rules of change, but in a sense also to rules of recognition). One of the problems is Kelsen's view about the 'alternative character'

[773] But not a legal power, see eg ch VI.1.B.

[774] For the distinction between ultimate and non-ultimate rules of recognition, see ch II.1.

[775] Basic Law for the Federal Republic of Germany. For a discussion, see Roznai (n 3) 128–129.

[776] See ch VIII.1.A.

[777] Tayyab (n 30).

of law-making powers, according to which any effective legal change is lawful as long as it comes from someone who normally has a power to make such changes (ie not from an usurper).

The focus on the distinction between who normally has a law-making power and who does not is too crude as a basis for identification of technical legal revolutions. For instance, just because it is an ordinary legislative body who successfully undertakes a legal change for which they do not have a pre-existing legal ability, should not affect whether we see this as a legal revolution. The fact of a lack of legal ability means that the law as it was before the change did not recognise that legislative body as a source of this kind of legal change. That the change was effective may *suggest* that they had a pre-existing ability – and to that extent Kelsen is right to raise the possibility of the 'alternative character' legal regulation of legal change. But if we have good reasons to reject that hypothesis, if we believe that there was no pre-existing ability, then I see no reason to preclude the possibility that the change constituted a technical legal revolution within a continuous legal system.

It is understandable why Kelsen made this rather implausible move: for him any truly unconstitutional change meant discontinuity of law, destruction of the old constitution. For me nothing like that follows, as I agree with Raz and Finnis and see unity and continuity of legal systems as tied to unity and continuity of the political communities they are the law of.[778] Hence, I do not think the stakes of identifying cases of technical revolutions are as high as they were for Kelsen.

[778] See also ch II.1.

Turning back to Neil MacCormick, he claimed that the accession of the United Kingdom into the European Communities was not accompanied by a technical legal revolution.[779] The reason MacCormick gave for that was unsound, as on his view:

> The constitutional changes that were made in 1972 are capable of being read as changes that involved the use of the 'power of change' to add a new 'criterion of recognition' to the rule of recognition.[780]

Because by 'the rule of recognition' MacCormick meant *ultimate* rules of recognition, his claim confuses how legal powers work. However, assuming that a change of an ultimate rule of recognition took place then,[781] it is possible that it was indeed meaningfully lawful and not revolutionary. Lawfulness of the change could have been provided by pre-existing rules of recognition imposing on UK legal officials a duty to recognize as law whatever Parliament enacts, including changes to the criteria of validity of UK law.

An interesting example of what arguably was a technical revolution is the decision of the House of Lords taken in 1966 to abandon its practice of considering itself bound by its own precedent, a practice that had a source in a 19th century precedent.[782] The decision was announced as a Practice Statement, not as a judgment. The change in law brought by the Practice Statement has been effective ever since and is considered as an improvement. As Cross and Harris have written: '… the rule

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[779] MacCormick, *Questioning Sovereignty* (n 8) 94.

[780] ibid.

[781] But see n 761.

[782] Rupert Cross and JW Harris, *Precedent in English Law* (4th edn, Clarendon Press 1991) 104–108; Duxbury (n 663) 129–131.

has now changed and nobody regrets it'.[783] Aside from academic criticism, the lawfulness of the Practice Statement or the change brought by it has not been challenged. However, it is far from obvious that the House of Lords had a legal power or even a legal ability to do what it did.

Plausibly, under the UK rule of recognition this was (and perhaps still is) an exclusive area for Parliamentary legislation, not something that judges may change themselves.[784] Given how fundamental the rule affected by change is, it is controversial whether UK rules of recognition identify (or at least identified before the Practice Statement) the ultimate court as a proper source of such change. Also, just because the change has been effective, it does not follow that there is now a rule of recognition providing a legal ability for similar court-led change in the law. It can also be that the change in question has been recognised *eo nomine*, to use Hart's term, ie that some rule of recognition directly refers to the new legal rule or to the 1966 Practice Statement (and not to some general source of new legal change).[785] That said, it is also possible that there is now an ultimate rule of recognition that recognises the ultimate court as a source of legal change even in respect to fundamentals of the doctrine of precedent.

Assuming, I think plausibly, that this indeed is an example of a change brought about without legal powers or legal abilities, it illustrates that such change can be

[783] Cross and Harris (n 782) 107.

[784] ibid 106.

[785] Hart, 'The Morality of the Law' (n 602) 1295; Finnis, 'Revolutions and Continuity of Law' (n 1) 423–424.

unquestioningly accepted as by the legal profession, even despite academic cries of constitutional impropriety.

XI. CONCLUSIONS

The main purpose of my thesis was to develop and elucidate the Hartian model of foundations of legal systems in the context of constitutional change. I aimed to provide a conceptual framework helpful for doctrinal and comparative approaches to constitutional change. A framework that would show the relationship between, on one hand, the jurisprudential concepts like rules of recognition and rules of change, and on the other hand the notions of 'constitutionality' of constitutional change, 'constituent power', 'amendment power' and 'revolution'.

In doing so I advanced an argument that the Hartian model, as I developed it, can account for lawfulness of legal change (including change of legal constitutional rules) that happens without anyone exercising any legal powers (and especially, powers of law-making). It can account for lawfulness of change that is not under anyone's volitional control, like change of customary law. It can also account for lawfulness of legal change through adjudication even if the courts do not have a legal power to change the law. In chapter VII, I provided several other examples of such kinds of legal change that may be lawful on my account.

On my view, a change in the law is lawful if it is recognised by a pre-existing rule of recognition (ie due to a *legal ability* to change the law) and if it obtains without a breach of legal prohibition (duty to forbear).[786] A lawful change is constitutional unless it violates a non-legal constitutional rule. This broad view of lawfulness and constitutionality is applicable to textual (explicit) and non-textual (implicit) changes,

[786] See ch IX. See also ch VI.3.

or to changes authorized by codified constitutional rules and to those without such authorization. It can even apply to what independently counts as an exercise of a primary constituent power (*pouvoir constituant*).[787] I showed that amendment powers, ie legal powers of constitutional change, are not the only tool by which the law can govern change of legal constitutional rules (and like all legal powers to change the law, they are necessarily accompanied by correlate rules of recognition[788]).

Not every change that is unconstitutional (or unlawful) is revolutionary on my view, at least in a technical legal sense.[789] I reserve the label of a (technical legal) revolution to such changes in the law that are not just unlawful, but also not meaningfully law-governed by the law as it was immediately before the change. A change can be unlawful if it somehow violates a legal prohibition, even if it is a valid result of an exercise of a law-making power or if it is merely recognized by a pre-existing rule of recognition. There is, however, a special category of unlawful legal changes: those that require a change of an ultimate rule of recognition and are not recognized by pre-existing rules of recognition.[790] This, I believe, is a situation where the law truly does not govern the change and as such I view it as (legally) revolutionary.

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[787] See ch VI.1.A.

[788] See ch II.3.A and ch IX.

[789] See ch X.2.

[790] See ch X.

This is a useful and realistic picture of what constitutional change is law-governed and lawful (and thus possibly constitutional). It is consistent with major modern conceptions of the concept of legal powers (most of which aim to track closely how the concept is used in legal practice),[791] unlike the alternatives proposed by Neil MacCormick and Jeremy Waldron, which entail ad hoc extensions of the concept of legal powers to cover, for example, customary legal change.[792] It is also arguably more useful for doctrinal and comparative reflection on constitutional change than Hans Kelsen's theory, with its idiosyncratic approach to individuation of legal norms and definition of constitutional norms.[793] Even though, like Kelsen, I aim to clarify and make more coherent the concepts used in legal practice, my approach tracks the ordinary use more closely.[794] Furthermore, the model I developed is not superfluous (pace Jeremy Waldron),[795] it is not inadequate in accounting for legal arguments about ultimate legal rules (pace Trevor Allan),[796] and it is not formalistic or text-centred (contrary to popular misconceptions about positivism).[797]

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[791] See ch V.

[792] See ch VIII.1.

[793] See ch VIII.1.A.

[794] See ch I.3.

[795] See ch II.3.A.

[796] See ch I and ch X.

[797] See ch IV.2. For examples of identifying positivism with a focus on legal texts or claims that positivist accounts of legal change are limited to intentional action aimed at making such change, see eg Roznai (n 3) 136; Lupo (n 4) 1054; Passchier (n 4) 1084; Doyle (n 3) 74.

While being realistic, my account does not entail a view that every effective change in the law is all-things-considered lawful or that effective changes cannot be criticised on legal grounds.[798] In other words, one should not misunderstand Hart's famous statement that 'all that succeeds is success'.[799] I stressed that, despite any contrary pretence after the fact (eg through legal fiction of lawfulness), an effective legal change may be brought about in unlawful (and unconstitutional) ways. Unlawfulness may be judged by reference to the law as it was immediately before the change took place. As I noted, criticising an effective change in the law may lead to its reversal through various mechanisms.[800] And in the case of customary change it may be that the change in question has not been fully accepted by the relevant group (ie it is not yet an effective change even though some participants of the legal practice may portray it as such), so criticising it may contribute to stopping it from taking place.

The scope of this work was limited. I provided a positivist jurisprudential account of how law can govern legal (constitutional) change. Hence, I did not aim to say what anyone – judge, politician or citizen – *should* do or whether any kind of legal (and constitutional) change is desirable in a moral or political sense. Secondly, I was not trying to provide a doctrinal account of any particular constitutional order – and any examples I used, I used to illustrate the general jurisprudential argument. Furthermore, I did not focus on non-legal constitutional rules and how they regulate

[798] See ch V.5 and ch IX.6.A.

[799] Hart, *The Concept of Law* (n 1) 153.

[800] See ch IX.6.A.

legal and constitutional change as this is an issue calling for a separate study, perhaps using a different methodology.

Nevertheless, the account I offered may inform the issues that remain outside of the scope of the thesis. Knowing that some actions bring about legal change in a way that is law-governed and meaningfully lawful, even without legal powers, seems relevant to the question whether someone should undertake any such action. Similarly, political constitutionalists concerned with the scope of legal powers (especially those held by the courts) may benefit from my analysis by concluding that they should primarily be concerned with the operation of rules of recognition, and not of rules of change or rules of adjudication. And, to the extent the ultimate rules of recognition allow the kind of legal effects that political constitutionalists oppose, proponents of that view have reasons to direct their advocacy on changing the custom that underlies such rules – which may be a different enterprise than advocating to change statutes or codified constitutions.

Finally, I want to stress that doctrinal and comparative constitutional law scholarship will benefit from the conceptual clarity I promoted in this thesis regarding, for example, the key notions of legal powers to effect constitutional change or lawfulness (and constitutionality) of constitutional change. My thesis showed how the Hartian positivist model of the foundations of law can be a basis, or a frame of reference, for discussions about change of legal constitutional rules in particular historical contexts. This is to an important extent due to the generality of the model, which I emphasized. Contrary to what some have suggested,[801] the

[801] See ch I.

positivist model is not limited to codified constitutions or to effects of intentional actions – it can truly account for lawfulness in all its guises.

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