CONSTITUTIONAL ADJUDICATION AND THE INDEPENDENCE OF CANADA: ISSUES OF PRINCIPLE, CONVENTION, AND LAW

by

Fabien Gélinas

St John's College

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy at the Faculty of Law in the University of Oxford

(length: approximately 100 000 words)

Trinity Term 1995



ABSTRACT

CONSTITUTIONAL ADJUDICATION AND THE INDEPENDENCE OF CANADA: ISSUES OF PRINCIPLE, CONVENTION, AND LAW

By Fabien Gélinas
St John's College

A thesis submitted in fulfilment of the requirements for the degree of Doctor of Philosophy at the Faculty of Law in the University of Oxford
(approximately 100 000 words)
Trinity Term 1995

This thesis seeks to identify the conceptual resources available to Canadian courts in the adjudication of fundamental constitutional change.

Part One offers a general analysis of the materials pertaining to the self-interpretation of the higher courts' role as a privileged forum for constitutional decision-making. Reviewing the rich development of the advisory opinion tradition, the drastic weakening of traditional bars to adjudication and the judicial pronouncements on constitutional conventions, it explains how the Canadian judiciary have come to assume in a uniquely Canadian way the role of "guardians of the constitution", well beyond traditional conceptions of the judicial function.

Part Two starts with a critical analysis of the Supreme Court's view of the distinction between convention and law and moves on to offer a more convincing account of the inevitable interface between convention and unwritten constitutional law, with a view to an appropriate treatment of constitutional change.

Part Three directly addresses the issue of fundamental constitutional change. It begins with a theoretical study of the problem of self-reference in constitutional law, moves beyond this so-called paradox to explore how the juncture between "logic" and "pragmatics" might be explained for law, and finally presents the issue as the courts faced it in the *Patriation Reference*.

Part Four, finally, explains how constitutional principles function in constitutional adjudication as the proper source of both constraint and justification in decisions where fundamental rules are at issue. Picking up the matter where it was left off at the end of Part Three, it concludes this thesis with a legal analysis of the transfer of ultimate and supreme constitutional authority from the United Kingdom to Canada, an analysis which puts all of the author's conclusions to work.

ACKNOWLEDGMENTS

My first thanks go to my supervisor Professor John Finnis, who has been very patient and generous in guiding and supporting a slow-learning pupil on three continents. What he has done for me has surpassed all expectations; my indebtedness to him is a life-long matter.

The ACU, FCAR, Quebec Bar, CRDP, and St John's College Oxford provided the financial and institutional support without which this project could not have been carried through. My thanks for making this possible go to Professor Jacques Frémont, Professor André Morel, and Justice Charles Doherty Gonthier.

Many friends and fellow students were good enough to discuss my topic with me and provide invaluable comments and moral support. I would particularly like to thank David Lametti, Philippe Bélanger, Robert Yalden and Robin Elliot.

Timothy Endicot, of Jesus College, Dr Steve Smith of St Anne's, Professors Jacques Frémont, José Woehrling and Daniel Poulain of the University of Montreal, Professor Yves DeMontigny of Ottawa University, Dr Eric Regener of Marianopolis College, and Professor René Provost of McGill all spared time to comment on my struggling attempts at various issues. I thank them all warmly.

I am most grateful to Dr Peter Oliver of King's College London, who spent much time reading drafts and discussing every significant aspect of this thesis with me. My decision to come to Oxford originates first and foremost in his encouragement; his expertise, generosity and invaluable friendship have been critical at all stages.

My greatest thanks go to Kerstin, for being exactly and incommensurably all that she is.

CONTENTS

Abstract ii

Acknowledgments iii

Abbreviations vi

Introduction 1

PART ONE

THE JUDICIAL FORUM IN CONSTITUTIONAL DECISION-MAKING

Chapter I - Advisory Opinions 42

1. DEVELOPMENT 43
2. PRECEDENTIAL FORCE 52

Chapter II - Real Cases: Access and Proper Issues 66

1. STANDING FOR DECLARATORY ACTIONS 66
2. PROPER ISSUES AND RELEVANT MATERIALS 74

Chapter III - Constitutional Convention in Court 89

1. OBJECTIONS 92
2. SOME IMPLICATIONS 98

PART TWO

CONSTITUTIONAL CONVENTION AND THE LAW

Chapter IV - Conflict and Soft Legal Standards 116

1. CONFLICT AS NECESSARY BAR TO CRYSTALLISATION 117
2. STANDARDS HARD AND SOFT 121
3. CRYSTALLISATION AND SOFT LEGAL STANDARDS 130

Chapter V - Precedents and Crystallisation 138

Chapter VI - Convention and Unwritten Law 156

1. THE LIFE OF UNWRITTEN CONSTITUTIONAL LAW 157
2. THE CONTRIBUTION OF CONVENTION TO UNWRITTEN LAW 172

PART THREE

FUNDAMENTAL CONSTITUTIONAL CHANGE IN THEORY AND PRACTICE

Chapter VII - The Modelling of Constitutional Change 191

1. LOGIC 192
2. PRAGMATICS 203
3. VALIDITY, ACCEPTANCE, AND REASONS 210
4. PERMEABILITY AND CIRCULARITY 216

Chapter VIII - Perspectives on Patriation 224

1. THE LEGAL ISSUE IN THE SUPREME COURT 225
2. PATRIATION AND FACTUAL INDEPENDENCE 231
3. THE MAJORITY OPINION AND CONTINUING SOVEREIGNTY 243

PART FOUR

CONSTITUTIONAL PRINCIPLE IN THE ADJUDICATION OF CHANGE

Chapter IX - Poles of the Debate in the Supreme Court 256

Chapter X - Legal Forms and Normative Content 265

1. FORM AND CONTENT IN LAW 267
2. PRINCIPLES AND LEGAL REQUIREMENTS 276

Chapter XI - Principles and the Adjudication of Change 292

1. THE ISSUE FOR A PRINCIPLED DECISION 292
2. PRINCIPLES FROM THE SUPREME COURT'S PERSPECTIVE 302
3. FEDERALISM BEYOND THE COURT'S MAJORITY 315
4. INDEPENDENCE BEYOND THE COURT'S MAJORITY 326

Table of Cases vii

Statutory and prerogative instruments xiv

Official documents xvi

Bibliography xiii

ABBREVIATIONS

CCC	Barry L. Strayer, *The Canadian Constitution and the Courts*, 3d ed., Toronto: Butterworths, 1988.
CL	H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961.
LE	Ronald Dworkin, *Law's Empire*, London: Fontana Press, 1986.
LRLT	Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978.
Manitoba Reference	*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.
Methodology	*Max Weber on the Methodology of the Social Sciences*, ed. & tr. by Edward A. Shils & Henry A. Finch, Glencoe (Ill.): Free Press, 1949.
MP	Ronald Dworkin, *A Matter of Principle*, Oxford: Clarendon Press, 1986.
NLNR	John Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980.
Patriation Reference	*Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.
Postscript	H.L.A. Hart, *The Concept of Law*, 2d ed. with postscript, ed. by Joseph Raz & Penelope A. Bulloch, Oxford: Clarendon Press, 1994, pp. 238-76.
Reply to Hart	Ronald Dworkin, "Hart's Posthumous Reply", Paper circulated in the *Program for the Study of Law, Philosophy & Social Theory* at New York University School of Law, September 1994.
Revolutions and Continuity	John Finnis, "Revolutions and Continuity of Law" in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence*, 2d series, Oxford: Clarendon Press, 1973, p. 44.
Self-Reference Puzzle	Alf Ross, "On Self-Reference and a Puzzle in Constitutional Law" (1969) 78 *Mind* 1.

The names of all periodicals are abbreviated in the footnotes; full references are provided in the bibliography.

Introduction

This thesis attempts to identify the conceptual resources available to Canadian courts in the adjudication of fundamental constitutional change. Both my objective and the manner in which I intend to achieve it involve certain methodological and normative assumptions, some of which are somewhat controversial. In this Introduction, I try to clarify these assumptions.

In the contemporary jargon of theory, my endeavour can be described as "interpretive". The arguments put forward are offered as a modest contribution to Canadian law; this contribution forms part of "Canadian legal practice". Since the arguments are about the resources a court may draw upon at the fringe of the system, that is, about the boundaries of the law viewed from within, these arguments can be said to participate in the ongoing self-definition of Canadian legal discourse. The decision to situate my project in interpretive theorising stems from a realisation that most of the normative arguments I wish to make can be accommodated within the practice: they can be articulated in terms which judges can listen to from their legal perspective. This realisation is the result of an evaluation, a judgment made at the outset which is situated outside the practice in two ways.

As a free moral agent, first, there is a clear sense in which one can reflect upon the rights and wrongs of collective decisions made with a view to action. And this reflection need not assume that legislation and past judicial decisions are authoritative in any way. It is from that perspective that one can make the assessment that Canadian law is

not "structurally flawed" to the point that what one wants to say cannot be accommodated within it. It is from that perspective that one can decide that the system is not fundamentally wrong to the point that it does not have the resources to bring about what one thinks is right, such that engaging in interpretation might be futile, or wrong, as a personal moral decision. Second, in order to make this assessment about what the system can or cannot accommodate, one needs first to describe that system to oneself in a way that is as far as possible independent of the values one is personally committed to. One needs to put oneself in the shoes of a judge and find out what can and what cannot count as a legal argument in that system. What is needed, in other words, is a description which is independent of the justificatory aims one might have, but which makes use of the internal point of view.[1] What I wish to stress, then, is that my engaging in an "interpretive" project does not imply my subscribing to the view which tends to "interpret" other types of theorising out of existence; my decision to engage in interpretation, indeed, is in a sense based on those other types of theorising. In legal theory, the view which tends to deny any scope for theorising outside interpretation thrives on the fertile ground of Dworkin's "empire" in legal theory.

Dworkin thinks that "the flat distinction between description and evaluation" has "enfeebled legal theory".[2] "Useful theories of law", in his view, "are interpretive of a particular stage of a historically developing practice".[3] This claim works in two ways. On one front,

---

[1] "Independent", of course, does not mean that the description might not turn out to fit those values.

[2] "A Reply by Ronald Dworkin" in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth, 1984, p. 247, at 254.

[3] *Law's Empire*, London: Fontana Press, 1986 (hereinafter *LE*), at 102.

the argument is that general "descriptive" theorising of the kind exemplified by Hart's *The Concept of Law* "would be better understood as itself internal to law: as interpretive of legal practice in a general and abstract way but interpretive in the same sense, and embodying the same evaluative dimension, as ordinary legal argument".[4] Hart's "own understanding of his work as descriptive", Dworkin writes, was therefore "unfortunate".[5] On the other front, Dworkin wishes to deny that there is any scope for normative theorising *about* the law from an "archimedean" standpoint situated outside (a particular) practice. Dworkin's claim on methodology, in short, leans towards denying that there is any room for either descriptive or normative theory; it proposes to annex such theoretical projects to the vast interpretive territory of *Law's Empire*. It takes "the province of jurisprudence" to be, indeed, just a province, the Empire's mountainous province where "interpretation" is conducted at a high level of abstraction. "Jurisprudence is only the abstract part of legal argument";[6] and legal argument is necessarily both normative and descriptive.

In the two following sections I distance myself from Dworkin's two-sided "imperialistic" claim.[7]

---

[4] Ronald Dworkin, "Hart's Posthumous Reply", Paper circulated in the *Program for the Study of Law, Philosophy & Social Theory* at New York University School of Law, September 1994 (hereinafter *Reply to Hart*) at 2 (Intro.). Note that the text I use is a draft which remains unpublished; for ease of post-publication reference, I add the number of the relevant section after the page reference. Dworkin's reply is to Hart's postscript in H.L.A. Hart, *The Concept of Law*, 2d ed. with postscript, ed. by Joseph Raz & Penelope A. Bulloch, Oxford: Clarendon, 1994 (hereinafter *Postscript*, or *CL* for original work). Note that Hart's postscript is an unfinished work left at his death, to which he has therefore not committed himself publicly.

[5] *Reply to Hart*, at 2 (Intro.).

[6] *Id.*, at 3 (§ 1).

[7] For references to Dworkin's claim as "imperialistic" see *Id.*, at 4 (§ 1); *Postscript*, at 243.

1. DESCRIPTIVE THEORY

The limited claim that descriptive theory necessarily involves an evaluative component is not new. The possibility of "neutral" descriptive theorising had been questioned, most notably by Max Weber in his work on methodology, well before the "interpretive turn"[8] in theory. And I would suggest that anyone concerned with clear thinking has to grant that limited claim. My point is that recognising the measure of evaluation necessary for any descriptive social theory to get off the ground does not mean that descriptions necessarily collapse into the interpretive project.

Hart directly takes up Dworkin's argument of methodology in his (unfinished) postscript to the *Concept of Law* and defends the descriptive character of his work in two ways. He says that his general account of law is descriptive in that it *is morally neutral* and *has no justificatory aims*.[9] I would suggest that the second claim is true and the first misleading. What can fairly be said is that Hart's theory is morally neutral *in that* it has no justificatory aims.

Hart asserts generally that his theory "makes no claim to identify the point or purpose of law and legal practices as such".[10] Yet he undeniably speaks of the purpose of law when he explains in a matter-of-fact fashion how a pre-legal system becomes a legal system through the emergence of secondary rules which "*remedy*" the "*defects*" of a primitive

---

[8] See Duncan Kennedy, "The Turn to Interpretation" (1985) 58 *S. Cal. L. Rev.* 251.

[9] *Postscript*, at 240.

[10] *Id.*, at 248.

primary-rule practice.[11] Describing uncertainty, "staticity" and inefficiency as "*defects*" to be "*remedied*" by legal forms is making a claim, howsoever limited, about the point or purpose of law. It is making a claim about what is an *improvement* over a "*defective*" state of affairs in social ordering. It is making an evaluative claim about what is a *better* "means of social control".[12]

We are now reminded by Hart that he thinks it "quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticism over such conduct".[13] But he readily acknowledges that this "will not of course serve to distinguish laws from other rules or principles".[14] And as Weber put it, "the specific meaning which a phenomenon has for us is naturally *not* to be found in those relationships which it shares with many other phenomena".[15] For Hart, what meaningfully distinguishes law from other social norms is precisely its further purpose of bringing in "adaptability to change, certainty, and efficiency" - "gains" which he says are "immense".[16] Now, "gains", in this context, can only be made in pursuance of some perceived good in society. That alone can provide Hart with a basis for saying that the emergence of such forms characteristic of law brings about a *better* state of affairs, that it

---

[11] *CL*, at 89-96; Hart also identifies a minimum content of primary rules and sanctions which provide a *reason* for compliance: *id.*, at 189-90, 193-95.

[12] *CL*, at 39.

[13] *Postscript*, at 249.

[14] *Ibid.*

[15] *Max Weber on the Methodology of the Social Sciences*, ed. & tr. by Edward A. Shils & Henry A. Finch, Glencoe (Ill): Free Press, 1949 (hereinafter *Methodology*), pp. 76-77.

[16] *CL*, at 197-98.

remedies the *defects* of a primary-rule set-up. So Hart does engage in a rough identification of point and purpose, and to this extent his theory is not evaluatively or even morally neutral; it is based on an evaluation of what elements combine to create and maintain a *good* state of affairs in social ordering.

I would suggest that one cannot even begin to describe law as a distinct normative phenomenon before law's specific point and purpose, what makes it a subject-matter for descriptive theory, is roughly assessed, i.e. identified through evaluation. Consider Hart's account of where his general project of describing law begins:

> This institution, in spite of many variations in different cultures and in different times, has taken the same general form and structure, though many misunderstandings and obscuring myths, calling for clarification, have clustered round it. The starting-point for this clarificatory task is the widespread common knowledge of the salient features of a modern municipal legal system which on page 3 of this book I attribute to any educated man.[17]

The project thus elucidates, "clarify" what educated agents already know and is therefore merely descriptive. It is a matter of putting order and organisation into a vast pool of facts, notions and attitudes found in "common knowledge" about a social phenomenon perceived as distinct. So Hart implicitly claims that the distinct purpose he identifies for law is part of "the common knowledge of the salient features of a modern municipal legal system" which can be described in a neutral way. But this claim is subject to an important methodological qualification affecting any descriptive social theory, i.e.: that an object of "common knowledge" cannot be identified, clarified or elucidated without presuppositions (or evaluations) about what is meaningful, significant and important in the mass of data available to us as "common knowledge".

---

[17] *Postscript*, at 239-40.

One can here apply to law what Weber said of any social phenomenon: that "perception of its meaningfulness to us is the presupposition of its becoming an *object* of investigation".[18] The whole analytical enterprise of "using" (and partly forming) "concepts" (such as rules of recognition, internal and external points of view, legal validity, etc.) which "focus attention on elements in terms of which a variety of legal institutions and legal practices may be illuminatingly analysed" is an enterprise of selecting amongst a perhaps infinite number of possibilities what elements *matter* in the data.[19] And this selection cannot be entirely value-free. The organisation of any mass of "social" data into something one can call a "clarification", or "explanatory" description, as Weber explained at an early stage of the development of social theory, requires an evaluation of what is significant, or important in the data.[20] The "misunderstandings and obscuring myths" which Hart wishes to "clarify" are part of the data;[21] and the decision to focus on the elements which purportedly clear away such misunderstandings and myths is based on an evaluation of significance. This evaluation is quite obviously necessary if descriptive social theory is to be more than a "chaos of 'existential judgments' about countless individual events" based on "an infinite number of constituent perceptions which can never be exhaustively

---

[18] *Methodology*, at 76. Note that Weber's work sometimes suggests that all meaning outside the exact sciences is imposed on "chaos" by culture-bound conceptions which can be described as subjective (*id.*, at 79-84). My point here and in what follows does not commit me to his apparent anti-realism in the metaphysics of morals and social science; my point is limited to epistemology and says nothing about ontology.

[19] Quotations are from the *Postscript*, at 240.

[20] *Methodology*, at 78, 81. The three essays which make up this book were written between 1903 and 1917 (*Id.*, at iii).

[21] *Postscript*, at 240.

expressed in a judgment";[22] or "a vast rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies".[23]

What can the evaluation of significance or importance be based upon? Hart chooses concepts, as I said, "which focus attention on elements in terms of which a variety of legal institutions and legal practices may be illuminatingly analysed".[24] If law is to be analysed at all, if it is to be grasped as a phenomenon distinct from other social norms which also provide "guides to human conduct and standards of criticism of such conduct",[25] again, one must refer to its distinct point or purpose. All the more so, one would surmise, if legal institutions and legal practices are to be analysed "illuminatingly". In fact, on Hart's own account an illuminating theoretical analysis uses concepts which focus on elements that make sense of the purpose or point of such institutions and practices.

Hart was notoriously aware of the importance of point in the understanding of a social practice. His theory clearly takes "description" and "analysis" to include the notion of "interpretive understanding" (the philosophical *Verstehen*) which allows social science to go beyond the rather sterile observation of external patterns of behaviour.[26] This means, in short, that the patterns of behaviour which form the subject matter of descriptive and analytical jurisprudence

---

[22] *Methodology*, at 78.

[23] John Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon, 1980 (hereinafter *NLNR*), p. 17.

[24] *Postscript*, at 240

[25] *Id*, at 249.

[26] On the notion of interpretive understanding, see Peter Winch, *The Idea of a Social Science and its Relation to Philosophy*, London: Routledge, 1958 (2d ed. 1990); this is referred to in the endnotes to *The Concept of Law*, at 242.

cannot be explained or described without proper attention being given to their point. His example of the pattern involved in car drivers stopping at a red traffic light was apt to show the importance of the notion:[27] one cannot understand what is happening if one has not the tool to distinguish that pattern from the pattern involved in, say, the same car drivers playing their car radio while at a stop.[28]

Hart uses the "internal aspect" primarily to distinguish *rules*, legal or not, from mere habits and predictions. This serves his avowed purpose of exposing legal realism as an unacceptably reductive account of normative behaviour. But since he offers a *legal* theory, he also needs to distinguish *legal* rules from other rules that also serve as "guides to human conduct and standards of criticism of such conduct".[29] And here, his notions of "unreflecting inherited or traditional attitude", "the mere wish to do as others do", or "long-term [self-] interest",[30] which he apparently borrowed from Weber,[31] cannot do the work as instances of the centrally relevant internal point of view. For

---

[27] *CL*, at 87.

[28] See Neil MacCormick, "Law, Morality and Positivism" in Neil MacCormick & Ota Weinberger (eds), An Institutional Theory of Law, Lancaster: Reidel, 1986, p. 127, at 130.

[29] *Postscript*, at 249.

[30] *CL*, at 198.

[31] See *Max Weber on Law in Economy and Society*, tr. Max Rheinstein & Edward Shils, ed. by Max Rheinstein, Cambridge (MA): Harvard Univ. Press, 1954, p. 9: "Unless the order is an entirely new one, acquiescence in it is generally based upon a combination of considerations of *self-interest*, of *tradition*, and of belief in legality"; p. 12: "The broad mass of the participants act in a way corresponding to legal norms, not out of obedience regarded as a legal obligation, but either because *the environment approves of the conduct* and disapproves of is opposite, *or merely as a result of unreflective habituation* to a regularity of life that has engraved itself as a custom." Note that Weber's sociology of law is a broad sociology of normative behaviour which includes but is not limited to behaviour under legal norms (*id.*, at 6-7).

in the "interpretive understanding" of normative practices, these viewpoints also characterise non-legal standards such as the rules of a college fraternity.[32] What Hart needs to use is the viewpoint which incorporates the point or purpose which in his theory makes law distinct from other normative practices. This he does to an extent when he takes the existence of the viewpoint of officials who accept secondary rules "as common public standards of official behaviour" to be a necessary condition for the existence of a legal system (and thus a necessary condition for the existence of legal theory). Officials must regard rules of validity, adjudication and change "as common standards of official behaviour and appraise critically their own and each other's deviations as lapses". Hart stops short of extending this requirement to primary rules.[33] But it is hard to see how one can use rules of recognition as *critical* standards of *behaviour* (critical standards for decision and action, not standards for mere cognition) and not consider the primary rules which they validate also as critical standards of behaviour. For the officials of a legal system are human moral agents, not cognition machines, and if they see a point, to which they are committed, for the legal forms which the secondary rules bring about (and which alone can make law a distinct object of study), they cannot fail to see the entailment that the primary rules which legal forms validate must also be taken at least presumptively as critical standards for the

---

[32] *Law in Economy and Society*, *supra*, at 6-7.

[33] *CL*, at 113-14. He writes, at 113: "Of course it is also true that there will be many primary rules which apply to officials in their merely personal capacity which they need only obey" (that is, with respect to which they need not "*use* the rules as standards for the appraisal of their own and others' behaviour" (at 96).

appraisal of their own behaviour (and everybody else's), even in their "merely personal capacity".[34]

The conclusion to be drawn should be clear: the selection of the viewpoint to which a legal theory must give priority in order to "explain" and further the "understanding" of law, that is, in order to "describe" legal practices beyond the vain recording of patterns of behaviour, is necessarily tied to the point or purpose of law which that theory must roughly identify through evaluation in order to get started as a theory of law. Hart does roughly and partly identify this point or purpose when he speaks of the defects which legal forms remedy; he has no reason to shrink from focusing openly on the specific internal point of view which acknowledges and accepts this purpose, and taking that specific point of view as the paradigmatic case of the internal viewpoint. The selection of this viewpoint resorts to the same evaluation of significance and importance which enables the theory to identify the point and purpose of law.[35]

---

[34] *Id.*, at 113. Having seen this, some might, of course, set their knowledge aside and act cynically or self-interestedly, a behaviour paradigmatic of Sartrian "bad faith". See Jean-Paul Sartre, *L'Existentialisme est un humanisme*, Paris: Nagel, 1970, pp. 81-82. For parallels, see generally William L. McBride, *Fundamental Change in Law and Society: Hart and Sartre on Revolution*, The Hague: Mouton, 1970.

[35] *Contra*: Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press, 1994, pp. 219-21. Raz's view, if I understand it correctly, is that the evaluative judgments of importance and significance which he concedes are necessary for general, descriptive legal theory are not moral judgments. This is seemingly because descriptive theorists are bound by their purpose of "helping us understand how people understand themselves", so that theorists "are not free to pick on any fruitful concepts" (at 221). As a constraint for describing legal systems and doctrines, this is real; indeed this constraint is what makes the project descriptive. But it remains extremely vague as a constraint for a *general* descriptive theory of "law". "People"'s efforts to understand themselves take a great many forms in the various contexts which a *general* legal theory of law is meant to cover. Raz does not stay to reveal the kind of judgment upon which one is expected to base one's identification of the central viewpoint which will "help us understand" how his undifferentiated "people" "understand themselves".

Does the foregoing support Dworkin's claim that "*describing law* is *doing law*, so that, to the extent and in the way that *ordinary legal reasoning* is normative, *legal theory* must be normative, too"?[36] This claim, as stated, reveals Dworkin's refusal to distinguish between "the law" (as in "doing law" through "ordinary legal reasoning" in a particular legal system) and "law" (as in shaping a Hartian "legal theory" the aim of which is "describing law" in general). This might, perhaps, have been taken as an oversight in *Law's Empire*,[37] but Dworkin's reply to Hart's *Postscript* makes the refusal explicit.[38] His refusal to see Hart's enterprise as distinct from what judges do when they describe their legal system to themselves might focus on either of two things: the starting-point of the enterprise or the purpose to which it is, in practice, often put.

The starting point is, in Hart's terms, "the widespread common knowledge of the salient features of a modern municipal legal system".[39] Hart necessarily has existing legal systems in mind, not just abstract ideas, and he presumably starts from "the law" of those systems to build his general theory of "law". He thus makes use of what lawyers and judges do when they "do law" within those systems, and the internal viewpoint which he uses for explanation reflects that of judges in such systems. Dworkin might be suggesting that Hart must therefore be doing what judges do, i.e.: engage in interpretive evaluations about what "the law" is. But this is inaccurate in at least one important way. Judges in particular legal systems need to go much further in their

---

[36] *Reply to Hart*, at 2 (Intro).

[37] Dworkin there uses "the law" and "law" interchangeably, for instance at 32.

[38] *Reply to Hart*, at 9 (§ 2).

[39] *Postscript*, at 240.

identification of "point and purpose" with respect to particular legal systems than a general theory could ever do with respect to "law". To get started as a *legal* theory, Hart's enterprise has roughly to identify law's distinct point or purpose – which for Hart is the introduction of adaptability to change, certainty, and efficiency in social ordering. The legal systems of particular states obviously share in their embodiment of such desiderata, and to this extent Hart's theory can be used by judges, insofar as general purpose is considered relevant intra-systemically, to illuminate what "the law" of their system is. But judges cannot limit themselves to such general purposes, because particular legal systems also embody values that are not necessarily shared by other systems (in the same way), and whose formulation in legal argument as legal principles may bear on judicial decisions. And Hart's theory says nothing of such values; it is value-free in this limited sense of being system-neutral. The way in which the perceived value of economic liberalism could bear on American judicial decisions appealing to the freedom of contract at the turn of the century, for instance, is not the same as it is today.[40] There is "the law" of the United States then, and there is "the law" of the United States today. Hart's theory can be used to explain both momentary legal systems as instantiations of the concept of law; but in neither case does it offer a guide to the right judicial decision. The role of the American judge is not to describe the general features of "law" but to make decisions according to "the law" of the United States at a particular moment. Hart's theory

---

[40] See for instance *Adair v. United States* (1908), 208 U.S. 161 (child labour) and *Hammer v. Dagenhart* (1918), 247 U.S. 252 (hours of work).

does not share this concern for justification and the right action (decision).[41]

Dworkin concedes that "some 'general' account of legal phenomena across lands and ages would plainly be descriptive in the sense Hart has in mind".[42] Descriptive accounts making use of the internal point of view are possible, in his view, provided two conditions are met. First, the account must describe "nothing more ... than what human beings have thought or think".[43] Second, the account must be "statistical in character".[44] His concession has the looks of a *reductio ad absurdum* argument, for a merely "statistical" account of what people actually have thought or think is not a descriptive *theory*. It can hardly be more than a "rubbish heap of miscellaneous facts described in a multitude of incommensurable terminologies".[45] Dworkin seemingly uses the word "statistical" in order to exclude the evaluative component from what he concedes can be both general and descriptive. But any statistics going beyond the never-ending, pointless, random listing of an infinite number of "unindividuated" and "incommensurated" objects needs organising principles based on an evaluation of what is relevant, significant and important. In this sense, Dworkin's concession is not compatible with his general position unless he can tell us where the line can be drawn between a purely descriptive account and an interpretive (partly

---

[41] Hart is conscious, note, that even a descriptive theory may influence actors and in this limited sense is concerned with the effect his theory might have on practical (moral) decisions: *CL*, at 205.

[42] *Reply to Hart*, at 3-4 (§ 1).

[43] *Id.*, at 7.

[44] *Id.*, at 8.

[45] *NLNR*, at 17.

evaluative) account. "Statistics" offers no solid ground upon which that line might rest.

While being aware of the evaluations of importance and significance necessary for a descriptive theory to bring "order into chaos",[46] Weber was very clear that beyond this, value-oriented conduct can be described as facts distinct from the theorists' own value-commitments:

> What is really at issue is the intrinsically simple demand that the investigator or teacher should keep unconditionally separate the establishment of empirical facts (including the "value-oriented" conduct of the empirical individual whom he is investigating) and *his* own practical evaluations, i.e., his evaluation of these facts as satisfactory or unsatisfactory (including among these facts evaluations made by the empirical persons who are the objects of investigation.) These two things are logically different and to deal with them as though they were the same represents a confusion of entirely heterogenous problems.[47]

Dworkin insists on "confusing" the two. His ultimate claim is apparently that describing the value-oriented conduct of the "empirical individuals" in legal practice (making use of the internal perspective of the actors) somehow turns a theorist into an actor, who makes the one kind of judgment that is possible – says Dworkin – in the practice: judgments of the interpretive (partly normative) kind. Dworkin writes:

> ... when a theorist says, not that the judge does or does not accept a particular rule, but that the law contains or validates that rule, the theorist does more than describe someone else's attitude. He *accepts* a rule himself, in the particular sense of confirming that it really is a rule of the system in question, and that plainly goes beyond describing other people's attitudes.[48]

---

[46] *Methodology*, at 78.

[47] *Id.*, at 11.

[48] *Reply to Hart*, at 7 (§ 1).

Dworkin is referring to Hart's rule of recognition. But as I pointed out, Hart does *not* say that "the law" contains or validates any particular rule. What he says is that instances of "law" may be illuminatingly explained by a rule-of-recognition framework; he would certainly not deny that "the law" of one particular system might conceivably be "off" his central case.

So Dworkin is perhaps entitled to say that Hart's theory is "interpretive" to the extent that it must start from existing practices and that the theory's evaluation of relevance, significance and importance may be characterised as the evaluative component in the "interpretation" of such practices; but he is in no way entitled to say that it is "interpretive" of law in *his* sense of attempting "to establish a justifying connection between past political decisions and present coercion".[49] What may be said is that Hart's theory is morally neutral *in that* it has no justificatory aims.

The second element on which Dworkin might focus in trying to annex descriptive theory to the interpretive enterprise is the purpose to which Hart's kind of theory is often put by people "doing law" within specific systems. Hart's elucidations of the general features of "law" are often used within particular legal systems with a view to clarifying what "the law" is in such systems. This is precisely how Hart's work is being used in this thesis. The concept of rules of recognition, to use the most common example, may be appropriated by judges or scholars as the main component in a legal doctrine providing a test for "the law" of a particular system. But it is an appropriation, self-conscious in the case of this thesis; the evaluative construction, the "interpretation" of the particular system using Hart's concepts is done by the judge and

---

[49] *LE*, at 98.

legal scholar, not by Hart. Such "appropriation" does not transform his general theory into a theory about "the law" of any particular system.

Hart's use of the internal perspective is limited to the point and purpose of "law" as seen by the actors of *any* legal system. Were he offering an account of "the law" of a particular system, the internal viewpoint employed would be both richer and more constrained. It would be richer because it would have to incorporate the further value-commitments perceived in that system and not necessarily (in the same way) shared by other systems. It would be more constrained because legal practice in a particular system is self-descriptive. As Dworkin himself put it, "we have no difficulty identifying collectively the practices that count as legal practices in our own culture. We have legislatures and courts and administrative agencies and bodies, and the decisions these institutions make are reported in a canonical way".[50] This kind of canonical and authoritative self-description is not available to Hart when he describes "law" across systems. For that reason, his "description" requires a greater component of evaluation in the selection of viewpoints and identification of point and purpose. That is why Dworkin's limited point that "general" legal theory must be "interpretive" in the sense I have circumscribed is well taken. But in a particular system, point and purpose, and the viewpoint that goes with it, are indirectly defined (to an extent) and articulated in a canonical way at what Dworkin would call (in *Law's Empire*) the pre-interpretive stage.[51] If Hart were, hypothetically, describing "the law" of a

---

[50] *LE*, at 91.

[51] *LE*, at 91. Note that his use of the word "pre-interpretive" is questioned by Dworkin in *Reply to Hart*, at 27-28 (§ 5): "I ... wish that I had used a different phrase, as I might easily have done" [full stop, end of the section]. My view is that he will have to use another concept, not just another phrase.

particular system, making use of the internal perspective of that system's officials, why, then, should he be taken as morally endorsing the further value-commitments incorporated in that perspective?[52]

One may wonder about the sense in which "confirming" that a rule is, *from other people's perspective*, part of a legal system "plainly goes beyond describing other people's attitudes".[53] Here Dworkin seems to go further than he does in *Law's Empire*. In his discussion of the system of Nazi Germany in *Law's Empire*, he effectively concedes that in some cases a theorist offering a descriptive account of a particular system can make use of the internal perspective without endorsing the values that make up that perspective:

> We can interest ourselves in the legal problems not of some contemporary system we consider immoral but of an ancient or primitive legal system whose morality does not concern us. Then we would find it easier to report our conclusion as straightforward and unqualified statements about their law. We can at least try to put ourselves fully in the position of Roman officials, for example, and then declare our opinion of what Roman law was, with no temptation to add that because Roman law supported slavery it was not fully law or not law at all.[54]

In the case of the Nazi judge, however, Dworkin says that we may "put ourselves [in his] shoes and interpret from the point of view of the full set of his political and social convictions", but that this would be "interpretive rather than descriptive".[55] Now, what is the difference between Roman law and Nazi law which makes it possible to "report" *official* attitudes in the first case and not the second? Is it just a

---

[52] On the various types of statements in legal discourse, including the non-committed statement from other people's viewpoint, see Joseph Raz, *Practical Reason and Norms*, London: Hutchison, 1975, pp. 171-77.

[53] *Reply to Hart*, at 7 (§ 1).

[54] *LE*, at 107.

[55] *Ibid.*

matter of "temptation"? Is it just a matter of keeping sentiments at bay in the otherwise possible endeavour of describing systems that are closer to us and our concerns? Would Dworkin say that the French comparatist René David, in his celebrated work on contemporary legal systems,[56] might have been "describing" the legal system of a distant and secluded U.S.S.R., making use of the internal perspective of Soviet officials, while in the case of the French system, or perhaps also the British system, he could only have been engaged in "interpretation"? Dworkin's apparent position here adds nothing to Weber's point that anarchists would make particularly good (descriptive) legal theorists because they are outsiders to the "community" of moral presuppositions in which most theorists participate.[57] But that point is a weak one. For it involves no denial that legal theorists who are not anarchists can "at least try" to articulate their personal moral presuppositions and commitments in order better to put them aside when they engage in the description of a system. If it is possible, with sufficient research, to put oneself in the shoes of Roman officials and accurately report Roman law without morally endorsing slavery, why is it not possible to put oneself in the shoes of British or Canadian officials now and report British or Canadian law without, by doing so, endorsing the values served by those systems? Since Dworkin concedes in *Law's Empire* that there was law "in the pre-interpretive sense" even in Nazi Germany,[58] surely a theorist can provide, on the basis of the (wicked) institutional decisions "reported

---

[56] René David, *Les grands systèmes de droit contemporains*, 1st ed., Paris: Dalloz, 1964; in English: John E.C. Brierly & René David, *Major Legal Systems in the World Today*, 1st ed., London: Stevens, 1966.

[57] *Methodology*, at 7-8.

[58] *LE*, at 107.

in a canonical way",[59] a non-committed descriptive account of what (wicked) Nazi law was.

I suggest in the rest of this section that the difference here between Dworkin and a positivist who engages in a purportedly neutral description of "the law" of a particular legal system stems from a different perception of the pervasiveness and indeterminacy of principles.

When Weber wrote about law in the early 'twenties the view was widespread that the "evaluative" role of a judge or legal writer never involved more than the application of a weak test of "coherence". The legal point of view, according to Weber, is this:

> The juridical point of view, or, more precisely, that of legal dogmatics aims at the correct meaning of propositions the content of which constitute an order supposedly determinative for the conduct of a defined group of persons: in other words, it tries to define the facts to which this order applies and the way in which it bears upon them. Toward this end, the jurist, taking for granted the empirical validity of the legal propositions, examines each of them and tries to determine its logically correct meaning in such a way that all of them can be combined in a system which is logically coherent, i.e.: free from internal contradictions.[60]

Weber's view of "dogmatics" does not assume that established legal rules unambiguously determine all cases; it assumes that the work of elucidation required on an ambiguous rule or the task of extending rules to cases seemingly not covered does not involve moral choice.[61] If one translates this into the language of contemporary positivism, one is likely to get rather close to MacCormick's view of what legal reasoning

---

[59] *Id.*, at 91.

[60] *Law in Economy and Society*, *supra*, at 11.

[61] See Anthony T. Kronman, *Max Weber*, London: Arnold, 1983, pp. 10-11.

often involves in terms of explaining rules through the formulation of a coherent set of principles.

Hart confesses that his main work said too little about legal principles.[62] His undeniable emphasis on rules gave precedence to standards that could be described as a matter of cognition, without evaluation. MacCormick, going beyond Hart, successfully manages to make room for the view that principles are pervasive in legal reasoning. He claims that the descriptive theorist can very well provide an account of the principles underlying the rules of a legal system without endorsing the values expressed by those principles. But there are limits, as MacCormick fully acknowledges, to how far the descriptive theorist can go in doing this. He notes that "values are characteristically expressed in statements of the principles of a given legal system", and that the "formulation, haltingly and hesitatingly and subject to improvement, of statements of principles in law is one way of making such values relatively more explicit".[63] To a certain extent, this is a matter of applying the weak test of coherence which Weber seemingly envisaged. It goes further, however:

> But observe, this is not necessarily nor even usually a matter of making explicit what is already known clearly; it is a matter of *making sense* of law, as much as of finding the sense which is already there.
> [...]
> Just because that is so, it would be false to argue that the principles are themselves determined by the 'rule of recognition': there may be more than one set of normative generalizations which can be advanced in rationalization of

---

[62] *Postscript*, at 259.

[63] Neil MacCormick, *Legal Theory and Legal Reasoning*, Oxford: Clarendon, 1978, p. 234.

> the rules which 'belong' to the system concerning a certain subject matter...[64]

The choice one makes between possible sets of normative generalisations to explain the established rules of a particular system is rightly called "doing law" in the fullest Dworkinian "interpretive" sense, i.e.: a sense which includes normative reasoning. "Describing" law at that level is clearly "doing law" in that sense. For beyond the application of a weak test of coherence, *choosing* normative generalisations for a system's rules is not just using the official viewpoint, it is partly defining this viewpoint through one's normative evaluations. This is the sense in which this thesis is "interpretive" of the Canadian practice.

Granted, generally, the relative indeterminacy and pervasiveness of principles in various systems, the question whether a theory aiming at the description of a particular system can really call itself "descriptive" becomes a matter of degree and emphasis. The pervasiveness and indeterminacy of principles may vary considerably between systems. And so may the degree to which one can provide a fair account of "the law" in terms of established rules and of principles formulated through a weak test of coherence. For a single system, it is also worth bearing in mind that different theorists might wish to focus their work on different aspects of that system. Some may wish to provide comprehensive descriptions of what Dworkin calls "pre-interpretive" materials and venture no further than what a weak coherence test can provide on that basis, leaving controversial matters and hard cases open. Some will decide to focus on hard cases where a great measure of normative reasoning is required. Dworkin's decision to focus almost exclusively

---

[64] *Id.*, at 234-35. See also "*Legal Rights and Social Democracy: Essays in Legal and Political Philosophy*, Oxford: Clarendon Press, 1982, pp.134-38.

on hard cases in the higher courts of the United States legal system, where indeterminate principles can indeed be expected to play a very significant role, is a matter of choice, not necessity.

This thesis deals almost exclusively with hard constitutional cases in the higher courts of the Canadian system, a legal system which I believe is no less open to arguments of principle in adjudication than that of the United States. Far from saying that I engage in this project because no other kind of theorising is possible, I suggested earlier that I could not even begin to deal with my subject without the help of existing descriptive work about Canadian law. Also, my treatment of "the law" of Canada would be a great deal poorer, the reader will note, had I not had the chance to start with the broad understanding of "law" provided by general theories such as Hart's. Let us now turn briefly to normative theorising.

2. NORMATIVE THEORY

To say that a great deal of normative reasoning can be accommodated within Canadian legal practice is not to say that *all* normative reasoning can. Nor is it to say that there exists no external standpoint from which a legal system can be evaluated morally, beyond the constraints of legal reasoning. This apparent implication of Dworkin's position does not deserve as much time as the claim he makes about descriptive theory, but it goes to the silent moral assumptions involved in the "interpretive" project and as such calls for a moment's attention in this Introduction. I should be brief because it is not possible to state Dworkin's position with much certainty; indeed, I have little doubt that he would think I have misunderstood his position on some counts. This

should not keep me, however, from working on what he has actually written in order to make my point[65].

Dworkin seemingly has something against metaphysics in general and against ontology in particular. What that something is is not clear. He certainly thinks that the debate between realist and anti-realist philosophers about whether moral judgments can be objectively true is at best useless. "[T]he whole issue of objectivity", he writes, "is a kind of fake".[66] His advice to literary theorists (and this holds *mutatis mutandis* for legal theorists as well as for moral theorists) is that "[w]e should stick to our knitting", that is, we should make substantive arguments *of* literary criticism (or law or morality) and not waste our time on useless metaphysical arguments *about* those domains.[67] In his view, "we can give no sense to the idea that there is anything else we could do in deciding whether our judgments are 'really' true".[68]

The metaphysical position Dworkin generally attacks is that of the sceptic who holds that moral or legal judgments can never claim to be true or right (or false or wrong) because we have no objective standards to assess them with. Dworkin first suggested that external scepticism of that kind was impossible, senseless or self-defeating;[69] he later backed off and took the position that "even if external skepticism is sound as a philosophical doctrine" it makes no difference whatsoever to

---

[65] *Reply to Hart*, I should stress again, is a draft which, although distributed to his students and discussed in his seminars, remains unpublished.

[66] Ronald Dworkin, *A Matter of Principle*, Oxford: Clarendon Press, 1986 (hereinafter *MP*), p. 172.

[67] *Ibid.*

[68] *Id.*, at 172.

[69] *Id.*, at 175.

what we do or think.[70] The reason is that we have human practices such as law and morality within which claims about truth or value both make sense and matter, and that is all we will ever need. With respect to law, Dworkin concludes, making external claims "neither adds to nor subtracts from the business at hand".[71] In this crusade against the external sceptic, I would suggest that Dworkin has strayed too far in the direction of relativising truth and value to specific disciplines, "domains" or "practices".

Dworkin doubts that the philosophical study of domains such as morality, art and law can be "archimedean" in the sense that it can claim to be *about* those domains, and not *of* them. "Archimedean philosophy", he writes, "is impossible so far as it purports to challenge or qualify or even to re-state judgments internal to the domain it studies".[72] And a judgment about which judgments are internal to the domain, to him, is a judgment internal to that domain.[73] Here, I think, Dworkin runs into trouble:

> The only argument that can provide a reason for endorsing or abandoning or qualifying a legal judgment is a legal argument, and that holds for morality and art and science as well.[74]

The trouble is that the statement is self-refuting.

---

[70] *LE*, at 266-67.

[71] *Id.*, at 86.

[72] *Reply to Hart*, at 2 (§ 1).

[73] See particularly *MP*, at 174.

[74] *Reply to Hart*, at 2 (§ 1).

Dworkin wishes to say that truth or value (or whatever warrants the endorsement of a judgment)[75] is relative to the standards of various interpretive practices, such as law or art. Now, one should wonder, from what perspective can this "relativity" thesis about all those practices be put forward if not from the very perspective which it denies? What standards of truth or value is one supposed to use in judging the relativity thesis he proposes? Dworkin asserts the thesis from a standpoint looking out on all the domains mentioned, thereby refuting his very claim by making it.[76] He is here playing a rather strange archimedean character, who says "I do not exist" and then makes himself air, into which he vanishes.

We can fairly say that Dworkin starts with a "coherentist" theory of knowledge and attempts to work out its consequences in metaphysics and legal theory.[77] Dworkin, like Rorty,[78] believes that there is no question of discovering foundational beliefs that are in some special sense part of a hard-fact reality; when it comes to justifying our beliefs, all we have is our other beliefs. Like Rorty, Dworkin notoriously trades on the distinction between internal and external

---

[75] On relativity, or practice-dependence, see, for "objectivity": *MP*, at 162, "validity", *id.*, at 153, and for "truth": "A Reply by Ronald Dworkin" in Cohen, *supra*, at 277.

[76] It will not do to claim that the statement is really four distinct statements internal to each practice. For the fact that the statements correspond exactly to one another is not a coincidence; and finding this kind of non-coincidental correspondence between what "holds" in distinct domains (i.e., what is "true" or "warranted") is doing precisely the kind of "archimedean" metaphysics Dworkin is hoping to avoid.

[77] See in general *MP*, at 169; For specific references to Quine: *LE*, at 421n, 447n; *Taking Rights Seriously*, London: Duckworth, 1977, p. 165n. For a critical account of the role of coherence in *Law's Empire*, see Joseph Raz, "The Relevance of Coherence" (1992) 92 *Boston Univ. L. Rev.* 273, 315-21.

[78] Richard Rorty, *Philosophy and the Mirror of Nature*, Oxford: Blackwell, 1980; *Consequences of Pragmatism*, Brighton: Harvester, 1982.

claims in order to deny the possibility (or at least the relevance) of the latter.[79] Coherence theories of knowledge are in this respect straightforward: we cannot stand outside the ensemble of our beliefs to stare at reality from some "archimedean standpoint" because the ensemble of our beliefs is all that we have.[80] As Moore has been at pains to show, however, this claim leaves the metaphysical debate between realism and anti-realism quite intact.[81] The view that knowledge cannot be foundational and must therefore be "circular" does not entail that reality is knowledge-dependent.[82] The supposed circularity of any knowledge-acquiring process does not mean that our circles of belief-justification just endlessly spin around some static axis which cannot itself move closer to some reality. Dworkin hesitates on this issue. What is clear is his denial of the practical relevance of the distinction between ontology and epistemology, between a theory of what there is, and a theory of knowledge. He thus wishes to use "truth" or "value" as knowledge-dependent, and thus practice-dependent, concepts: a "true" or "right" judgment is a warranted judgment in a given practice.

---

[79] *LE*, at 78-86; *MP*, at 171-77; *Philosophy and the Mirror of Nature*, *supra*, at 150.

[80] *Philosophy and the Mirror of Nature, supra*, at 150. Rorty makes a further claim about retail and wholesale inquiries: an attempt to question one's beliefs "wholesale" would leave nothing with which to answer the questions, which makes such questioning meaningless. He ultimately rejects "wholesale" epistemology and metaphysics. (*Consequences of Pragmatism*, at 165). Dworkin has also made use of Rorty's distinction between "wholesale" and "retail" criticism in "'Natural' Law Revisited" (1982) 34 *U. Fla L. Rev.* 165, 175-77, but later abandoned this to allow for "general" scepticism as a possible position "*within* the enterprise it challenges" (*MP*, at 175; see also *LE*, at 78-79, 83-84, 266-75).

[81] Michael S. Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?" (1989) 41 *Stanford L. Rev.* 871.

[82] On the consequences of this for legal theory, see Michael S. Moore, "Law as a Functional Kind" in Robert P. George (ed.), *Natural Law Theory*, Oxford: Clarendon, 1992, p. 188.

General coherence theories which take truth or value as knowledge- and practice-dependent have a plausible answer to the usual "standpoint objection". This objection claims that anti-realist "coherentism" must be asserted from some privileged standpoint which in the end goes to make coherence "foundational". The answer is that the claims of coherence can be asserted from the internal standpoint of our human practices considered as a whole; the standpoint is "internal" in that coherence does not shrink from having its own test applied to itself. This is not the place to consider the merits of this position. It is enough to note that Dworkin cannot adopt this response to the standpoint objection.[83] The reason is this: the claim that "coherentism" can be asserted "internally" is entirely dependent on its being applied to the whole of the "practice" one is both talking *about* and speaking *from*; if Dworkin wishes to relativise truth or value to discrete practices, he has to do it from one of those discrete practices because he has purportedly eliminated the only standpoint from which a *general* relativity thesis could be asserted, assessed and maintained.[84] When he says that "a theory of interpretation is an interpretation of the higher-order practice of using interpretive concepts",[85] he is speaking "above" law,

---

[83] Note that Rorty also wishes to relativise "truth" (whatever may be left of "truth" after we have decided that it has no essence) to very discrete practices and contexts. He ends up insinuating that he does not have to answer the "standpoint argument" because he is himself making no argument (he is engaged in keeping the conversation going): *Consequences of Pragmatism*, *supra*, at xliii-xliv. On this see Moore, "The Interpretive Turn in Modern Theory", *supra*, at 892-905. The fact is that there is no tangible limit to what "truth" or "value" may be taken to be relative to: "practice" here can be broken all the way down, an absurdity, to one single text, written by oneself. See Costas Douzimas and Ronnie Warrington, *Postmodern Jurisprudence: The Law of Text in the Texts of Law*, London: Routledge, 1991, pp. 144-46.

[84] Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?, *supra*, at 954.

[85] *LE*, at 49.

literary criticism and seemingly morality, and making assertions that are purportedly true or right as judgments both *of* and *about* each and every one of those domains.

One might not be able to step out of one's skin and one's general historical context in deciding what is true or right; it is fair to say that one cannot but use one's knowledge to make any assessment about human knowledge. But one certainly is able to step out of any legal practice to assess whether that practice is on the whole or in some aspects good or bad, from an unrestricted moral viewpoint. This unrestricted moral viewpoint does not assume at the outset that "past political decisions" must be authoritative. That viewpoint, rather, provides scope for asking the very question *whether* a particular legal practice which treats past political decisions with respect is worth following. Dworkin's attempt to treat judgments *about* the law as judgments *of* law looks like an attempt to put somehow beyond unrestricted questioning the silent normative assumptions involved in his interpretive project.

Thus, Dworkin describes interpretation as "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong".[86] The "genre" is here taken as *given*. But one is entitled to ask what further purpose informs and shapes the genre itself. Dworkin writes that "the most abstract and fundamental point of legal practice", the legal "genre", "is to guide and constrain the power of government...".[87] But again, the power of government is taken as *given*. And, once more, one is entitled to ask from one's unrestricted moral point of view why a

---

[86] *LE*, at 52.

[87] *Id.*, at 93.

"government" should have "power" at all. And since Dworkin's defence of political legitimacy is, ultimately, a matter of *interpretation*, a (rather confused) matter of "which attitudes we should try to interpret our political practices to express",[88] the moral question of political legitimacy is in the end denied standing.[89]

To many readers, this gives Dworkin's enterprise a distinct air of ideological propaganda. Specifically addressing "Jurisprudence" as it is practised at Oxford, by Dworkin and Finnis particularly, Kerruish makes the following point:

> We should be quite clear about the questions that can be asked regarding the legitimacy of the state. One can question *whether* the state is legitimate. Alternatively, one can assume that it is legitimate and ask *why* it is legitimate. It is the latter question with which Jurisprudence is concerned.[90]

Her point does not carry as against Finnis because his work answers the question *why* with a full-blown normative theory which in fact includes an elaborate answer to the question *whether*. So even if such was his original intuition, he cannot be accused of *assuming* that the state (authority) is legitimate. But the point can be taken as against Dworkin, who does, apparently, assume that we should make "our political practices" the best they can be (and not simply throw them because they

---

[88] *Id.*, 206-15, at 214. Much of the ambiguity of Dworkin's project culminates in this sentence: what does *we* stand for?; where does the *should* (ought to?) come from?; how does the *should* stand in relation to *interpret*?; and whose *political practices* is he talking about (of)?

[89] See Joel C. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 *Osgoode Hall L.J.* 123, 191 (note that this article, in spite of good insights, is generally flawed because it wants to step out of the practice to discuss legitimacy, and offers no normative theory to ground the discussion; the untold assumption is simply that power or authority is illegitimate by definition).

[90] Valerie Kerruish, *Jurisprudence as Ideology*, London: Routledge, 1991, p. 117.

are, say, utterly unjust and corrupt through and through). His answer to the question *why* cannot even begin to include an answer to the question *whether* because the latter requires the external perspective outside "our political practices" which he apparently denies. The question *why* is answered in the constrained terms of "our political practices" and the question *whether* cannot be asked in those terms. "Structural" critiques in particular, and moral philosophers in general, want to ask both *whether* and *why* such practices, *all things considered*, are worth keeping.[91]

Dworkin shows an awareness of the question *whether* when he writes that there "is plainly room ... for sceptical or nihilistic conceptions of law", and that it "must be open to a philosopher of law ... to recommend that the practice ... be abandoned".[92] In *Law's Empire*, similarly, Dworkin says that the interpreter setting out to "interpret" a practice needs "an argument why a practice of that general shape [as roughly identified at the pre-interpretive stage] is worth pursuing, *if it is*".[93] But those statements are not consistent with the overall position. For when it comes to the justification of a given political practice, the unrestricted question *whether* is simply left to fiction writers:

> The great classics of political philosophy are utopian. They study social justice from the point of view of people

---

[91] For an account of this problem in terms of the limits of hermeneutics, see generally Jerome E. Bickenbach, "Legal Hermeneutics and the Possibility of Legal Critique" in Evan Simpson (ed.) *Anti-foundationalism and Practical Reasoning: Conversations between Hermeneutics and Analysis*, Edmonton: Academic Printing & Publishing, 1987, p. 217.

[92] Ronald Dworkin, "Legal Theory and the Problem of Sense" in Ruth Gavison (ed.), *Issues in Contemporary Legal Philosophy*, Oxford: Clarendon Press, 1987, p. 1, at 15.

[93] *LE*, at 66 (emphasis added).

> committed in advance to no government or constitution, who are free to create the ideal state from first principles. So they imagine people living in a prepolitical state of "nature" writing contracts on blank slates. But real people in ordinary politics act within a political structure as well as on it. Politics, for us, is evolutionary rather than axiomatic; we recognize, in working toward a perfectly just state, that we already belong to a different one.[94]

Dworkin's project, clearly, is carried out "from the point of view of people" *who are* "committed in advance" to a "government or constitution". It is carried out from what he apparently takes to be the only available (or at least useful) viewpoint, a viewpoint which is not archimedean with respect to one's political practices. Towards the end of *Law's Empire*, where Dworkin pursues the issue of justification further, it is conceded that the argument must at one point "move to the plane of abstract political morality", that "it must move toward arguments of utopian theory". But even on that plane, structural critiques are swiftly driven out of the picture:

> ... the argument still belongs to law, at least in an attenuated sense, because each contestant begins by establishing a contemporary shadow of the future he celebrates. (Neither a Marxist nor a fascist could find enough present law distinctively explained by his political philosophy to qualify for the contest.)[95]

The problem with this position is apparent where Dworkin discusses Nazi Germany in *Law's Empire*.[96] Dworkin says that a Nazi judge might conceivably take the interpretive attitude towards the pre-interpretive materials on the basis that Nazi law can provide at least weak

---

[94] *Id.*, at 164.

[95] *LE*, at 408.

[96] In *Reply to Hart*, there is a hint that Dworkin might back off from this position taken in *Law's Empire*, but no discussion: at 27 (§ 5).

justifications for coercion.[97] And yet, that judge might do everything in his power, "*even lie about the law* if this would help", in order to enforce what he takes to be, "all things considered", moral rights.[98] The judgment "all things considered" envisaged here is the full-blown practical judgment which moral philosophers want to make from their unrestricted moral viewpoint. It is a judgment made from a standpoint "above" the legal practice of our Nazi judge, a standpoint which is, to use Dworkin's terminology, archimedean with respect to that practice.[99] The fact that Dworkin thinks this possible for the Nazi judge yet not for the American (or British) judge strongly suggests, I think, that his whole (self-refuting) argument against "archimedean philosophy", at bottom, is not an argument against metaphysics or ontology so much as a misguided means to support the moral judgment (all things considered) that the American (or British) system is basically good, and that the project of making it better therefore deserves our interpretive efforts.[100]

I do not personally subscribe to "structural" critiques and this thesis does not offer a full-blown normative theory of law or legitimacy which might provide adequate support for that position. This project is "interpretive" of an existing practice; the approach assumes from an unrestricted moral viewpoint that the practice is not so structurally flawed that an attempt to improve it through the use of internal

---

[97] The weak justification is provided by Rule-of-Law considerations: "A Reply by Ronald Dworkin" in Cohen, *supra*, at 257-59.

[98] *LE*, at 106; see also *Taking Rights Seriously*, *supra*, at 326-27.

[99] The judge, bear in mind, lies *about* the law; and in *Law Empire* Dworkin uses "law" to mean "the law" of a particular system: *Reply to Hart*, at 9 (§ 1).

[100] If I have "misunderstood" Dworkin's position throughout this section, the point that he has to be more careful with his argument about "archimedean philosophy" than he has been remains valid.

resources would be futile. My participation in the practice is thus a moral endorsement of it to the extent that I could certainly be doing something other than what I do in this thesis: attempt to make the practice better through my interpretive efforts. This thesis, therefore, rides on a patch of road well past Kerruish's question *whether*. Since it does not offer anything close to a fully developed normative theory, what it does say (in terms internal to the practice) about the question *why*, says very little to the question *whether*. My point, to conclude, is that I would not dream of denying status to those theoretical enquiries which I do not engage in.

3. JUDICIAL POWER AND THE MORAL OBSERVER: THIS THESIS AND BEYOND

The reader will quickly find that the "interpretation" of Canadian constitutionalism offered in this thesis leaves a great deal of political power in the hands of judges. Because the thesis raises a much-discussed problem of political philosophy, the kind of interpretive approach I use may at times leave the reader wondering about the normative assumptions behind my position with respect to "legitimacy".[101] I should therefore say a few words here about judicial power.

The general assumption about legitimacy made in this thesis is that the usual argument that elected people should have the last word is not as strong as it is often made out to be. Those who doubt the legitimacy of judicial review at the highest constitutional level typically base their case on the presupposition that "majority rule" is *par excellence* legitimate. And yet, few will seriously doubt that straightforward

---

[101] For a review of the main arguments *pro* and *con* extensive judicial review, see Mauro Cappelletti, *The Judicial Process in Comparative Perspective*, Oxford: Clarendon Press, 1989, pp. 40ff.

majority rule governments cannot fully be trusted. The post-war constitutional systems of Europe are based on the clear understanding that "democratic government" - what is deemed desirable – is not satisfactorily achieved by straightforward "majority rule". Beyond the obvious fear related to the "tyranny of the majority", that understanding appeals to the notion that majority decisions need to be controlled because electoral politics tend to foster a rather short view in decision-making. Bicameral legislatures in Commonwealth countries provided something close to that kind of check by giving a passive veto-power to people who, mainly because of job-security, could afford to take the long view. But the strength of party loyalties in Canada effectively defeated this particular purpose of the Senate and contributed to making the notion of a second House lose most of its credibility.[102]

In my view, whatever may be lost on the plane of electoral accountability can be gained on the plane of "rational" (or *rationale*) accountability" by means of a justification requirement. This is what makes judges and a legal-like framework good candidates when it comes to devising a control mechanism. Shortly after the most determined attempt of the Canadian government to abolish the Senate, the Supreme Court, *de facto*, substantially inherited the role of "taking the long view" when being told openly to veto legislation which could not be justified "in a free and democratic society". The Court was a good candidate for the role because legal learning provides a framework of justification which

---

[102] A discussion paper published by the Minister of Justice in 1993 identified, as one of a number of possibilities, the only plausible role which in my opinion is now left for the Senate: "a supporting body that provides technical review and improvement of legislation adopted by the lower house; [... a] 'second look' is useful if errors and inconsistencies, sometimes with serious implications, are to be avoided": Canada, Minister of Justice, "Reform of the Senate", Discussion paper presented to the Special Joint Committee of the Senate and House of Commons on Senate Reform, by Hon. Mark MacGuigan, Ottawa, 16 June 1983, p. 11.

is essentially public. It offers a tangible, principled basis for discussion, debate and criticism which take place not only in law faculties and bar associations, but also in editorial pages. Legal-like decision-making affords a measure of predictability without ever closing the door to reassessment.

The major problem with picking the judiciary as the best candidate, I think, is the lack of transparency, the element of make-believe involved where those real political choices made in the ongoing process of defining, say, "a free and democratic society" are not fully acknowledged for what they are. With such vague constitutional provisions to apply as section 1 of the Charter, it is not hard to see that judges do at times run out of the clear direction which a weak test of coherence might often provide when applied to established legal rules. In all cases established law is enough to exclude most answers, but in a great many cases it does not provide a uniquely right answer, and judges have to *choose*. They have to make practical decisions which will bind the community, that is, they have to make political decisions. Acting upon the obvious temptation to "use" the baggage of credibility slowly and painfully gained by a judiciary through the day-to-day performance of predominantly neutral tasks in order to give political decisions the appearance of neutrality is not perfectly honest, and can be dangerous.[103] But then, at the level of principles, the question how much is "determined" or "established" by the system is a matter of some difficulty, and the seriousness of a transparency deficit depends on what a particular community has been used to.

---

[103] See Jean Beetz, "Le contrôle juridictionnel du pouvoir législatif et les droits de l'homme dans la constitution du Canada" (1958) 18 *R. du B.* 361, 372.

A long tradition of judicial review of legislation can make a significant difference in the way people see the judiciary. Such a tradition broadens the range of arguments that everybody considers courts should listen to as intelligible and appropriate for constitutional decision. It broadens the scope of the constitutional law discourse to include normative arguments that are constrained only partly by the technical rationality of legal forms. One cannot really speak of a "tradition" with respect to the young Charter yet. But I would suggest that the general attitude making the Charter acceptable had been shaped by the older tradition of judicial review on grounds of imperial law and federalism. That tradition had made people accustomed to the notion that legislation can be subjected to a set of partly undetermined norms which courts incrementally shape into a coherent framework of principles. It had made informed people comfortable with the idea that judicial decision-making about the constitution cannot be reduced to a matter of recognising existing rules by means of a specified process situated entirely in technical reasoning. In performing the task of constitutional review, Canadian higher courts had found themselves defining the rules regulating the reception of English law into the colonies, thereby shaping ultimate constitutional rules of identification in a way that went, as it turned out, significantly beyond established common law rules.[104] They later found themselves shaping a conception of federalism which established rules could perhaps suggest but certainly not determine. The notorious divergence of views between the Privy Council and the Supreme Court about federalism was a divergence not over established rules but over the evaluation of what unwritten principles

---

[104] See the remarkable study of Barry Cahill, "How Far English Laws are in Force Here: Nova Scotia's First Century of Reception Law Jurisprudence" (1993) 42 *U.N.B. L.J.* 111.

best justified and organised those rules into a coherent framework which could provide guidance beyond them. More than one set of principles was available which satisfied a weak test of coherence; the disagreement was mainly in the evaluative realm of which set was best "all things considered".[105] People, in due time, have come to see this, and Courts have been bolder and bolder in acknowledging it. On the whole, then, I think that the problem of transparency is not as serious in Canada as it might be, say, in the United Kingdom.[106]

The fact that the interpretation offered in this thesis does not attempt to strengthen the constraints of the existing framework of judicial review does not mean, note, that I give no weight at all to the so-called argument from "democracy". My concern, first for providing a check on majority rule, and then for transparency in its provision, also imposes itself, indirectly, as an argument calling for recognisable limitations on judicial power. For if all that we needed were the "long view" in political decisions, we could do without elected legislatures. My point is that the concern for "democracy" is not better attended to by an improbable interpretation straining the materials in order to restrain judicial power at all cost. The interpretation I offer grants a great deal to the judiciary but it is coherent and fits the materials; as such, I believe it suggests more effective constraints than would an interpretation more sceptical of judicial wisdom.

---

[105] See generally Bora Laskin, "Tests for the Validity of Legislation: What's the 'Matter'?" (1955) 11 *U. of T. L.J.* 114; Alan C. Cairns, "The Judicial Committee and its Critics" (1971) 4 *Can. J. Pol. Sc.* 301. Frederick Vaughan, "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation" (1986) 19 *Can. J. Pol. Sc.* 495.

[106] On this problem, see John Finnis, "A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence" (1985) 71 *Proc. Brit. Acad.* 303, 330-31.

This thesis does not present a general theory of constitutional review for Canada. It addresses adjudication explicitly concerned with constitutional change and thus focuses heavily on the patriation episode, leaving important Charter issues and cases to the side. The subject nevertheless requires a general treatment of how constitutional adjudication can be explained and this is provided on the basis of a fairly wide review of the materials. When I claim that my general interpretation "fits the materials", what I refer to is my general treatment of constitutional adjudication; as for the issue of change, the reader will quickly become aware that I am thoroughly critical of the most important Supreme Court decision on the subject.

Part One offers a general analysis of the materials pertaining to the self-interpretation of the higher courts' role as one of providing a privileged forum for constitutional decision-making. Reviewing the rich development of the advisory opinion tradition, the drastic weakening of traditional bars to adjudication and the judicial pronouncements on constitutional conventions, it explains how the Canadian judiciary have come to assume in a uniquely Canadian way the role of "guardians of the constitution", well beyond traditional conceptions of the judicial function. Part Two starts with a critical analysis of the Supreme Court's view of the distinction between convention and law and moves on to offer a more convincing account of the inevitable interface between convention and unwritten constitutional law, with a view to an appropriate treatment of constitutional change. Part Three directly addresses the issue of fundamental constitutional change. It begins with a theoretical study of the problem of self-reference in constitutional law, moves beyond this so-called paradox to explore how the juncture between "logic" and "pragmatics" might be explained for law, and finally presents the issue as the courts faced it in the *Patriation Reference*.

Part Four, finally, explains how principles function in constitutional adjudication as the proper source of both constraint and justification in decisions where fundamental rules are at issue. Picking up the matter where it was left at the end of Part Three, it concludes the thesis with a legal analysis of the transfer of ultimate and supreme constitutional authority from the United Kingdom to Canada, an analysis which puts all of my conclusions to work.

PART ONE

The Judicial Forum in Constitutional Decision-Making

This Part provides an overview of how the Canadian judiciary, particularly the Supreme Court, understands and defines its role in constitutional adjudication. My purpose is to pave the way for an account of the conceptual resources which Canadian judicial practice affords when it comes to deciding questions of fundamental constitutional change.

The discussion shows how the "advisory opinion" tradition has allowed Canadian higher courts to engage in what would be described in other common law jurisdictions as politics. The combination of that tradition with the liberalisation, in the past thirty years, of the rules of justiciability and standing in constitutional matters may be explained as the result of the judiciary perceiving themselves as the ultimate guardians of the constitution, a role which came fully in focus during the patriation episode.

Chapter I

Advisory Opinions

It is common in legal scholarship to use the concept of the separation of powers negatively to illustrate the special position of Canadian courts with respect to issues also dealt with by other branches of government. As Canadian constitutional law textbooks standardly indicate, Canadian courts, unlike their American and (to a lesser extent) Australian counterparts, do not consider themselves constitutionally confined to a purely judicial role by a notion of the separation of powers.[1] The most conspicuous example of a function which, although non-judicial (in the traditional sense), has regularly been performed by Canadian courts, is their giving advisory opinions on questions referred to them by the executive.

---

[1] See for instance Barry L. Strayer, *The Canadian Constitution and the Courts*, 3d ed., Toronto: Butterworths, 1988, p. 137 (hereinafter *CCC*); André Tremblay, *Droit constitutionnel: Principes*, Montréal: Thémis, 1993, pp. 71-87. "Separation of powers" here means "separation of functions"; for a clarification of the "cluster of overlapping ideas" expressed by the phrase "separation of powers", see Geoffrey Marshall, *Constitutional Theory*, Oxford: Clarendon Press, 1971, pp. 100ff.

I.1 DEVELOPMENT

The reference procedure was challenged early this century, after many years of application,[2] when the federal government asked the Supreme Court to determine the extent of provincial powers with respect to a particular subject. Many provinces objected to such use of the reference procedure and decided to intervene and argue that the procedure was invalid. Unsuccessful before the Supreme Court,[3] the provinces appealed to the Privy Council and submitted, *inter alia*, that the "Court of Appeal" created by the federal parliament under s. 101 of the *Constitution Act, 1867* (the Supreme Court) had to be a real court performing truly judicial functions, and that the constitution granted no power to assign it a non-judicial duty.[4] The Judicial Committee of the Privy Council emphasised the supremacy of the federal parliament within its own sphere of legislation and its liberty to distribute governmental powers as it thought fit. The only possible constitutional limitation, then, was s. 101 with its reference to a "Court of Appeal". In the eyes of the Privy Council, the practice of giving advisory

---

[2] The practice was established by the statute creating the Supreme Court in 1875: *An Act to establish a Supreme Court and a Court of Exchequer for the Dominion of Canada*, 1875, 38 Vict. c. 11, ss. 52-53. Manitoba, Nova Scotia and Ontario introduced reference procedures for their higher courts in 1890; the other provinces eventually all followed the lead. After a period of hesitation ending in 1922 the Supreme Court accepted to grant leave to appeal from provincial advisory opinions. The Court had often refused to grant leave on the basis that those opinions were not "judgments". See *Union Colliery Co v. A.G. B.C.* (1897), 27 S.C.R. 637. The situation has gradually evolved to the point where over 80% of the Supreme Court references in the eighties were given on appeal from provincial advisory opinions: James L. Huffman and MardiLyn Saathoff, "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction" (1990) 74 *Minn. L.R.* 1251, 1261-62, 1294.

[3] *Reference Re References* (1910), 43 S.C.R. 536.

[4] *A.G. Ont. v. A.G. Can.*, [1912] A.C. 571 (P.C.).

opinions did not prevent a decision-making body from being a "judiciary" within the meaning of the constitution; after all, even the Judicial Committee had been given such a role when it was created[5] and had, in addition, given advisory opinions on appeal from the Canadian Supreme Court in six instances since the enactment of the reference procedure in 1875. This insistence of the Privy Council upon the supremacy of the federal parliament in this matter implies that the separation of functions as a constitutional doctrine has but a very limited role to play in Canada's constitutional structure.

Their Lordships felt the need, however, to point out that the opinions given in a reference context "are only advisory" and "have no more effect than the opinions of the law officers", thereby suggesting that the procedure lies outside the "judicial" functions of the court.[6] The Privy Council reaffirmed the validity of the reference procedure two years later in *A.G. British Columbia v. A.G. Canada* and commented upon the difference between Canada and the United States in this matter:

> It [the reference procedure] is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of the litigants in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee,

---

[5] The *Judicial Committee Act, 1833*, 3 & 4 Wm. IV, c. 41, s. 4, conferred on the Crown the power to refer to the Committee "for hearing and consideration any such other matters whatsoever". The Committee suggested that this provision inspired the introduction of the reference system in Canada: *Id.*, at 585. The common law also recognised the possibility that courts be required to answer abstract questions of existing law: *M'Naghten's Case* (1843), 8 Eng. Rep. 718; *London and Westminster Bank Case* (1834), 6 Eng. Rep. 1127.

[6] *A.G. Ont. v. A.G. Can.*, [1912] A.C. 571, 589 (P.C.).

> although not bound by any Canadian statute, is to give to it as a Court of review such assistance as is within its power.[7]

The United States Supreme Court had clearly indicated in *Muskrat v. United States* that Congress could not validly confer on the Court the duty to give opinions outside "the regular course of judicial procedure".[8] Article III of the Constitution was referred to: it confers judicial power on the federal courts and defines it as one of determination of "cases and controversies".[9] The Australian High Court also rejected the possibility of its giving advisory opinions in *Re the Judiciary and Navigation Acts*.[10] Although the Court found the practice of giving advisory opinions an essentially judicial function,[11] it did not fall within the meaning of the "matters" to be decided by the Court under the Constitution:

> In our opinion, there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court.[12]

---

[7] [1914] A.C. 153, 162 (P.C.).

[8] (1911), 219 U.S. 346, 356. To the same effect: *Alabama State Federation of Labor v. McAdory* (1945), 325 U.S. 450, 451.

[9] This only holds true at the federal level. There is an old tradition of advisory opinions in the states' judiciaries: Manley O. Hudson, "Advisory Opinions of National and International Courts" (1924) 37 *Harv. L. Rev.* 970; Note, "Advisory Opinions on the Constitutionality of Statutes" (1956) 69 *Harv. L. Rev.* 1302. Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island and South Dakota all have reference procedures: Laurence H. Tribe, *American Constitutional Law*, 2d ed., Mineola (New York): The Foundation Press, 1988, p. 73n.

[10] (1921) 29 C.L.R. 257.

[11] As in the United States, some Australian State Supreme Courts do have advisory jurisdiction and give advisory opinions; the High Court refuses appeals from such opinions: P.H. Lane, *A Manual of Australian Constitutional Law*, 5th ed., Sydney: The Law Book Co., 1991, pp. 228-29.

[12] *Id.*, at 267. The situations of both Canada and the United States were referred to in argument.

The Constitution was said to be based upon a separation of the functions of government where each power is clearly delimited and where nothing authorises Parliament to confer on the High Court the duty "to determine abstract questions of law".[13]

The situation in the United States and Australia reveals the comparatively broad scope of judicial activity in the Canadian tradition. It is true, of course, that the United States Supreme Court's record can hardly be described as a prime example of judicial restraint. Indeed, its Canadian counterpart's record may comparatively look rather weak. But that is mostly due to the former's long career in the practice of enforcing a constitutional document of human rights protection, a practice in which the Canadian Supreme Court is rapidly catching up. The fact remains that federal courts in the United States will only enforce rights and duties in actual controversies between legally interested parties, on a justiciable issue – and "political questions" there are not justiciable issues.[14] In Canada, the reference procedure puts aside any possible requirement of an actual controversy and regulates to a great extent (by virtually eliminating them) the rules of standing and justiciability.

Even though the judicial practice of making authoritative pronouncements about the constitution started as part of the regular

---

[13] *Ibid.* Note that the Chief Justice of the High Court has in the past given informal constitutional opinions to the Governor-General. Such an opinion was given by Chief Justice Barwick to Governor-General Kerr and was made public by the latter during the constitutional crisis of 1975. The core issue was whether the Senate (which was then controlled by the opposition) had the constitutional power to refuse to pass a money bill; the answer was yes: John Kerr, *Matters for Judgment*, London: Macmillan, 1979, p. 343.

[14] On the limited scope of this doctrine, see *Baker v. Carr* (1962), 369 U.S. 186.

judicial function of applying an Act of Parliament,[15] there is little doubt that the judiciary (at least its higher ranks) has since come to consider that practice as a more abstract duty performed in its self-granted capacity as a "protector and preserver of the Constitution".[16] This self-perception of the judiciary has evolved with the practice of giving advisory opinions (the validity of which, as I noted, had originally been upheld on the basis of the powers of the federal parliament), a practice which has gradually come to play a role far more significant in the development of constitutional law than could have been foreseen when it was introduced.

During the early decades of confederation, perhaps out of a concern regarding the legitimacy of the reference practice,[17] the courts were extremely emphatic that the opinions given in a reference were "advisory only". In the *Manitoba Education Reference*, for instance, Taschereau J. writes:

> ... our answers to the questions submitted will bind no one, not even those who put them, nay, not even those who give them, no court of justice, not even this court. We give no judgment, we determine nothing, we end no controversy ...[18]

Similarly he insists in the *Provincial Fisheries Reference*:

---

[15] The *British North America Act*, made in a sense supreme by another Imperial Act, the *Colonial Laws Validity Act, 1865*, 28 & 29 Vict., c. 63.

[16] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 753.

[17] For instance, a concern was apparent amongst judges of higher courts that giving advisory opinions involved a risk of depriving private litigants of a trial by due process of law. Their general reaction to this was to insist on the freedom of a court to reject certain questions put by the government and to emphasise the non-binding character of such opinions. See *A.G. Can. v. Atts G. Ont., Qué, N.S.*, [1898] A.C. 700 (P.C.); *Re References*, (1910), 43 S.C.R. 536; *Marriage Laws Reference* (1912), 46 S.C.R. 132. Recent legislative adaptations have included procedures to ensure representation of interested parties: The *Supreme Court Act*, R.S.C. (1985), c. S-26, s. 53(5).

[18] (1894), 22 S.C.R. 577, 678.

> Our answers are merely advisory ... We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves.[19]

In a reference of 1912, *Re Criminal Code,* four of the five judges on the bench took care to mention in their separate reasons the non-binding nature of an advisory opinion.[20] With that kind of insistence coming from above, it was conceivable at that time that a trial judge might quote and simply disregard an advisory opinion given by the Supreme Court. A passage from a judgment of the Ontario High Court delivered in 1912, which refers to the Supreme Court opinion given earlier in the *Sunday Labour Reference*[21] suggests this:

> With all proper deference to the Judges of the Supreme Court, I cannot regard the opinion expressed on this head as a judgment binding on me, nor can I accept it as the law.[22]

The validity of the reference procedure was unsuccessfully challenged in the same year, as I have mentioned, and the Privy Council again stressed that opinions given in that context were advisory only.[23]

But after this explicit recognition of the reference procedure's validity, statements about the advisory and non-binding nature of the resulting opinions virtually disappeared from judicial prose. There is a conspicuous "terminological" habit in the higher courts of referring to advisory opinions as "judgments" and "decisions", a habit strongly encouraged by the process and form of the reference procedure which

---

[19] (1896), 26 S.C.R. 444, 539.

[20] (1910), 43 S.C.R. 434: Girouard J. at 436; Davies J. at 437; Duff J. at 451, 453; Anglin J. at 454.

[21] (1905), 35 S.C.R. 581.

[22] *Kerley v. London and Lake Erie Transportation Co.* (1912), 6 D.L.R. 189, 197.

[23] *A.G. Ont. v. A.G. Can,* [1912] A.C. 571, 589 (P.C.).

ensures that reference cases are orally argued like other cases and that the opinions are duly reported along with judgments. This makes the formal difference between judgments and advisory opinions nearly invisible. But going beyond terminology and form, one cannot fail to notice a clear tendency in the judiciary to actually treat advisory opinions just like other decisions of higher courts. The decision of the Privy Council in *A.G. Canada v. A.G. British Columbia*[24] is an illustration of this. Facing yet another distribution of powers dispute, the Privy Council there lists four propositions of constitutional law as having been "established" in four of its earlier "decisions";[25] two of these "decisions" turn out to have been made on appeal from advisory opinions.[26] Similarly in the *Aeronautic Reference*,[27] the Privy Council mentions that "there has grown up round the British North America Act a body of precedents of high authority and value as guides to its interpretation and application". Four "cases" are then referred to as illustrations; three of them are appeals from advisory opinions.[28] The Supreme Court has been in the same habit. In the *Natural Products Marketing Act Reference*, the Chief Justice, perhaps by mistake, refers to an advisory opinion amongst other cases as "binding".[29] In the *Labour Conventions Reference*, Rinfret J. quotes from an advisory opinion

---

[24] [1930] A.C. 111 (P.C.).

[25] *Id.*, at 118.

[26] *A.G. Ont. v. A.G. Can.*, [1894] A.C. 189 (P.C.), and *A.G. Ont. v. A.G. Can.*, [1896] A.C. 348 (P.C.).

[27] [1932] A.C. 54.

[28] *A.G. Ont. v. A.G. Can.*, [1896] A.C. 348 (P.C.); *A.G. Can. v. Atts G. Ont., Qué, N.S.*, [1898] A.C. 700 (P.C.); *A.G. Ont. v. A.G. Can.*, [1912] A.C. 571 (P.C.).

[29] *Reference re Weekly Rest in Industrial Undertakings Act*, [1936] S.C.R. 398, 404-5; the advisory opinion referred to is *A.G. Can. v. A.G. Alta*, [1916] 1 A.C. 588 (P.C.).

(which he calls a "unanimous judgment") and writes squarely that it "may be regarded as binding" upon the Supreme Court.[30] By 1945, the Supreme Court was prepared to recognise expressly that reference cases should be – and were actually being – given the force of precedents. Referring to the *Saskatchewan Natural Resources Reference*[31] in *A.G. Can. v. Higbie*, the Chief Justice boldly writes:

> *It is needless to mention here that, although this was not a judgment in the true sense of the word, but merely what is sometimes referred to as an opinion* made in Reference to this Court by the Governor General in Council as provided for by section 55 of the Supreme Court Act and the special jurisdiction therein given to this Court, *we should regard an opinion of that kind as binding upon this Court.*[32] [Emphasis added.]

Did advisory opinions acquire the strict legal force of precedents upon this "binding" pronouncement of the Supreme Court? Probably not.[33] In such a context, the word *binding* acquires a measure of elasticity. If it is assumed that the Court did not mean *binding* in a strict legal sense, the situation, then, is reminiscent of the way the Privy Council treated its own opinions tendered on appeal from the colonies. Such opinions being given formally in advice to the Crown, the Law Lords were "not absolutely bound by previous decisions", but they made it clear that "on constitutional questions it must be seldom indeed that the Board would depart from a previous decision which it may be assumed will have

---

[30] [1936] S.C.R. 461, 507. The advisory opinion referred to is the *Hours of Labour Reference*, [1925] S.C.R. 505.

[31] [1931] S.C.R. 263.

[32] [1945] S.C.R. 385, 403.

[33] Later instances can be found where the Court adverts to the merely advisory nature of an opinion given in a reference context: *Reference re Wartime Leasehold Regulations*, [1950] S.C.R. 124, 126; and *C.P.R. v. Town of Estevan*, [1957] S.C.R. 365, 368-69.

been acted on by governments and subjects".[34] The thin line left between the authority of advisory opinions and that of real judgments was further disturbed when the Supreme Court, after acting for a number of years as the final appeal body in Canada, announced in *Binus v. R.* its willingness to depart from its own decisions.[35] Real judgments of the Supreme Court were then to lose their absolute binding character in that Court.[36] The difference in status, at least in the Supreme Court, between real judgments and advisory opinions was thereafter hard to grasp. So much so that the Supreme Court purported in 1978 expressly to "overrule" *in a reference* a constitutional decision of the Privy Council.[37]

What should be made of such judicial statements? Should one treat all judicial claims to apply "binding references" or to engage in "advisory overruling" as having been made *per incuriam*? One could then fall back on the notion of persuasive authority, enshrined in a broad doctrine of precedent, to account for the actual importance of references in constitutional adjudication. Here a few clarifications on the doctrine of precedent and the notion of bindingness are perhaps called for.

---

[34] *A. G. Ont. v. Canada Temperance Federation*, [1946] A.C. 193, 206 (P.C.), *per* Lord Simon.

[35] [1967] S.C.R. 594.

[36] With the usual warning that a departure from a previous decision "should be made only for compelling reasons". *Id.*, at 601.

[37] *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 1257. The decision purportedly "overruled" (in part) was *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy*, [1933] A.C. 168 (P.C.).

I.2 PRECEDENTIAL FORCE

A court decision can be said to bind the parties to the case. It can also be the basis of a new rule or a new and authoritative formulation of an old rule, because it stands as a precedent binding on lower courts. Confusion may arise where a decision or opinion is envisaged both as a ruling binding on the parties and as a precedent, the source of a rule, binding on the lower courts. Hence, the various judicial assertions about the binding character of a reference opinion can be taken to address the separate questions of whether the opinion is binding on the parties to the case, and whether it is binding on lower courts and other parties. Both questions seemed to have been envisaged by the Supreme Court in the *Manitoba Education Reference*, where Taschereau J., as I pointed out earlier, said that advisory opinions bind "no one, not even those who put them, nay, not even those who give them, no court of justice, not even this court".[38] Assertions about the advisory nature of reference opinions can also be about the role of the judge in those proceedings. One could conceivably assimilate such role to that of a textbook writer, or legal advisor, who purports to set out the applicable law as it is already established. This is apparently what Taschereau J. had in mind two years later, in 1896, when he wrote the following about reference opinions:

> ... we have to say what is the law as heretofore judicially expounded, not what is the law according to our opinion. We determine nothing.[39]

---

[38] (1894), 22 S.C.R. 577, 678.

[39] *Provincial Fisheries Reference* (1896), 26 S.C.R. 444, 539.

This asserts that judges will not make use of their power of working the incremental evolution of the law in a reference context, the implication being that advisory opinions cannot break new grounds, cannot establish precedents in the literal sense. The obvious difficulty with this view is that the law-making and law-applying functions of a court are but rarely distinguished in practice, and that higher courts have not in fact refrained from breaking new grounds in reference opinions. (One can say, at all events, that Taschereau J. was ahead of his time in asserting indirectly the now well-accepted fact that the role of the judge is not always limited to declaring what the law is.)

With respect to the question whether a reference opinion is binding on the parties, one can be fairly confident in saying that an executive authority would not take any enforcement measures at the request of one of the parties unless a real judgment containing an order can be produced, and that a court would not reject a claim previously dealt with in a reference on the basis of the doctrine of *res judicata*.[40] The opposite situation arose in *Reference re Regina v. Coffin*,[41] where the Supreme Court held that a criminal matter that was *res judicata* could be considered in a reference. The question of bindingness, however, does not arise in such terms when it comes to controversies of a more public import.

First of all, a great proportion of constitutional disputes have been judicially settled in declaratory proceedings the result of which are not mandatory orders, but mere declarations concerning the legal situation of the parties. If one of the parties elects to ignore a declaration, further proceedings are required before one can speak of

---

[40] *C.P.R. v. Town of Estevan*, [1957] S.C.R. 365 (*obiter dictum*).

[41] [1956] S.C.R. 186.

enforcement. As a rule, further proceedings are not necessary, because court pronouncements in constitutional matters are respected by public authorities. Justice Pigeon, after he had left the Supreme Court, pointed out that this tradition of respect on the part of public authorities made questions of enforceability virtually irrelevant in public law cases; a court pronouncement, especially one by the Supreme Court, was generally taken by all to be the end of the matter and was automatically complied with.[42] A judge can thus confidently assert, as MacGuigan J. once did in the Federal Court, that "declarations are invariably honoured by governments", so that there is "no necessity for other relief".[43] Here one can say that advisory opinions have the same effect as judgments in declaratory proceedings.

But beyond the limited scope of the strict enforcement of a constitutional pronouncement as between parties to a case, the more interesting question is that of the extent to which such pronouncements become relevant materials in other proceedings, or relevant sources for a government or any other party to refer to in assessing what the law is. For, beyond the respect of public authorities for judgments settling disputes as between parties, there is the farther reaching matter of respect for court decisions as a source of constitutional law.

---

[42] Louis-Philippe Pigeon, "L'effectivité des décisions de justice en droit public interne (constitutionnel)" (1985) 26 *C. de D.* 995, 996. Such a practice can probably meet the criteria set out by the Supreme Court in the *Patriation Reference* for constitutional conventions: *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753; see Stéphane Létourneau, "L'Autorité d'un jugement prononçant l'inconstitutionnalité d'une loi" (1989) 23 *R.J.T.* 173.

[43] *Finlay v. Canada (Minister of Finance)*, [1990] 2 F.C. 790, 816 (C.A). See also *Lount Corp. v. Canada (A.G.)*., [1984] 1 F.C. 332, 365 (T.D.), *per* Muldoon, affd. [1985] 2 F.C. 185 (C.A.). In the United Kingdom, to the same effect, see the comments of Lord Woolf in *M. v. Home Office* (1993), [1994] 1 A.C. 377, 397, 422-23 (H.L.(E.)).

Unlike the case of some European constitutional tribunals, Canadian institutional arrangements do not provide that constitutional decisions of the Supreme Court are binding *erga omnes*.[44] Outside the reference context, constitutional proceedings generally follow the pattern set for normal adjudication, which means that, apart from the minor exception of judgements *in rem*, court decisions are considered to be *res judicata* as between the parties only.[45] The government's being a party to given proceedings does not modify that situation: like all litigants, it is not strictly bound as regards persons or bodies not party to such proceedings.[46] If the constitutional validity of a tax law is challenged in court by some offender, for instance, and the law is held by the Supreme Court to be invalid, this particular taxpayer might very well go free,[47] but Canadian courts have not so far developed remedies that can prevent the government from carrying on collecting monies from

---

[44] See the articles on the constitutional courts of Germany, Italy and Austria by, respectively, K. Schlaich, A. Pizzorusso and F. Emacora in L. Favoreu (ed.), *Cours constitutionnelles européennes et droits fondamentaux*, Paris: Economica, 1982.

[45] *Halsbury's Laws of England*, 4th ed. (Reissue 1992), Vol. 16, para. 972.

[46] For a discussion of the possibility that a finding of invalidity might be considered a judgment *in rem*, see *CCC*, at 192-94. The matter is made very complex by the federal structure of Canada. The court of appeal of a province does not consider itself bound under the doctrine of *stare decisis* by judgments of other courts of appeal. Treating a finding of invalidity as a judgment *in rem* would apparently mean that the judgment of a court of first instance not appealed from could not be varied even by the Supreme Court; like a divorce matter, the question of the validity of the statute would have to be considered *res judicata*, as against the whole world.

[47] Subject to the doctrine of mistake of law as applied to the recovery of tax monies: see *Eadie v. Township of Brandford*, [1967] S.C.R. 573; *Amax Potash Ltd et al. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576.

other parties under the same statute if it chooses to.[48] Formally, the presence of a law "in the statute book", its application by the executive, and its recognition by the courts can be seen as three different things. There have been a few cases where governments have begged to differ following a constitutional court decision in Canada. The various Manitoba language rights proceedings which culminated in the famous Supreme Court reference in 1985[49] provide a number of examples where the Manitoba government, ignoring several holdings of invalidity, kept on applying to other parties statutes judicially held unconstitutional.[50] Court pronouncements change the law, or make determinations of it that are legally authoritative *erga omnes*, only through the doctrine of precedent. To use the same example, a tax law that is held invalid or inoperative by the Supreme Court is not thereby "wiped out of the statute book"; all that can be said is that lower courts, and more often than not the Supreme Court itself, will follow that holding as a precedent (and, of course, that public authorities are aware of that). The doctrine of precedent, again, is the only direct source so far recognised for the *legal* status of a constitutional

---

[48] The United States judiciary has had recourse in some cases to structural injunctions in order to make a decision binding *erga omnes*. Canadian courts may now have to contemplate the possibilities of structural remedies in order to deal with "structural", large scale violations of the Charter. See generally Ghislain Otis, "La *Charte* et la modification des programmes gouvernementaux: l'exemple de l'injonction structurelle en droit américain" (1991) 36 *McGill L.J.* 1348; Nitya Duclos and Kent Roach, "Constitutional Remedies as 'Constitutional Hints': A Comment on *R. v. Schachter*" (1991) 36 *McGill L.J.* 1. One Supreme Court judge has recently hinted that is not unlikely that the Canadian Supreme Court will follow suit on structural injunctions: John Sopinka, "Constitutional Remedies and their Limitations" in Jeffrey Berryman (ed.), *Remedies: Issues and Perspectives*, Toronto: Carswell, 1991, p. 357, at 369-72.

[49] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

[50] See Joseph E. Magnet, "Validity of Manitoba Laws after *Forest*" (1980) 10 *Man. L.J.* 241.

pronouncement as regards other parties. And similarly it is the authority of advisory opinions as precedents which determines their importance in the legal system.

The doctrine of precedent postulates a basic distinction between persuasive and binding authority. *Stare decisis*, which determines strict binding authority, is now part of the broader and much older doctrine of precedent. The broad doctrine of precedent is summarised in the adage that like cases should be treated alike, which is in some form or another recognised by all advanced legal systems. It can be said to have been part of English law since at least the twelfth century.[51] No such ancestry can be claimed for the narrower doctrine of *stare decisis*, which is peculiar to common law systems. Rules governing strict binding authority can only emerge in a context where a system of clear judicial hierarchy exists together with effective arrangements for case reporting; and this state of affairs did not come about in the United Kingdom before the middle of the last century.[52] The thorough re-organisation of the judiciary that gave the doctrine its present shape in England was introduced by the *Supreme Court of Judicature Acts, 1873 and 1875*.[53] This is the time when the Supreme Court was created in Canada, the court which made the emergence of a self-contained, all-Canadian doctrine eventually possible.[54]

---

[51] R.W.M. Dias, *Jurisprudence*, 5th ed., London: Butterworths, 1985, p. 56.

[52] Note that it took almost another century before the English Court of Appeal considered itself strictly bound by its own decisions: *Wynne-Finch v. Chaytor*, [1903] 2 K.B. 475; *Re Shoesmith*, [1938] 2 K.B. 637, 644 (*dictum*). The rule is now known as the rule in *Young v. Bristol Aeroplane Co Ltd* ([1944] K.B. 718).

[53] 36 & 37 Vict., c. 66; 38 & 39 Vict., c. 77.

[54] Before that, the higher courts of the existing provinces (British Columbia, Manitoba, New Brunswick, Nova Scotia, Ontario, Quebec and Prince Edward Island) followed the relevant decisions of the Judicial

Decisions that have strictly binding authority are now fairly well defined in Canada. Briefly stated, the accepted rules provide that Supreme Court decisions are binding on all courts of the country except the Supreme Court, and that decisions of a court of appeal are binding on all courts of the province including the court of appeal.[55] The category of decisions that have persuasive authority is not so clear cut. All court pronouncements can be said to have a measure of persuasive authority which depends mostly on the level in the Canadian judicial hierarchy at which they are made. Court decisions of foreign jurisdictions also have a measure of persuasive authority, especially those of the higher courts of other common law jurisdictions. One thing that gives such decisions persuasive authority in Canadian courts is the fact that they deal with similar legal concepts. One thing that makes advisory opinions given by Canadian higher courts even more persuasive, by comparison, is the fact that they express the position of a Canadian higher court on Canadian law. This suggests that persuasive materials

---

Committee of the Privy Council but no Canadian court could make decisions binding on all Canadian lower courts. The Supreme Court of Canada made decisions binding on all Canadian courts, rigorously followed the decisions of the Privy Council (even though they were not judgments) and considered itself bound by its own decisions (*Stuart v. Bank of Montreal* (1909), 41 S.C.R. 516). This lasted about one hundred years. Arguably, the rule in *Robins v. National Trust Co.*, [1927] A.C. 515, 519 (P.C.), also made decisions of the House of Lords, "the supreme tribunal to settle English law", binding on all Canadian courts in common law matters for a time. In 1967 the Supreme Court indicated its willingness to depart from its own decisions (*Binus v. The Queen*, [1967] S.C.R. 594) and has openly done so for the first time in 1973 (*Brant Dairy v. Milk Commission of Ontario*, [1973] S.C.R. 131, 152-53). The Court also clearly indicated that it could "overrule" a Privy Council precedent when it purported to do so, as we have seen, in an advisory opinion (*Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 1257: expressly setting aside, in part, *Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy*, [1933] A.C. 168 (P.C.)). See generally George F. Curtis, "Stare Decisis at Common law in Canada" (1978) 12 *U.B.C. L. Rev.* 1.

[55] A court of appeal binds itself (like the English Court of Appeal) but is not bound by the decisions of other courts of appeal; the trial division of the Federal Court follows decisions of the appeal division.

can perhaps be divided between those which courts often consider and those which they must consider.

The line which it is suggested should be drawn here reminds us that the strict obligation put on a court to follow binding decisions does not exhaust the court's duties under the broad doctrine of precedent. Discussing the distinction between persuasive and binding sources, Rupert Cross writes:

> The obligation of the common law judge to consider case-law entails not only a duty to follow the *rationes decidendi* that are binding on him according to the rules of precedent, but also the duty of considering, though not necessarily of following, rules and principles mentioned in dicta or constituting the *rationes decidendi* of merely persuasive precedents.[56]

It is clear that most Canadian judges believe themselves to be under an obligation to *consider*, where relevant, pronouncements of *Canadian higher courts* on *Canadian law* even where such pronouncements are not strictly binding. Those two elements together poin to where a line can be drawn. On the one hand, no judge has an obligation to pay attention to academic works and extra-curial writings by judges on *Canadian Law*; on the other hand, casual remarks not bearing on the law made in judgments by higher court judges do not have to be considered either. This leaves obiter dicta in higher courts and advisory opinions in the separate category of materials that have to be considered in judicial decision-making where relevant. Such materials can be said to have law-quality, which distinguishes them from other persuasive sources like doctrinal

---

[56] Rupert Cross, *Precedent in English Law*, 3d ed., Oxford: Clarendon Press, 1977, p. 156. For further possible distinctions, see Richard Bronaugh, "Persuasive Precedent" in Laurence Goldstein (ed), *Precedent in Law*, Oxford: Clarendon Press, 1987, p. 217.

writings.[57] It could at least be argued that a decision of a Court of Appeal flatly contradicting one of its prior advisory opinions without even a mention of it lends itself to being treated as having been given *per incuriam*.[58]

Because advisory opinions make statements about Canadian law, about the Canadian constitution, and because they are given by the higher courts of the country, they inevitably provide a first-rate source of information when it comes to planning one's behaviour in accordance with the law. Indeed, one would be hard-pressed to explain what the use of the reference procedure might be if advisory opinions could not be relied upon as highly persuasive material, that is, as material that cannot be simply ignored. Beyond the wide-ranging requirement of justice that like cases should be treated alike – which is obvious when dealing with real *inter partes* cases – a number of the reasons for the broad doctrine of precedent can be seen as basic requirements of the Rule of Law. They are the requirements of publicity, clarity, coherence, and stability which secure the possibility of ordering one's life with the dignity of knowing where one stands, looking back and looking ahead. The reference system enables governments to have points that presumably need clarification easily clarified in a forum which is public.[59] This is an improvement

---

[57] This is in keeping with Dias' organisation of sources which insists that binding materials do not exhaust the ensemble of materials with law-quality. See, for instance, *supra*, at 45-46 (principles) and 143-44 (obiter dicta).

[58] The core of this doctrine, it is true, concerns binding decisions only. But see, on decisions given in ignorance of merely authoritative cases, Lord Goddard C.J.'s remarks in *Moore v. Hewitt*, [1947] K.B. 831, 835 and *Nicholas v. Penny*, [1950] 2 K.B. 466, 473-74.

[59] As I have noted, reference opinions are published in the official reports along with judgments. Also, interested parties can generally come forward (with leave of the Court) to make arguments: *Supreme Court Act*, R.S.C. (1985) c. S-26, s. 53(5). For comments on the intervention of interested parties, see *CCC*, at 170-75.

on the traditional "trial and error" mechanism involved in normal litigation which the government would otherwise have to go through. It avoids the serious problems involved in the government having to "test" the uncertain validity of a measure through actual application. Using the reference procedure "before the fact" where the resulting opinions are generally respected fosters clarity and publicity for the law and probably enhances coherence (including consistency) and stability in its administration. The persuasive force of advisory opinions thus ultimately lies in the fact that governments, as well as people in general, act upon them as accurate statements of the law in making decisions and setting out on courses of action; and those opinions are relied upon because they are highly respected by courts in ulterior determinations and are generally applied to like cases. This circle of justification can thus be said to be embedded in basic requirements of the Rule of Law.

The fact that courts have good reasons for respecting, and, it is suggested, an obligation to at least consider and give weight to advisory opinions does not entail, as I suggested, that those have strict binding force, that they have any status under the narrow doctrine of *stare decisis*. It is true that the number of judicial statements treating advisory opinions just like judgments could arguably indicate that a change has come about in fundamental doctrine concerning what is to count as binding material in Canadian law. *Stare decisis* is, after all, judge-made law, and as such is subject to judicial modifications.[60] The

---

[60] One can always claim that the rules of stare decisis are not really legal because they are ultimate rules governing what is to count as binding law. I do not consider this a serious objection. A classic of jurisprudence such as Dias, *supra*, will typically advert to the question (at 58) but will otherwise refer unquestioningly (as I would) to "the rule in *Young v. Bristol Aeroplane Co. Ltd*" ([1944] K.B. 718, stating that the English Court of Appeal is bound by its own decision) in the standard formula used for common law rules (at 128). On the status of the

doctrine was changed in Canada when the Supreme Court decided it could overrule its own decisions as well as the opinions of the Privy Council. This was, in part, a matter of adapting judicial doctrine to legislative evolution, namely the abolition of appeals to the Privy Council which gave the Supreme Court jurisdiction of last resort in Canada.[61] One could argue that the application of *stare decisis* to advisory opinions is simply an adaptation of the doctrine to a legislation-based reality of Canadian institutions. Mention of the advisory nature of reference opinions was actually dropped from federal legislation in 1956,[62] and provincial statutes have merely stated all along that a reference opinion should be "deemed" a judgment (although this is generally taken to mean simply that an opinion can be appealed from, and it can be taken negatively to assert that it is *not* a judgment)[63]. But such a change in fundamental doctrine as would imply the strict application of *stare*

House of Lords practice statement of 1966, see the comment of Lord Simon of Glaisdale in *R. v. Knuller*, [1973] A.C. 435, 485 (H.L.(E.), and generally Anthony Blackshield, "'Practical Reason' and 'Conventional Wisdom': The House of Lords and Precedent" in Goldstein, *supra*, p. 107.

[61] Note that the Supreme Court was probably influenced by the practice statement of the House of Lords on precedent: Note, [1966] 3 All E.R. 77 (*sub nom.* Practice Statement (Judicial Precedent)). When the Supreme Court indicated, the following year, that it, too, might overrule itself in a proper case (*Binus v. The Queen*, [1967] S.C.R. 594), it purported to change a situation that had become exceptional in the practice of final appellate courts; see Gordon Bale, "Casting off the Mooring Ropes of Binding Precedent" (1980) 59 *Can. Bar Rev.* 255.

[62] *An Act to amend the Supreme Court Act and the Criminal Code, 1956*, 4 & 5 Eliz. II, c. 48, s. 7, repealing ss. 55(6) of the *Supreme Court Act*, R.S.C. (1952), cc. 259; 335. Ss. 56(6) provided that a reference opinion, "although advisory only", shall for purposes of appeal be treated as a "final judgment" of the Court "between parties". Appeals from the Supreme Court had then been abolished.

[63] On this question, see *CCC*, at 331-33. As noted there, the British Columbia Court of Appeal, after express consideration of the matter, has considered itself bound by an advisory opinion of the Supreme Court: *Milk Board v. Hillside Farm Dairy Ltd.* (1963), 43 W.W.R. 131 (B.C. C.A.). The Supreme Court had stated in *Union Colliery Co. v. A.G. B.C.* (1897), 27 S.C.R. 637, that the mention in a provincial statute that an opinion is deemed to be a judgment only indicates that it is *not* a judgment.

decisis to reference opinions would need more articulation than is now found in the case-law.

For *stare decisis* fits rather uneasily in a context where no *ratio decidendi* is to be found.[64] A real case has a factual background which indicates and qualifies what the *ratio* is, whereas an opinion merely purports to answer questions referred to the court in a relatively abstract context. If one were to identify in an advisory opinion what is to be associated with the *ratio decidendi* of a real judgment, the questions as referred to the court would be the first element coming to mind. But those cannot be all that helpful since they are often modulated or changed, more or less openly, by the courts.[65] One would have to go further and analyse the elements of contextual evidence actually given at the hearing (including facts if there are any), and expressly considered in the opinion, which could serve, arguably, as a basis for distinguishing in future decisions. But such analysis is very likely to result in something broader, more abstract, more comprehensive than the *ratio* of a real judgment. This is so because nothing prevents reference proceedings from being conducted, from beginning to end, at the level of abstraction characteristic of principles. The Supreme Court, far from underplaying this, openly describes a constitutional reference as "an attempt to determine and give effect to the broad objectives and purposes of the Constitution".[66] *Stare decisis* was evolved in a context where courts, as Lord Denning put it (though certainly too

---

[64] On the determination of the (or "a") *ratio*, see Dias, *supra*, at 136-51; Cross, *supra*, at 171ff; and Neil MacCormick, "Why Cases have Rationes and what these are" in Goldstein, *supra*, p. 155.

[65] See for instance: *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54; *Reference re Waters and Water-Powers*, [1929] S.C.R. 200.

[66] *Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714.

categorically), "decide cases according to their merits and then see what principle emerges from them".[67] Principles do not acquire law-quality, strictly speaking, through *stare decisis* alone; they normally require more than one judicial decision to be considered legal. They fit into the broader doctrine of precedent in that they can be explained in terms of persuasive authority. When they are recognised, principles may have to be *considered*, but they lie outside the strict doctrine of *stare decisis* which can turn a single ruling into a binding rule of law.[68]

This does not minimise the importance of advisory opinions in the broader context of constitutional adjudication. Quite the contrary. Broad legal determinations made at a comparatively high degree of abstraction from facts can have, and have had, a great impact on the evolution of constitutional law in the courts. What is suggested is that any attempt to force advisory opinions into the narrow scope of the doctrine of *stare decisis* would be somewhat misguided; the broader doctrine of precedent provides a satisfactory account of the actual importance of advisory opinions in adjudication.

In respect of importance, it is worth noting that the proportion of the higher courts' resources devoted to clarifying constitutional law which has been spent on references is very large indeed. After one hundred years of confederation, approximately one third of the constitutional cases that had reached the highest level of appeal (the Privy Council before 1949 and the Supreme Court thereafter) had been introduced by means of a reference.[69] This frequent use of the

---

[67] *Chic Fashions (West Wales) Ltd. v. Jones*, [1968] Q.B. 299, 313.

[68] The functioning of principles in adjudication will be introduced in Part Two and discussed in Part Four.

[69] François Chevrette and Herbert Marx, *Droit constitutionnel*, Montreal: P.U.M., 1982, p. 181; *CCC*, at 334n. Strayer notes in *CCC* that the figure is 25% when 20 years are added (at 311). It should be noted,

reference mechanism, coupled with the high persuasive force of opinions, has arguably generated a proclivity for broad judicial pronouncements about the constitution, even outside the reference framework.[70] In that way the reference procedure has greatly contributed to the evolution of the self-perception of Canadian courts, especially the Supreme Court, as "protector and preserver of the constitution"[71] in an abstract sense not quite in keeping with a traditional conception of the judicial function. Public authorities of other branches can be said to share to a great extent that perception.[72]

The evolution of that notion of "protector and preserver of the constitution" is also reflected in the gradual relaxation of the rules of standing for declaratory actions and the liberal conception adopted by the Supreme Court of what constitutional issues are properly decided in the judicial forum.

---

finally, that Charter litigation has greatly increased the proportion of "real" judgments in constitutional matters since 1982 (a fact reflected in Strayer's figure).

[70] This is what makes Strayer, *id*, at 311, say of reference cases that "[i]n terms of impact on the political, social, and economic affairs of the country the decisions in these cases have had an effect far beyond their numerical proportion." See also pp. 323-29, on "abstract jurisprudence".

[71] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 753.

[72] See Pigeon, *supra*.

Chapter II

"Real Cases": Access and Proper Issues

II.1 STANDING FOR DECLARATORY ACTIONS

In *Operation Dismantle Inc. v. R.*,[1] a declaration was sought that the federal government's decision to allow cruise missiles to be tested on Canadian territory violated the right to life, liberty, and security of the person guaranteed by s. 7 of the Charter of Rights. The action for a declaration was launched by a coalition of interest groups which did not have a claim or interest superior to that of any resident of the Canadian territory. At the beginning of the century, the action would have been rejected on the ground that a public interest declaratory action could only be brought by the Attorney General. But drastic changes have occurred since then in the rules governing standing for declaratory actions filed in the public interest.

In the celebrated trilogy *Thorson, McNeil, Borowsky*,[2] the Supreme Court opened the door to declaratory relief in constitutional matters beyond the line set for administrative matters in the English case *Dyson*

---

[1] [1985] 1 S.C.R. 441.

[2] *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575.

v. Attorney General.[3] As this is not the place for a thorough analysis of these cases, the following summary of their result, as set forth by Martland J. in *Borowsky*, shall here suffice:

> ... to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable manner in which the issue may be brought before the Court.[4]

Granting standing remains a matter of discretion: an absolute right to ask for a declaration of invalidity on the basis of a mere interest in public law has never been recognised.[5] But the rationale is clear that the courts should have the means to rule on questions of constitutional validity where governments show no intention of submitting the issue to the courts. As the Supreme Court put it in a recent case:

> The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge.[6]

---

[3] [1911] 1 K.B. 410.

[4] *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575, 598. Barry L. Strayer, *The Canadian Constitution and the Courts*, 3d ed., Toronto: Butterworths, 1988, p. 159 (hereinafter *CCC*), offers a more detailed summary: "The combined result of these three cases appears to leave the door open for standing to seek a declaration of invalidity of a statute for anyone who can show either: (1) that he has been, or is imminently threatened under the statute with legal consequences of a regulatory or enforcement nature; (2) that he has suffered or will suffer, like all members of the public, some denial by the statute of a benefit or privilege or freedom that would otherwise be available to him, even if there may be certain other people potentially within category (1) who have not chosen to attack it; or (3) even if he cannot bring himself within categories (1) or (2), that there is no one else who would have standing for other reasons or, having standing, would be likely to attack the statute."

[5] See *Solosky v. R.*, [1980] 1 S.C.R. 821, 832-33.

[6] *Canadian Council of Churches v. Canada (M.E.I.)*, [1992] 1 S.C.R. 236, 252.

Understandably, it should not be a prerogative of the governments to ask for court rulings on the constitutional validity of statutes or public acts. For the role of an independent judiciary perceived as the "protector and preserver of the Constitution" would quickly lose its significance if it were to operate for the sole benefit of governments. From that perspective, a reasonably open recourse in declaration creates a counterbalance to the governments' exclusive right – a right peculiar to Canadian constitutionalism – to refer matters to the courts.

For, here again, the Canadian situation can be contrasted with that of other common law jurisdictions. In the United Kingdom, courts have generally kept to the rule that the Attorney General is the only party authorised to litigate the interests of the public. The House of Lords has shown its determination in *Gouriet v. Union of Post Office Workers*[7] to stick to the traditional approach and leave a possible liberalisation of the rules to Parliament.[8] In Australia, the High Court confirmed its restrictive approach in the early eighties[9] and decided to stick to the "special interest" requirement despite the "Open Door Policy" recommendation of the Law Reform Commission made a few years before.[10] Mason J., agreeing with his colleagues, noted that the Canadian approach expressed in *Thorson* directly contradicted Australian case-law; he

---

[7] [1978] A.C. 435 (H.L.(E.)).

[8] See p. 506. The House of Lords there confirms, and limits itself to, three exceptions to the rule that only the Attorney General can litigate the interests of the public: (1) where the challenged act simultaneously affects the plaintiff's private rights; (2) where the challenged act causes special damage to the plaintiff; (3) where the plaintiff is a local authority seeking to promote or protect the interests of its citizens.

[9] *Australian Conservation Foundation Inc. v. Commonwealth* (1980), 146 C.L.R. 493.

[10] Australia, Law Reform Commission, *Access to the Courts. Standing: Public Interest Suits*, Paper No. 4, Canberra, 1977.

refused to follow it.[11] The attitude of the High Court is thus in keeping with the notion behind its refusal to give an advisory opinion in *Re the Judiciary and Navigation Acts*: a matter is not for the courts "unless there is some immediate right, duty or liability to be established".[12] In the United States, the Supreme Court has been consistent in interpreting the "cases and controversies" provision of the Constitution (Article III) as strictly limiting the federal courts' jurisdiction. In terms of standing, this is taken to mean that plaintiffs must be able to show they have "personally suffered some actual or threatened injury" which "fairly can be traced to the challenged action" and which is "likely to be redressed by a favorable decision".[13] Noting that the law on standing has been the subject of much criticism, Tribe remarks that a narrow rule of standing weakens the view, typically shared by those criticising this area of constitutional law, that the Supreme Court should take on a role "as the branch of government best able to develop a coherent interpretation of the Constitution".[14] This, it appears by contrast, is a view that the Canadian Supreme Court has not feared to foster.

---

[11] *Australian Conservation Foundation Inc. v. Commonwealth* (1980), 146 C.L.R. 493, 551-52.

[12] (1921), 29 C.L.R. 257, 267.

[13] *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.* (1982), 454 U.S. 752, 758.

[14] Laurence H. Tribe, *American Constitutional Law*, 2d ed., Mineola (New York): The Foundation Press, 1988, p. 110. A leading article defending the strict approach to standing is R.L. Brilmayer, "Judicial Review, Justiciability and the Limits of the Common Law Method" (1977) 57 *Boston Univ. L.R.* 807. He writes, at 823, that rules of standing serve "the legitimacy of a judicial process that applies principles from previous cases to decide the claims of future litigants by requiring that such principles be derived only as an incident of determining the rights of the parties before the court". His working distinction is between "ideological" and "Hohfeldian" plaintiffs. See Westly N. Hohfeld, *Fundamental Legal Conceptions as Applied in Legal Reasoning*, ed. by Walter W. Cook, Westport (Ct): Greenwood Press, 1919.

This comparatively liberal approach of Canadian courts with respect to standing was discussed in the now leading case of *Canadian Council of Churches v. Canada (M.E.I.)*.[15] The Supreme Court there found that the adoption of the *Constitution Act, 1982*, with the introduction of the Charter of Rights and Freedoms and its express preambular recognition of the Rule of Law, supported the trend set in *Thorson* towards a uniquely "liberal and generous"[16] Canadian approach to standing. Cory J., for the Court, writes:

> The *Constitution Act, 1982* does not of course affect the discretion courts possess to grant standing to public litigants. What it does is entrench the fundamental right of the public to government in accordance with law.[17]

This is a clear echo of the notion of a "right of the citizenry to constitutional behaviour by Parliament" ventured by Laskin C.J. in *Thorson*.[18] The echo suggests that the approach which was perhaps rightly considered bold and daring when *Thorson* was decided in 1975 has been endorsed, and is now justified by, the Constitution. But the support found in the *Constitution Act, 1982* is certainly not as obvious as the Court makes it to be.

It is the Rule of Law, according to the judgment in *Canadian Council of Churches*, which guarantees the right of citizens against unconstitutional government action.[19] In its judgment the Court goes on to quote the "supremacy clause" of the Constitution as also affirming this right of citizens:

---

[15] [1992] 1 S.C.R. 236.

[16] *Id.* at 253.

[17] *Id.* at 250.

[18] [1975] 1 S.C.R. 138, 163.

[19] [1992] 1 S.C.R. 236, 250-51.

> 52.(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.

The American experience is here instructive about the relative force of the Supreme Court's argument. Firstly, the Rule of Law can hardly be said to enjoy a significantly weaker recognition in the United States than it does in Canada. Secondly, the "supremacy clause" of the Canadian Constitution – which, beyond rhetorical flourish, is taken to have changed nothing to the situation prevailing before it was introduced[20] – clearly brings in no more than what American lawyers have found since the very beginning of the 19th century in *Marbury v. Madison*.[21] And yet, the United States Supreme Court has consistently rejected claims of standing predicated on "the right, possessed by every citizen, to require that the Government be administered according to law".[22] In the United States, the requirement that Federal Courts make constitutional pronouncements only in the course of the determination of "cases and controversies" has not been taken to hamper the Rule of Law or the supremacy of the constitution. What it has in fact hampered is the maturation in the United States of the view that considers the judiciary, as Tribe put it, "as the branch of government best able to develop a coherent interpretation of the Constitution".[23] That view of the role of the judiciary appears to be somehow part of the Canadian Supreme

---

[20] In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 746, the Supreme Court assimilates judicial review under the supremacy clause to judicial review under the *Colonial Laws Validity Act, 1865*, 28 & 29 Vict., c. 63 (U.K.).

[21] (1803), 1 Cranch 137 (5 U.S. 60).

[22] *Valley Forge Christian College v. Americans United for Separation of Church and State Inc.* (1982), 454 U.S. 752, 764.

[23] Tribe, *supra*, at 110.

Court's conception of the Rule of Law and of the supremacy of the Constitution. The step in the Court's reasoning in *Canadian Council of Churches* which really differentiates the Canadian approach, then, lies not in the appeal to the 1982 formal expression of the Rule of Law and of the supremacy of the Constitution. The step is to be found, rather, where the Court, discussing the duty of legislators to act within the bounds of the constitution, feels no need to justify its assertions:

> ... courts will undoubtedly seek to ensure that their discretion is exercised so that standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and the *Charter*.[24]

This is where the fundamental difference is most apparent between, on the one hand, a judiciary limited to the traditional judicial function of determining cases and controversies (and making what constitutional pronouncements are necessary to such determinations), and, on the other hand, a judiciary that has developed, in the midst of increasing state activism and the growing importance of public rights, into the primary actor in the task of giving life to the constitution.[25]

Traditional rules of access to the judicial forum – rules that can be said to take part in the definition of the judicial function in the polity – have thus given way to the growth of the general perception of the courts as the proper ultimate forum for the resolution of constitutional disputes. The once conceivable view that legislative assemblies and executive councils also have ultimate and exclusive responsibilities in the application of written constitutional standards

---

[24] [1992] 1 S.C.R. 236, 251.

[25] The growth of state activism and of the concept of public rights is part of the Court's justification for the trilogy approach in *Canadian Council of Churches*. What is not questioned is that the "validity of government intervention [in the affairs of its citizens] must be reviewed by courts" (*Id.*, at 249).

in their respective spheres has seemingly lost a lot of its plausibility. It was once thought, for instance, that the propriety of judicial investigation into the validity of statutes on procedural grounds might be precluded by parliamentary privilege.[26] Written constitutional provisions dealing with procedures for legislating could be envisaged under that view as "directory" in the sense that legislatures would be the only judge of how they would be construed and applied.[27] This was the main argument of the Attorney General of Manitoba when the validity of all the legislation of the province was challenged under of the formal constitutional requirement of bilingualism, which had been ignored (or deemed unimportant) for over a hundred years.[28] It was also argued that the executive branch of the government provides an additional and sufficient review of constitutionality through the Lieutenant-Governor's power to withhold assent to a unilingual bill, or to reserve the bill for the signification of the "Governor General's pleasure". But the Supreme Court, to whom the matter was referred by a worried federal government,

---

[26] British law was clear that such investigation could not be undertaken: *R. v. Irwin*, [1926] Ex. C.R. 127; *British Railways Board v. Pickin*, [1974] A.C. 765 (H.L.(E.)). For Canada, see William E. Conklin, "Pickin and its Applicability to Canada" (1975) 25 *U. of T. L.J.* 193; Katharine Swinton, "Challenging the Validity of an Act of Parliament: the Effect of Enrolment and Parliamentary Privilege" (1976) 14 *Osgoode H. L.J.* 345. The Canadian situation is different in that written procedural requirements can be (and are) part of superior written provision.

[27] This is also the explanation for the application of the traditional law of parliamentary procedure. Chief Justice Lamer has recently suggested that a legislative assembly could well be the "court of competent jurisdiction" for purposes of hearing a *Charter* claim (and granting a remedy) in the application of a question deemed to be one of inherent parliamentary privilege: *New Brunswick Broadcasting Co. v. Nova Scotia*, [1993] 1 S.C.R. 319, 366 (Lamer C.J.'s reasons are separate from those of the majority). This case decides that inherent privileges are not subject to judicial review under the *Charter* because they have the same constitutional status as the *Charter*.

[28] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721. The Court quotes from the factum of the Attorney General of Manitoba, at 740.

was not prepared to leave things out of its reach. In the unanimous reasons of the Court, this is expressed in no ambiguous language:

> The overall effect of implementing the suggestion of the Attorney General of Manitoba would be to insulate the Legislature's failure to comply with s. 23 of the *Manitoba* [Constitutional] *Act, 1870* from judicial review. Such a result would be entirely inconsistent with the judiciary's duty to uphold the Constitution.[29]

The consequences of fulfilling that perceived duty could hardly have been more spectacular, for it meant that the Court would declare virtually all the statute law of the province invalid. As I explain in more detail in Part Four, the Court appealed to the Rule of Law to ground an "order" meant to avoid the impending situation of chaos. The Court perhaps never had been bolder in expressing "its responsibility as protector and preserver of the Constitution",[30] that is, its primary responsibility in the continuous and open-ended task of shaping a working vision of that constitution.

II.2 PROPER ISSUES AND RELEVANT MATERIALS

Closely related to the absence of a clear doctrine of the separation of functions in Canada is the absence in the case-law of a well-articulated concept of justiciability. One thing can be safely asserted, however: the vague notion of justiciability present in the Canadian tradition has very little to do with the question whether a matter is too "political" to be determined in the judicial forum.

The Supreme Court directly considered the issue whether "political questions" were to be rejected as improper for judicial consideration in

---

[29] *Id.*, at 754.

[30] *Id.*, at 753.

Operation Dismantle.[31] As I said earlier, the plaintiffs sought a declaration that the testing of cruise missiles on Canadian territory would violate their right to life, liberty, and security of the person guaranteed by s. 7 of the Charter of Rights. The action for a declaration was ultimately rejected by the Supreme Court because of the absence of a sufficiently demonstrable link between the duty of the government to act in conformity with the Charter, and the alleged violation. Justiciability was the subject of extensive argument, but the court elected merely to stress that political questions are not beyond judicial consideration. The majority judgment states, straightforwardly (*per* Dickson C.J.):

> The approach which I have taken is not based on the concept of justiciability. I agree in substance with Madame Justice Wilson's discussion of justiciability and her conclusion that the doctrine is founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes. *I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts.*[32] [Emphasis added.]

Wilson J., in concurring reasons, had written:

> The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts.[33]

In essence, the decision asserts that if there is a constitutional norm – in this case a Charter provision – that can be applied to the facts in a given case, the political implications of the issue will not prevent

---

[31] *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441.

[32] *Id.*, at 459.

[33] *Id.*, at 472.

the courts from performing their duty of judicial review. It is a clear recognition that the judicial determination of constitutional law sometimes has political implications, and that such implications should not hinder the performance of judicial review under the constitution.

But the limits to what courts are in a position to determine are also apparent in the judgment. First, there must be an ascertainable constitutional standard to be applied. In *Operation Dismantle*, this was allegedly provided by s. 7 of the Charter of Rights and Freedoms. Second, there must be an ascertainable set of facts to apply the standard to. The majority concluded in *Operation Dismantle* that the factual determination of whether the risk to the life or security of the appellants would be increased by the testing (through an alleged increase in the likeliness of a nuclear war) could not be undertaken. The link between the norm and the facts, insofar as it is conceived as a separate issue, must also be ascertainable:

> As stated above, I do not believe the alleged violation – namely the increased threat of nuclear war – could ever be sufficiently linked as a factual matter to the acknowledged duty of the government to respect s. 7 of the *Charter*.[34]

In practice, the question whether factual elements are ascertainable boils down to whether the claim is capable of proof, in a judicial forum, to an acceptable degree of certainty. In *Operation Dismantle*, the government's decision to allow the testing of cruise missiles "simply could not be proven to cause the alleged violation of s. 7...".[35]

What qualifies as a constitutional question susceptible of judicial determination, then, remains rather vague. On one side, there is the factual aspect which may be said to put functional limits on what courts

---

[34] *Operation Dismantle Inc. v. R.*, [1981] 1 S.C.R. 441, 459.

[35] *Id.*, at 459.

can determine with a credible degree of certainty. No more will be said here on that aspect. On the other side, the normative aspect requires that there be a constitutional standard to apply. The difficult question, it appears, is how the ensemble of constitutional standards that can be used in adjudication can be delineated. The case of *Operation Dismantle* seemed easy in this respect because the standard put forward by counsel was an enacted provision of the Constitution.[36] But what about constitutional standards not expressly mentioned in the Constitution? What about constitutional conventions and common law principles of a constitutional import? The question whether an ascertainable standard is available for constitutional adjudication thus points to the general theme of this thesis.

The inflection of the majority opinion in *Operation Dismantle* leaves the impression that discussing such issues at the preliminary stage of "justiciability" is perhaps superfluous. The Chief Justice boldly writes that though he is in agreement with Wilson J.'s discussion of that concept, his own approach is not based on justiciability. The message seemingly is, again, that courts will ensure that the constitution is respected no matter how far this will lead them into "questions" that might be considered "political" under an American-style "political question" doctrine. The only question left for the purpose

---

[36] Despite the extreme vagueness of s. 7 of the Charter, the Court did not doubt in *Operation Dismantle* that a constitutional standard actually existed in legal terms and could be violated. One could argue that the difficulty of establishing a violation lay in the vagueness of the constitutional standard as much as in the vagueness of the claim of fact that the risk of nuclear war was increased by the government's decision. Before the plaintiffs could "prove", in factual terms, a violation of "the right to life, liberty and security of the person", a convincing interpretation of the broad Charter provision in terms of more precise "rules" had to be offered, an interpretation which could show the way to a coherent set of judge-made rules giving life to the general principle. It was presumably the duty of the plaintiffs' counsel to offer such an interpretation to make their case.

of this thesis, then, is whether the constitution provides a judicially manageable standard. The question raises the major difficulty in jurisprudential enquiries of defining what is to count as relevant normative material for guiding adjudication. This means that in Canada, theories of adjudication meant to explain the proper basis for decision in "hard cases" are directly relevant to, and play an important role in, the determination of which cases can be brought to the judicial forum. Such theories of adjudication usually offer definitions of what normative material should guide a court in deciding a hard case brought to it under formal and partly independent rules regarding the existence of an actual controversy between directly interested parties. The scope of such formal rules being extremely limited in the context of Canadian constitutional adjudication, the definition of what is to count as relevant normative material here also serves to define which cases courts may decide. Also, the fact that the Canadian constitution is only partly written makes the definition of what is to count as relevant normative material more difficult, at least at the first level of assessment. To take a standard example, a Dworkinian "rights thesis" here would serve not only to define what considerations a court may appeal to in deciding a hard case under a written constitution; it would also sometimes determine indirectly which questions may be decided in the judicial forum, having regard to the availability of relevant normative material (as defined by the theory).

The fact that the constitutional standard at issue in *Operation Dismantle* was a "right" means that the decision lends itself to a "rights-based" interpretation of what the Supreme Court treats as relevant normative material. This interpretation was recently suggested by Allan in the course of an argument proposing a variant of Dworkin's

rights thesis for British public law.[37] Making use of judicial authorities from various countries of the Commonwealth, Allan argues that the essential characteristic of judicial review is a concern, in court, "for the rights and interests of the applicant, as opposed to the merits of the relevant action or decision as a matter of public policy".[38] This judicial concern is linked in its basic form to what Allan terms "the general right to fair treatment at the hands of the state". His argument is grounded on the Dworkinian distinction between principle and policy, that is, between the protection of rights and the promotion of *collective* interests in decision-making.[39] Following Dworkin, Allan defines the proper scope of judicial decision-making as the determination and enforcement of rights (the application of principle, in Dworkin's terms) as against policy choices, which are properly made by other organs of the state. With respect to justiciability, Allan writes:

> If, then, public law is understood primarily as protecting individual rights – including the right to fair treatment – against excess or abuse of power, there is little room for any independent theory of justiciability: the only question is whether the applicant can establish the violation of right which he alleges.[40]

This question, indeed, seems to be the one which the Court chose to address in *Operation Dismantle*. Also, the Court's assertion that the decision whether a Charter right had been violated was "no doubt" a decision for the courts even where the issue could otherwise be

---

[37] T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundation of British Constitutionalism*, Oxford: Clarendon Press, 1993. Allan discusses Wilson J.'s (concurring) reasons in *Operation Dismantle* at 215-16.

[38] *Id.*, at 212.

[39] Ronald Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977, pp. 81, 90-91; also in *Law's Empire*, London: Fontana, 1986, pp. 221-24, 244, 338-39.

[40] *Supra*, at 214.

considered to be "of a political or foreign policy nature" would seem at first sight to bear out Allan's interpretation. And so would the statement of the Supreme Court in *Reference re B.C. Motor Vehicle Act* that the principles of fundamental justice "do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system".[41] But on closer examination it appears, at least in the Canadian context, that an opposition between "principle" and "policy" might not be conducive to clear thinking about the role of the courts.[42]

It is unfortunate that Allan did not address MacCormick's general remarks on Dworkin's thesis. MacCormick makes a limpid argument that principle and policy can be opposed only at the price of stipulating definitions that are out of touch with the common understanding of such terms as well as with their use in law-related discussions.[43] He explains that the "artificial" opposition confuses the *policy*, a complex of actions articulated towards a given goal, with the *goal* of that policy (the *policy-goal*).[44] Once that distinction is made, it becomes clear that stating a principle (taken in the ordinary sense of "a relatively general norm which from the point of view of the person who holds it as a principle, is regarded as a desirable general norm to adhere to, and which thus has explanatory and justificatory force in relation to

---

[41] [1985] 2 S.C.R. 486, 503.

[42] On Dworkin's distinction generally, see Donald H. Regan, "Glosses on Dworkin: Rights, Principles and Policy" (1978) 76 *Mich. L.R.* 1213, 1234-61.

[43] Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978, p. 260 (hereinafter *LRLT*).

[44] *LRLT*, at 262-63. See also Geoffrey Marshall, "Positivism, Adjudication, and Democracy" in Peter M.S. Hacker & Joseph Raz (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, Oxford, Clarendon Press, 1977, p. 133, at 136-37.

particular decisions, or to particular rules for decision")[45], is framing a possible policy-goal.[46] This is why it makes perfect sense to write, as MacCormick points out by way of example, "both that the British Courts have a standing policy of securing fairness in judicial and quasi judicial determinations of all sorts, and that the principles of natural justice are important principles of Scots and English law".[47] Similarly, while the Supreme Court of Canada can write generally that the "principles of fundamental justice" do not belong with "general public policy", it still makes perfect sense to speak of "the policy" chosen by the Court in the application of such general principles. This goes to show that it would indeed be "singularly eccentric to commit oneself to Dworkin's prescriptions for the usage of the terms 'principle' and 'policy', since to do so consistently would be to make unsayable all manner of things which are perfectly sayable within the ordinary usages of lawyers, philosophers and indeed laymen".[48] MacCormick's argument shows that the distinction between considerations of policy and considerations of principle as defined by Dworkin is not workable in a theory which purports to be both descriptive and normative.[49] As MacCormick explains elsewhere, a more appropriate distinction would define rights as concerning "the enjoyment of goods by individuals separately, not simply as members of a collectivity enjoying a diffuse common benefit in which all participate in indistinguishable and

---

[45] *LRLT*, at 260.

[46] *LRLT*, at 264.

[47] *Ibid.*

[48] *LRLT*, at 260.

[49] *Taking Rights Seriously*, *supra*, at 350-53.

unassignable shares".[50] That definition fits the materials and makes it plain, as will shortly appear, that Canadian courts cannot be said – as Allan would suggest, in line with Dworkin's thesis – to be concerned only with rights ("principle") and not at all with diffuse collective interests ("policy").[51]

Dworkin himself notes a possible limitation of this aspect of his thesis in cases where it cannot be assumed, as he does for all standard civil cases, that one party has a right to win.[52] He offers the example of criminal cases where it may be said that the accused has a right to be acquitted when innocent, but where the prosecution cannot assert a right to have the guilty convicted. He notes, without committing himself to saying that it is proper, that in such cases courts might sometimes want to base their decisions on "policy" considerations. He gives the example of a hard case turning on the admissibility of evidence in a criminal trial, which a higher court might decide in favour of the accused not because the accused has a right to that decision, but in order to deter police officers from collecting such evidence in the future.[53] Remaining non-committal, Dworkin says that he merely wants to point out how the "geometry" of a criminal case differs from that of the

---

[50] Neil MacCormick, "Rights in Legislation" in Hacker & Raz, *supra*, p. 189, at 205.

[51] *Taking Rights Seriously*, at 84; *Law's Empire*, *supra*, at 244. For an argument against Dworkin's distinction with respect to the respective role of courts and legislatures, see John Finnis, "A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence" (1985) 71 *Proc. Brit. Acad.* 303, 308-16.

[52] *Taking Rights Seriously*, *supra*, at 100.

[53] The case is *Mapp v. Ohio* (1961), 367 U.S. 643, which the Supreme Court interpreted as a policy decision in *Linkletter v. Walker* (1965), 381 U.S. 618.

"standard civil case" (which here serves as his analytical "central case").[54]

In Canada, established sources apparently leave little scope for such theorising about the effect of "geometry" on the use of "policy" considerations. Here the Constitution prescribes, in effect, that diffuse collective interests should be considered in the determination of whether evidence should be admitted. The enforcement section of the Charter provides as follows:

> 24. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, *the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.*[55] [Emphasis added.]

The envisaged consequences of the decision which this section seems to mandate should determine the case look rather like the "policy" considerations Dworkin says might be used "in favour of the accused".[56] For instance, the consideration of future police behaviour which Dworkin specifically has in mind is recognised by the Supreme Court as an important factor of decision under s. 24.(2). In *Collins*, the Court stressed that it must "dissociate itself from the conduct of the police" in cases of "flagrant and serious violation of the rights of an

---

[54] Dworkin addresses criminal cases in *A Matter of Principle*, Oxford: Clarendon Press, 1986, pp. 72-92.

[55] Note that in view of the French version of this section, the Supreme Court takes the phrase *would bring* to mean *could bring*: *R. v. Collins*, [1987] 1 S.C.R. 265, 276.

[56] *Taking Rights Seriously*, *supra*, at 100.

individual";[57] the Court later explained in *Greffe*, that in this respect regard must be had for long-term consequences:

> ... disrepute results from ... judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies. As well, ... it is the long-term consequences of regular admission or exclusion of the evidence on the repute of the administration of justice that must be considered.[58]

Such consideration of consequences works both ways. For this section of the Charter not only suggests that courts can properly act upon diffuse collective interests; it suggests that the actual effect given to individual rights (in terms of remedy) can sometimes properly depend on such considerations. Dworkin would perhaps now say that the argument of deterrence with respect to the conduct of police officers is actually one of "principle" (since arguments of principle can also appeal to consequences).[59] In this case, Dworkin might say that the considerations mandated by the Charter appeal to the abstract rights of other people which might be threatened in the future administration of the law. But using the notion of rights in this way, to cover interests of a more diffuse kind, threatens to collapse the whole distinction.[60]

Whatever may be said about s. 24 of the Charter, it otherwise seems quite clear that although Canadian sources do recognise a distinction between rights and diffuse collective interests, that distinction has

---

[57] *R. v. Collins*, [1987] 1 S.C.R. 265, 288.

[58] *R. v. Greffe*, [1990] 1 S.C.R. 755, 784; 795-96 (Lamer C.J. for the majority). See also *R. v. Dersch*, [1993] 3 S.C.R. 768, 779.

[59] *Taking Rights Seriously*, at 294-301.

[60] See Lawrence A. Alexander & Michael D. Bayles, "Hercules or Proteus? The many theses of Ronald Dworkin" (1980) 5 *Social Theory and Practice* 267, 289-91. See generally John Bell, *Policy Arguments in Judicial Decisions*, Oxford: Clarendon Press, 1983, pp. 207-13.

little to do with the definition of the judicial role.[61] Section 1 of the Charter makes all the rights and freedoms which it guarantees subject "to such reasonable limits ... as can be demonstrably justified in a free and democratic society". Under the criteria formulated by the Supreme Court under s. 1, a court must first evaluate whether the objective of the measure which abridges a right is sufficiently important to warrant the restriction, and, second, it must determine whether the means chosen to achieve the objective are appropriate in terms of proportionality in relation to the objective pursued and in relation to the effect on Charter rights.[62] Now, no one can deny that all of this often involves a kind of weighing of collective goals advanced by governments as against the listed rights those goals might affect. It is a balancing of diffuse community interests and individual interests which is squarely put in the hands of the courts.[63] It is very hard to see how this kind of balancing could be reconciled with the view that courts may not deal with diffuse collective interests.

The argument has thus far dealt with cases where individual rights are at issue. The fact that the "rights thesis" cannot hold water in the context of Canadian constitutional adjudication is even more obvious where no private party is to be found before the court. In this respect,

---

[61] For a view from the Bench, see Beverly McLachlin, "The Role of Judges in Modern Commonwealth Societies" (1994) 110 *L.Q.R.* 260, 262-65.

[62] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[63] See *R. v. Oakes*, [1986] 1 S.C.R. 103, 139: "in each case courts will be required to balance the interests of society with those of individuals or groups"; see also *R. v. Swain*, [1991] 1 S.C.R. 933, 997. Independently of s. 1, a similar kind of balancing occurs in the judicial definition of the "principles of fundamental justice" mentioned in s. 7: *Cunningham v. Canada*, [1993] 2 S.C.R. 143, 152-53. See also *Rodriguez v. B.C. (A.G.)*, [1993] 3 S.C.R. 519, 592-94 (Sopinka J. for the majority). Note that it is not yet clear when, and to what extent, the "balancing" should be left to the analytical stage of s. 1, where the state bears the burden of providing a justification; see the dissenting opinion of McLachlin J. in *Rodriguez*, at 616, 620-23.

one may recall that, for over a century following confederation, the primary constitutional function of the Supreme Court has been the resolution of institutional disputes about the distribution of powers between governments. The reference procedure was widely used to that purpose, which meant that, in relation to such issues, the role of private litigants was minimal. Also, even outside the reference framework, the relaxation of the rules of standing for constitutional adjudication clearly meant that courts would not limit themselves to dealing with individuals. From the "traditional mode" of operation where courts "determine rights as between individuals", enforce "the rights of individuals in their relationships with the state", or decide "whether an individual is guilty of a crime",[64] Canadian courts have switched to the *Thorson* mode where they may enforce not only the rights and duties of individuals, but also uphold the interests of the "citizenry" in the invalidation and prohibition of unconstitutional state action.[65] A theory which limits the scope of judicial activity to the enforcement of "rights", if conceivable under the "cases and controversies" requirement of the United States Constitution or under the United Kingdom unitary constitutional structure, appears simply irrelevant in the Canadian context.[66]

---

[64] *Canadian Council of Churches v. Canada (M.E.I.)*, [1992] 1 S.C.R. 236, 248-49.

[65] *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138, 163.

[66] That which always remains relevant, however, is the ensemble of constraints of formal justice imposed by the Rule of Law. Even in a case argued on "policy" grounds as between institutions, or as between the government and an individual seeking the protection of public interests, courts keep to an evaluation of the merits of the proposed ruling *in generic terms*: see *LRLT*, at 263. Indeed, such cases, where *ad hoc* arguments are not likely to dominate the proceedings, naturally favour rulings justified in generic terms.

Where does that leave us? As should now be apparent, the identification of constitutional questions suitable for judicial determination is not regulated by a clear doctrine in Canada. It does not depend on whether the issue has political implications, and it cannot depend on a notion that courts deal with rights not policy. Functional constraints, however, are always present in the form of limits in the judicial gathering of reliable and relevant information insuring a measure of certainty on factual matters. But it is the requirement implied in *Operation Dismantle* that a constitutional standard exist (and be capable of being linked to a set of facts) which is most interesting for this thesis. Strayer ventured the following cautious definition:

> ... within loose limits it is possible to identify questions suitable for the court: those questions of fact capable of proof by admissible evidence to a reasonable degree of certainty; and those questions of law which may be determined on the basis of enacted law or by analogy and deduction from already established principles.[67]

The attitude of the courts over the last fifteen years does not allow a more precise definition, and it certainly seems that the Supreme Court would not commit itself to anything narrower. The difficulty lies in the fact that the status of principles is far from being clear in the complex structure of the Canadian constitution. This difficulty will here lead to an investigation of the use of principles through conventions and unwritten law in constitutional adjudication.

That investigation will have to take into account that the Canadian judiciary does not operate in the "traditional mode" of common law courts when it comes to constitutional disputes. The separation of functions in Canada is weak, courts do not limit themselves to the determination of actual "cases and controversies" directly involving the rights and

---

[67] *CCC*, at 218.

duties of individuals, and "political questions" are not excluded. Canadian courts have assumed a primary role in the determination of constitutional disputes, a role which knows few of the usual limitations present in a traditional conception of the judicial function. The *Patriation Reference*,[68] with which the next chapter begins, confirmed and strengthened this unique role as Canadian higher courts gave advisory opinions on constitutional conventions. This can be seen as a peak in the developments which have led to the broad notion of "protector and preserver" of the constitution, a notion which the Supreme Court could directly appeal to in the later *Manitoba Language Rights Reference*.[69]

---

[68] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

[69] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 753.

Chapter III

Constitutional Conventions in Court

Constitutional conventions may be defined as political rules of behaviour accepted as obligatory by those involved in the working of the constitution.[1] They supplement the bold outlines of strict constitutional law so as to bring constitutional practice into accord with the political morality accepted at any given time. An often cited example of a convention in the British system of government, used by Dicey in his treatise,[2] is that although the Monarch has the legal power to refuse assent to any Bill duly passed by the Houses of Parliament, as a matter of convention this will not be done. A convention very often thus operates as a restriction on an otherwise unfettered legal power. This usually makes it inconsistent, in one legal sense, with a rule of law.[3]

---

[1] See Kenneth C. Wheare, *Modern Constitutions*, 2d ed., Oxford: Oxford Univ. Press, 1966, p. 122. The "judicial enforcement" aspect often included in the definition of conventions is discussed in this Chapter. Note that there exist "power-conferring" as well as "duty-imposing" conventions; in the former case, the "obligatory" component is shifted to actors not directly targeted by the convention: see Geoffrey Marshall, *Constitutional Conventions*, Oxford, Clarendon Press, 1984, pp. 7-8.

[2] *Introduction to the Law of the Constitution*, 8th ed. (last by the author), London: MacMillan, 1927, p. 25.

[3] Conventions and rules of law are usually consistent in one other legal sense: they can be complied with simultaneously. The Monarch complies with both the law and the convention when assenting to Bills duly passed by the Upper and the Lower House. This important question of consistency or conflict between law and convention will be discussed more

The introduction of the distinction between law and convention is usually credited to Dicey.[4] He wrote that the "law of the constitution" consists "of rules enforced or recognised by the Courts", whereas the "conventions of the constitution" consist of "customs, practices, maxims, or precepts which are not enforced or recognised by the Courts".[5] The sanction for a breach of convention is political, it is often said, not legal. Despite repeated criticism by writers such as Jennings,[6] the distinction is still widely recognised as relevant,[7] though the distinguishing criterion has come to focus on judicial enforcement only, leaving judicial recognition aside.[8]

It is the framework of the reference procedure that provided the Supreme Court of Canada with an opportunity to deal directly with

---

fully in Chapter IV.1.

[4] Dicey's treatise, first published in 1885, included the most comprehensive treatment of constitutional conventions then available, but the distinction between law and convention had been noted earlier (by Burke and Austin, for instance): see Hood Phillips' historical account in "Constitutional Conventions: Dicey's predecessors" (1966) 29 *Modern Law Review* 137.

[5] *Supra*, at 413.

[6] Ivor Jennings, *The Law and the Constitution*, 5th ed., London: Univ. of London Press, 1959, pp. 103-32.

[7] For a thorough discussion of this see Colin Munro, "Laws and Conventions Distinguished" (1975) 91 *L.Q.R.* 218.

[8] This is exemplified by the definition of conventions offered by Geoffrey Marshall and Graeme Moodie in *Some Problems of the Constitution*, London: Hutchison, 1959, p. 88: "By conventions of the constitution, we mean binding rules of constitutional behaviour which are considered to be binding by and upon those who operate the Constitution, but which are not enforced by the law courts (although the courts may recognise their existence), nor by the presiding officers in the Houses of Parliament". Colin Munro stressed that Dicey did not mean to say that conventions could never be "recognised" by a court (Dicey wrote, as we have seen, that conventions "are not enforced or recognised by the courts"): "Dicey on Constitutional Conventions" [1985] *P.L.* 637, 646-47.

conventions in the *Patriation Reference*;[9] the case has made constitutional convention a necessary element in the study of Canadian constitutional adjudication. The constitutional saga surrounding this important opinion need not be set out here in much detail, but some background information will be useful as the *Patriation Reference* is extensively discussed throughout this thesis. The short version of the story begins in February 1980 with the announcement by the federal government that it would secure the patriation of the constitution and the adoption of a constitutional Charter of Rights binding on all governments, and that it would do so with or without the assent of the ten provinces. In essence, the method would be the same as that which had been used to secure amendments not affecting the powers or rights of provincial legislatures or governments, that is, a joint resolution of the two Houses of the federal parliament adopted without provincial consent and forwarded to Westminster for enactment. A constitutional package was prepared and the proposals were introduced in the federal parliament. Eight provinces opposed the federal project and the issue was submitted for advisory opinion to the courts of appeal in Manitoba, Newfoundland, and Quebec.[10] On appeal the proceedings were joined and

---

[9] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

[10] The questions in the Manitoba reference were as follows:

> 1. If the amendments to the Constitution of Canada sought in the "Proposed Resolution for a joint Address to Her Majesty the Queen respecting the Constitution of Canada", or any of them, were enacted, would federal-provincial relationships or the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments be affected and if so, in what respect or respects?
>
> 2. Is it a constitutional convention that the House of Commons and Senate of Canada will not request Her Majesty the Queen to lay before the Parliament of the United Kingdom of Great Britain and Northern Ireland a measure to amend the Constitution of Canada affecting federal-provincial relationships or the powers, rights or privileges granted

the Supreme Court answered, *inter alia*, questions concerning the existence and application of a constitutional convention about the requirement of provincial consent.

III.1 OBJECTIONS

Quite predictably, objections were raised before the Supreme Court as to the appropriateness of the judicial forum for the determination of constitutional conventions. It was argued that the discussion of such

---

> or secured by the Constitution of Canada to the provinces, their legislatures or governments without first obtaining the agreement of the provinces.
>
> 3. Is the agreement of the provinces of Canada constitutionally required for amendment to the Constitution of Canada where such amendment affects federal-provincial relationships or alters the powers, rights or privileges granted or secured by the Constitution of Canada to the provinces, their legislatures or governments.

The same questions were posed in the Newfoundland reference, with the addition of a fourth question concerning Newfoundland only. The questions in the Quebec reference differed in that they asked not whether constitutional rules *forbade* the federal project but whether constitutional rules *empowered* federal authorities to proceed as planned (the translation is from the Supreme Court judgment):

> A. If the *Canada Act* and the *Constitution Act, 1981* should come into force and if they should be valid in all respects in Canada, would they affect:
>
> (i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
>
> (ii) the status or role of the provincial legislatures and government within the Canadian Federation?
>
> B. Does the Canadian Constitution empower, whether by statute, convention or otherwise, the Senate and the House of Commons of Canada to cause the Canadian Constitution to be amended without the consent of the provinces and in spite of the objection of several of them, in such a manner as to affect:
>
> (i) the legislative competence of the provincial legislatures in virtue of the Canadian Constitution?
>
> (ii) the status or role of the provincial legislatures or governments within the Canadian Federation?

issues of constitutional ethics as were involved in the reference questions did not belong in the courts.

Counsel for the federal government covered the main grounds for argument. It was submitted that the determination of conventions was not for the judiciary "because they are imprecise and flexible", and because they are "purely political" rules.[11] Precedents of some weight were also adduced and interpreted as precluding the Court from directly addressing a convention. In *Reference re Disallowance and Reservation of Provincial Legislation*,[12] the Supreme Court had refused to give an opinion on whether constitutional usage had affected the powers of disallowance granted in the *B.N.A. Act, 1867*. The Court had there stated that the powers under the written constitution were subsisting; and to the further question whether they were subject to limitations or restrictions, the Court had said that it was "not concerned with constitutional usage or constitutional practice".[13] As for the Judicial Committee of the Privy Council, it had declined in *Madzimbamuto v. Lardner-Burke* to declare or apply a constitutional convention in a case following the unilateral declaration of independence of Southern Rhodesia in 1965.[14] It was a recognised convention that Westminster would not enact legislation for Southern Rhodesia without the request and consent of its government. In reaction to the declaration of independence, Westminster did legislate in apparent violation of the convention, and the Judicial Committee of the Privy Council, sitting as a Rhodesian court, was ultimately asked to consider the legal force of that

---

[11] Factum of the Attorney General of Canada, p. 31.

[12] [1938] S.C.R. 71.

[13] *Id*, at 78.

[14] [1969] 1 A.C. 645 (P.C.).

legislation in Southern Rhodesia. Upholding the validity of the statute, the Judicial Committee wrote:

> It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid. It may be that it would have been thought, before 1965, that it would be unconstitutional to disregard this convention. But it may also be that the unilateral Declaration of Independence released the United Kingdom from any obligation to observe the convention. *Their Lordships in declaring the law are not concerned with these matters. They are only concerned with the legal powers of Parliament.*[15] [Emphasis added.]

The situation faced by the Supreme Court might have seemed very similar indeed, and some expected a similar reaction. These important preliminary objections were rejected, however, and the Supreme Court proceeded to offer a complete opinion on the conventional issue. A number of reasons were given.

First, the main question was, "at least in part, constitutional in character",[16] and therefore legitimately called for an answer by the Court.[17] As I have pointed out, Canadian higher courts see themselves as the "protector and preserver" of the constitution in a sense that goes beyond their purely judicial functions. Second, the statutory bases upon which the questions were put to the courts were broad enough to cover

---

[15] *Id.*, at 723.

[16] This was approvingly quoted from the reasons of the Chief Justice of Manitoba in the same case: *Reference re Questions concerning the amendment of the Constitution of Canada*, [1981] 2 W.W.R. 193, 204.

[17] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 884.

such questions; "any matter" or "any question" could be referred.[18] Third, one of the other questions put to the courts was whether the alleged constitutional convention had crystallised into law; the consideration of the convention was thus a useful step in ascertaining the law.[19] Finally, the Supreme Court mentions that courts have always of their own motion recognised, but not enforced, conventions.[20]

The first two reasons are valid as far as they go and they are not unrelated. Over the years, the Canadian courts' willingness first to recognise the constitutional validity of the reference procedure, and then to construe its provisions liberally, has favoured the development of a strong tradition of advisory opinions which has, in turn, encouraged the development of the "constitutional guardian" conception of the judiciary. Under that conception, the duty of the Court to rule on the convention flows quite naturally, in the reasons of the majority (convention), from the previously stated equation: "constitutional conventions plus constitutional law equal the total Constitution of the country".[21] The courts see themselves as guardians of "the total Constitution". These reasons, one may think, impliedly discard *Madzimbamuto* on the basis of the narrower role of the Judicial Committee of the Privy Council in the Rhodesian context.

The third and fourth reasons, which regard precedents of "recognition" as opposed to "enforcement", do not fare as well. It is perhaps true that *Reference re Disallowance and Reservation of Provincial*

---

[18] *Id.*, at 767-68.

[19] *Id.*, at 885.

[20] *Ibid.*

[21] *Id.*, at 883-84. The equation summarises the thesis of Dicey, *supra*, at 22-24.

Legislation[22] may be seen, and set aside, as a case where the Court was basically "asked to hold that a convention has in effect repealed a provision of the *B.N.A. Act*".[23] No written provision was directly at issue in the *Patriation Reference*. It may also be true that the *notion* of convention had to be considered for the purpose of answering the submission that the alleged convention had crystallised into law. Indeed, this was done in the first majority opinion (on law).[24] But since the very possibility of *any* convention crystallising into law had been therein rejected, a ruling on the definition and application of the particular convention of provincial consent in a second majority opinion (on convention) was clearly not useful, let alone necessary, for the consideration of the question of law. This goes to the heart of the fourth reason: that courts have always recognised conventions. The Supreme Court itself points out that conventions have often been judicially recognised *in a law-application context*. For instance, a convention could be referred to with a view to establishing the constitutional context in which an Act of Parliament was passed, in order to ascertain the intention of Parliament with respect to such Act.[25] But the Court does nothing even remotely resembling that in the reasons of the *Patriation Reference*. What the Court does do is far more

---

[22] [1938] S.C.R. 71.

[23] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 885.

[24] It would be misleading to say that a majority runs through the issues in the *Patriation Reference*. There is a majority of seven to two that the procedure envisaged by the federal government was *legally valid* (majority (law)); and a majority of six to three that "a substantial measure of provincial consent" was required for the procedure to be "conventionally valid" (majority (convention)). Only a minority of four judges signed both opinions (Dickson, Beetz, Chouinard and Lamer JJ.).

[25] See *Copyright Owners Reproduction Society Ltd. v. E.M.I. (Australia) Pty. Ltd.* (1958), 100 C.L.R. 597.

surprising. The first majority (law) provides a complete treatment of the legal issue where the possibility of crystallisation is considered and rejected, and where the federal package (i.e.: its submission to Westminster without provincial consent) is declared constitutionally *legal*. Then, the second majority (convention) proceeds in a separate opinion to define a convention with a view to its application *qua* convention, with a view, that is – since the law is otherwise settled – to the guiding of political actors under a non-legal rule. Under that rule, proceeding with the package without provincial consent was *unconstitutional*.[26] Clearly, none of the precedents referred to in the opinion had dealt with conventional rules in that way.

A year later, the fact that the third and fourth reasons did not have much sway in the Court's actual decision to deal with conventions was made abundantly clear in the *Quebec Veto Reference*,[27] where the Court gave a further opinion on the convention of provincial consent, and did so when no *legal* question was at issue. The Quebec government had referred to the Quebec Court of Appeal the question whether the constitutional convention which the Supreme Court had said required a "substantial measure" or a "substantial degree" of provincial consent for patriation required the assent of Quebec.[28] As a matter of *law*, the

---

[26] The majority opinion on convention begins at 874. See Peter W. Hogg, "Constitutional Law – Amendment of the British North America Act – Role of the Provinces" (1982) 60 *Can. Bar Rev.* 307, 324, who stresses the point that the Court could have had no other purpose than the guiding of political actors. See also Richard S. Kay, "Courts as Constitution-Makers in Canada and the United States" (1982) 4 *Sup. Ct L.R.* 23, 28.

[27] *Reference re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793.

[28] The main argument advanced by counsel for the the Quebec government was that the importance and special position of the Province of Quebec in the Canadian federation was such that the degree of provincial consent could not be said to be "substantial" where Quebec was excluded. It was by no means obvious that the phrases "substantial measure" and "substantial degree" should refer to numerical calculations. A good

validity of the patriation process (which was by then completed) had already been upheld in the first reference; the questions put in the second reference were therefore purely conventional.[29] The reasons given by the Court for answering in this case were more straightforward: the constitutional issue was important and it was highly desirable to dispel any doubt over it.[30] It was clear from the first reference that the passing of the resolution initiating amendment was "unconstitutional" if in breach of a convention. The nagging doubt felt in professional circles was whether the result of the patriation process was indeed "unconstitutional" despite its admitted legal validity, so that Canada might have something so unsettling as an "unconstitutional constitution". The Court's reaction in this case can only be justified by the first and most important reason it gave in the first reference for venturing in the territory of conventions: the question was constitutional in character and could therefore be dealt with by the Court.

III.2 SOME IMPLICATIONS

One of the most surprising aspects of the *Patriation Reference* is that while the substance of the main opinion firmly asserts the notion of a watertight distinction between convention and law, the fact that in the

---

analysis of the arguments advanced at that stage of the patriation eposode is Andrew Petter's "Maître Chez Who? The Quebec Veto Reference" (1984) 6 *Sup. Ct L.R.* 387.

[29] The Attorney General for Quebec had recognised before the Court of Appeal that a favourable opinion would only have political consequences: *P.G. du Québec et P.G. du Canada (dans l'affaire d'un renvoi à la Cour d'appel relatif à une résolution concernant la constitution du Canada*, [1982] C.A. 33, 37 (Que. C.A.).

[30] The Court also mentioned that the legislation directed the Court to treat an advisory opinion given by a court of appeal as a "judgement" on appeal (a reason not available to the Quebec Court of Appeal).

reasons of the Court a convention is directly defined and, though not strictly enforced, virtually applied to a factual situation arguably brings that concept very close to the boundaries of the law.[31] Given that the asserted distinction between the two types of norms focuses heavily if not exclusively on judicial enforcement, one might be tempted to question its significance where court pronouncements are made on both types. The Court expressly leaves the creation and enforcement of conventions to political actors and maintains that a court can recognise and define them. But in this context, the lines between creation, definition, application, and enforcement seem rather thin. One may wonder how far the Court has in fact gone in the business of creation and enforcement by giving the convention a definition and by virtually applying it to the facts.

The Court did not limit itself to *defining* the convention of provincial consent. There was a set of facts agreed upon by all parties before the Court and this included the fact that the federal patriation proposal was supported by two provinces only. The Court first (in the reasons, that is) found that there was a convention which required "at least a substantial measure of provincial consent".[32] So far we have a definition. The reasons then go on to assert that provincial consent as it stood – the agreement of two provinces – was clearly not sufficient.[33] The convention was thus first defined, and then applied to the facts, to finally produce a declaration that the federal

---

[31] This striking effect in due in part to the formal arrangement of the reasons. Only four judges signed both majority opinions. Had the usual practice for split-decisions been followed, these four judges would have prepared reasons covering both the conventional and the legal issues and would have had to make their rulings more consistent.

[32] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 905.

[33] *Ibid.*

government's plan as it stood, in the form of a proposed resolution assented to by two provinces only, was unconstitutional in the conventional sense.[34]

What difference would it have made in terms of enforcement if the "declaration of unconstitutionality" had been based on a legal rule, as a minority on the Court would have had it? Very little, as it turns out, because the Supreme Court's treatment of the issues in this case only amounts to an advisory opinion which is by definition not binding or enforceable. In giving an advisory opinion on a *legal* question like the constitutional (law) validity of a statute, the Court goes through the very same process: (1) identification/definition of the constitutional rule; (2) application of the rule to the factual situation brought about by the (projected) statute. The opinion which then follows is not enforceable, but it is usually complied with by political actors and followed in future judicial deliberations. The very same thing can be said of the opinion on the convention given in the *Patriation Reference*.[35]

One effectual way, then, of keeping a distinction between legal and conventional norms in constitutional adjudication would have had the Court stop at the first step (identification/definition) when dealing with conventions, since the only remaining sense of "enforcement" in a reference is the application, *in the written reasons* of the majority, of

---

[34] The Court noted that it is "appropriate" to describe behaviour violating a convention as "unconstitutional": *Id.*, at 883.

[35] In a reply to a last-resort request by the premier of Quebec addressed to Downing Street before the passing of the patriation package through the United Kingdom Parliament, the Leader of the House of Commons stated: "We have given weight to the decision of the Supreme Court of Canada of 28 September 1981. We believe that the agreement of nine out of ten provinces constitutes a substantial measure of support for the proposals and we therefore feel we would not be justified in declining to act upon the request by the Federal Government and Parliament." Quoted from Marshall, *Constitutional Conventions*, *supra*, p. 199.

the rule to the facts. But the Supreme Court elected to move on to the second step, and, consequently, the distinction in such cases, as far as enforcement goes, merely hinges on the Court's assertion that one norm is legal and the other one is not.

Arguably, the Court's say-so should be sufficient to support the distinction since it indicates that the legal norm, as opposed to the conventional norm, *could* be enforced through proper judicial proceedings. But in the context of Canadian constitutional adjudication, the concept of "enforcement" calls little to mind beyond the idea of a judicial declaration of the constitutional situation. "Declaration" comes under the title "Remedies" in English law books.[36] Does that count as enforcement?[37] It certainly is the most favoured way of settling constitutional law disputes in Canada.[38] The tradition of respect paid to the courts by governments goes a long way to explaining that this has so far been sufficient. But what of the possibility that a government decide simply to ignore a judicial declaration?

Courts, surely, could then undertake to rule in every case according to the declaration, or set out to issue prerogative writs or injunctions against government officials.[39] But compliance with an

---

[36] See for instance F.H. Lawson, *Remedies of English Law*, 2d ed., London: Butterworth, 1980.

[37] According to Colin Munro, the answer is yes: "Dicey on Constitutional Conventions", *supra*, at 642-44. He grants that "enforcement", even if it does not necessarily or even usually imply "specific" enforcement, "may not be the most appropriate way to describe a court's role in respect of some of its functions or with regard to some kinds of law", adding, however, that "there is no difficulty in concluding that recognition of the legal quality of rules causes courts to react in characteristic and *distinctive* ways" (at 644).

[38] This is the case when advisory opinions are counted as declarations.

[39] See generally Robert J. Sharpe, *Injunctions and Specific Performance*, 2d ed., Toronto: Canada Law Book Inc., 1992, paras 3.1030-3.1530.

injunction or mandatory order, just like compliance with a declaration, is normally not brought about by force. The Supreme Court of British Columbia once held that it would not be proper to order the police to enforce an injunction, that it was for the persons in authority over the police to determine the appropriate course of action.[40] A *mandamus* might of course be issued in judicial review proceedings in the event of a neglect of duty on the part of police authorities; but that would involve no coercion. At a further stage, disregarded mandatory orders or injunctions may be followed by contempt of court rulings. Surely, the prospect of such measures does affect the behaviour of government officials. But a finding of contempt does not involve coercion unless a writ of sequestration or an order of attachment or committal is issued. And it is not obvious that such measures would be forthcoming as against government officials. Here I may simply make Jennings' point that the fallacy in Dicey's position on law and convention lies in the view that law can actually be *enforced* against the executive.[41] Envisaging the possibility of the use of force against a minister, Jennings found it "hard to believe that a Metropolitan policeman under the control of the Home Secretary would arrest the Home Secretary or one of his colleagues in order to put the Home Secretary or one of his colleagues into a prison controlled by the Home Secretary".[42] Such scenarios help understand why courts may be reluctant to back a contempt of court ruling against a government official with coercive measures. Thus, when the House of Lords decided that a minister could, in his official capacity, be found guilty of contempt, it was still maintained that "the Crown's

---

[40] *Can. Post Corp. v. L.C.U.C., Local 12* (1987), 15 B.C.L.R. (2d) 356.

[41] *The Law and the Constitution*, *supra*, at 131.

[42] *Id.*, at 132.

relationship with the courts does not depend on coercion", and that a "*finding*" of contempt should be sufficient because it demonstrates "that a government department has interfered with the administration of justice". It is "for Parliament", their Lordships continued, "to determine what should be the consequences of that finding".[43] The result is that the purpose of a contempt ruling against a minister – which is "not so much to punish an individual as to vindicate the rule of law" – "can be achieved equally by a declaratory finding of the court as to the contempt against the minister as representing the department".[44] Coercive measures "would clearly not be appropriate".[45]

Unless coercive measures against government officials are found appropriate, what difference can there be in terms of enforcement between convention and law? If the ultimate "enforcement" of the mandatory orders available for *legal* obligations amounts to all intents and purposes to a *declaration* that a government acted in disregard of the law and in contempt of a court's decision, what should one think of a judicial *declaration* (such as the majority (convention) opinion in the *Patriation Reference*) that in taking a particular course of action (defined in detail in the proceedings) a government would be acting *unconstitutionally*, in disregard of a fundamental principle of the constitution as now declared by the court?

The Appeal Division of the Federal Court, in *Bhatnager v. Canada*, was apparently prepared to go further than a mere "finding" of contempt. In that case the Minister of Employment and Immigration and the Secretary of State for External Affairs were found guilty of contempt of court by

---

[43] *M. v. Home Office* (1993), [1994] 1 A.C. 377, 425 (H.L.(E.)), *per* Lord Woolf.

[44] *Id.*, at 425-26.

[45] *Id.*, at 424.

the Appeal Division for failing to comply with an order to produce certain documents.[46] Having made that finding, the Court thought that some form of "penalty" might be called for:

> What, then, should the penalty be? Since no representations were made in this Court by counsel for any of the parties as to the nature of the penalty to be assessed, the matter should be referred back to Strayer J. for imposition thereof, if any, after appropriate representations by the party.[47]

Strayer J., in the Trial Division, had found that the ministers could not be held in contempt because there was no evidence that the court order had been brought to their attention.[48] When the matter was referred back to him, he decided to impose no penalty apart from an award of costs,[49] thus effectively leaving the matter where the House of Lords thought it should be left in *M. v. Home Office*. The Supreme Court later agreed with Strayer J.'s first judgment on the merits and found that contempt had not been established.[50] The Supreme Court thus assumed that a minister may be found guilty of contempt[51] but had no occasion to pronounce on the question of "penalty" or further coercive measures.

When, if ever, Canadian courts engage in taking coercive measures against government officials, we shall have a tangible difference between law and convention with respect to en*force*ment. Meanwhile, the

---

[46] *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1988] 1 F.C. 171 (A.D.).

[47] *Id.*, at 190.

[48] [1986] 2 F.C. 3 (T.D.).

[49] As reported in Supreme Court judgment, note below, at 223.

[50] *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217.

[51] The assumption is made with the apparently general – and important – qualification that the standards of criminal law apply so as to exclude vicarious liability.

conventions of the constitution are being used as constitutional standards for the "cooperative" resolution of disputes in the courts. Conventions may therefore be counted as conceptual instruments which the higher ranks of the Canadian judiciary are willing to use along with legal rules as a means to settle constitutional disputes[52].

One might ask, however, whether such use of constitutional conventions affects their nature. It is assumed in the *Patriation Reference* that conventions are evolved by political actors only and that a court's involvement in giving definitions of them does not change the situation. To many, this assumption will seem just as fictitious as the declaratory theory of the common law. One can always claim that the Court, in articulation the terms of a controversial convention, or, to use the words of the majority (convention), in giving it "such precision as is derived from the written form of judgment",[53] does not involve itself in that convention's development. But such a claim is simply notconvincing.[54] A good indication of this is the fact that the Court settled on a requirement of a "substantial measure" of provincial consent even though no one, among Canadian political actors and constitutional scholars, had ever suggested this before the issue had reached the courts.[55]

---

[52] It is true that this is dependent on the will of a government to refer questions to the Courts on conventions. But in a case of institutional dispute, chances are that one of the ten governments will have an interest in invoking conventions to make its case.

[53] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 885.

[54] This is particularly obvious in the subsequent *Quebec Veto Reference* (*Reference re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793.) where the same convention was defined with greater precision.

[55] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 905. A few people had made the suggestion before the references reached the Supreme Court, notably: U.K., H.C., "British North America

This problem is partly related to the Supreme Court's definition of the criteria for convention recognition. One might wonder if the Court, in laying down and perhaps freezing the applicable test of identification at a given point of time, is not thereby getting involved in the business of evolving – or engraving – conventions.[56] But the more interesting problem for this thesis is the normative status of the Court's pronouncements.

Without drawing conclusions as to its possible significance with respect to enforcement, Marshall has suggested a distinction between convention as "positive" and as "critical" morality for constitutional behaviour which may be helpful here.[57] At first sight, the opinion of the Supreme Court apparently purports to determine the convention requiring provincial consent basically as "a question of fact, to be established on the basis of historical events and expert factual evidence",[58] like purely descriptive analysts would envisage the matter. In other words, convention is seen as the positive morality of political actors and taken to be capable of "description" from some external viewpoint allowing the observer to remain quite neutral regarding the values and reasons behind the reported practices.[59] But that would have

---

Acts: The Role of Parliament", First Report of the Foreign Affairs Committee, HCP 42 (1980-81), 30 Jan. 1981; also, less clearly, Brian Schwartz, "General National Agreement: The Legal Sanction for Constitutional Reform in Canada" (1981) 6 *Queen's L.J.* 513.

[56] See the discussion in Rodney Brazier and St.John Robillard, "Constitutional Conventions: The Canadian Supreme Court Views Reviewed" [1982] *P.L.* 28, 30.

[57] *Constitutional Conventions*, *supra*, at 10-12.

[58] See Munro, "Dicey on Constitutional Convention", *supra*, at 646.

[59] Yves DeMontigny alludes to this problem, using Hart's terminology: "Preuve d'une convention constitutionnelle devant les tribunaux – Modification de l'Acte de l'Amérique du Nord – Rôle du Québec" (1983) 43 *R. du B.* 1133, 1137-38.

to be reconciled with Jennings' test for the establishment of a convention, a test which the Court unquestioningly adopted[60] (with uncharacteristic unanimity): (1) are there precedents?; (2) do the actors feel bound?; (3) *is there a reason for the rule?*.[61] An analyst "reporting" both a given practice and a general belief that the practice is binding will be concerned with (1) and (2), but not, in a strong and direct sense, with (3) as formulated by Jennings and the Court. As should be apparent from the Introduction, jurisprudence becomes both interesting and controversial when an analyst wishes to enquire about the reasons behind established patterns and to distinguish, say, conventions from constitutional usages of no normative import.[62] Hartian theorists, making use of the notion of "interpretive understanding" which purports to bring social science beyond the sterile description of patterns of behaviour into the explanation of normative social practices, would say that as a theorist one can, for explanatory purposes, use the "internal point of view" of the actors without committing oneself to "accepting" the normative propositions revealed by that method. Dworkin might perhaps say that there is no standpoint from which one can meaningfully "report" or "describe" the normative reasons behind a pattern of behaviour without making the moral judgements implied in those reasons. No more need be said about this here. The limited point I wish to make

---

[60] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 888.

[61] *The Law and the Constitution*, *supra*, at 136; *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 888.

[62] A quaint example of a constitutional practice with no normative force is that the Minister of Finance should wear new shoes when presenting the budget in the House of Commons. Don Mazenkowsky, Finance Minister in 1993, humorously illustrated the status of that practice when he had journalists photograph the insoles of the old shoes he was wearing on budget-day, which bore the name of a shoe-repair shop. See *Le Devoir*, Montreal, 27 April 1993.

is that no matter what scope there is for a non-committal use of the "internal point of view",[63] the Supreme Court cannot have been non-committal in the *Patriation Reference*.

The reason is that conventions "form an integral part of the constitution and of the constitutional system"[64] and the courts, as I suggested throughout Part I, are precisely agents within this system and have assumed the general role of "protector and preserver"[65] of the whole constitution, a role going well beyond the traditional enforcement of law. In legal theory, the judge's perspective on things is widely taken as the paradigmatic case of the internal viewpoint; the statements in a judgment or judicial opinion are the committed statements *par excellence* in the system. When Taschereau J. attempted to make a distinction in 1896 between statements made in advisory opinions and statements made in judgments, there was good reason why the distinction would never be taken up. He wrote, as I noted earlier, that in advisory proceedings judges "have to say what is the law as heretofore judicially expounded, not what is the law according to [their] opinion".[66] The distinction could not be taken up because when it comes to reasons or principles underlying the rules of a sophisticated normative system, stating "what is the case" implies the creative formulation of such reasons or principles as will, *in the opinion of the court*, best explain

---

[63] See Neil MacCormick, "Law, Morality and Positivism" in Neil MacCormick & Ota Weinburger (eds), *An Institutional Theory of Law: New Approaches to Legal Positivism*, London: Kluwer, 1986, p. 127, at 135. MacCormick uses the term "hermeneutic perspective". See also his *H.L.A. Hart*, London: Arnold's, 1981, pp. 29-44.

[64] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 883; also: "constitutional conventions plus constitutional law equal the total constitution of the country", at 883-84.

[65] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 753.

[66] *Provincial Fisheries Reference* (1896), 26 S.C.R. 444, 539.

the practice or the system of rules as heretofore expounded. MacCormick, who offers the most plausible continuation of Hart's endeavour in the non-committed use of the internal viewpoint, concedes this much, as I noted in the Introduction, with respect to the formulation of the underlying principles of a legal system:

> But observe, this is not necessarily nor even usually a matter of making explicit what is already known clearly; it is a matter of *making sense* of law, as much as of finding the sense which is already there.[67]

Taschereau J.'s distinction would have meant that the higher courts could not make constructive statements of principle in advisory opinions when the questions referred to them generally required such statements. Indeed, the Supreme Court was even prepared to say in a reference immediately preceding the *Patriation Reference* in the Court's reports that an advisory opinion is "an attempt to determine and give effect to the broad objectives and purposes of the Constitution".[68] There lies the crucial point: the broad objectives and purposes of the constitution cannot be different when it comes to the determination of constitutional conventions. The "Constitution similar in Principle to that of the United Kingdom" referred to in the preambular statement of the *Constitutional Act, 1867* must be taken as a coherent whole which clearly includes, as the Supreme Court rightly noted,[69] constitutional conventions. If court pronouncements are taken to be exemplars of the committed internal viewpoint when they formulate the underlying principles of constitutional law, how can they be non-committal when they

---

[67] Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978, p. 235.

[68] *Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714.

[69] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 883.

formulate *the same principles*, for the same constitutional system, as reasons for conventions? Clearly, the "federal principle", which was taken to be "the reason" behind the convention,[70] also underlies the whole set of *legal* arrangements respecting the distribution of ordinary legislative powers between provinces and centre.

This means that in applying the third element of Jennings' test for convention recognition, the Court was assessing whether the practice requiring provincial consent was justified from the standpoint of anyone committed to the whole constitutional system. Now, this throws a much needed light on the Supreme Court's claim that it is merely engaged in "recognising" convention. As should now be clear, the Court did not say: we reckon that political actors think it obligatory that provincial consent be secured and we recognise that they have as a rule acted accordingly. What the Court said is this: by virtue of the federal principle, it is an important rule of our constitution that provincial consent be secured and political actors have an obligation to conform to that principle now as they have in the past. This is endorsing by independent judgment the normative character of the convention. And from the internal viewpoint of a judge, the moral force of the obligation so endorsed is indistinguishable from that of a legal obligation.

The foregoing suggests that it would not have been inconceivable for the Court to recognise that the role it chose to assume with respect to convention, on the suggestion of the governments who referred the questions, is not merely passive. The Judicial Committee has surely participated as a political actor in the elaboration of conventions with respect to the rules of discretion governing petitions for leaves to

---

[70] *Id.*, at 905.

appeal from the Dominions.[71] Perhaps the Court would have made its position more convincing had it openly said in a similar fashion that in defining and virtually applying conventions it was exercising a partly creative role, much like the creative role it otherwise plays when dealing with constitutional law. Like conventional rules, the norms of constitutional law mostly originate in the decisions of other actors of government. As Chief Justice Lamer said in *Nova Scotia Broadcasting Co. v. Nova Scotia*, patriation may perhaps be taken by some to be "part of an evolution of our Constitution which culminated in the supremacy of a definitive written constitution".[72] The written constitution, of course, leave some room for creation in the application. But as that very case nicely exemplified with the notion of parliamentary privilege, unwritten constitutional law is also alive, and it does not formally originate in decisions of other political actors. It originates and lives on in the partly creative decisions of the courts. And despite what the comment of the Chief Justice might suggest, unwritten constitutional norms not only include rules that could be described as vestiges of the past, such as surviving prerogatives of the Crown, or parliamentary privilege; they also include fundamental principles of the present constitution such as the Rule of Law. When the Supreme Court unanimously wrote in the *Manitoba Language Rights Reference* that "in constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution",[73] it was not referring to quaint rules from days of yore which had accidentally survived the evolution towards "a comprehensive written constitution".

---

[71] See *Hull v. M'Kenna*, [1926] I.R. 402, 408 (*per* Lord Haldane). This case will be discussed in Part Two.

[72] [1993] 1 S.C.R. 319, 355

[73] *Reference re Manitoba Language Rights*, [1985] S.C.R. 721, 752.

The Court was referring to the unwritten postulates that inevitably underlie a contemporary written constitutional document. The notion expressed in that reference of the courts being the "protector and preserver" of the constitution[74] refers to such unwritten postulates. The responsibility of the courts in expounding and giving life to unwritten principles was apparently ignored by the Supreme Court in the *Patriation Reference*. For it is hard to conceive that this responsibility can properly be assumed if the conventions of the constitution – even when judicially expounded – are sealed off from judicial consideration in the determination of *unwritten* constitutional law. Allan is rightly puzzled by this. Having noted the significance of the judicial application of Jennings' test, he concludes:

> To recognise a convention is necessarily to endorse the principle which justifies it; and, in a context where legal doctrine is developed to reflect that principle, recognition means enforcement.[75]

Moving beyond the context of separation of functions and the judicial forum, Part Two discusses the necessary interface between conventions and law.

---

[74] *Id.*, at 753.

[75] T.R.S. Allan, *Law. Liberty, and Justice: The Legal Foundations of British Constitutionalism*, Oxford: Clarendon Press, 1993, p. 244.

PART TWO

Constitutional Convention and the Law

The controversial relationship between convention and law was put to the Supreme Court in the *Patriation Reference*[1] through the comprehensive questions which provincial governments had originally referred to the courts in Manitoba, Newfoundland and Quebec.[2] One of the key issues argued on appeal before the Supreme Court was whether the purported constitutional convention requiring the assent of provinces for any constitutional amendment affecting their powers, rights or privileges should be considered as having "crystallised" into a rule of law. The majority of the Supreme Court categorically rejected the argument and

---

[1] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 762-65.

[2] The questions are set out at the beginning of Chapter III. The question of what conventions existed around patriation will not be addressed critically in this thesis. The *Kershaw* Report provides a good analysis of this from the United Kingdom's perspective: U.K., H.C., *British North America Acts: The Role of Parliament*, First Report from the Foreign Affairs Committee, HCP 42 (1980-81), 30 Jan. 1981; see also Geoffrey Marshall, "The United Kingdom Parliament and the British North America Acts" (1981) *Alta L.R.* 352 (reproducing his presentation to the *Kershaw* Committee). From the Canadian perspective, see Peter W. Hogg. "Constitutional Law – Amendment of the British North America Act – Role of the Provinces" (1982) 60 *Can. Bar Rev.* 309.

firmly maintained the proposition that a watertight separation necessarily stands between convention and law.[3]

At first glance, the most persuasive argument that could be offered in favour of the Court's position is that conventions are often seemingly "in conflict" with the law regulating the area of their development. This argument appears as follows in the reasons of the Court:

> Perhaps the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules. The conflict is not of a type which would entail the commission of any illegality. It results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all.
>
> [...]
>
> This conflict between convention and law which prevents the courts from enforcing conventions also prevents conventions from crystallizing into laws, unless it be by statutory adoption.[4]

To use the habitual example, the conventional duty of the Monarch normally to assent to any bill duly passed by both Houses of Parliament is not enforceable in court, because judges are under a legal duty to apply the law relating to the prerogatives, a body of doctrine which was legislated into the *B.N.A. Act* and which gives total discretion to the Monarch and her representatives.

With this argument, the Court seems to be ruling out each of the two possible variants of non-legislative crystallisation: the "passive" version where convention turns into law independently of the courts' intervention, and the "active" version where courts are expected to turn convention into law. Quite obviously the line between the two cannot be very sharp for, on the one hand, a "passive" crystallisation would not

---

[3] *Id.*, at 774-84 (majority on law).

[4] *Id.*, at 880-82.

be certain until a court got to apply the new rule and, on the other hand, an "active" crystallisation would not necessarily be presented as such by a court of law. The distinction is unnecessary for the argument in most of this Part but is taken up in Chapter VI, where the relationship between convention and the evolution of unwritten law is addressed. Before that, a more direct critique of the Supreme Court's position on crystallisation is offered over the next two chapters.

Chapter IV

Conflict and Soft Legal Standards

According to the Supreme Court, "the main reason why conventional rules cannot be enforced by the courts is that they are generally in conflict with the legal rules which they postulate and the courts are bound to enforce the legal rules".[1] This does not mean, the Court continues, that following conventions implies illegal behaviour; the usual conflict "results from the fact that legal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all".[2] The enforcement of the convention in such cases, the argument goes, would entail a violation of the court's duty to apply the legal rule. Put in such terms, the conventional rule requiring substantial provincial consent for constitutional amendments affecting provincial rights and privileges is not enforceable in court, because judges are under a legal duty to apply the law relating to parliamentary procedure, which presumably gives discretion to the Houses of the federal parliament to pass any resolution whatsoever and to transmit it to whomsoever they please[3]. Thus cast, the "conflict"

---

[1] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 880.

[2] *Id.*

[3] In the Court's opinion, apparently, judges are also under a duty to apply any Act of the United Kingdom Parliament meant to apply to Canada. This aspect of the issue is discussed in Chapter XI.3.

argument apparently reveals a logical impediment to the crystallisation of convention into law. But a brief consideration of the notion of conflict shows that there is no such logical impediment, and that in taking this position the Court did not bear in mind all types of legal standards.

IV.1 CONFLICT AS NECESSARY BAR TO CRYSTALLISATION

A summary examination of the Supreme Court's reasoning reveals that it arbitrarily makes use of a broad test of conflict, a test which is only one among several others a court could be expected to use in determining whether two rules are consistent. For the purpose of my argument here, one can envisage two categories or "tests" of conflict between normative propositions.[4]

(1) There is a conflict only where simultaneous compliance with two duty-imposing rules is impossible;

(2) There is a conflict where simultaneous compliance is impossible in the sense of (1); *or* where a duty-imposing rule forbids what a power-conferring rule permits *and* the rule which is to prevail in case of conflict either claims exclusivity in the relevant field or is impaired by the application of the other rule.

The second test results in a conclusion of "inconsistency" or "conflict" in a far greater number of cases.

In its claim that conventions are generally "in conflict" with the law, the Supreme Court applies the second, broader test without giving reasons. "The conflict", writes the Court, "is not of a type that would

---

[4] Adapted from Stephen Munzer, "Validity and Legal Conflicts" (1973) 82 *Yale L.J.* 1140, and Allan Murray-Jones, "The Tests for Inconsistency under Section 109 of the Constitution" (1979) 10 *F.L. Rev.* 25. On the respective role of consequence-based considerations and logic in the application of inconsistency tests, see generally Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change*, New York: Peter Lang, 1990, pp. 165ff.

entail the commission of any illegality",[5] which is to say that the conflict envisaged is not one where simultaneous application would involve the breach of a duty-imposing rule. As it turns out, this broader test (2) had been rejected by the Supreme Court in nearly all the paramountcy cases – cases involving the operation of federal and provincial statutes in related fields – since the early 1960s.[6] According to the case-law on paramountcy, a provincial rule and a federal rule will be treated as consistent and will *both* be applied unless one rule dictates a behaviour that is forbidden under the other.[7] This corresponds to the simultaneous compliance test (1), which the Supreme Court had no reason to put aside for the specific purpose of the *Patriation Reference*, apart from the intention of giving conventions the appearance of being necessarily inconsistent with the law. The fact that the Supreme Court reasserted the simultaneous compliance test a year after patriation makes this particularly conspicuous.[8]

Under the simultaneous compliance test (1), the convention requiring provincial consent which was at issue in the *Patriation Reference* is simply not inconsistent with the legal rules on parliamentary procedure; the convention is a supplementary rule applicable to the limited category of resolutions touching upon some constitutional amendments, a rule with which the Houses of the federal parliament can comply without violating other rules of law (including the

---

[5] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 881.

[6] See the thorough discussion of the case-law in Peter W. Hogg, *Constitutional Law of Canada*, 3d ed., Toronto: Carswell, 1993, §16.1-6.

[7] Despite apparent difficulties, this test can be applied to rules addressed to judges as well as to other rules; see Eric Colvin, "Legal Theory and the Paramountcy Rule" (1979) 25 *McGill L. J.* 82.

[8] *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 191.

legal rules on parliamentary procedure). In the language devised by the Supreme Court in paramountcy cases, one can say there is no conflict in the "operation" of the rules;[9] such rules *cannot* be presented as inconsistent by a court under the simultaneous compliance test which the Supreme Court has otherwise generally applied in constitutional law, whether in the three decades preceding patriation or in subsequent cases.[10]

But one can go further. The application of the broader test (2) does not even *require* a conclusion of conflict with respect to the rules at issue in the *Patriation Reference*. The Court's application of that test to the convention at issue would go roughly as follows: the convention requiring provincial consent to a federal resolution initiating an amendment which affects provincial rights and privileges is in conflict with the law because the legal rules on parliamentary procedure claim exclusivity in the determination of the legal validity of all resolutions. It is simply assumed here that the legal rules are to prevail, and that they claim exclusivity in all cases. The legal rules are presumably – and rightly – taken to be "superior" in the sense that they are postulated as first-order material by the very conventions which qualify them. What is problematical is the Court's silent and sweeping assumption that virtually all legal rules governing fields which are also covered by convention do "claim exclusivity" in the governance of such fields, which presupposes at the outset that conventions are necessarily in conflict with the law (that is, with the claim of

---

[9] *Ibid.*

[10] Note, however, the case of *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, in which the Supreme Court (*per* La Forest J.) reaffirms the simultaneous compliance test as governing the case but proceeds to find a conflict where dual compliance was in fact apparently possible.

exclusivity presumably implied in the legal rules).[11] If one does not make the question-begging assumption that legal rules claim exclusivity in all fields which conventions may govern,[12] it becomes clear that the enforcement of at least some conventions along with the legal rules whose application they circumscribe is perfectly possible,[13] even under the broader test of conflict.

It appears, then, that although the conflict argument offered in the *Patriation Reference* does have some appeal it is by no means conclusive. Its effectiveness depends on the questionable use of a broad test of conflict which the Court did not justify. Under the narrower test which the Court was used to applying in division of power cases, and even under the broder test applied with different assumptions, there is no logical impediment to crystallisation resulting from any alleged necessary "conflict" between convention and law.

This treatment of the crystallisation thesis in terms of "conflict" also reveals a fundamental assumption of the Court about what it is that conventions could crystallise into. The Supreme Court professes that conventions cannot be enforced and cannot crystallise "into laws". In asserting this, the Court leaves out a type of standard which courts regularly use in making decisions and which can arguably be described as legal standards. Making use of a distinction made popular in

---

[11] "[C]onventional rules ... are generally in conflict with the legal rules which they postulate": *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 880-81.

[12] José Woehrling, "La Cour suprême et les conventions constitutionnelles : Les renvois relatifs au «rapatriement» de la constitution canadienne" (1984) 14 *R.D.U.S.* 391, 418ff.

[13] See T.R.S. Allan, "Law, Convention, Prerogative: Reflections prompted by the Canadian Constitutional Case" [1986] *C.L.J.* 305, 314.

contemporary jurisprudence by the early work of Dworkin,[14] a distinction alluded to earlier, the rest of this Chapter will show that the *Patriation Reference* only addressed the possibility of a convention becoming a legal rule (a *hard standard*), not that of a convention turning into a legal principle (a *soft standard*).

IV.2 STANDARDS HARD AND SOFT

Dworkin uses the actual functioning of standards in adjudication to explain his distinction between rules and principles. Both rules and principles, he explains, "point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give".[15] Rules operate in an all-or-nothing fashion; they are either valid or invalid and either applicable or not to a particular case. Principles have a weight dimension. They are generally weighed against other standards of the same type; they can be more or less relevant in a particular case and are often said to be "considered" rather than "applied". Road safety regulations usually provide clear examples of rules, whereas maxims such as "the courts will not permit themselves to be used as instruments of inequity and

---

[14] Ronald Dworkin, *Taking Rights Seriously*, London: Duckworth, 1979, essays 2 & 3; the distinction was first made by Dworkin in "The Model of Rules" (1967) 35 *U. Chi. L. Rev.* 14. In the English-speaking tradition, such a distinction can be found in the earlier writings of Roscoe Pound: *Jurisprudence*, vol. IV, St Paul: West, 1959, pp. 10 ff. See also J.W. Bingham, "What is the Law?" (1912) 11 *Mich. L.R.* 1 & 109. In continental scholarship, see Joseph Esser, *Grundsatz und Norm in der richterlichen Forbildung des Privatrechts*, Tübingen: Mohr, 1956; Georges Ripert, "Les règles du droit civil applicables aux rapports internationaux: Contribution à l'étude des principes généraux du Droit visés au Statut de la Cour permanente de Justice internationale" (1933) 44 *Recueil des cours* 569, 575-87.

[15] *Taking Rights Seriously*, *supra*, at 24.

injustice", or "[n]o one shall be permitted to profit by his own fraud" are typical principles.[16]

Dworkin's principles have later taken a "rights" connotation which is not relevant to my discussion here and was summarily discarded in Chapter III as a bit of a misfit in the Canadian context. This is one of the reasons why a different terminology will sometimes be used here, at least with respect to principles. Another reason is that legal idiom sometimes uses "rules" to refer to one type of standard which I would characterise as soft standards. Those are typically the standards judicially applied for statutory interpretation purposes, which are in practice mostly referred to as "rules". The same goes for the standards used by courts in the exercise of a judicial discretion.[17] Those are sometimes referred to as rules but, like the rules of statutory interpretation, they clearly have the functional "weight dimension" characteristic of soft standards.[18]

At first sight, the distinction between hard and soft standards may appear more as one of degree than as one of kind because it is difficult

---

[16] *Id.*, at 26ff.

[17] See for instance Barry L. Strayer, *The Canadian Constitution and the Court*, 3d ed., Toronto: Butterworths, 1988, who on occasions speaks of "the rules of standing" when referring to the principles governing the Court's discretion to grant status in declaratory actions (pp. 157, 159). The Supreme Court also refers to "the rules of standing" in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, 249.

[18] This further distinction between types of soft standards corresponds to that put forward by Genaro R. Carrió in *Legal Principles and Legal Positivism*, tr. M. Isabel O'Connell, Buenos Aires: Abeledo-Perrot, 1971, p. 16. One type refers to "patterns or criteria of second order which indicate how other rules are to be understood, used and, occasionally, completed". The other type refers to "the goals, aims or policies of a rule or group of rules of the system; certain basic demands of positive justice and morality; and maxims drawn from legal tradition".

to point to a "logical distinction" between them.[19] From the point of view of ordinary practical reasoning, one might thus say that "the gradations in the generality and weight of normative propositions are so fine that no real demarcation line can be drawn between those which should properly be called 'rules' and those which should be called 'principles'".[20] The normative "universe" under which moral agents order their lives may look rather like a spectrum of standards directing outcomes in a more or less flexible way. But the matter looks different from the internal perspective of a judge, who endorses the point, specific to law, of providing clear and authoritative determinations for disputes arising through community life, determinations which ordinary practical reasoning might not be able to provide. What I would like to suggest here is that the distinction between hard and soft standards is internally supported in common law systems by the fundamental distinction in the doctrine of precedent between persuasive and binding authority.

It was tentatively suggested in Chapter I, in my discussion of the doctrine of precedent with respect to advisory opinions, that principles (here called soft standards) are not easily accommodated within the narrow scope of *stare decisis*. *Stare decisis* concerns strict binding authority and operates in a mode which closely follows the black-and-white pattern set for statutory rules in terms of validity and invalidity. According to that pattern, *stare decisis* is taken instantly to turn a single ruling into binding law much like a statute at once

---

[19] See Melvin A. Eisenberg, *The Nature of the Common Law*, Cambridge (MA): Harvard Univ. Press, 1988, p. 77.

[20] John M. Eekelaar, "Principles of Revolutionary Legality" in A.W. Brian Simpson (ed.), *Oxford Essays in Jurisprudence*, 2d series, Oxford: Clarendon Press, 1973, p. 22, at 33. Eekelaar there writes about English law.

turns a proposition into law.[21] Soft standards cannot be made to follow this black-and-white pattern because generally their origin cannot be traced to a single decision, and they cannot be called valid without awkwardness,[22] nor binding without inaccuracy. In the realm of statutory law, considered in isolation, the all-or-nothing quality of legal validity implies that standards not validly enacted have no direct relevance in legal determinations.[23] When it comes to case-law, however, the broad doctrine of precedent provides that materials which do not qualify as binding under the strict doctrine of *stare decisis* may nevertheless be directly relevant to legal determinations. Such materials can have persuasive authority and judges may have a legal duty to *consider* them where relevant.[24]

Such materials, it is suggested, are typically envisaged at the level of abstraction characteristic of soft standards, for it is not possible to speak of the persuasive force of a hard standard unless one is appealing to a more abstract standard underlying it. In legal argument, using hard standards as persuasive material is reasoning by analogy, and in such cases, as was well explained by MacCormick, reasoning by analogy is reasoning from principle.[25] If a rule can be

---

[21] For a critical assessment of this association, see A.W. Brian Simpson, "The Common Law and Legal Theory", in Simpson, *id.*, p. 77.

[22] See John Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980, p. 280.

[23] A striking statement of this is Field J.'s in the United States Supreme Court: "An unconstitutional Act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed": *Norton v. County of Shelby* (1886), 118 U.S. 425, 442.

[24] See Rupert Cross, *Precedent in English Law*, 3d ed., Oxford: Clarendon Press, 1977, p. 156.

[25] Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978 (hereinafter *LRLT*), ch. VI. See also Eisenberg, *supra*, at 83-96.

said to support a proposed ruling not covered by it, it is necessarily because a principle was found which explains both the rule and the proposed ruling.[26] In other words, a hard standard can be said to be persuasive only insofar as the soft standard underlying it is contemplated and found persuasive. Resort to analogy, and more generally to soft standards, is typically though not exclusively had when no strictly binding material is found, that is, when no hard standard precisely covers the case. Persuasive materials then typically take over in the form of soft standards, standards that are "considered" rather that applied.

I would suggest, then, that the proposed distinction between hard and soft standards corresponds to the fundamental divide in the doctrine of precedent between binding and persuasive materials. Only hard standards can be binding under the doctrine of *stare decisis*, and only soft standards, upon analysis, can have persuasive force. It may be pointed out in this respect that even express enactment will not make a soft standard binding in the strict sense. The formal validation implied in enactment may provide a soft standard with law-quality and carry a judicial obligation to give it serious consideration where relevant, but the abstract nature of the standard affords the notion of bindingness no hold. Bindingness catches up when courts begin to use the soft standard in making decisions and to attach binding force to the *ratio decidendi* of such decisions.

The notorious difficulties related to the determination of the *ratio* of a precedent often make the distinction between binding and persuasive materials a little messy in practice. "The bindingness of

---

[26] *LRLT*, at 163.

stare decisis operates up to a point" as Dias noted.[27] "It means that a judge is bound to follow a precedent unless he can reasonably distinguish it. Since distinguishing techniques are numerous, the element of bindingness is correspondingly limited".[28] There can be no doubt that soft standards actually serve in the very determination of whether a precedent can "reasonably" be distinguished and thus feature, in the first place, in the decision whether or not hard standards should be taken to cover the new facts at bar.[29] Those difficulties are well known. But the fundamental distinction between binding and persuasive materials remains deeply rooted in common law systems. The categorisation of norms into hard and soft standards reflects that fundamental distinction; it therefore finds support within the legal system and should be recognised.

Those who are attached to the celebrated picture of law offered by Hart in *The Concept of Law*[30] have found that soft standards, at least some of them, do not fit in very well. Hart's test for membership (or test of validity) contained in his rule of recognition does not seem to allow for degrees as the weight dimension of soft standards would require. It has been suggested that standards used in the legal practice which cannot be validated under the "pedigree" test of the rule of recognition should therefore be considered non-legal standards which legal standards (formally validated under the rule of recognition)

---

[27] R.W.M. Dias, *Jurisprudence*, 5th ed., London: Butterworths, 1985, pp. 163-64.

[28] *Ibid.*

[29] Richard Bronaugh, "Persuasive Precedent" in Goldstein, *supra*, p. 217, at 245-46.

[30] Oxford: Clarendon Press, 1961.

sometimes point to as relevant in deciding cases.[31] The proposition implies that the law is limited to "valid" standards originating in determinate acts of enactment and adjudication. At common law this would seem to mean that the fundamental categories of materials in precedents are the binding and the non-binding, and that this nicely separates the legal from the non-legal. Persuasive standards here are not legal standards.

That strictly rule-based picture of the law, however, would seem to imply the surprising notion that the relatively recent doctrine of *stare decisis* has entirely replaced the broader and much older doctrine of precedent (which requires that past judicial decisions be taken into account well beyond the narrow scope of the *ratio* of judgments given in specified higher courts), and in doing so has changed something common that was not law into the common law.[32] In point of fact, English case-law existed well before *stare decisis* came into the picture.[33] The common law (as it was already called without the help of *stare decisis*) then functioned under the general desideratum that like cases should be treated alike, which is the core of the broader doctrine of precedent.[34] It would therefore seem more accurate to say that *stare decisis* has become a part of the broader doctrine, a part which puts the modern judicial hierarchies at the service of the general desideratum of that

---

[31] Joseph Raz, "Legal Principles and the Limits of Law, A Postscript" in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth, 1984, p. 81. For Raz's earlier position, see *The Authority of Law*, Oxford: Clarendon Press, 1979, pp. 96-97.

[32] On the belated emergence of the notion of binding law in European legal traditions, see H. Patrick Glenn, "Persuasive Authority" (1987) 32 *McGill L.J.* 261.

[33] See J.H. Baker, *An Introduction to English Legal History*, 2d ed., London: Butterworths, 1979, pp. 171-75.

[34] Dias, *supra*, at 56.

doctrine, and that the strict requirements of *stare decisis* cannot be said to exhaust judicial duties under the doctrine of precedent. The doctrine has always required and still requires that past judicial decisions be given due consideration, and has always provided and still provides that they should have justificatory force in present judicial deliberations. Since persuasive and justificatory force, as was suggested, cannot be assessed without a minimal appeal to the underlying, more abstract principle behind a particular ruling, it would seem reasonable to say that soft standards have law-quality under the doctrine of precedent even where they are not binding under the narrower and more recent doctrine of *stare decisis*.

The above is only an attempt to indicate some intra-systemic support for the proposition that soft standards are legal standards. That proposition seems in any case to match common understandings in the practice. "No one disputes that strict and full responsibility are part of the law, nor does anyone doubt that notions such as privity of contract, *mens rea*, presumption of innocence, unjust enrichment, *ex turpi causa non oritur actio* are also part of the law".[35] Nobody would deny that soft standards play an important part in legal argumentation and adjudication. Courts openly refer to them as significant considerations in reaching decisions, and they do this not only where hard standards have run out; soft standards are an integral part of the legal process throughout.

MacCormick does not question the law-quality of soft standard. He writes, following the presentation of his validity thesis:

> But the concepts of 'law' and 'legal system' are ... not exhausted by reference to the whole set of legal rules.

---

[35] *Id.*, at 45. See also, generally, Antony M. Honoré, *Making Law Bind*, Oxford: Clarendon Press, 1987, pp. 27-28.

> Principles also belong to the genus 'law', legal systems comprise principles and all the rest of it as well as laws. And in all the ways discussed in this book the principles interact with the rules, underpin them, hedge them in, qualify them, justify the enunciation of new rulings as tested out by consequentialist arguments, and so on.[36]

His account retains the Hartian feature of taking hard standards to be in a significant sense primary, insofar as it defines soft standards in relation to them. He defines the legal principles of a system as "the conceptualized general norms whereby its functionaries rationalize the rules which belong to the system in virtue of criteria internally observed",[37] and explains how a validity thesis organised around Hart's rule of recognition can indirectly account for such principles:

> There is a relationship between the 'rule of recognition' and principles of law, but it is an indirect one. The rules which are rules *of law* are so by virtue of their pedigree; the principles which are principles *of law* are so because of their function in relation to those rules, that is, the function which those who use them as rationalizations of the rules thus ascribe to them.[38]

MacCormick's picture is, to my mind, the most convincing account of soft standards that preserves Hart's rule of recognition. Hart's model here keeps its original appeal and gains from the added explanation of the functioning of "principles". The functioning of legal principles in adjudication is discussed in Chapter X. Let me now go back to the Supreme Court's treatment of crystallisation with the distinction between binding and persuasive materials in mind.

---

[36] *LRLT*, at 244.

[37] *Id.*, at 155

[38] *Id.*, at 233.

IV.3 CRYSTALLISATION AND SOFT LEGAL STANDARDS

In the discussion of the issue of crystallisation in the *Patriation Reference*, the Court seemingly uses the phrases "into a rule of law" and "into law" interchangeably.[39] One could argue that this hints at the Court's perception of the law as a set of rules excluding soft standards, but no conclusion could seriously be drawn from this terminological detail. It appears quite clearly from the substance of the reasons, however, that the Court did not, in analysing crystallisation, consider soft standards to be part of the law, and that, consequently, the possibility of a convention turning into a soft standard is not ruled out.

"Convention", as Allan rightly pointed out in a comment prompted by the *Patriation Reference*, "may qualify the exercise of legal powers as a matter of legal principle".[40] Two examples from the list of cases analysed by the Court in that context will show this. The *Copyright Owners*[41] case was one of the few precedents really looked into by the Supreme Court in their analysis of crystallisation.[42] The High Court of Australia in that 1928 case had put forward a rule of construction whereby British legislation did not apply to Australia unless the statute

---

[39] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 774.

[40] "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case", *supra*, at 314n.

[41] *Copyright Owners Reproduction Society Ltd. v. E.M.I. (Australia) Pty. Ltd.* (1958), 100 C.L.R. 597.

[42] One Canadian case which was not discussed and where the use of convention is similar to that in the *Copyright Owners* case is *Arseneau v. R.*, [1979] 2 S.C.R. 136. The Supreme Court there referred to the "generally accepted practice in this country whereby Ministers are accountable to the elected representatives of the people in Parliament or the Legislature" in interpreting the provision making it an offence of bribing a member of the legislature (at 149).

under consideration expressly indicated that it did. This was drawn from a convention which was clear since the Imperial Conference of 1926, but which was only enacted in 1931 as s. 4 of the *Statute of Westminster*, and only adopted as part of Australian law in 1942.[43] The rule of interpretation was clearly derived from the terms of the convention; or, put differently, the convention was applied as a rule of statutory construction. McTiernan J. explains this as follows:

> Constitutional practice governing the political relations between the United Kingdom and the Commonwealth, as at that time, could not but enter into the question whether the Act of 1928 was intended to operate in Australia. The rule of construction which found its source in the political and constitutional relations between the United Kingdom and the Commonwealth of Australia before the *Statute of Westminster* would raise a presumption that the Act of 1928 was not intended to operate of its own force in this country. Needless to say, it is a rule of construction which this Court would be expected to apply.[44]

Dixon C.J. reasons along the same lines:

> It is true that in 1928 the *Statute of Westminster* had not yet been passed but the convention was strong and unbending which governed the exercise of legislative power of the Parliament of the United Kingdom to affect the law in operation in a dominion. Every presumption of construction was against such an intention.[45]

In considering that case, the Supreme Court of Canada did not envisage the possibility that rules of interpretation might be viewed as part of the law, and that the derivation of such a rule from a convention might be viewed as a form of crystallisation of that convention. The Court set the case aside in the following terms:

---

[43] *Statute of Westminster Adoption Act*, 1942, No 56 (Aus.)

[44] *Id.*, at 613.

[45] *Id.*, at 612.

> True, this took account of political practice but it was the Court's application of rules of interpretation which governed and the political practice would have counted for nothing if the British legislation of 1928 had been made expressly applicable to Australia.[46]

In the Court's view, therefore, the only possible rule of law at stake in that case was the rule that Parliament ultimately had the power to legislate for Australia. This had not been modified by convention.

Similarly, the Court dismissed the argument that *Hull v. M'Kenna*[47] was a relevant precedent. The case was the first instance of an application for leave to appeal to the Judicial Committee of the Privy Council from the Court of Appeal of the Irish Free State. The preliminary question at issue was what standards were to be applied by the Judicial Committee in the assessment of whether leave should be granted. The Committee cautiously laid down the general principle as one of trusting the local courts of the various Dominions with the application of law and justice. In deciding whether to grant leave to appeal the Committee would consider whether "the question is one that can best be determined on the spot", whether "the case is one involving some great principle or is of some very wide public interest", and whether the Dominion is unitary or federal (leave being granted more freely in cases opposing governments).[48] Viscount Haldane, speaking from the Board, made it quite clear that the relevant standards to be applied in the exercise of the Committee's discretion were constitutional conventions:

> One must remember in dealing with what is Dominion status, we are dealing with nothing which you can find any definition of in any law book – there cannot be – it is a question really of constitutional practice. By the strict

---

[46] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 781.

[47] [1926] I.R. 402.

[48] *Id.*, at 404-05.

> legal theory of this constitution of the Empire, the King is omnipotent; but there has grown up a restriction of a constitutional kind through Parliaments and through the necessities of responsible representative Governments, which strictly limits the power of the King; but you will not find the limitations by searching books; you will not find this laid down in the form of an abstract legal proposition of statute law, or common law; they are just as real, but they are constitutional limitations.[49]

The case could very well have been presented as one in which constitutional conventions are actually developed as well as applied by a judicial body. Admittedly it could be distinguished as a precedent on the basis of the exceptional position of the Judicial Committee of the Privy Council as a judicial body. The members of the Committee "in form and in name"[50] remain political councillors to the sovereign and in this particular case, they were *de facto* exercising a power derived from the royal prerogative; they were consequently expected to follow the conventional rules that had evolved to circumscribe that power. This exceptional situation of the Committee arguably implied a certain degree of participation in the so-called "political" business of fashioning conventions. But Lord Haldane otherwise stressed that the Committee "have nothing to do with politics", that they give advice "in a judicial spirit", and that, "in substance, what takes place is a strictly judicial proceeding".[51] The Supreme Court chose not to address the issue and summarily set the case aside as follows:

> The question at issue was the application of Privy Council practice on petitions to it for leave to appeal. The *legal* issue, on which the case turned, was the manner in which the

---

[49] *Id.*, at 408.

[50] *Id.*, at 403.

[51] *Id.*, at 403.

> Privy Council exercised its discretion on such petitions.[52] [Emphasis added.]

Here, *Hull v. M'Kenna* is apparently set aside on the basis that the question at issue was the application of a practice, not of a rule of law. But then the word "legal" which I have emphasised in the quotation would appear to have been a "slip of the pen", for if the issue on which the case turned had been a "legal" issue, then this was surely a case where convention had turned into law and, as I noted, the Court rejects that possibility.

The analysis of those two cases in the *Patriation Reference* shows that the Supreme Court did not consider rules of interpretation and rules as to the exercise of a judicial discretion (here soft standards) to be legal standards. Those two cases are set aside on the basis that they were about rules of construction and rules of practice in the exercise of a discretion, not rules of law. Therefore, the reasoning goes, they are not instances of conventions that have (been) turned into law. The Court quite clearly accepts in the same breath that those standards, which are regularly applied by courts in deciding cases but do not qualify as binding standards, can be derived from constitutional conventions.

That conclusion is understandable given the reason provided at the outset why convention cannot turn into law. The reason is that conventions are taken to be generally in conflict with legal rules and that "the courts are bound to enforce the legal rules".[53] What the Supreme Court feared most, I would suggest, was creating a situation where a court could be faced with two binding rules of law mandating

---

[52] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 780 (majority on law).

[53] *Id.*, at 881 (majority on law).

contrary rulings. But soft standards function in such a way that they cannot be in direct conflict with hard standards or with other soft standards in a way that could force a judge into a sort of legally binding schizophrenia. The reason is that soft standards do not point conclusively to a particular decision. Rather, they argue in a direction and their weight can be counterbalanced by other soft standards pointing in a different direction. They never straightforwardly contradict legal rules; they complement the body of rules. As I have suggested, soft standards typically help find the appropriate rules to be applied and the proper interpretation to be given to such rules, they guide judges in the exercise of discretion and in reaching a decision in hard cases where no applicable rule seems available. Soft standards acknowledge rather than contradict the absolute powers or discretions sometimes afforded by rules. The Supreme Court's conflict argument, flawed as it was shown to be, concerned hard standards only. No hold on soft standards is afforded by the simultaneous compliance test because they require no compliance. Even a broader test of conflict which interrogates the legal rule as to whether it claims exclusivity in a given field would be difficult to apply. Interpreting a legal rule as involving an attempt to exclude soft standards from the field otherwise covered by that rule would amount to excluding the normative context in which the rule has meaning. Consider the possibility of constitutional provisions attempting to exclude all rules of interpretation judicially expounded around the constitution, or all customs of constitutional import. Even Kelsen thought such provisions would fail.[54]

Thus, if I go back to my case-law examples, the convention that Westminster will not legislate for the Dominions may be said, under a

---

[54] Hans Kelsen, *Pure Theory of Law*, 2d ed., tr. Max Knight, London: Cambridge Univ. Press, 1967, pp. 226-27.

common-sense notion, to be in conflict with the rule that Westminster can do so; but nothing prevents such a convention from becoming, or serving as, a rule of statutory construction (a soft standard) creating a presumption that Westminster has no intention of so legislating even though it certainly could (*Copyrights Owners*). Similarly, the conventional rules governing the exercise of the discretion by the Judicial Committee on petitions for leave to appeal from the Dominions can be described as rules for the exercise of a discretion (soft standards) without straightforwardly denying the legally absolute right of the Crown through its Councillors to do as it pleases with a petition. A further example might be afforded by the British constitutional practice of legislating only in conformity to the European Convention of Human Rights, which has arguably turned, at least in England,[55] into a rule of interpretation (a soft standard) taking the form of a presumption of intention, without any denial of the ultimate legal power of Parliament to pass any law whatsoever.[56] Such rules of construction and discretion are by definition not in conflict with the absolute authority at law of the ultimate power holder; they inherently recognise that legal authority.

To sum up, the "conflict argument" on the basis of which the Supreme Court rejects the crystallisation thesis is both flawed and limited. The argument is flawed for two reasons. First, it arbitrarily makes use of

---

[55] Scots Law may be different. In *Kaur v. Lord Advocate*, [1981] S.L.T. 322, the Lord Ordinary made it clear that courts should not have regard to the Convention even as an aid to interpretation (at 329): "If the Convention does not form part of the municipal law, I do not see why the court should have regard to it at all".

[56] See T.R.S. Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, Oxford: Clarendon Press, 1993, at 259-62. Allan specifically addresses the relationship between convention and official attitudes towards the European Convention.

a broad test of conflict which has no currency in Canadian constitutional law. Second, it gratuitously assumes that this test leads to the same result in any assessment of whether a convention is consistent with the legal rule it postulates. The argument is also limited in that it only concerns hard standards; the crystallisation thesis is therefore not excluded when it comes to soft standards, which I have argued are also legal standards. For at least one type of soft standard, the Supreme Court implicitly acknowledges that they may originate in conventions. The chapter which follows continues my critical examination of the Supreme Court's rejection of crystallisation with an analysis of the most important precedents.

Chapter V

Precedents and Crystallisation

The Supreme Court maintains in the *Patriation Reference* that because of "[t]he very nature" of convention no precedent could be produced of a constitutional convention maturing into an enforceable rule:

> No instance of an explicit recognition of a convention as having matured into a rule of law has been produced. The very nature of a convention as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement.[1]

It is certainly true that examples of clear conversion from convention to law have become something of a rarity. All the more true if the "explicit recognition" the Court was looking for was a detailed judicial explanation that a clearly acknowledged constitutional convention had (or was being) turned into a clear, enforceable rule of law. I suggest, nevertheless, that there are, and were at the time of patriation, clear precedents of crystallisation.

There are, first, the many cases that have been used by various authors to undermine the somewhat controversial distinction between law

---

[1] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 774-75

and convention.[2] The vast majority of these can be explained as not amounting to crystallisation.[3] Such cases are typically those where conventional material has been used in a judgment in order to give a meaning to a rule of law which it would perhaps not have had otherwise. One can argue endlessly on whether such cases give legal effect to conventions; one's position basically turns on whether soft standards are treated as law by one's general theory of law. The following is an analysis of only three cases which I believe are not disputable. They are instances of conventions which have turned ("hardened" would here be particularly appropriate) into hard standards which no theory could conceivably define out of the law.

At the time of the *Patriation Reference* there were at least two cases providing strong authority for the proposition that a convention could turn into a rule of law; one was discussed and made light of by the Court while the other does not seem to have been located by anybody in the proceedings.

The first case, *Reference re Weekly Rest in Industrial Undertakings Act* (*Labour Conventions case*),[4] contains the express statement by Sir Lyman Duff, then Chief Justice of Canada, that "constitutional usage" can "crystallize into a rule of constitutional law to which the Courts will give effect".[5] The reference was about the constitutional validity of a series of federal statutes which purported to implement draft international conventions adopted by the International Labour

---

[2] See for instance Ivor Jennings, *The Law and the Constitution*, 5th ed., London: Univ. of London Press, 1959, pp. 122-27.

[3] See Colin Munro, "Laws and Conventions Distinguished" (1975) *L.Q.R.* 218.

[4] [1936] S.C.R. 461.

[5] *Id.*, at 477. The use of the term "crystallization" probably originated in this passage.

Organization of the League of Nations in accordance with the Labour Part of the Treaty of Versailles of 1919. Federal authorities claimed complete jurisdiction in the government and the parliament of Canada over both the making and implementing of treaties. The provinces argued in substance that the government of Canada did not have the power at law to exercise the royal prerogative of entering treaty agreements, and that the federal parliament did not have a special competence regarding their legislative implementation. Six judges sat on the case in the Supreme Court. Three of them, in reasons written by the Chief Justice, declared the statutes valid, while the other three declared them *ultra vires*. On appeal,[6] the Judicial Committee found the statutes invalid on the ground that Parliament did not have a general jurisdiction over the implementation of treaties, and said that a consideration of the executive power to make treaties for Canada was not necessary.[7] The discussion of the Chief Justice with which I am here concerned deals with the issue of executive power; it was therefore not superseded by the reasons of the Judicial Committee on appeal. It has the persuasive authority of reasons given by the Chief Justice for half of the Court on the rare occurrence of an even split. The relevant statement in those reasons appears in the third paragraph of this long passage quoted by the majority (law) "for more accurate context"[8] (the emphasis is mine):

> With reference to the report of the Conference of 1926, which in explicit terms recognizes treaties in the form of agreements between governments (to which His Majesty is not, in form, a party), it is said that since an Imperial Conference possesses no legislative power, its declarations do not operate to effect changes in the law, and it is

---

[6] *A.G. Can. v. A.G. Ont.* (Labour Conventions), [1937] A.C. 328 (A.C.).

[7] *Id.*, at 342, 349.

[8] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 776-78.

emphatically affirmed that, in point of strict law, neither the Governor General nor any other Canadian authority has received from the Crown power to exercise the prerogative.

The argument is founded on the distinction it draws between constitutional convention and legal rule; and it is necessary to examine the contention that, in point of legal rule, as distinct from constitutional convention, the Governor General in Council had no authority to become party by ratification to the convention with which we are concerned.

There are various points of view from which this contention may be considered. First of all, constitutional law consists very largely of established constitutional usages recognized by the Courts as embodying a rule of law. An Imperial Conference, it is true, possesses no legislative authority. But there could hardly be more authoritative evidence as to constitutional usage than the declarations of such a Conference. The Conference of 1926 categorically recognizes treaties in the form of agreements between governments in which His Majesty does not formally appear, and in respect of which there has been no Royal intervention. It is the practice of the Dominion to conclude with foreign countries agreements in such form, and agreements even of a still more informal character – merely by an exchange of notes. Conventions under the auspices of the Labour Organization of the League of Nations invariably are ratified by the Government of the Dominion concerned. *As a rule, the crystallization of constitutional usage into a rule of constitutional law to which the Courts will give effect is a slow process extending over a long period of time; but the Great War accelerated the pace of development in the region with which we are concerned, and it would seem that the usages to which I have referred, the practice, that is to say, under which Great Britain and the Dominions enter into agreements with foreign countries in the form of agreements between governments and of a still more informal character, must be recognized by the Courts as having the force of law.*

Indeed, agreements between the Government of Canada and other governments in the form of an agreement between Governments, to which his Majesty is not a party, have been recognised by the Judicial Committee of the Privy Council as adequate in international law to create an international obligation binding upon Canada (*Radio Reference*, [1932] A.C. 304).

[...]

Ratification was the effective act which gave binding force to the convention. It was, as respects Canada, the act of the Government of Canada alone, and the decision mentioned appears, therefore, to negative decisively the contention that, in point of strict law, the Government of Canada is [9] incompetent to enter into an international engagement.

---

[9] *Reference re Weekly Rest in Industrial Undertakings Act*, [1936] S.C.R. 461, 476-78.

Those words which I have italicised in the passage are certainly hard to get around if one stands for a complete rejection of the idea of crystallisation. The majority (law) of the *Patriation Reference* attempts to do this by presenting the entire passage as a general discussion of the evolution of customary international law:

> What the learned Chief Justice was dealing with was an evolution which is characteristic of customary international law; the attainment by the Canadian federal executive of full and independent power to enter into international agreements. (Indeed, in speaking of "convention" in the last quoted paragraph, he was referring to an international agreement and, similarly, in the use of the word in the second last line of the second paragraph of the quotation and again in the middle of the third paragraph.) International law perforce has had to develop, if it was to exist at all, through commonly recognized political practices of states, there being no governing constitution, no legislating authority, no executive enforcement authority and no generally accepted judicial organ through which international law could be developed. The situation is entirely different in domestic law, in the position of a state having its own governing legislative, executive and judicial organs and, in most cases, an overarching written constitution.[10]

It may be true, in a general way, that the Chief Justice was dealing with "an evolution *characteristic* of customary International law"; but it is clearly not the case that he was dealing with an evolution of customary international law.[11] Indeed, in speaking of a "distinction" "between *constitutional convention* and *legal rule*" in the second paragraph, and of the "*crystallization of constitutional usage* into a *rule of constitutional law*" in the third paragraph, Chief Justice Duff cannot possibly be said to be speaking of a distinction between international

---

[10] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 778.

[11] One commentator quite rightly described the Court's explanation here as *incompréhensible*: José Woehrling, "La Cour suprême et les conventions constitutionnelles: Les renvois relatifs au «rapatriement» de la constitution canadienne" (1984) 14 *R.D.U.S.* 391, 423.

custom and international legal rule, or of the crystallisation of international practice into a rule of international law. The case was about the constitutional validity of federal statutes, not about some question of international law. What is being discussed here, more particularly, is the power of the Governor General in Council to exercise the prerogative of treaty-making for Canada, as clearly appears in the paragraph immediately preceding the extended passage quoted by the Court (and which the Court did not think fit to include "for more accurate context"):

> The argument on behalf of some of the provinces (while conceding equality of status between the Dominions and Great Britain in respect of such matters, and the political responsibility of the Dominion Government in respect of all treaties or agreements to which the Dominion is a party) denies the authority of the Governor General, acting on the advice of the Canadian Government, to conclude a treaty or an agreement with a foreign state. *The prerogative, it is said, resides in the Crown and it is most earnestly contended that the power to exercise this prerogative has never been delegated to the Governor General of Canada or to any Canadian authority.*[12] [Emphasis added.]

This is the argument being dealt with all along. The law of the prerogatives of the Crown in Canada is, rather obviously, part of Canadian constitutional law, not international law. The purpose of the inquiry (and of the argument being dealt with) is to ascertain the possible effect of the federal executive's authority (or lack of it) to make treaties upon the legislative authority to implement them (all of this in Canadian law). What the Chief Justice finds (which is not superseded by the reasons given on appeal) is that the constitutional usage whereby the government of Canada enters into agreements with foreign countries without His Majesty formally being a party, has

---

[12] *Reference re Weekly Rest in Industrial Undertakings Act*, [1936] S.C.R. 461, 475-76.

hardened or crystallised into law, or must be recognised as having legal force in Canada. The practice had enjoyed the normative support of the Imperial Conference of 1926, which declared the equality of status of Great Britain and the Dominions, and described a Governor General as "holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain".[13] According to the Chief Justice, in other words, a constitutional convention has become part of the common law, which now recognises that the prerogative of treaty-making, with the exception, perhaps, of treaties "in head of state" form,[14] lies with the Governor General in Council. The references to international law merely emphasise that this constitutional law position accords with the status of Canada as an independent subject of international law.

After this vague, indeed evasive, explaining away, the majority (law) goes on to present as the "true" opinion of Chief Justice Duff a passage quoted from his reasons in the later *Reference re Disallowance and Reservation of Provincial Legislation*:

> We are not concerned with constitutional usage. We are concerned with questions of law which, we repeat, must be determined by reference to the enactments of the *British North America Acts* of 1867 to 1930, the *Statute of Westminster*, and, it might be, to relevant statutes of the Parliament of Canada, if there were any.
>
> [...]
>
> The powers are, therefore, subsisting. Are they subject to any limitation or restriction?
>
> Once more, we are not concerned with constitutional usage or constitutional practice.[15]

---

[13] U.K., "Summary of Proceedings", Imperial Conference, 1926, Cmd 2768 XI (1926), at 10.

[14] These were sent to London to be formally approved and sealed until 1947, when new Letters Patent constituting the office of Governor General were issued. See Peter W. Hogg, *Constitutional Law of Canada*, 3d ed., Toronto, Carswell, 1992, § 11.2.

[15] [1938] S.C.R. 71.

The 1938 case, as I remarked in Chapter III, was about the subsistence of the power of reservation and disallowance of the Governor General with respect to provincial legislation. It is essential to note that this advisory opinion was given in answer to questions broad enough to cover constitutional usage. After the question whether "the power of reservation" was "still a subsisting power" (the answer was yes), there followed another question asking, in the event that the power was indeed still subsisting, whether its exercise was "subject to any limitations or restrictions", and if so, of what "nature and effect".[16] Put in the language of the *Patriation Reference*, the government wanted to know whether disallowance, if "constitutional" in the legal sense, was also "constitutional" in the sense which includes conventions. The answer given by the Chief Justice might have been taken as a precedent for the proposition that the Supreme Court should not give advisory opinions on conventions. As for the suggestion that the passage negates the idea expressed in the *Labour Conventions case* on crystallisation, it can easily be discarded. Quite obviously, the proposition that there must be a watertight and immutable division between convention and law in all cases does not follow from Chief Justice Duff's opinion, and could hardly have been in issue in a case where one particular alleged convention (not even considered by the Court) was assumed not to have affected the legal force of a written rule of the constitution.

In fact, had the written constitutional rules been looked into in that case, the Supreme Court might have found that the constitutional provision on which disallowance is based[17] had in one aspect been

---

[16] *Id.*, at 73.

[17] The federal provisions, amongst them s. 56, deal with "imperial" disallowance and are referred to as applying to the disallowance of provincial legislation by federal authorities in s. 90 of the *Constitution Act, 1867*.

effectively rendered inoperative by a convention.[18] Section 56 of the *Constitution Act, 1867* provides that the Governor General "*shall* by the first convenient opportunity send an authentic copy" to London of every Act assented to in order that the propriety of the Act may be considered for purposes of Imperial disallowance. The "mandatory" or "imperative"[19] part of this constitutional provision has in fact been disregarded since 1942 by virtue of a convention regulating Imperial-Dominion relations.[20] Were the Supreme Court faced with this issue, it could only explain this apparent "passive" crystallisation away by asserting that section 56 is only "directory", that it imposes no legal obligation, a position which would be nearly impossible to reconcile with the Court's unanimous opinion in the *Manitoba Language Rights Reference*.[21]

To return to the *Labour Conventions case*, the reasons of Chief Justice Duff would admittedly carry more weight had they represented the opinion, albeit advisory, of more than half of the Court. But the long

---

[18] Under the heading "Whether the questions should be answered", the majority on convention of the *Patriation Reference* distinguished *Reference re Disallowance* on the basis that the Supreme Court had there been "asked to hold that a convention ha[d] in effect repealed a provision of the *B.N.A. Act*": *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 885.

[19] Such is the proper interpretation of the word "shall" in the Constitution, according to a unanimous Supreme Court in *Reference re Manitoba Language Rights*, [1985] S.C.R. 721, 737.

[20] As officially declared by Prime Minister Mackenzie King in the House of Commons: Canada, House of Commons, *Debates*, (1943) Vol. II, at 1829. The Conference of 1929 on the operation of Dominion Legislation had voiced the convention that disallowance of a Dominion statute in London was not to be: U.K., Secretary of State for Dominion Affairs, "Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation", Cmd 3479 XVI (1929-30), para. 23, approved: U.K., "Summary of Proceedings", Imperial Conference, 1930, Cmd 3717 XIV (1930-31), at 18.

[21] *Reference re Manitoba Language Rights*, [1985] S.C.R. 721, 737, 741-43. This argument is taken up in Chapter X.2.

passage discussed above stands unaffected by the reasons given by the Privy Council on appeal, and it has a persuasive authority that cannot be lightly disregarded. The reasons of the Chief Justice assert more openly that any other judicial authority then available that the crystallisation of constitutional usage into constitutional law is indeed possible. The majority (law) does not offer good reasons for discarding it.

The other case providing strong authority for the idea of crystallisation at the time of the *Patriation Reference* is *Auckland Harbour Board v. R.*,[22] a New Zealand case decided on appeal by the Judicial Committee of the Privy Council in 1924. The case is not referred to in the reasons of the Supreme Court in the *Patriation Reference*; it was not mentioned in any of the facta submitted and was probably not located through independent research in the Court.[23] In terms of persuasive authority, it can be said that the proceedings are that of a real case, not advisory proceedings; that the case deals with the law of New Zealand but refers to a principle of the British constitution equally applicable to Canada; and, finally, that the judgement is given by the then highest judicial authority for Canada.

The facts are simple. A sum of money was at issue which had been paid to the appellants by the government of New Zealand without (so it was decided) proper parliamentary authorisation. The Privy Council applied the principle that no money can be paid out of the Consolidated Fund without a distinct authorisation from Parliament, and accordingly declared the payment illegal (with the drastic consequence that the

---

[22] [1924] A.C. 318 (P.C.).

[23] The relevance of this case was pointed out to me by John Finnis.

recipient was liable to return it). The reasoning of the Judicial Committee was as follows:

> The payment was accordingly an illegal one, which no merely executive ratification, even with the concurrence of the Controller and Auditor-General, could divest of its illegal character. For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the Consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment.[24]

Now, the obvious question is where did the principle come from? Of course the principle had been part of the British constitution for a very long time indeed. It belatedly followed the relinquishment by the Crown of all powers pertaining to taxation, which Parliament can arguably be said to have obtained towards the end of the fourteenth century, but which remained matter for legal and political dispute well into the seventeenth century.[25] May's *Treatise on the Law, Privileges, Proceedings and Usages of Parliament* simply states that the principle "is based on ancient constitutional usage".[26] But the fact that it had been "a principle of the British constitution for more than two centuries" could not be sufficient to make it enforceable since a good portion of the British constitution is made up of conventions which are, by definition, not enforceable. No authority was quoted to support the assertion that this particular principle was binding constitutional law, yet the principle was enforced. It is true that some legal sources had

---

[24] *Id.*, at 326.

[25] The legislative expression of the principle that the Crown cannot tax without Parliamentary authorisation is in the *Bill of Rights* 1688.

[26] 21st ed. by C.J. Boulton, London: Butterworths, 1989, p. 689.

recognised the existence of the principle, but no source had in any way enacted or laid it down as a *legal* and/or *binding* rule. The *Exchequer and Audit Departments Act* 1866,[27] for example, which in the United Kingdom provides the basis of modern formalities surrounding the payment of money out of the Consolidated Fund, assumes the existence the principle; like many statutes it recognises the existence of a convention but does not turn it into binding law. The principle was also judicially referred to as early as 1786 in *Macbeath v. Haldimand*,[28] and then in *Churchward v. The Queen* in 1865.[29] These legislative and judicial

---

[27] 29 & 30 Vict. c. 39

[28] (1786), 99 E.R. 1036, 1038 (Lord Mansfield): "His Lordship said that great difference had arisen since the Revolution, with respect to the expenditure of public money. Before that period, all the public supplies were given to the King, who in his individual capacity contracted for all expenses. He alone had the disposition of public money. But since that time, the supplies have been appropriated by Parliament to particular purposes, and now whoever advances money for the purposes of the public service trusts to the faith of Parliament".

[29] L.R. 1 Q.B. 173, *per* Shee J. at 209-10:

> ... the suppliant has demurred, on the ground that the provision of moneys by parliament was not a condition precedent to the performance of the contract on the part of the commissioners, and therefore, that the absence of such condition cannot be set up as a justification of their breach of the contract.
>
> [...] In the case of a contract with commissioners on behalf of the crown to make large payments of money during a series of years, I should have thought that the condition which clogs this covenant, though not expressed, must, on account of the notorious inability of the crown to contract unconditionally for such money payments in consideration of such services, have been implied in favour of the crown.
>
> [...] It was beyond the power of the commissioners, as the suppliant must have known, to contract on behalf of the crown, on any terms but those by which the covenant is restricted and fenced. I am of opinion that the providing of funds by parliament is a condition precedent to it attaching.

This passage can be described as a dictum, and is neither confirmed nor undermined by anything in the other three judgments. For a fuller historical account of the emergence of the principle as regards the contractual liability of the Crown, see *New South Wales v. Bardolph*, (1934) 52 C.L.R. 455. Most of the cases dealing with the principle that parliamentary authorisation is required to take money out of the Fund can be explained as using the principle merely for the "interpretation" of

acknowledgements were seemingly not sufficient to lay down the principle as a rule of law. But *Auckland Harbour Board* uses the principle to declare the payment illegal and refundable. Is it not, then, a convention turned into a rule of the common law? It would be hard to find or even invent, it would seem, a clearer example of crystallisation.

But the fact that the Judicial Committee did not expressly acknowledge the conventional origin of the principle being enforced makes it somewhat vulnerable to the reasoning of the Supreme Court. According to that reasoning, the enforcement of the principle could simply be taken as compelling evidence that it was not – and had never been – a mere convention. The reasoning is as follows: if a convention is an obligatory but unenforceable constitutional rule (with no legislative basis), then whatever obligatory constitutional rule is enforced (without a legislative basis) must be deemed not to be a convention; that which it must be deemed to be is law. If one adds the notion, seemingly put to work in this context by the Supreme Court, that in a common law context a court only declares what has always been the law, any obligatory constitutional rule which is enforced must also be deemed *never to have been* a convention.[30]

This circularity reveals the central difficulty of the criterion based on enforcement. Dicey had noted a similar pattern in relation to the "opposite" phenomenon of the political violation of convention:

---

contracts with the Crown.

[30] The other notion which the Supreme Court might be using with the same result was put forward by Jennings, who also rejected Duff C.J.'s statement on crystallisation in the *Labour Conventions case*. The notion is that the constitutional usages incorporated into the common law were the conventions of the seventeenth century: *The Law and the Constitution*, *supra*, at 127. As will be further discussed in the next Chapter, this appeals to a conception of the common law as a now-frozen body of rules originating in a period of formative years that is now over.

> The uncertain character of the deference paid to the conventions of the constitution is concealed under the current phraseology, which treats the successful violation of a constitutional rule as a proof that the maxim was not in reality part of the constitution. If a habit or precept which can be set at nought is thereby shown not to be a portion of constitutional morality, it naturally follows that no constitutional rule is ever disobeyed.[31]

Along similar lines, the Supreme Court, had it considered *Auckland Harbour Board* in the *Patriation Reference*, could conceivably have set it aside as an irrelevant precedent, taking the enforcement of the principle as clear evidence that it had never been a convention.

One should not be lured so easily into the trap of such circular reasoning, however. First of all, nobody now pretends that rulings at common law merely declare what has always been the law (and thus, in the Supreme Court's reasoning, what has *never* been *mere* constitutional usage).[32] Second, there are sources independent from judicial rulings that enable us to identify constitutional conventions. A court can well write that a principle has always been part of the common law and that, by necessary implication, it cannot have been a mere convention at any point in time, but this will not change the facts recorded by writers of politics and history. The proposition seemingly put forward by the majority (law) that there cannot be any overlap between convention and law entraps the discussion into a circle and obviously needs a little more backing than the statement, advanced on the basis of that very proposition, that there are no precedents of crystallisation. The possibility of crystallisation is expressly stated in the *Labour*

---

[31] *Introduction to the Study of the Law of the Constitution*, 8th ed. (last by the author), London: MacMillan, 1927, p. 437.

[32] On the declaratory theory in the Canadian legal tradition, see W.R. Jackett, "Foundations of Canadian Law in History and Theory", in O.E. Lang (ed.), *Contemporary Problems of Public Law in Canada*, Toronto: Univ. of Toronto Press, 1968, p. 3.

Conventions case and very clearly exemplified by *Auckland Harbour Board*. Those two precedents were available at the time of patriation.

One of the most compelling precedents to date of a convention crystallising into law is perhaps *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others*,[33] which was decided by the English Court of Appeal some four months after the opinion of the Supreme Court was handed down in the *Patriation Reference*. It casts an interesting light on the dubious proposition of the Supreme Court that "the very nature of a convention ... is inconsistent with its legal enforcement".[34] To the extent that it provides an express judicial statement of crystallisation, this precedent is immune to the circular reasoning of the Supreme Court.

The case is a chapter of the British side of the same patriation story. Various Indian associations in Canada opposed the Canada Bill (U.K.), fearing that the special rights granted to Indians under the Royal Proclamation of 1763 and the treaties made between 1693 and 1906 were in danger of being reduced or extinguished. In particular, they feared that the achievement of complete independence by Canada would sever the link they believed had so far been preserved with the British Crown with respect to various treaty obligations. Following representations by the associations to the United Kingdom government, the Foreign and Commonwealth Office stated in a memorandum to the Foreign Affairs Committee of the House of Commons that "All relevant treaty obligations insofar as they still subsisted became the responsibility of the Government of Canada with the attainment of independence, at the latest

---

[33] [1982] Q.B. 892.

[34] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 774-75.

with the Statute of Westminster 1931".[35] The Indian Association of Alberta together with other Indian associations in New Brunswick and Nova Scotia applied to the Divisional Court of the Queen's Bench Division for declarations that the statement was wrong in law and that obligations entered into by the Crown under various treaties and statutory provisions were owed to the Indian peoples by Her Majesty in right of the United Kingdom government. The application was dismissed. On appeal, the applicants contended in substance (1) that the obligations entered into by the Crown under the Royal Proclamation of 1763 and various treaties still subsisted against the Crown in right of the United Kingdom because they had never been transferred; (2) that, having in law retained the power of disallowance respecting Canadian legislation the Crown in right of the United Kingdom had retained a degree of sovereignty over the Canadian constitution which carried the obligations above. The Court of Appeal dismissed the appeal; and the Appeal Committee of the House of Lords refused to grant leave, on the ground that, "for the accumulated reasons given in the judgments of the Court of Appeal, it simply is not arguable that any obligations of the Crown in respect of the Indian peoples of Canada are still the responsibility of Her Majesty's government in the United Kingdom".[36] The question here is how the obligations entered into by the Imperial Crown had come to lie exclusively with the Crown in right of Canada. For Lord Denning M.R., the explanation is quite simple: constitutional usage in the Empire evolved in the course of this century with the emancipation of the great colonies, and the legal conception of the Crown gradually followed this

---

[35] 11 November 1980, as quoted in the judgment: [1982] Q.B. 892, 909.

[36] 11 March 1982, reported with the Court of Appeal judgment: *Id.*, at 937 (*per* Lord Diplock).

development towards a nearly complete recognition of divisibility. He writes:

> In all these matters in the eighteenth and nineteenth centuries it was a settled doctrine of constitutional law that the Crown was one and indivisible. The colonies formed one realm with the United Kingdom, the whole being under the sovereignty of the Crown.[37]

And he continues, referring to the developments surrounding the Imperial Conference of 1926:

> Hitherto I have said that in *constitutional law* the Crown was single and indivisible. But *that law was changed* in the first half of this century, *not by statute, but by constitutional usage and practice*. The Crown became separate and divisible, according to the particular territory in which it was sovereign.
>
> [...]
>
> As a result of this important constitutional change, I am of opinion that those obligations which were previously binding on the Crown simpliciter are now to be treated as divided.[38] [Emphasis added.]

The words of Lord Denning M.R. are a rare breed, as I noted, because they explicitly acknowledge that a change in "*constitutional law*" has come about through "*constitutional usage and practice*", not legislation.[39]

The brief discussion in this chapter should be more than sufficient to show that the rejection of the crystallisation thesis in the *Patriation Reference* does not sit comfortably with other weighty judicial

---

[37] *Id.*, at 911.

[38] *Id.*, at 127-28.

[39] May L.J. also relied, amongst other things, on the Imperial Conference and the idea of devolution, while Kerr L.J. put the transfer of the obligations at an earlier date as a consequence of the grant of a representative legislature. Note that the *ratio* of this case, if there is one, is not clear; one interpretation puts Lord Denning M.R. in the majority with Kerr L.J. See the discussion in *Manuel v. Attorney General* (1982), [1983] 1 Ch. 77, 89-95.

authorities. The well-known reasons of Chief Justice Duff in the *Labour Conventions case* were discarded on grounds shown to be at best patently erroneous.[40] As for the *Auckland Harbour case*, it was unfortunately not brought to the attention of the Court despite the impressive number of distinguished lawyers involved in the case. This means that the opinion was given in ignorance of a crucial precedent, as this was one of the few cases of a convention clearly turned into a hard standard. Moreover, the analysis of the Supreme Court has been shown to entrap the discussion into a circle which defined virtually all precedents as irrelevant.

The next and last chapter of Part Two will show why the position of the English Court of Appeal, at least that of Lord Denning M.R., makes more sense of the public law tradition (British and Canadian) than that of the majority in the *Patriation Reference*.

---

[40] One might indeed suspect that the way in which the Court chose to discard those reasons is somewhat less than honest.

Chapter VI

Convention and Unwritten Law

The Supreme Court concludes its unsatisfactory examination of the crystallisation thesis in the *Patriation Reference* with the proposition (so it seems) that a convention can only become law through statutory (or formal constitutional) adoption, that is, through a non-judicial change in the body of law that courts are under a duty to enforce.[1] The proposition reveals a measure of uneasiness in defining the boundaries of unwritten law – including its relationship to convention – in the field of constitutional law. The most problematical statement of the Court goes as follows:

> The leap from convention to law is explained [in argument] almost as if there was a common law of constitutional law, but originating in political practice. That is simply not so. What is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute.[2]

This statement makes a far-reaching assumption about judicial law-making in the constitutional field. It not only denies the existence of a common law "originating in political practice"; it also apparently denies that if there is such a thing as a common law of the constitution –

---

[1] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 882.

[2] *Id.*, at 784.

which, being common law, must have originated in the courts – it can "evolve" in judicial decisions. For, ultimately, what could possibly be the reason for the evolution of the common law in this field but its (political) desirability?

What the Court implicitly asserts, in other words, is one of three things: (1) that there is no such thing as a body of unwritten constitutional law; (2) that if there is such a thing it has by now fully matured into a rigid body which only (constitutional) legislation can modify; or (3) that if there is a body of unwritten constitutional law capable of changing, then courts in their evolving of it are forbidden to look to the body of constitutional conventions. All those possibilities, it is suggested, are unacceptable. The discussion in this last chapter of Part Two shows that the watertight distinction between convention and law put forward by the Supreme Court cannot be reconciled with a workable theory of judge-made law in constitutional matters.

VI.1 THE LIFE OF UNWRITTEN CONSTITUTIONAL LAW

The proposition that there is no such thing as unwritten constitutional law can hardly be taken seriously. Nowadays, it may perhaps at first glance seem warranted by the existence of some legislative basis to support judicial decisions in a majority of constitutional cases.[3] In England, and later the United Kingdom, the best known changes in the law of the constitution find their expression in such statutes as the Bill of Rights of 1688 and Act of Settlement of 1701, the Union with Scotland Acts of 1707, the Union with Ireland Act of 1800, the Parliament Acts of

---

[3] For observations on the weakness of public law reasoning in common law courts (from an Australian perspective) see Colin Howard, "Public Law and Common Law" in D.J. Galligan (ed.), *Essays in Legal Theory*, Melbourne: Melbourne Univ. Press, 1984, p. 1.

1911 and 1949, the Statute of Westminster of 1931, and the European Communities Act of 1972.[4] In Canada, it is clear that the majority of judicial cases dealing with constitutional matters concern the interpretation and application of constitutional legislation. A portion of constitutional law remains, however, which cannot be traced back to legislative material and can be recognised as common law. The majority on convention expressly acknowledged this in the *Patriation Reference*: "Another part of the Constitution of Canada consists of the rules of the common law".[5] Clearly, one can legitimately speak of "the common law of the constitution"[6].

There lies at the very least what is left of the law relating to the royal prerogatives after very extensive legislative interventions in that field.[7] One example of this in Canadian constitutional law is the prerogative over the making of treaties.[8] But the primary example of a constitutional matter being governed by common law is probably afforded

---

[4] See Wade and Bradley, *Constitutional and Administrative Law* 10th ed., by A.W. Bradley, London: Longman, 1985, pp. 13ff.

[5] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 896.

[6] It will be assumed throughout this thesis that there is no reason to distinguish "unwritten constitutional law" from "common law of the constitution". I agree with the essential point made in Owen Dixon's celebrated article, "The Common Law as Ultimate Constitutional Foundation" (1957) 31 *A.L.J.* 240.

[7] Another example may be afforded by the fundamental rule which was surprisingly but repeatedly confirmed in the *Patriation Reference* that whatever the United Kingdom Parliament enacted respecting the Canadian constitution was law. That rule had not been the object of formal constitutional adoption and was being given legal force by the Supreme Court. The status of this rule will be discussed in both Part Three and Part Four.

[8] On the controversy as to the origin of the power and its distribution in the federation, see Gerald L. Morris, "The Treaty-Making Power: A Canadian Dilemma" (1967) 45 *Can. Bar Rev.* 478.

by the famous case of *Stockdale v. Hansard.*[9] The Court of Queen's Bench there decided that common law courts were bound to decide an issue of privilege put "directly" (as opposed to "incidentally") before them.[10] The decision proceeded from the recognition that the *lex et consuetudo Parliamenti* was not to function as a separate legal system unknown to common law courts. It was to be taken, rather, as a part of the common law of the realm, which was said to recognise the special jurisdiction of the House of Commons in matters of privilege.[11] Faced with a claim of privilege, courts would thereafter consider themselves competent to enquire as a matter of common law "whether the subject matter does fall within the jurisdiction of the House of Commons".[12] It is the core meaning of constitutional law which is here exemplified with fundamental issues of power, privilege, jurisdiction and bodies of law being judicially settled; and the issues are settled as a matter of common law. This famous example was recently echoed in the more rigid context of the Canadian constitution when the Supreme Court decided a claim of privilege made in the face of the *Canadian Charter of Rights and Freedoms* in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly).*[13]

The Nova Scotia House of Assembly in that case had prohibited the use of television cameras in the House in the purported exercise of its parliamentary privileges to exclude strangers and to control its

---

[9] (1839), 112 E.R. 1112 (Q.B.).

[10] *Id.*, at 1166-68.

[11] A crucial statement in this respect was that resolutions of the House of Commons could not have the full force of law because at common law an Act of Parliament must be adopted by Queen and Lords as well as Commons: *id.*, at 1153-54.

[12] *Id.*, at 1168.

[13] [1993] 1 S.C.R. 319.

decorum.[14] The media had been attempting to use small, battery-operated, hand-held, silent cameras from the public gallery, wanting to get better – or more realistic – coverage of the debates than that afforded by the publicly available "electronic Hansard". An application was made for an order allowing the use of independent cameras on the basis that the decision of the House of Assembly contravened the freedom of the press guaranteed by the *Charter*.[15] The Supreme Court in substance decided that the claim of privilege was justified and that a court of law was not going to enquire whether a decision properly made by a legislative assembly pursuant to its constitutional privileges was in violation of the *Charter*. Constitutional status for the privilege meant that it was not subject to review under a document – the Charter – which was, after all, just another part of the constitution. The Supreme Court here recognised that those rules governing privileges which "arose from the common law"[16] have, "without expression in imperative constitutional text or statute",[17] the same constitutional status as has the recently adopted *Charter*.

This decision may be questionable on a number of grounds which will not be addressed here.[18] That which is of great interest for this

---

[14] The privilege to control the publication of the debates was not claimed.

[15] Section 2(b).

[16] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 379.

[17] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 784.

[18] First, the courts' review of whether a claim of privilege is justified is given a very ambiguous status as the Supreme Court visibly refrains from giving a straightforward definition of the protected "sphere", thus leaving the matter open to judicial review for every single decision made pursuant to parliamentary privilege, on a case-by-case basis; the Court otherwise asserts that the rulings of the House should be final (see the ambiguous passage at 387(j)-388). Second, the

thesis is the general attitude of the Supreme Court with respect to unwritten constitutional law. If the existence of the common law of the constitution cannot be doubted, the attitude of the Chief Justice, as we shall shortly see, makes plain that the actual life of that body of law in the contemporary constitutional context cannot be taken for granted. Hence the second possible interpretation of the problematical passage quoted from the *Patriation Reference* at the beginning of this Chapter: if there is anything like a body of unwritten constitutional law, it should be considered frozen until modified by (constitutional) legislation.[19]

The notion that the evolution of the common law of the constitution has come to an end calls for special attention in view of the comments made by the Chief Justice in *New Brunswick Broadcasting.* Expressing in separate reasons his discomfort with unwritten constitutional materials, Lamer C.J. looked for a way to ground privileges on the preamble to the *Constitution Act, 1867*, which states that Canada is to have a constitution "similar in Principle to that of the United Kingdom". The

---

notion that "one part of the Constitution cannot be abrogated or diminished by another part of the Constitution" (at 373) does not necessarily lead to the Court's conclusion. Consider the following: the legislative powers conferred by the *Constitutional Act, 1867* are constitutional powers; the *Charter* cannot, therefore, limit the exercise of those powers. The difficulty lies in the confusion mentioned above between the power (the protected sphere) and its exercise (a particular decision of the speaker). Third, the reasoning would require that a great deal more be said about the status of privileges legislated by the provinces in accordance with the reasoning of the Judicial Committee of the Privy Council in *Fielding v. Thomas*, [1896] A.C. 600 (P.C.). On this problem, see the reasons of Sopinka J., at 394ff.

[19] H.L.A. Hart, in *The Concept of Law* (Oxford: Clarendon Press, 1961, p. 132), makes this assumption for some common law rules: "... the result of the English system of precedent has been to produce, by its use, a body of rules of which a vast number, of both major and minor importance, are as determinate as any statutory rule. They can now only be altered by statute ...".

principle of judicial independence having been recognised through the preamble,[20] the following analogy could be made:

> There is a clear parallel between the doctrines of independence of the judiciary and of parliamentary privilege as the latter is the means by which the Houses of Parliament protect their independence. In Canada, it is through the exercise of the privileges inherent in all legislative bodies that the provincial Houses of Assembly are able to control their own proceedings and thereby maintain the independence of the legislative process.[21]

But the Chief Justice could not resolve to accept that "unexpressed" parliamentary privileges could enjoy constitutional status. The following passage from his reasons puts a disturbing question mark on the future of unwritten constitutional law:

> I am not sure, however, that this argument can be taken so far as to grant parliamentary privileges a constitutional status which is on the same footing as the *Charter*. The *Charter* is part of an evolution of our Constitution which culminated in the supremacy of a definitive written constitution. Given this, I would be reluctant to import unexpressed concepts into the Constitution in a way that would evade scrutiny under the expressed guarantees of the *Charter*.[22]

This seems to give surprising weight to the flow of rhetorical flourish which surrounded the adoption of the *Charter*. It may be true that patriation managed to bring some (very limited) order into the bulk of formal documents making up the written part of the Canadian constitution. But surely we are still a very far cry from the Chief Justice's hopeful vision of a "definitive written constitution" with exclusive supreme

---

[20] *Beauregard v. Canada*, [1986] 2 S.C.R. 56, 72.

[21] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 354.

[22] *Id.*, at 354-55.

status.[23] Notwithstanding the relative value of that "vision" from a normative standpoint, it is clear that it could not sit easily with some basic propositions about the constitution that are recognised in legal materials.[24] One example of this is afforded by the rather startling attempt of the Chief Justice at excluding the English *Bill of Rights* from his definition of the Canadian constitution. The appellant had argued that the preamble to the *Constitution Act, 1867* had incorporated art. 9 of the *Bill of Rights* and thereby incorporated the privileges of legislative assemblies. But that did not square with Lamer C.J.'s vision:

> I do not think that the wording of the preamble of the *Constitution Act, 1867* can be taken to refer to so specific an article of the Constitution of the United Kingdom. While the Constitution of Canada is undoubtedly founded upon many of the same broad principles as is the Constitution of the United Kingdom, the two are far from identical. Article 9 cannot be directly transplanted without specific reference.[25]

Those words would be surprising enough had a majority of the Supreme Court not said the very exact opposite in the *Patriation Reference*, and had that majority of seven not actually included Lamer J. (as he then was). The relevant passage is this:

---

[23] The Chief Justice does not tell us where the notion of the supremacy of written law over case-law (which he refers to as "unexpressed", as if his very comment was not "expression") comes from. What I may note, however, is that the notion is self-defeating insofar as it purports to eliminate the standpoint (outside written law) from which it is necessarily uttered. If there are such principles *about* written law as the principle of its supremacy, they cannot be subjected to the supremacy of that written law. This will be discussed more fully in Part Three.

[24] See Peter W. Hogg, *Constitutional Law of Canada*, 3d ed., Toronto: Carswell, 1993, p. I-8.

[25] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 353.

> It would be incompatible with the self-regulating – "inherent" is as apt a word – authority of Houses of Parliament to deny their capacity to pass any kind of resolution. *Reference may be appropriately made to art. 9 of the* Bill of Rights *of 1689, undoubtedly in force as part of the law of Canada*, which provides that "proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".[26] [Emphasis added.]

The question whether a "specific reference" actually *excluded* the *Bill of Rights* from the constitution would perhaps be more appropriate.[27] The necessary "transplantation" of bodies of law into new territories or new regimes is normally governed by a body of unwritten constitutional rules which tend to prevent the creation of a legal vacuum. It is the common law which has assumed the role of regulating the reception of metropolitan law in the British North American colonies and later the Dominion of Canada.[28] For a settled colony (such as Nova Scotia was judicially decided to be),[29] the general rule provided that English law was received insofar as it was considered "applicable" to the situation

---

[26] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 785.

[27] The applicability of the *Bill of Rights* was not doubted in the celebrated New Zealand case of *Fitzgerald v. Muldoon*, [1976] 2 N.Z.L.R. 615 (S.C.). Wild C.J. there wrote, with respect to the *Bill*, at 622: "The fact that no modern instance of its application was cited in argument may be due to the fact that it is rarely that a litigant takes up such a cause as the present, or it may be because governments usually follow established constitutional procedures. But it is not a reason for declining to apply the Bill of Rights where it is invoked and a litigant makes out his case". The Privy Council has recently applied the *Bill of Rights* in a case from New Zealand: *Prebble v. Television New Zealand Ltd.* (1994), [1995] 1 A.C. 321 (P.C.). For a comment on that decision see Geoffrey Marshall, "Impugning Parliamentary Impunity" [1994] *P.L.* 509.

[28] On reception generally, see J.E. Cote, "The Reception of English Law" (1977) 15 *Alta L.R.* 29; Barry Cahill, "'How far English Laws are in force here?': Nova Scotia's first Century of Reception Law Jurisprudence" (1993) 42 *U.N.B. L.J.* 113

[29] *Uniacke v. Dickson* (1848), 2 N.S.R. 287, 299 (S.C. N.S.). Excepting the Island of Cape Breton, Nova Scotia was in fact ceded to Great Britain by the Treaty of Utrecht in 1713.

of the settlers and to "the condition of an infant colony".[30] With respect to the law of privileges, the common law provided, after some hesitation, that local legislatures could only claim as inherent privileges those rights which were found necessary to their capacity to function as legislative assemblies.[31] The Privy Council settled the matter at common law in *Kielley v. Carson*,[32] a case concerning the privileges of the legislative assembly of Newfoundland:

> Their Lordships see no reason to think, that in the principle of the Common Law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform.[33]

This meant that the colonial legislatures did not enjoy the broad range of privileges of the House of Commons at Westminster, which by virtue of ancient usage and tradition, and because of the paramount position of the Westminster Parliament, included the privilege to punish for contempt. Such broader privileges going beyond protective and self-defensive powers were not thought to be necessary for a colonial legislature,[34] a

---

[30] The words are from the *Commentaries* of Blackstone (as quoted in *Uniacke*, *id*, at. 299-300). Statutes were often found to be misadapted to the local situation, as in *Uniacke*, whereas the common law was only rarely rejected on that basis.

[31] The story of the reception of privileges in British North America is recited in Joseph Maingot, *Parliamentary Privilege in Canada*, Toronto: Butterworths, 1982.

[32] (1842), 13 E.R. 225 (P.C.).

[33] *Id.* at 234.

[34] The legislative assemblies meeting in Parliament were recognised as having the power to go beyond their "inherent" privileges by legislation: *Fielding v. Thomas*, [1896] A.C. 600 (P.C.). The *New Brunswick Broadcasting* case states that legislated privileges do not necessarily enjoy the same constitutional status.

position which the Supreme Court of Canada confirmed after confederation with respect to provincial legislatures.[35]

If one is enquiring about the applicability of the ninth article of the *Bill of Rights* with respect to the House of Assembly of Nova Scotia, one will find the answer in those cases. The answer is that the law governing privileges, including the ninth article of the *Bill of Rights*, was received conformably to the general principle of reception, that is, *insofar* as it was "applicable" to the "situation" and "condition" of a new colonial legislature. Common law courts have considered that this "situation" and "condition" did not justify the incorporation of the broader "punitive" privileges recognised at Westminster under the general principle of necessity which "is the foundation of every privilege".[36] The general principle of necessity applicable to Westminster was received, in other words, but was considered in this new "situation" to justify only those "protective" privileges which were enjoyed by the Mother Parliament. The ninth article of the *Bill of Rights* could well be accommodated in this new context; it is therefore hard to see what the Chief Justice was looking for in the preamble of the *Constitution Act, 1867*. That preamble can only be said to recognise for the new federation the otherwise well-established common law position for settled colonies that the law should be "similar in Principle to that of the United Kingdom", though it may vary in the details, having regard to the "situation" and "condition" of that colony.

---

[35] *Landers v. Woodworth* (1878), 2 S.C.R. 158.

[36] *Stockdale v. Hansard* (1839), 112 E.R. 1112, 1169.

It is reassuring that the majority of the Court chose to set aside the disturbing analysis of the Chief Justice (although great respect was shown in doing this):

> It is argued, however, that we in Canada have pursued the enterprise of constitution-writing to the point where unwritten concepts can no longer be said to have a place in our Constitution. I say immediately that I share the concern of the Chief Justice that unwritten concepts not be freely imported into a constitutional regime which has culminated in a written constitution. I note as well that there is eminent academic support for taking a cautious approach to the recognition of unwritten or unexpressed constitutional powers. Yet the matter is not susceptible to categoric exclusions...[37]

Hogg is later quoted in the majority opinion[38] as noting the truism that "Canada's gradual evolution from colony to nation has denied it any single comprehensive constitutional document".[39] The habit is nevertheless honoured in the majority reasons of referring to the preamble of the *Constitution Act, 1867* to ground the status of legal propositions not laid down in (constitutional) legislative materials. The limited privileges of the legislative assemblies are thus said to "fall within the group of principles constitutionalized by virtue of this preamble".[40] But that reference to the preamble is soon after shown to be superfluous:

> This is not a case of importing an unexpressed concept into our constitutional regime, but of recognizing a legal power

---

[37] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 375-76 (*per* McLachlin J.). McLachlin J.'s reasons were signed by only three other members of the Court out of the eight who took part in the judgment; La Forest J. concurred with slight qualifications which McLachlin J. endorsed.

[38] *Id.*, at 377.

[39] Hogg, *supra*, at I-8.

[40] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 377.

> fundamental to the constitutional regime which Canada has adopted in its *Constitution Acts, 1867 to 1982*. Nor are we here treating a mere convention to which the courts have not given legal effect; the authorities indicate that the legal status of inherent privileges has never been in doubt.[41]

What the majority recognises here – and the consequence is crucial – is that what is "constitutionalized by virtue of" the preamble to the *Constitution Act, 1867* dos not necessarily qualify as constitutional law; it is plain that a great number of the "principles" referred to are constitutional conventions. In the Court's reasoning, the proposition that a principle is part of constitutional *law* must therefore find support elsewhere. Such support will be found, quite obviously, in "*the authorities*". In this case, the Court finds, "the authorities indicate that the legal status of inherent privileges has never been in doubt". Again, the question for us is the extent to which such "authorities" are taken to be static. When Jennings criticised the crystallisation thesis put forward by Chief Justice Duff in the *Labour Conventions case*,[42] he was appealing to the notion, which Chief Justice Lamer might now find attractive, that the common law of the constitution had sealed its gates after having incorporated the constitutional usages of centuries past; the formative years of the common law were simply over.[43] On that view, the situation of constitutional law would be somewhat analogous to that of criminal law, insofar as Canadian courts have never claimed the power to declare new offenses.[44] The *Patriation Reference* Court did not quote

---

[41] *Id.*, at 377-78.

[42] *Reference re Weekly Rest in Industrial Undertakings Act (Labour Conventions)*, [1936] S.C.R. 461.

[43] Ivor Jennings, *The Law and the Constitution*, 5th ed., London: Univ. of London Press, 1959, pp. 126-27.

[44] *Frey v. Fedoruk*, [1950] S.C.R. 517, 526, 530.

Jennings on that point, but my running case on parliamentary privileges may afford a precious clue on this issue.

Ever since *Stockdale v. Hansard* it has been clear that the definition and limits of parliamentary privileges are properly to be found in common law "authorities". The general principle was expressed in that case that necessity is the foundation of every privilege. Necessity largely depends upon context, of course, and as I said the Canadian context (like other colonial contexts) was not thought to justify as many privileges as had been recognised at common law in Great Britain. Now, quite obviously, the passage of time may affect context as much as a passage to a colony might have affected context for settlers. So much so that the Supreme Court majority, who found the general principle of necessity to be still relevant in Canada today, nevertheless thought it necessary to reassess the rules, that is, the actual privilege at issue, which the common law had "upheld for many centuries". The privilege ultimately claimed at the bar was the right to exclude strangers from the House. McLachlin J. writes for the majority:

> The fact that this privilege has been upheld for many centuries, abroad and in Canada, is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model. *However, it behooves us to ask anew: in the Canadian context of 1992, is the right to exclude strangers necessary to the functioning of our legislative bodies?*[45] [Emphasis added.]

The answer was yes. But, for our discussion, it is the *question* which has enormous significance. To ask this question is openly to recognise that the rules of the common law of the constitution are being subjected to an ongoing process of judicial reassessment. To many this may seem

---

[45] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 387.

trite. Surely there are other examples of the evolution of unwritten rules in recent Canadian constitutional law. A good example of this can be found in the line of cases on Crown immunity in which the well established doctrine in *Lovibond*[46] was gradually set aside (*British Columbia Power*,[47] *Amax Potash*[48] and *Air Canada* (1986)[49]). But the explicit recognition of the Supreme Court in *New Brunswick Broadcasting* that the law is subjected to reassessment in view of the evolving context, made in respect of rules which are undeniably part of the common law of the constitution, with the supplementary reminder that such rules enjoy the same status as "imperative constitutional text",[50] possibly has no equivalent.

It cannot be denied, therefore, that the common law of the constitution can still evolve, and the *Patriation Reference* should be interpreted accordingly. The opposite interpretation, which would seem to suggest a strong belief in modern institutional stability and/or the notion that courts are not a proper forum for the implementation of change in the law of the constitution, would require *more* articulation than was provided by the Court in the *Patriation Reference* (nothing, that is), and *better* articulation than that which Chief Justice Lamer provided in *New Brunswick Broadcasting*.

---

[46] *Lovibond v. Governor General of Canada*, [1930] A.C. 717 (P.C.).

[47] *British Columbia Power Corp. v. British Columbia Electric Co.*, [1962] S.C.R. 642.

[48] *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576.

[49] *Air Canada v. A.G. B.C.*, [1986] 2 S.C.R. 539.

[50] Those are the words of the majority (law) in the *Patriation Reference* Court: *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 784.

May the statement of the *Patriation Reference* majority (law) that "[w]hat is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute"[51] be given a different reading? May it be taken to mean that political practice "in and of itself" cannot change the law without the support of formal enactment; that only judicial decisions can? The passage so read would only operate to reject the "passive" version of crystallisation (whereby conventions crystallise without judicial intervention), saying nothing directly to the functioning of the common law. Such a reading would make the passage consistent with the abstract but explicit acknowledgement found in the same reasons that the rules of the common law "are subject to modification and even reversal by the courts which gave them birth".[52]

But as we know, the *Patriation* Court also rejected the "active" version of crystallisation.[53] This leaves only one possible interpretation of the *Patriation Reference* with respect to the relation between convention and unwritten constitutional law. Given that the common law of the constitution exists and is still developed by the courts, and given that conventions can neither turn nor be turned into law, the Court's position must mean that courts cannot look to the body of constitutional conventions when it comes to evolving the common law of the constitution. Or, put more precisely, the reason for the

---

[51] *Id.*, at 784.

[52] *Id.*, at 775.

[53] "The very nature of a convention, as political in inception and as depending on a consistent course of political recognition by those for whose benefit and to whose detriment (if any) the convention developed over a considerable period of time is inconsistent with its legal enforcement" (majority on law, *id.*, at 774-75); "This conflict between convention and law which prevents the courts from enforcing conventions also prevents conventions from crystallizing into laws, unless it be by statutory adoption" (majority on convention, *id.*, at 882).

introduction of a new common law rule can never be an existing convention. This seems to be the narrowest available interpretation; and as I suggested at the beginning of this Chapter, it proves to be untenable.

VI.2 THE CONTRIBUTION OF CONVENTION TO UNWRITTEN LAW

We have seen that in the working of the constitution, convention and common law often regulate the powers of the same entities. The Crown and the legislative assemblies are for instance governed in some respects both by convention and common law. "The main purpose of conventions" as the Supreme Court put it in the *Patriation Reference*, "is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period".[54] This is particularly important for the appropriate operation of those written constitutional rules which have become outdated and are difficult to change because of the rigidity of the amending procedure. Political actors tend to develop rules around outmoded provisions, rules that give effect to evolving values in the polity and that they generally abide by. The actual exercise by the federal cabinet of the vast powers granted to the Governor General by the written constitution is an apt example.

When it comes to *unwritten* constitutional rules which have been allowed to become outmoded, however, the need for constitutional convention is more difficult to grasp. The common law is known worldwide for its flexibility, and its capacity to adapt to new circumstances which experience shows can scarcely be predicted. Yet the notion of

---

[54] *Id.*, at 880.

constitutional conventions originates in the cradle of the common law, a polity which is widely considered as yielding the prime example of an unwritten constitution.[55] This may perhaps be explained partly by the fact that conventions sometimes emerge too rapidly for the courts, who can catch up only when occasions are given them to make rulings adapted to new realities. Certainly it may be attributed in part to the popularity, over at least a century, of the view articulated by Jennings in the 'forties: that the common law, open as it was to the surrounding context until it had created enough rules to form a comprehensive, functioning body of law for the polity, had at some point turned rigid to the benefit of a Parliament which was willing to take over the responsibility of adjustment and revision in the face of change. With necessary adaptations (dates being slightly different, and Parliament being substituted for the Canadian constitutional authority), this is in substance the view reflected in Lamer C.J.'s dicta in *New Brunswick Broadcasting*, on which I have commented. But the majority in that case made clear, with due consideration for the normative argument that courts should show restraint for the sake of an important aspect of the democratic principle, that the common law of the constitution is not frozen in the law books of another century.

We have seen that the Supreme Court thought it incumbent on them to reassess whether the long-standing privilege of a legislative assembly to exclude strangers was still justified "in the Canadian context of 1992". This was acknowledging that courts have a duty to reassess and re-articulate the common law of the constitution, having regard to the ever changing context which slowly but constantly brings about new

---

[55] This view is notoriously contested by Neil MacCormick, "Does the United Kingdom Have a Constitution? Reflections on *MacCormick v. Lord Advocate*" (1978) 29 *N.I.L.Q.* 1.

"values and principles" pertaining to the legitimate government of a polity. Given the fact that conventions often address the very powers which the common law regulates, and that they typically embody those values or principles which have gained currency, it is hard to see why they should not be considered a primary element of that "context" which informs the reassessment and re-articulation of the common law.

Historically, as Geoffrey Marshall noted,[56] there can be no doubt that the courts have incorporated into the common law what later came to be known as constitutional conventions. The rules or principles of public law which are not derived from legislation must have been introduced at some point in the case-law and it is extremely likely that such rules and principles were derived in most cases from factually established standards of constitutional propriety. Courts have relied on – and in a strong sense enforced – such principles as "the king can do no wrong", or such rules as that laid down in *Campbell v. Hall* respecting the termination of the prerogative power of legislation over a colony following the grant of a local representative legislature.[57] These can only have evolved out of some idea of constitutional propriety prevailing at the time of their inclusion in the case-law. The rationales for the evolution of these rules of the common law are clearly the same as those of constitutional conventions. O'Sullivan J.A., dissenting, recognised this in the *Manitoba Patriation Reference*:

> If the courts could not take account of constitutional convention and practice, we would still be enforcing the Divine Right of Kings as understood by the Stuarts.[58]

---

[56] *Constitutional Conventions*, Oxford: Clarendon Press, 1984, p. 15.

[57] (1774), Lofft 655.

[58] *Reference re Amendment of the Constitution of Canada*, [1981] 2 W.W.R. 193, 244 (Man. C.A.).

Another clear example, pointed out by Allan,[59] is the denial at the beginning of the seventeenth century of the right of the Monarch to administer justice in person. Cases "ought to be determined and adjudged" Chief Justice Coke found, "in some Court of justice, according to the law and custom of England".[60] Some may believe that the constitutional usages that made up the common law are those of the seventeenth century, and that the period of incorporation is over. But such is not the position of the Supreme Court.

A more recent example of the phenomenon is afforded by the transfer of the royal prerogative power over the acquisition of territory from the Imperial Crown to the Crown in right of the Commonwealth of Australia.[61] It is clear that this particular prerogative was to be exercised by the Crown on the advice of British ministers for the whole Empire when the Letters Patent constituting the Office of the Governor-General were issued in 1900.[62] For, in accordance with the political practice of the

---

[59] T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundation of British Constitutionalism*, Oxford: Clarendon Press, 1993, pp. 262-63.

[60] *Prohibitions del Roy* (1607), 12 Co. Rep. 63, 63-64.

[61] The case of the other great colonies is in principle similar, but the point is more limpid in the case of Australia. With respect to Canada, the powers exercisable by the Crown can be said to have been formally transferred to the Governor General in 1947 by the *Letters Patent constituting the Office of Governor General of Canada* (reproduced in R.S.C. (1985), App. II, No 31).

[62] *Letters Patent constituting the Office of Governor-General and Commander-in-Chief of the Commonwealth of Australia*, reproduced in *Commonwealth Rules, Regulations and By-Laws*, (1901-05), vol 1, p. 3. The Australian Constitution, being s. 9 of *The Commonwealth of Australia Constitution Act, 1901*, 63 & 64 Vict., c. 12 (U.K.), provides that the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative (s. 69), and that he is to have "such powers and functions of the Queen as Her Majesty may be pleased to assign to him." (s. 2). The High Court has linked this last phrase to the Letters Patent constituting the Office of Governor-General and the Instructions of 1900: *Commonwealth and Central Wool Committee v. Colonial Combing, Spinning and Weaving Co. Ltd.* (1922), 31 C.L.R. 421, 453 (*per* Higgins J.).

Empire in the period immediately following the Australian union, the Imperial Crown had in principle retained all prerogatives pertaining to external affairs.[63] Then the developments leading to the Imperial Conferences of 1926 and 1930 made this legal situation rather awkward and constitutional conventions consequently emerged regulating the exercise of external powers among the now equal partners of the British Commonwealth of Nations. But the *Statute of Westminster* 1931, as a legal instrument, cannot be said to have formally changed the situation with respect to the prerogative. By virtue of s. 3 of the *Statute*, the proper legislative assembly in the Dominion was now allowed to confer extra-territorial powers on the local executive, but the prerogative formally remained with the Crown Imperial. This legal situation had become quite absurd in the fifties, and by 1975 judges in the High Court were prepared to assert that the prerogative had actually come to lie with the Crown in right of the Commonwealth.[64] How did such a change in the common law

---

[63] See Philip Noel Baker, *The Present Juridical Status of the British Dominions in International Law*, London: Longman, 1929, p. 127.

[64] *Bonser v. La Macchia* (1969), 122 C.L.R. 177, 223-24 (Windeyer J.); *New South Wales v. The Commonwealth* (1975), 135 C.L.R. 337, 388 (Gibbs J.):

> "The prerogatives of the Crown to acquire new territory or extend its sovereignty or jurisdiction are, in my opinion, available to the Crown in right of the Commonwealth. An extension of sovereignty over an area of the sea not already part of the Commonwealth (and therefore not part of any state), or the acquisition of new sovereign rights over the continental shelf, might be effected by executive act, but might validly be authorized, ratified or given recognition by legislation."

This last case was about the jurisdiction of the Commonwealth over the three-mile zone off the coast, including the sea-bed, and over the continental shelf as defined by recent international treaty-law. Gibbs J. dissented on the issue of the three-mile zone but ruled with the majority as regards the continental shelf. His comment on the prerogative is found in the part of his reasons applying to both issues and is not inconsistent with the (rather improbable) reasoning of his colleagues. The latter all insist on such notions as international personality and independence as if the jurisdiction of the Commonwealth (of Australia) came from the dictates of some notion of international law. Gibbs J. is the only one who attempts to really explain the situation in terms of the

come about? It is not necessary to present the case as one of "crystallisation" to illustrate how the reasons informing changes in the common law of the constitution can be found in conventional rationality. In this case a constitutional convention clearly precluded the exercise by British authorities, with respect to the Dominions, of the prerogative formally left with the Crown Imperial. The conventional rationale may be implied from the reasons of Windeyer J. in *Bonser v. La Macchia*:

> The Commonwealth of Australia has, I consider, now succeeded to the Imperial rights and interests formerly existing in and under the territorial waters, as understood in international law, which are adjacent to the coast of Australia. That is because Australia has grown into nationhood. With the march of history the Australian colonies are now the Australian nation. The words of the Constitution must be read with that in mind and to meet, as they arise, the national needs of the "one indissoluble Federal Commonwealth" under the Crown. The law has followed the facts. ... It follows, in my opinion, that rights in and over the territorial sea and its seabed are now vested in the Crown in right of the Commonwealth of Austalia.[65]

It was quite natural that the prerogative should be vested in local authorities by virtue of the common law of an independent Australia.[66]

There are other recent cases where the role of convention in the evolution of common law rules is apparent. In the famous *Crossman Diaries* case,[67] the English Court of Queen's Bench asserted a power to restrain by injunction breaches of confidence where required by the public interest. The case was about the publication of diaries which Crossman had kept while he was a cabinet minister, diaries which

---

Australian legal system.

[65] (1969), 122 C.L.R. 177, 223-24.

[66] From the subsisting perspective of "colonial" or "imperial" law, the matter presents itself as an evolution towards the divisibility of the Crown. See generally George Winterton, "the Evolution of a Separate Australian Crown" (1993) 19 *Mon. L.R.* 1.

[67] *Attorney-General v. Jonathan Cape Inc.*, [1976] Q.B. 752.

disclosed the views of named individual ministers on sensitive issues discussed in cabinet meetings. Although it was found that the need for secrecy had gone in this particular case because of the passage of time (some eleven years), the Court was clear that cabinet secrecy deserved judicial protection:

> The maintenance of the doctrine of joint responsibility within the cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual ministers.[68]

The doctrine of joint responsibility, which in the eyes of the Court deserved judicial protection, was very clearly a constitutional convention.[69] The Supreme Court of Canada considered this case in analysing the crystallisation thesis, but discarded it on the basis that the English court "was applying its own legal principles as it might to any question of confidence, however it arose".[70] The English Court surely did find grounds for its ruling in established legal propositions, but that does not change the fact that convention was explicitly recognised as justifying the extension of an equitable doctrine which had never been applied to "public secrets made confidential in the interests of good government".[71] The "equitable doctrine" at issue was that one shall not profit from the "wrongful" publication of information received "in confidence". It was said to have its origin in *Prince Albert v.*

---

[68] *Id.*, at 771.

[69] *Id.*, at 765. See, on both the British and the Canadian situation: Andrew Heard, *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Toronto: Oxford Univ. Press, 1991, at 65ff.

[70] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 779.

[71] *Attorney-General v. Jonathan Cape Ltd*, [1976] Q.B. 752, 769.

Strange,[72] and had been developed first to restrain the use of commercial secrets, and had been extended to protect domestic secrets.[73] In view of the convention of cabinet joint responsibility, "an established feature of the English form of government"[74] whose maintenance was thought to be in the public interest, the "equitable doctrine" would now be extended to protect the public interest in maintaining cabinet secrecy.[75]

Surely the reason given by the Supreme Court of Canada for discarding this case misses the point. The fact that the English court was indeed applying "its own legal principles" clearly reflects a requirement of judicial decision-making that even creative rulings must find minimal justification in established legal propositions. This is where analogy, which was described in Chapter IV as a form of reasoning from principle, plays its most important role. The "toe-hold" requirement I have in mind is well explained by MacCormick:

> When problems of relevancy ... arise within the system, the requirement of coherence is satisfied only to the extent that novel rulings given can be brought within the ambit of the existing body of general legal principle.
>
> Among reasons why this is a requirement of legal justification is that there are limits to the ambit of legitimate judicial activity: judges are to do justice according to law, not to legislate for what seems to them an ideally just form of society. Although this does not and cannot mean that they are only to give decisions directly authorized by deduction from established and valid rules of law, it does mean that in some sense and in some degree every decision, however acceptable or desirable on consequentialist grounds, must also be warranted by the law as it is ... To the extent that the existing detailed rules are or can be rationalized in terms of more general principles, principles whose tenor goes beyond the ambit of

---

[72] (1849) 1 H. & T. 1, as mentioned by Lord Widgery C.J., *ibid.*

[73] *Id.*, at 769-70.

[74] *Id.*, at 770.

[75] *Id.*, at 769.

> already settled rules, a sufficient and sufficiently legal warrant exists to justify as a *legal* decision some novel ruling and the particular decision governed by it.[76]

MacCormick further explains that this is the reason why "the Common Law can only be developed incrementally". New values come in only where principles and analogies can give them a toe-hold.[77] But the reason for a ruling may openly go well beyond the intra-systemic justification which makes it a ruling at law. This is why the *Crossman Diaries* case cannot be satisfactorily set aside by simply implying, as Munro did[78] from a statement of Lord Widgery C.J. in that case, that the Attorney General would have had to fail if the convention were all that he could rely on.[79] The convention, rather, was openly taken as providing a *reason* for developing an existing doctrine. I am not claiming that a convention was turned into law; my point is that a convention may clearly and explicitly inform the development of common law.

The British case of *Council of Civil Service Unions v. Minister for the Civil Service*,[80] provides another example. The government had instructed that the right of membership in a union be withdrawn from all civil servants who worked at the Government Communications Headquarters. The instruction had been issued under a prerogative instrument without

---

[76] Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978, p. 107.

[77] *Id.*, at 237.

[78] Colin Munro, "Dicey on Constitutional Conventions" [1985] *P.L.* 637, 645.

[79] In fact, what Lord Widgery C.J. says is not that "the Attorney-General would have to fail if the convention was all that he could rely on", as Munro claims, but that "he would be in difficulty" if he "were restricted in his argument to the general proposition that Cabinet papers and discussion are all under the seal of secrecy at all times": *Attorney-General v. Jonathan Cape Inc.*, [1976] Q.B. 752, 765.

[80] [1985] A.C. 374 (H.L.(E.)).

prior consultation with the unions. It was clear that the targeted civil servants, holding their appointments "at the pleasure of the Crown", had no private law right to question the decision. It was argued nevertheless that prior government consultation with the unions was legally required by virtue of "legitimate expectations" created by past practice. The House of Lords agreed in principle, holding that the claim was in the particular circumstances overridden by the demands of national security. Stressing that a number of prerogatives might remain unaffected because their exercise was not justiciable (as was not the case here), the House of Lords indicated for the first time that the exercise of the royal prerogative could in some cases be reviewed by a court of law.[81]

The traditional doctrine had been very clear that in prerogative matters courts could only go as far as pronouncing on the existence and extent of prerogatives; the exercise of a prerogative power was not subject to judicial review. Now, one may wonder about the basis on which the Lords could ground their decision to endorse a change in that long-established legal doctrine. Lord Scarman put it in straightforward

---

[81] Lord Denning M.R. had suggested in *Laker Airways v. Department of Trade*, [1977] Q.B. 643, 705, that a court might intervene whenever a prerogative had been "exercised improperly or mistakenly", an expression which Lord Roskill described in *Council of Civil Service Unions*, at 416, as "far too wide". Before that, a certiorari had been issued for "error of law on the face of the record" against the decision of a board established under prerogative powers: *R. v. Criminal Injuries Compensation Board, ex parte Lain*, [1967] 2 Q.B. 864. *Lain* was described by Lord Scarman in *Council of Civil Service Unions*, at 407, as "a landmark case comparable in its generation with the *Proclamations Case* (1611), 12 Co. Rep. 74" (which ruled that the King has no prerogative but that which the law allows and in particular no legislative power to affect the rights of subjects). The Court of Appeal later recognised that the issuance of passports under the prerogative was subject to a duty of fairness: *R. v. Foreign Secretary, ex parte Everett* (1988), [1989] Q.B. 811. More recently, the prerogative of mercy was subjected to judicial review on the basis of *Council of Civil Service Union*, even though that prerogative was listed by Lord Roskill, at 418, as one which is *not* "susceptible to judicial review": *R. v. Home Secretary, ex parte Bentley* (1993), [1994] Q.B. 349 (D.C.).

language: the limitations had simply been "overwhelmed by the developing modern law of judicial review".[82]

That development which Lord Scarman refers to had until then been considered a matter of administrative law which did not affect the prerogative. In administrative law, the exercise of discretion under statute law was subjected to close judicial scrutiny, which was meant to keep administrators, including the government, strictly within the bounds of their statutory powers. This was at the outset a matter of controlling the "extent" of the statutory powers, much like the matter of controlling the "extent" of prerogative powers. But the law gradually developed and the requirements of fairness, first taken to be "implied" in power-conferring statutes, emerged as the most important consideration in administrative law, since those requirements are now taken to govern the exercise of any statutory discretion. From there, the House of Lords decided to increase the already extended application of those requirements. From the narrower field of statutory discretion, the requirements of administrative fairness were abstracted to cover the broader field of legal discretion in general. As Lord Diplock explained, a power should not be immune to judicial review on the sole ground that it originates not in statute but in common law.[83] Surely the House of Lords, to put it in the words of the Supreme Court of Canada, "was applying its own legal principles";[84] the required "toe-hold" was afforded by the rules of fairness which had theretofore governed the exercise of statutory discretion. The new, broader principle was that

---

[82] *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, 407.

[83] *Id.*, at 411.

[84] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 779.

any legal discretion, statute- or prerogative-based, had to be exercised in fairness and might be reviewable.[85]

But that tells us very little of the reasons underlying this sort of evolution of the law. One feature of *Council of Civil Service Unions* which might be linked to constitutional conventions is the House of Lords' recognition that past administrative practices in matters of procedure can create legitimate expectations which may be enforced in judicial review proceedings.[86] The criterion was "whether the practice of prior consultation of the staff on significant changes in their conditions of service was so well established by 1983 that it would be unfair or inconsistent with good administration for the Government to depart from the practice in this case".[87] Now, this certainly sounds rather like the question whether a constitutional convention was well-enough established to warrant legal recognition, and it is even, perhaps, arguable that the practice of union consultation was a constitutional convention,[88] a case of Dicey's rules "for determining the mode and

---

[85] Judicial review being subject, as I have noted, to the quite independent, but nevertheless important, rules of justiciability.

[86] The Privy Council had previously recognised that a promise made by the administration as to procedure had to be implemented, unless implementation would interfere with statutory duties: *A.G. Hong Kong v. Ngyuen Shiu*, [1983] 2 A.C. 629, 638 (P.C.).

[87] *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, 401 (Lord Fraser).

[88] In giving examples of constitutional relationships which may generate constitutional conventions, Geoffrey Marshall includes "relations between Ministers and the Civil Service": *Constitutional Conventions*, Oxford: Clarendon Press, 1986, p. 4. According to O. Hood Phillips, the practices in the administration of the civil service do not qualify as constitutional conventions, but "the negotiation of pay and conditions of service between the Treasury and the staff side" may be an exception: "Constitutional Conventions: A Conventional Reply" (1964) 8 *J.S.P.T.L.* (New Series) 60, 68.

spirit in which the prerogative is to be exercised".[89] But since none of the Lords treated the practice as a convention, and since it is not clear exactly what the doctrine of legitimate expectations adds to previously recognised requirements of fairness, I will not press this point further (save perhaps to mention that the relation between the categories *legitimate expectations* and *constitutional conventions* could do with closer attention).

What I will stress here is that beyond the practice of consultation with the civil service unions, the general move towards the reviewability of prerogative decisions is clearly linked to the development of conventions. Speaking of the "orthodox" position "that the remedy for abuse of the prerogative lay in the political and not the judicial field", Lord Roskill was clear that conventional developments now could not be ignored:

> But fascinating as it is to explore this mainstream of our legal history, to do so in connection with the present appeal has an air of unreality. To speak today of the acts of the sovereign as "irresistible and absolute" when modern constitutional convention requires that all such acts are done by the sovereign on the advice of and will be carried out by the sovereign's ministers currently in power is surely to hamper the development of our administrative law by harking back to what Lord Atkin once called ... the clanking of mediaeval chains of the ghosts of the past".[90]

In this case, "modern constitutional convention" was perhaps not turned into law, but the law was certainly developed to match the values underpinning prevailing convention. And if the exercise of prerogative powers is now going to be subjected to judicial review in appropriate

---

[89] A.V. Dicey, *Introduction to the Law of the Constitution*, 8th ed. (last by author), London: MacMillan, 1927, p. 421.

[90] *Council of Civil Service Unions v. Minister for the Civil Service*, [1985] A.C. 374, 417. Lord Atkin's metaphor (more elegantly phrased) is found in *United Australia Ltd v. Barclays Bank Ltd*, [1941] A.C. 1, 29 (P.C.).

cases, it is hard to see why convention, which Dicey, again, considered to be "in the main precepts for determining the mode and spirit in which the prerogative is to be exercised",[91] should not be seen as providing appropriate standards for review.[92]

In concluding this Chapter, I should note that there is very little difference between the straightforward "enforcement", or judicial adoption, of a reasonably precise conventional *rule*, and the use of such a rule's *rationale* in evolving the common law. In the *Auckland Harbour Board* case,[93] analysed in the previous Chapter, the convention about parliamentary authorisation was precise enough to be acknowledged as the common law rule it had effectively become; it is now clear as a matter of *law* that money cannot be taken out of the Consolidated Fund without parliamentary authorisation. The *Indian Association of Alberta* case[94] is a little closer to the use of conventional rationales in evolving the common law. The conventions governing the extent to which the Crown is divided throughout the Commonwealth have never been very clear. They are about an evolving notion of self-government and the factual recognition of independence for some territories. Such broad considerations provide *reasons*, reasons found compelling in that case, in the determination of

---

[91] Dicey, *supra*, at 421.

[92] See Allan, *supra*, at 241-42. Allan first suggested this argument, with a discussion of *Council of Civil Service Unions* (*G.C.H.Q.*), in a critical analysis of the *Patriation Reference*: "Law, Convention, Prerogative: Reflections prompted by the Canadian Constitutional Case", [1986] *Camb. L.J.* 305.

[93] *Auckland Harbour Board v. R.*, [1924] A.C. 318.

[94] *R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] Q.B. 892.

common law rules.[95] In other words, conventions often provide hard standards which are directly relevant in the articulation and re-articulation of the common law, as in the case of *Auckland Harbour Board*; sometimes they provide soft standards which may be thought relevant in elaborating new rules or re-articulating old rules of the common law.

I may ask rhetorically, in concluding this Part, whether there could be a more appropriate source than conventions upon which courts might be expected to draw in evolving the common law of the constitution. Again, the Supreme Court writes in the *Patriation Reference* that the main purpose of convention "is to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period".[96] This makes convention operate as a sort of permanent constitutional reform commission: it informally determines what the rules of behaviour in the practice of the constitution should be in view of the constitutional values and principles of the period.[97] Convention naturally emerges where legal rules start losing touch with the facts of politics; it naturally dwells upon the areas where the common law is inadequate or outdated and points to a more or less elaborate sketch for a new rule. If courts of law are expected to evolve the rules of the common law, how can they be expected to ignore convention?

---

[95] Note that the common law still requires much clarification on the issue of the divisibility of the Crown in the Commonwealth. The situation is summarised in *Halsbury's Laws of England* (4th ed.), vol. 6 (Reissue 1991), para. 817.

[96] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 880 (majority on convention).

[97] See generally Charles Sampford & David Wood, "Codification of Constitutional Conventions in Australia" [1987] *P.L.* 231.

As I suggested in Part One, it is the unique and primary role which Canadian higher courts have actively assumed in the working of the constitution that has made judicial pronouncements on conventions *qua* convention possible. This Part has shown, it is hoped, that maintaining the distinction between law and convention does not prevent conventions from being, directly or indirectly, incorporated into the common law of the constitution. Perhaps the most fundamental reason why the watertight distinction made by the Supreme Court is untenable, then, is that both the common law of the constitution and the conventions of the constitution are non-static normative systems that evolve, ultimately, *for the same reasons*. They concern the same actors in the same polity with its evolving values and principles. Those values and principles inform the constitutional system as a whole; they are the same for convention and law. This is not to say that the distinction between law and convention has to be completely abandoned. The dominant analytical framework in which convention and law are distinguished can very well accommodate the possibility of crystallisation. Convention and law simply overlap and communicate to a certain extent within the one system which we call the constitution (in a broad sense).[98] In Hart's terminology, both include rules of obligation some of which can be found in both law and convention and thus form an overlap. Only the legal ensemble, however, has all the secondary rules which in Hart's opinion transform a collection of primary rules into a legal system.[99] Rulings at law have their own requirements of intra-systemic justification which

---

[98] There may be a measure of uneasiness in speaking of overlap if conventions are by definition not rules of law. But even if a convention is said to cease being a convention upon crystallisation, it can usually be recognised as one from an historical perspective. Section 4 of the *Statute of Westminster*, for instance, does not stop commentators from calling the material it was based on a convention.

[99] Hart, *supra*, at 91.

effectively limit the potential effect of conventional material in judicial decisions. But it is a mistake to assume that such requirements operate to exclude the use of such material.

A crucial point to bear in mind, therefore, is that the fact that some conventional rules crystallise into law – or, to put it another way, become duplicated in the common law of the constitution – does not affect the status of constitutional convention as a distinct ensemble of standards with its distinct test of recognition. Martland and Ritchie JJ. had obviously well understood this in the *Patriation Reference* when they signed the majority opinion on convention which applied Jennings' "test of recognition",[100] having otherwise found in dissent that the law, too, required provincial consent for some constitutional amendments. The reason for each finding was the same: the federal principle.[101] Crystallisation, or duplication, does not have the apprehended effect of "freezing" conventions, taken as a necessary normative system supplementing the law, in such a way that they cannot any longer play their role of keeping the practice of constitutional law in harmony with changing constitutional values or principles. When a convention is reflected in a new rule of the common law, the law itself is then, for a time, in keeping with prevailing constitutional principles; eventually other conventions will doubtless emerge as constitutional values change and the law once again needs qualification by further conventions, which judges may in turn – and in time – consider in further evolutions of the common law. This is an open-ended process which ensures not only that the *practice* of constitutional law remains consistent with prevailing constitutional value or principle – this is the primary role of

---

[100] *Supra*, at 134-36.

[101] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 847. Martland and Ritchie JJ.'s dissent begins at 809.

convention – but also that the law itself, at least the portion judges can change, does not become completely alien to the constitutional structure as it is conceived under the values or principles prevailing at any given time.

To sum up, Part Two has shown the important role conventions of the constitution can be made to play in constitutional adjudication. Conventions can influence outcomes in three ways. First, they can generate soft standards of public law which are openly considered by courts to be relevant in making binding rulings. Second, through the advisory opinion mechanism, conventions can sometimes be ascertained *qua* conventions in the higher ranks of the judiciary, and be virtually applied to given sets of facts. The pronouncement of the court then has the same normative status as a pronouncement on law because it endorses or rejects a constitutional principle which generally also underlies constitutional law. In both cases, the statements of the courts are generally taken by all as settling the issues they deal with. Finally, it appeared quite clearly that, despite the contrary view taken by the Supreme Court in the *Patriation Reference*, convention does serve as a pool of rationales and rules, soft and hard standards, that forms a most natural source for judges to draw upon when it comes to evolving the common law of the constitution.

Before addressing, in Part Four, the difficult question of how constitutional principles can be legally accounted for in adjudication, I shall now turn to the issue of constitutional change at the ultimate level.

PART THREE

Fundamental Constitutional Change in Theory and Practice

The so-called paradox of omnipotence is a central difficulty in any attempt to explain fundamental constitutional change in formal terms. In the context of parliamentary sovereignty, this difficulty has given rise to much discussion and a number of misunderstandings. Before I can attempt to offer an account of the role of constitutional principles at the constitutional level, some of those misunderstandings have to be cleared up. This is what this Part attempts to do.

It should appear that the use of formal logic in the explanation of legal change is much reduced by the importance of the normative context surrounding any structure of formal legal validation. The discussion will first be set at a high level of abstraction before it moves on to the *Patriation* case in the Supreme Court of Canada, at which point the link with the previous two Parts will become clear.

Chapter VII

The Modelling of Constitutional Change

One simple statement of the "paradox" of omnipotence is as follows: if Parliament (or God, or whatever) is omnipotent then it can bind itself; if Parliament can be bound, then it is not omnipotent.[1] The paradox is the same as that which is seemingly involved in constitutional amendment. A formally similar expression of it could read thus: if the constitution-amending body is supreme then it can deprive itself of its supremacy; if that body can be deprived of its supremacy then it is not supreme. More practically, the question for rigid constitutions is whether an amending provision can be used to replace itself entirely, so that it can no longer be appealed to for further amendments.

The notion of omnipotence or supremacy relied on in such formulations may be said to be incoherent. It requires that Parliament can be bound if and only if it cannot, just like the so-called paradox of the barber apparently requires that a man shave himself if and only if he does not shave himself.[2] The distinction between continuing and

---

[1] See Ilmar Tammelo, "The Antinomy of Parliamentary Sovereignty" (1958) 44 *Archiv für Rechts- und Sozialphilosophie* 495, 503: "If Parliament can always pass any law whatsoever, then Parliament can and cannot pass a law limiting its law-making competence. It *can* do this because it can pass any law at any time. It *cannot* do this because doing this means that Parliament cannot pass any law at any time". See also J.C. Hicks, "The Liar Paradox in Legal Reasoning" (1971) 29 *Camb. L.J.* 275.

[2] One popular solution to this paradox is to point out that the barber is a woman. Translated into the language of constitutional amendment, this could mean that the ultimate constituent authority is not a legal authority and cannot be changed in legal terms (which roughly corresponds, as will shortly appear, to Alf Ross' solution). See, in general, Laurence Goldstein, "Four Alleged Paradoxes in Legal Reasoning" (1979) 38 *Camb. L.J.* 373.

self-embracing sovereignty, common to theologians and legal theorists, was introduced as a solution to (or dissolution of) the paradox.[3] For my purpose here, the distinction can be said to make two intelligible notions out of one that is incoherent.[4]

VII.1 LOGIC

Continuing sovereignty has often been considered the most natural understanding of sovereignty. The fact that it has for so long remained the dominant interpretation of the powers of the United Kingdom Parliament probably has something to do with an assumption that other interpretations might be logically unsound.[5] Dicey, for one, seemed to think that continuing sovereignty was somehow dictated by logic:

> The *logical reason* why Parliament has failed in its endeavours to enact unchangeable enactments is that a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment. [...] Every attempt to tie the hands of such a body necessarily breaks down on *the logical* and practical

---

[3] See John L. Mackie, "Evil and Omnipotence" (1955) 64 *Mind* 200, 212; H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961, pp. 145-49 (hereinafter *CL*) and "Self-Referring Laws" in Fritjof Lejman et al. (eds), *Festskrift Tillägnad Karl Olivecrona*, Stockholm: Kungl, Boktryckeriet, Norstedt & Söner, 1964, p. 307, at 315.

[4] On the proposition that the choice is somehow unavoidable between continuing and self-embracing sovereignty, see George Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 *L.Q.R.* 591. This is not to say that in-between positions are excluded; they are simply qualified versions of one of the basic positions (for instance: continuing sovereignty *cum* manner-and-form exception, which could also, conceivably, be expressed as self-embracing sovereignty *cum* limits-on-content exception). See also his "Is the House of Lords Immortal?" (1979) 95 *L.Q.R.* 386.

[5] See generally Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth*, Oxford: Clarendon Press, 1957, pp. 60-75. For a recent discussion of the assumption, see Peter Oliver, *The Patriation and Amendment of the Constitution of Canada*, Doctoral Thesis, Oxford, 1992, pp. 125-26.

> *impossibility* of combining absolute legislative authority with restrictions on that authority...[6] [Emphasis added.]

In other words, the incoherence of the popular concept of "omnipotence", the fact that one cannot have both continuing and self-embracing powers, was believed to involve that self-embracing sovereignty was logically impossible.

Ross succeeded in raising doubts about the logical status of self-embracing powers when he wrote that a typical pattern of constitutional amendment may involve a logical contradiction.[7] He was referring to constitutional amending provisions that are commonly interpreted as providing for their own replacement.[8] He used the example of the amending provision of the Danish constitution to introduce his puzzle, which he explained as follows:

> Now, if we suppose art. 88 to be amended according to its own rules with the result that it is replaced by art. 88' (with a content contrary to that of art. 88) the validity of art. 88' is based on an inference of the following pattern:
>
> | | |
> |---|---|
> | Art. 88: | The constitution may be amended by a process in accordance with conditions C_1, C_2 and C_3, and only by this process; |
> | Art. 88' | (Stating that the constitution may be amended by a process, in accordance with conditions C_1', C_2' and C_3') has been created in accordance with C_1, C_2 and C_3. |

---

[6] A.V. Dicey, *Introduction to the Law of the Constitution*, 8th ed. (last by author), London: MacMillan, 1927, at 65-67n. Dicey believed, however, that Parliament could conceivably "abdicate", so long as the abdication was complete, so that the "logic" of continuing sovereignty could then be applied to the next "sovereign" (*Ibid.*).

[7] Alf Ross, "On Self-Reference and a Puzzle in Constitutional Law" (1969) 78 *Mind* 1 (hereinafter *Self-Reference Puzzle*). The general issue of self-reference taken as a logical absurdity, which was also dwelt upon by Ross, will only be addressed indirectly. See also *On Law and Justice*, London: Stevens and Sons, 1958, pp. 78-84; more generally see Jon Barwise & John Etchemendy, *The Liar: An Essay on Truth and Circular Propositions*, Oxford: Oxford Univ. Press, 1987.

[8] In a context of parliamentary sovereignty, this corresponds to self-embracing powers.

∴ Art. 88' is valid, that is, the constitution may be amended by a process in accordance with conditions C_1', C_2' and C_3', and only by this process.

> As the meaning of art. 88 is to indicate *the only way* in which the constitution may be amended, this is an inference in which the conclusion contradicts one of the premisses, which is a logical absurdity.[9]

Ross believed the reasoning to be irremediably flawed by the apparent contradiction between conclusion and first premise as to how the constitution can be amended. "It is not possible", he writes, "that anything can appear in the conclusion of a valid deductive inference which is in conflict with the premises".[10]

The strategy most often invoked to dissolve the apparent paradox consists in showing that art. 88 and art. 88' do not apply over the same time period, and so do not come into conflict.[11] This strategy embodies the common-sense reaction and, certainly, the reaction most lawyers would have. But Ross was not satisfied with that. He believed that the argument "confounds legal with logical contradiction".[12] The inference could not be made logical by stipulation; the contradiction remained even though law might have tools to deal with it, such as the *lex posterior* principle.

Another strategy has been to point out that the first premise does not refer to the same constitution as the one mentioned in the conclusion. This is the explanation offered by Goldstein, who refers explicitly to Ross' formulation of the inference:

---

[9] *Self-Reference Puzzle*, at 5.

[10] *On Law and Justice*, *supra*, at 84.

[11] See "Self-Referring Laws", *supra*, at 314; Joseph Raz: "Professor A. Ross and Some Legal Puzzles" (1972) 81 *Mind* 415, 420.

[12] *Self-Reference Puzzle*, at 20.

> The fallacy in this inference stems, I suggest, from a mistaken view about the relation between a constitution and its rules. We say that a constitution *contains* rules and this might lead the unwary to suppose that a constitution is an entity independent of its rules, just like a purse which contains coins is an entity distinct from any of the coins it contains on any particular occasion. The difference is, however, that a constitution is, in part, *determined by* or *constituted by* its rules. Different constitutional rules determine different constitutions. If we call the constitution of which Article 88 is part "CONST", and the constitution of which Article 88' is part "CONST'" (where CONST ≠ CONST' since Article 88 ≠ Article 88') then it is clear that, in the inference pattern exhibited by Ross, the conclusion does *not* contradict the premises since conclusion and first premise predicate contrary things but about *different* objects – CONST and CONST' respectively. By amending the constitution in a way sanctioned by Article 88, a *new*[13] constitution is created of which Article 88' is a part.

The contradiction apparently vanishes because the word "constitution" has a different referent in premise and conclusion. One can readily imagine how Ross would have reacted to this. Applying his system of logic, Ross would have been entitled to say that Goldstein's strategy merely shows how the inference pattern of self-amendment can be interpreted as involving the modification of the first premise in "mid-inference". In Goldstein's version of the example, the referent of "constitution" is modified just as what is taken to be the conclusion is being asserted, thus irremediably vitiating the inference.[14] On this plane, Goldstein's claim that no contradiction is involved because "conclusion and first premise predicate contrary things about *different* objects" would

---

[13] Goldstein, *supra*, at 376. See also Norbert Hoerster, "On Alf Ross' Alleged Puzzle in Constitutional Law" (1972) 81 *Mind* 422.

[14] Thus put, the inference violates the canon of Ross' logical system that premises determine the conclusion instantaneously.

seemingly amount to a claim that conclusion can simply not be said to follow from premises.[15]

Hart doubted, perhaps more helpfully, that the exercise of legislative power to create new norms could be modelled as a deductive inference of that type. "[I]t is not clear", he wrote, "how this logical principle [that "nothing can appear in the conclusion of a valid deductive inference which is in conflict with the premises"] applies to a legislative act".[16] Although the point was not dwelt upon by Hart, Ross made the following remark about his suggestion:

> In my opinion there can be no doubt that in legal as well as popular reasoning the legality of the amendment procedure and the validity of the amended article are based on an inference: *As* art. 88 is valid constitutional law and *as* the amendment conditions prescribed in this article are fulfilled, so it *follows* that art. 88' is now valid constitutional law.[17]

The problem, I would suggest, is not whether constitutional self-amendment is, or is believed to be, based on an inference. In one sense, self-amendment certainly is based on some form of inferential pattern. The problem seemingly lies, rather, in the sophistication of the logic used to model the real-world phenomenon of constitutional self-amendment. Ross gives a clear indication of what he takes logic to be when he writes that a "logical inference ... knows of no sequence in time".[18] This suggests that his whole argument is based on the most basic first-order

---

[15] I would suggest that Goldstein's strategy only differs formally from the time-based strategy. What he is saying in substance is that the first premise applies to the constitution found at $time_1$, and the norm contained in the conclusion applies to the constitution found at $time_2$. Goldstein otherwise asserts that the time-based strategy is invalid.

[16] "Self-Referring Laws", *supra*, at 315.

[17] *Self-Reference Puzzle*, at 19.

[18] *Id.*, at 6-7.

logic where the only connectives (or operators) allowed are those of propositional logic (*not*, *and*, *or*, *implies*, *if and only if*, and *exclusive or*).[19] Hart's reaction to Ross' puzzle – pointing out that logic perhaps does not apply to legal reasoning in that way, or that self-amendment does not *really* result in a contradiction – may be a good reflection of the fact that a formal representation of the type of legal reasoning here envisaged requires a more complex system of logical representation.

The basic system used by Ross is known to show very serious shortcomings when it comes to modelling instances of real-life reasoning. The most important limit of that system in the representation of law is probably the fact that it provides no tools to handle statements about sentences.[20] If one takes a close look at Ross' example, one will notice that the conclusion of his inference is not the new amending provision. The conclusion is a statement about the sentence taken to be that new amending provision. Consider Ross' formulation of the conclusion:

> Article 88' is valid, that is, the constitution may be amended by a process in accordance with conditions C_1', C_2' and C_3' and only by this process.

And a more accurate version:

> Article 88', that is, "the constitution may be amended by a process in accordance with conditions C_1', C_2' and C_3' and only by this process", is valid.

---

[19] These are sometimes called the "Boolean operators".

[20] The traditional rule of first-order logic is that predicates can take as an argument only a term, not a sentence (a "sentence" being the representation of a "proposition" which contains a subject and a predicate). A "statement about a sentence" takes the proposition as subject and adds a further predicate (introducing thereby a "second-order" of predication). See Ernest Davis, "Representations of Commonsense Knowledge", San Mateo (Ca): Morgan Kaufmann, 1990, pp. 83-86.

The general modelling of legal change offered by Ross shows this clearly:

> A norm is valid, when created in accordance with conditions C_1, C_2 and C_3;
> The norm *N* has been created in accordance with the conditions C_1, C_2 and C_3;
> ∴ The norm *N* is valid.

The conclusion here is simply "The norm *N* is valid" and not "The norm *N* is valid, that is, *N'*". The conclusion is that *N* is valid whatever its content and not the supplementary predication of that content. Basic first-order logic does not provide the relation between the "statement about the sentence" and the "sentence" itself.[21] Any attempt to express "statements about sentences" directly in that logical system is very likely to lead to trouble such as apparent contradiction.[22] Ross' modelling of self-amendment was such an attempt.[23]

---

[21] The same applies to the problem of self-reference, taken in isolation, which cannot be translated directly into first-order logic. Consider the classical liar sentence: "This sentence is false". Basic first-order logic has no equivalent of the demonstrative "this" used self-referentially because the latter implies a "second order" of predication. See Davis, *Ibid.*

[22] *Id.*, at 52-53. This is apparently a common mistake.

[23] Note that Ross otherwise rejects that approach to deontic logic which treats directive propositions descriptively in order to ascribe to them truth-value (in terms of legal validity), an approach which directly puts a logic of norms outside the scope of first-order logic (see generally Georg H. von Wright, *Norm and Action: A Logical Inquiry*, London: Routledge & Kegan Paul, 1963). To Ross, "deontic" logic is a system parallel to "indicative" logic, the latter "dealing with the formal conditions for [meaningful] indicative discourse, and the other dealing with the formal conditions for [meaningful] directive discourse"; logic is thus "concerned with the conditions under which the posing of one [directive or indicative] proposition is compatible with the posing of another one [respectively directive or indicative]" (Alf Ross, *Directives and Norms*, London: Routledge & Kegan Paul, 1968, pp. 180, 29-33, 177-82). For his constitutional law puzzle, at least in the 1969 version, Ross treats his inference as a "directive", or "deontic", inference (*Self-Reference Puzzle*, at 5n) and concludes, presumably, that taken in isolation it is contradictory and therefore fails to meet the conditions for meaningful direction.

Nothing in the foregoing means, of course, that self-amendment in law is illogical or absurd. What it means is that more powerful tools are certainly needed if a logical representation of the phenomenon is to be provided. Artificial intelligence research has had to deal with the numerous problems involved in the logical representation of real-life reasoning. It has explored various ways in which basic first-order logic can be augmented or extended to that purpose. One of the more obvious strategies has been to provide additional logical connectives or operators for sentences, so that statements about sentences could adequately be dealt with.[24] The most important of those connectives in the representation of real-life, or common-sense, reasoning, are probably the time connectives.[25] This is so because "[v]ery few commonsense problems can be formulated in purely static terms".[26] And if that is the case for common-sense problems in general, it is probably even more so with respect to legal problems. In Ross' example of self-amendment, for instance, the present tense used in "the constitution may be amended", in both conclusion and first premise, is not the timeless present it appears to be and that basic first-order logic would *require* it to be.[27]

---

[24] Those additional connectives have to meet a number of formal criteria in order to qualify as "extensional connectives", that is, connectives that can function in legitimate first-order logic. For instance, they have to commute with the traditional connectives. See Davis, *supra*, at 52-59.

[25] *Id.*, at 56. Extensional time operators have been discussed in artificial intelligence research since the late fifties: John McCarthy, "Programs with Common Sense" [1959] *Proceedings of the Symposium on Mechanisation of Thought Processes* 1. A complete set of time operators should at least include a set of "tense operators" covering all the possibilities envisaged by a traditional grammar.

[26] Davis, *supra*, at 187.

[27] This is the same as saying that "constitution" is a time-varying term in the inference, which the basic system of representation cannot handle. One commentator encapsulates Ross' problem as follows: "His

Let me now go back to where our enquiry into logic started in order to point out that the orthodox British understanding of sovereignty cannot be said to be dictated by logic. Consider a British version of Ross' puzzle. For that purpose, suppose a formal expression of parliamentary sovereignty were found by some lucky analyst in a secret document used by judges only. Article 88 of that document, along the lines of Ross' puzzle, reads thus:

> Art. 88: The law and constitution of the United Kingdom can be modified by Acts of Parliament and by no other process.

Suppose Parliament, in some unprecedented effort to modernise British political life, enacted a statute stating that the law and constitution of the United Kingdom can be modified by Acts of, say, the new "House of Citizens", and by no other process. Before even starting to imagine inference patterns that could yield a conclusion, conscientious judges might want to have a second look at art. 88 and wonder whether the sovereignty is continuing or self-embracing. Like Danish judges, they would find that the answer is not really there: art. 88 can be interpreted either way in both cases.[28] Ross assumed for his popular puzzle that art. 88 allowed self-amendment; put in British terms, for our puzzle, the assumption is that the body designated or formed by the amendment procedures enjoys self-embracing powers. The attempt to

---

intransigence suggests the assumption that all logical matters are concerned with the timeless and changeless interplay of concepts, which then of course cannot accommodate amendment. This resistance can be met by embedding a logic of process within the scope of logic, or by removing the stigma from the epithet 'illogical' when applied to action under norms, in case one continues to insist upon the narrower scope of logic": Christopher B. Gray, "Amendment: Legal Continuity and Ongoing Revolution" in Elspeth Attwooll (ed.), *Shaping Revolutions*, Aberdeen: Aberdeen Univ. Press, 1991, p. 47, at 51.

[28] I have so far assumed with Ross that his Art. 88 does refer to itself but the assumption is not provided by the text.

formulate self-embracing sovereignty in British terms gives a choice between two tactics:

> (1) "Parliament can make any law including a law changing *this* rule"
> (2) "Parliament can make any law *until* it provides otherwise"

Since, as already noted, basic first-order logic does not handle time-frames and has no representation for "*this*" used self-referentially, Ross concluded that a contradiction appears whenever one starts from such premises. So my imaginary British court might want to say that in (basic first-order) logic, "Parliament" cannot be a time-varying term in any valid inference, that sovereignty must therefore be continuing, and conclude that, notwithstanding its purported transfer of power to the House of Citizens, the same (old) Parliament can still make law exclusively. But to be consistent, the court would have to assume that continuing sovereignty can validly be expressed in a first-order logical construction. And it cannot. Consider the two corresponding formulations:

> (1) "Parliament can make any law excepting a law changing *this* rule"
> (2) "Parliament can make any law *at all times*"

Here again, one gets the same choice between a self-referential "*this*" and the time operator. And both involve a second-order predicate.[29]

---

[29] One commentator has claimed that the equivalent of continuing (unchangeable) powers could be formally written into a constitutional document as follows: "All rules concerning the making and change of the rules of the constitution are unchangeable...", and that this can be taken as "solving the paradox of the rule of constitutional change" (Nicholas H.M. Roos, "The Identity of Legal Systems in the light of some Paradoxes of Constitutional Law" in Attwooll, *supra*, p. 56, at 66-68). The paper takes it as "self-evident that any system in its proper sense must have a core of rules that do not change and that define the limits of change compatible with the system" (at 66). I would suggest that this is a change-reluctant practical judgment which simply happens to match the "staticity" of first-order logic. The author is mistaken in thinking

Basic first-order logic is fundamentally a static system, and reality is not static. A common problem in the treatment of "sovereignty" in terms of logic, it seems, has been to confuse the necessarily static directions of basic first-order logic with the contextual assumption which may have for a long time favoured, in British theory, static answers to real-life legal questions.[30] Very few legal questions can be solved without the help of time-frames which basic first-order logic ignores. Pointing to the "staticity" of that logic to support the assumption that Parliamentary sovereignty cannot be self-embracing, therefore, would be very much like using a four-equations pocket calculator to disprove Gödel's theorem.

I have assumed so far that reasoning from norms can perhaps be translated into an extended system of logic commensurable with the principles underlying first-order logic.[31] Under that assumption, I

---

that a "negatively recursive" rule can therefore be formally self-referential in a first-order logical construction.

[30] Note that in other respects self-embracing sovereignty is more "static" than continuing sovereignty. For an original argument showing that the reason most commonly advanced to defend continuing sovereignty (wisdom of future generations) usually involves a self-refutation, see John Finnis, "Scepticism, Self-Refutation, and the Good of Truth" in Peter M.S. Hacker & Joseph Raz (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, Oxford: Clarendon Press, 1977, p. 247, at 254-56.

[31] Major problems have yet to be overcome for this assumption to prove satisfactory (see, generally, the special Number of *Ratio Juris* (1991) 4, No 3; Georg H. von Wright, *Norm and Action: A Logical Inquiry*, *supra*; Ota Weinburger, *Law, Institution and Legal Politics*, London: Kluwer, 1991, pp. 77-89). Some prominent problems are as follows. First, the applicability of the principle of contradiction to normative systems remains a controversial matter (see Hans Kelsen, *General Theory of Norms*, tr. Michael Hartney, Oxford: Clarendon Press, 1991, at 211-14). Second, a sufficiently differentiated set of extensional sentence operators remains to be developed (see Georg H. von Wright, "Is There a Logic of Norms?" (1991) 4 *Ratio Juris* 165; Ilmar Tammelo, *Modern Logic in the Service of Law*, New York: Springer-Verlag, 1978). Third, the use of even the most basic truth-functional operators with normative propositions give rise to serious problems (see Carlos E. Alchourrón and Eugenio Bulygin, "Limits of Logic and Legal Reasoning" in Antonio A. Martino (ed.), *Expert Systems in Law*, London: North-Holland, 1992, p. 9, at 22).

showed that there is no reason to believe that continuing sovereignty is more (or less) "logical" than self-embracing sovereignty. In both cases, a satisfactory representation would clearly require extensional operators on sentences which basic first-order logic does not provide. Leaving that aside, what I wish to stress now is the fact that constitutional change is already intelligible in the form law presents it. The reason lies in context, which clearly informs the way lawyers envisage the common occurrences of constitutional change, and which logicians must look to in their attempt to offer accurate representations of this real-life phenomenon. This is what is next considered.

VII.2 "PRAGMATICS"

If lawyers often know that an older amending provision does not conflict, in any relevant sense, with a newer amending provision derived from it, it is because the context in which they find constitutional self-amendment tells them so. It is because in some sense "in" that context there are principles about how words are used around constitutional amendment and, more generally, around legal change.[32] Apart from syntax and semantics, this is the third source of information that logicians have to look to in attempting to provide adequate representations of language-based, real-world reasoning. This is where Ross found a basis for choosing his interpretation of art. 88, which was one of at least two

---

Fourth, attempts at providing a formal representation of the conceptual structure of reasoning from norms have so far succeeded only with the most primitive patterns (Georg H. von Wright, "Is There a Logic of Norms?" *supra*, at 266).

[32] With respect to logic, I refer to this context as the "pragmatics" of legal change ("pragmatics" is a term in contemporary Linguistics indicating the branch of the discipline which deals with language-in-use).

possibilities. For as I suggested, on the basis of syntax and semantics only, he could have taken art. 88 to be immutable, just like Parliamentary sovereignty can be, and has been, viewed as being forever "continuing". But the context directed him to choose the self-embracing interpretation even though he *a priori* thought that it could lead to logical contradiction. The information provided by context is difficult to handle because it is but rarely expressed in the form of words.

In order to solve his puzzle, Ross suggested a principle he meant to serve as the immutable "basic norm" of the legal system, from which the amendment provisions could derive their validity:

> Obey the authority instituted by art. 88, until this authority itself points out a successor; then obey this authority, until it itself points out a successor; and so on indefinitely.[33]

This, he thought, would solve his self-reference problem because any amending provision in the future could be said to rest on the general principle rather than on the amending provision(s) preceding it.[34] His principle, however, could certainly not solve the problem of logical representation as he conceived it since the basic logic he was using knows of no time connectives on sentences such as "until". Ross' "basic norm" is nevertheless valid as an attempt to express the unwritten rules that are followed (often unreflectively) when self-amendment of the type implied in art. 88 is in fact understood and acted upon in the legal practice. But as such it has serious limitations.

One of the problems with Ross' "basic norm" is that it is assumed to be immune from legal change, which is to say that any change to it

---

[33] *Self-Reference Puzzle*, at 24.

[34] He also relied on the idea that an inference from his principle was a delegation, as opposed to a "self-destroying transference of competence", which is postulated from outside the principle.

must happen outside the law. Its modification must be analysed as some sort of revolution, perhaps peaceful, entailing a break in the continuing identity of the system. From a descriptive standpoint, this is not entirely satisfactory because it fails to explain how a change in a basic norm can be effected, on a principled basis, using normative materials that are part of the legal system and that survive the change.[35] Moreover, observation tells us that, from the point of view of a judge, the acceptance of a new ultimate rule of competence never entails a total rejection of the "former" legal system.[36] Cases of successful revolutions or *coups* usually show that the only norm necessarily changed in the "new system" is the ultimate rule of competence; all other norms are generally understood to continue in force, subject to repeal under the new rule of competence.[37] Ross' "immutable basic norm" does not adequately explain the continuing validity of most norms in cases where a break in legal continuity is believed to have occurred. The surviving norms usually include the ultimate rules of adjudication, and rules of identification envisaged separately from the rule of competence.[38] When courts are called upon to settle constitutional matters in cases of revolutions or *coups*, as they were, for instance, in Pakistan,[39]

---

[35] See John M. Eekelaar, "Principles of Revolutionary Legality" in A.W. Brian Simpson (ed.), *Oxford Essays in Jurisprudence*, 2d Series, Oxford: Clarendon Press, 1973, p. 22.

[36] See Charles Sampford, "Coups D'Etat and Law" in Attwooll, *supra*, p. 161, at 162-67.

[37] For an exhaustive survey of judicial responses to coups d'état in post-colonial common law jurisdictions, see Tayyab Mahmud, "Jurisprudence of successful Treason: Coup d'Etat & Common law" (1994) 27 *Cornell Int'l L.J.* 49.

[38] For an account of the various modes of validity with respect to time, see Eugenio Bulygin, "Time and Validity" in Antonio A. Martino (ed.), *Deontic Logic, Computational Linguistics and Legal Information Systems*, Vol. II, London: North-Holland, 1982, p. 65.

[39] *State v. Dosso*, [1958] S.C. Pak. 533.

Uganda,[40] and Grenada,[41] it is generally assumed by all that former rules of adjudication are to continue in force, and that a rule of identification points to enactments of the former regime (under the former rule of competence) as valid law for the adjudication of ordinary disputes.[42] Some of those surviving rules may perhaps be changed under the new rule of competence, but it is clear that a new rule of competence does not otherwise affect them. The case of legal devolution shows the same phenomenon where a British-style independence statute is understood to bring about a "new" (independent) legal system. Ceylon provides a good example. The Privy Council found in 1964[43] that even though the *Independence Act, 1947* was "irrevocable"[44] and made the legal system completely independent, it did not "alter the existing corpus of law in Ceylon",[45] so that appeals to the Privy Council remained possible under the law of Ceylon. Ultimate rules of adjudication and identification had survived the acknowledged change in the ultimate rule of competence.

Finnis can be said to have made a major contribution to the clarification of the unwritten rules surrounding legal change in general, at least in the Anglo-American literature, when he proposed a more convincing formulation of what lawyers actually apply, more or less consciously but quite consistently, when they have to handle the "life"

---

[40] *Uganda v. Matovu*, [1966] E. Afr. L.R. 514 (Uganda).

[41] *Mitchell v. Director of Public Prosecutions*, [1986] L.R.C. Const. 35.

[42] For other cases see Mahmud, *supra*, at 54-99.

[43] *Ibralebbe v. R.*, [1964] A.C. 900.

[44] *Id.*, at 918.

[45] *Id.*, at 922.

of formal legal norms through time.[46] He managed to shape his conclusion into one rule-like principle (which can be said to include Ross's):

> A law once validly brought into being, in accordance with criteria of validity *then in force*, remains valid until *either* it expires according to its own terms or terms implied at its creation, *or* it is repealed in accordance with conditions of repeal in force *at the time of its repeal.*[47]

Here as with Ross' principle, it is easy to see how an amendment provision can effectively provide for its own replacement if that principle is taken to be part of the normative context in which self-amendment takes place. The present validity of the new amending provision, which is in one sense "derived" from a provision no longer in force, can be said to rest on the general principle, which has remained

---

[46] John Finnis, "Revolutions and Continuity of Law" in Simpson, *supra*, p. 44, at 63-65 (hereinafter *Revolutions and Continuity).* Finnis says that his formulation makes sense of the practice and offers the further justification of practical reasonableness. The French legal philosopher Michel Virally had reached a substantially similar conclusion, though in a mode that never gets beyond the description of practice: *La pensée juridique*, Paris: L.D.G.D. 1960, pp. 188-98.

[47] *Revolutions and Continuity*, at 63. Compare with Virally, *supra*, who, speaking of legal continuity in cases of revolution, secession or annexation, writes (at p. 193): "La continuité de l'ordre juridique, dans ces diverses hypothèses, pour remarquable qu'elle soit, n'a rien de mystérieux. Elle va de soi pour toute la partie de cet ordre qui est d'origine coutumière ou jurisprudentielle : sa validité n'a jamais été déduite d'une quelconque norme fondamentale. Elle résulte du fonctionnement de l'ordre juridique, c'est-à-dire de l'ensemble des rapports sociaux, qui ne sont pas immédiatement affectés par un changement d'institutions politiques ou d'appareil étatique, dans la mesure où ils sont compatibles avec les règles dominant les institutions nouvelles. Mais il faut en dire autant du droit écrit. Comme nous l'avons vu, il bénéficie d'une validité permanente à partir du moment où il est créé. Cette validité lui est conférée par l'acte qui l'a posé et qui l'empruntait lui-même à la norme supérieure en vertu de laquelle il a été pris. La validité du droit écrit – c'est là la grande différence avec le droit coutumier – lui est attribuée par l'acte qui le pose, dans l'instant et de façon définitive. Il n'est donc pas nécessaire que la norme supérieure conserve sa validité pour que la norme inférieure soit maintenue dans la sienne".

untouched throughout the change. Like Ross's, the principle solves any problem of self-reference there may be by providing an external ground for the expiration, "according to its own terms", of the old amending provision. But Finnis' principle is broader and can be said to apply to any situation of formal legal change, including constitutional self-amendment; it explains the continuing validity of all formal norms adopted under a rule of competence no longer in force, whether or not it is believed that a "new system" was introduced upon a change of the ultimate rule of competence. Any attempt at formalising the actual reasoning which surrounds legal change would have to take account of this principle, which is not tied, unlike Ross', to any particular system.

How much of such contextual considerations "surrounding" legal change can usefully be given formal legal expression, however, is not clear. This type of information has an ambiguous status. It can usually be formalised to a certain extent, but, because of the dynamic character of context, it can never be reduced effectively to its formal expression.[48] An example of a paradigmatic case of this is afforded by certain rules of statutory construction. Those "rules" are about the ways in which language is used in and around statutes. Case-law has worked them out to an extent where it seemed at one point possible to put some of them down in a statute, and this is what most Canadian jurisdictions have done. Have the Interpretation Acts stopped the

---

[48] The formalisation of the rules of "pragmatics" poses the same problem in the logical representation of real-life reasoning. For building such rules into a system of representation will usually mean the cutting off of that system from the real-world situation it is meant to represent. After a period of time, real-world reasoning may evolve new rules of pragmatics and the system cease to provide adequate representations. In order to avoid this, one may want to keep the rules of pragmatics separate in the system of logical representation and provide a "window out on the real world" through which those rules can be updated. This is one of the difficulties in evolving a computer expert-system meant to give legal advice. As will shortly appear, this is the problem of accounting for soft standards in legal decisions.

possible evolution of the rules of interpretation they express? Surely not. The context has not disappeared, and the Interpretation Acts may themselves need a contextual framework for their interpretation. The evolution of the practice will inevitably affect, amongst other things, the use of language in legislation and, in turn, the rules of interpretation that will actually be in use.[49] Finnis' principle itself is also a case in point. At first sight it may appear as a timeless principle quite independent from context. But as Finnis himself points out, a common law rule provided otherwise, in a certain respect, for a very long time, and that which perhaps seems obvious today might have looked odd in a different context.[50]

It would appear, then, that there is a type of normative material surrounding the hierarchical structure through which legislative norms are formally validated, material that resists attempted reduction to formal expression. The formal structure of legal validation, often seen as a pyramid, is embedded in a context that is essentially dynamic and cannot be reduced to a set of rigid rules. The formal structure can attempt to draw up the entire context in which it is embedded only at the price of quickly losing its grip on reality, that is, the social reality *for* which and *in* which it exists. It is fair to say that the formal structure can replicate the surrounding or underpinning informal materials but can never appropriate them. It is perhaps at the constitutional level that this is most apparent. Consider the absurdity of a Constitution attempting to exclude all unwritten rules or principles which judges may want to use in constitutional adjudication. The attempt

---

[49] It is significant in this respect that the Interpretation Acts in Canada seem to be largely ignored by lawyers and judges alike.

[50] "In England, prior to 1850, the common law notion of repeal included the rule that the repeal of a repealing Act revived the Act originally repealed": *Revolutions and Continuity*, at 61, 63n.

would simply fail. Even Kelsen thought that a formal constitutional enactment would be powerless to exclude the paramount application of customary law at the constitutional level.[51] This is what Chief Justice Lamer overlooked in *New Brunswick Broadcasting* when he expressed the notion that the *Charter* was part of "an evolution which culminated in the supremacy of a definitive written constitution", and that parliamentary privileges should perhaps not enjoy the same constitutional status as the *Charter* because they are "unexpressed".[52] This very notion of the supremacy of written constitutional law over "unexpressed concepts" could only come from the pervasive unwritten normative surrounding of the formal constitution, which Lamer C.J. implies cannot enjoy full constitutional status. In this important sense, his approach is self-defeating: it purports to reject the viewpoint from which it is taken. The rules of a formal constitution can in no way be "superior" to the reasons why that Constitution was adopted and the principles under which it is understood and maintained.

VII.3 VALIDITY, ACCEPTANCE, AND REASONS

The importance of "context", broadly understood, is one of the reasons why the "acceptance model" of the foundation of a legal system offered by Hart was so popular.[53] The model relieves ultimate norms from their Kelsenian "hypothesised", "presupposed" or, eventually,

---

[51] Hans Kelsen, *Pure Theory of Law*, 2d ed., tr. Max Knight, London: Cambridge Univ. Press, 1967, pp. 226-27.

[52] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 355.

[53] The terminology is from Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change*, New York: Peter Lang, 1990, pp. 49ff.

"fictional" character.[54] The model explains that the basic rules of a system ultimately rest on the *fact* of their *present* recognition by officials, most importantly judicial organs, given a background of general obedience to the rules of that system. They rest, in other words, on something found outside the formal structure. Hart elaborates this in connection with the emergence and development of independent legal systems in the colonial context:

> At the end of the period of development we find that the ultimate rule of recognition has shifted, for the legal competence of the Westminster Parliament to legislate for the former colony is no longer recognized in its courts. It is still true that much of the constitutional structure of the former colony is to be found in the original statute of the Westminster Parliament: but this is now only an historical fact, for it no longer owes its contemporary legal status in the territory to the authority of the Westminster Parliament. The legal system in the former colony has now a 'local root' in that the rule of recognition specifying the ultimate criteria of legal validity no longer refers to enactments of a legislature of another territory. The new rule rests simply on the fact that it is accepted and used as such a rule in the judicial and other official operations of a legal system whose rules are generally obeyed.[55]

The ability better to account for the emancipation of British colonies was one of the strengths of Hart's rule of recognition when it was formulated. The existence of independent legal systems throughout the Commonwealth had become a basic datum to be accounted for in legal theory when Hart published *The Concept of Law.* One can fairly say, therefore, that Hart's rule of recognition was a move forward in that it drew attention to the importance of acceptance, that is, the importance of the context in which formal law is embedded. With respect to the hierarchical structure of formal validation, which Hart insisted had to

---

[54] See generally Hans Kelsen, *General Theory of Law and State*, tr. Anders Wedberg, New York: Russell & Russell, 1945, p. 115.

[55] *CL*, at 117.

be accounted for, the acceptance model highlighted the fact that formal validity has ultimately to rest on something other than formal.[56]

But Hart's account also shows well-known weaknesses. Because the model recognises the possibility of direct acceptance as sufficient for some norms, one is led to ask if it is not the case that all norms are law by virtue of their being directly accepted, whether or not they meet the criterion of validity posed by the rule of recognition.[57] The reliance on acceptance as mere "fact" thus seriously threatens Hart's overall position against legal realism: if the rule of recognition can be accounted for as mere fact, why should we not treat other rules of the system in the same way? A related problem is that of the continuing unity and identity of the legal system. At first sight, and envisaged statically, Hart's rule of recognition may seem to provide a good basis for saying that this or that is an independent legal system. One is tempted to say that a legal system is the set of rules unified by a distinct rule of recognition. But on analysis, the "rule of recognition" inevitably appears, rather, as a set, not fully defined, of various rules held together by nothing in particular.[58] This is already noticeable in *The Concept of Law* where Hart has to discuss the "rules of recognition" of a system, despite his usual reference to "the" rule of recognition.[59] And there seems to be nothing bringing these rules together but for the fact that they are part of the same system, which begs the question. The

---

[56] This contrasts with his staunch insistence as a logician that formal rules of change *can* be self-reflective and provide for their own amendment. His position on acceptance, as a legal theorist, means that a new ultimate rule of competence is valid *whether or not* it can be formally brought about by self-reference.

[57] See *Revolutions and Continuity*, at 59.

[58] On this see generally *Revolutions and Continuity*, at 65-70.

[59] *CL*, at 113.

explanation is even more problematical with respect to the further problem of unity and identity regarded through time, that is, the unity and identity of dynamic systems. Nothing formal, first of all, brings together a rule of identification of rules and a rule of competence distinct from it.[60] Further, the rule of recognition being on the whole a customary law, it is subject to changes which are, Hart tells us, to be authoritatively determined by courts.[61] Some elements of the rule, therefore, will appear and others will vanish over time, thus generating a series of sets of ultimate rules deprived of a unifying element.

As I said earlier, Hart's model makes the highest rule of the formal structure rest on acceptance and makes other formal rules derive their validity from that highest rule. Finnis goes further and gives more importance to that which happens outside the formal structure in making the continued validity of *all* formal rules rest individually on a principle "of the practical and theoretical understanding of law" which stands outside the formal structure of validation and refers to it. This principle provides an illuminating perspective on the important but clearly limited place actually taken by the hierarchical structure of formal validation in a broader understanding of law. That perspective reverses a familiar picture and treats context as a phenomenon prior to, and as necessarily embedding, formally validated law.[62]

---

[60] One example of this is afforded by British statutes still applied in Canada: the rule which identifies some British statutes as valid Canadian law today is distinct from the ultimate rule of competence which does not recognise British law-making power for Canada.

[61] *Id.*, at 149.

[62] Contrast this with Raz's second attempt to account for "rules of discretion" (soft standards) in Hartian terms: the normative context is outside "the law", but is pointed to as relevant in adjudication by formally validated law: "Legal Principles and the Limits of Law, A Postscript" in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth, 1984, p. 81. The picture taking shape in the text above reads the other way: it is not the law which points to

At one end, there can be no doubt, as even positivist analysts agree, that the unity and identity through time of legal system lie, at least in part, somehow "outside" the structure of formal validation. They ultimately rest on the unity and identity of the society whose legal system it is taken to be.[63] They depend on the maintenance of the *ensemble* of social relations;[64] they lie in the political system and its continuity[65] and hinge on a smooth evolution of its "dominant ideology".[66] These inform the context in which the structure of formal validation is embedded.

At the other end, a parallel conclusion should follow with respect to the very notion of legal validity applied to norms. All of the analysts quoted above have, more or less openly, taken the positivist notion of validity as their starting point in showing how the unity and identity through time of legal systems cannot rest exclusively on formal considerations.[67] Finnis, to take the most meticulous, begins with this assertion: "No lawyer will deny that every rule in a legal system is equally valid".[68] From there, he works his way up to the "radical" conclusion that "*the legal system, considered simply as a set of 'valid rules', does not exist*" because there is *nothing* (formal) which provides

---

external considerations as relevant for legal decisions; it is those external considerations reflected upon by human beings in society which point to certain acts and facts as presumptively conclusive for decisions.

[63] Revolutions and Continuity, at 65-70.

[64] Virally, *supra*.

[65] Raz, *The Authority of Law*, *supra*, at 100.

[66] Ross, *On Law and Justice*, *supra*, at 83.

[67] That conclusion does not involve that self-reference as a means of constitutional change is illogical: it means that even if it were free of logical flaws, it could not be sufficient.

[68] *Revolutions and Continuity*, at 66.

(and secures) its unity and identity through time.[69] He then points out that the unity and identity of a legal system is, like the all-or-nothing notion of legal validity, "a basic phenomenon of legal experience", and goes on to find that "there seems only one conclusion: the continuity and identity of a system is a function of "the continuity and identity of the society in whose ordered existence in time the legal system participates".[70] All of this would seem to imply more than our analysts mentioned. For there is apparently no reason which could stop more sceptical analysts who would take the notion of validity as no more that an assumption for discussion, from working their way *down* from the absence of a unifying formal master rule. Starting from the *formal disunity* of the system, the absence of a *formal* test of membership that could give the system an identity through time, one could go all the way down to show, "radically", that "validity", considered simply as the characteristic of all the rules making up a "unified and identifiable" legal system, *cannot exist*. Since all-or-nothing validity may nevertheless be considered "a basic phenomenon of legal experience" and cannot be grounded on a formal master rule, "there seems only one conclusion", one might say: the legal validity of a rule is a function of the validity of that rule considered in the broader context of the society which it is meant to regulate.

As with the case of the legal system's identity, however, stepping out of the formal structure means that black-and-white certainty is no longer afforded: all-or-nothing validity turns into relative worth or

---

[69] *Id.* at 69. The mimeographed work from which Finnis drew this insight is now published: Eric Voegelin, *The Nature of Law*, London: Louisiana State University Press, 1991 (from 1957 copyrighted materials).

[70] *Ibid.*

value; it becomes a matter of justification.[71] Some may perhaps say that, empirically speaking, all-or-nothing legal validity is not, after all, such an important phenomenon of legal experience. They may say that the notion of justification may provide a better account of the actual use of norms in adjudication than does the notion of all-or-nothing validity. But few would deny that there are weighty normative reasons in favour of adopting and maintaining an all-or-nothing notion of legal validity. There are weighty reasons, that is, in favour of adopting and maintaining a framework of formal validation. Showing the limits of that framework, as I tried to do here, is simply pointing to the underlying reasons which sustain it. Those reasons are part of the context in which the whole structure of formal validation moves; they make up the *normative* aspect of that context. Those reasons often take the form of principles which play a justificatory role in adjudication. They may play this role because in the Canadian constitutional tradition, as can be inferred from Part One, their often undeniable status as political principles does not disqualify them from also having a status as legal principles.

VII.4 PERMEABILITY AND CIRCULARITY

The need for security and predictability in social relations is an obvious enough reason for maintaining legal forms. But it is perhaps fairness as impartiality which provides the most basic drive towards the adoption of legal forms:

> In the working of the legal process, much turns on the principle – a principle of fairness – that litigants (and

---

[71] See François Ost in "Entre ordre et désordre: le jeu du droit" (1986) 31 *Archives de philosophie du droit* 133.

> others involved in the process) should be treated by judges (and others with powers to decide) *impartially*, in the sense that they are as nearly as possible to be treated by each judge as they would be treated by every other judge. It is this above all, I believe, that drives the law towards the artificial, the *techne* rationality of laying down and following a set of positive norms identifiable as far as possible simply by their 'sources' (i.e. by the fact of their enactment or other constitutive event) and applied so far as possible according to their publicly stipulated meaning, itself elucidated with as little as possible appeal to considerations which, because not controlled by facts about sources (constitutive events), are inherently likely to be appealed to differently by different judges.[72]

This drive is what brought about such models as Kelsen's, under which judges are said to derive the validity of standards in a formal way down from the historically first constitution *beyond which no court can go*. Hart attempted to trade this past-tense cascade of validation for a notion of the acceptance of the present rules of recognition which would not otherwise disturb the "source" thesis at the lower levels. I noted that "informal" considerations cannot be eliminated completely even at the lower levels of the structure of formal validation. As Finnis remarked, from a position which can only be characterised as one of outstanding awareness of the importance of legal forms, the "drive to insulate legal from moral reasoning can never ... be complete".[73] Hart was concerned to preserve the moral neutrality of the ultimate rules and attempted to treat their existence as a factual matter. Regarding the emancipation of the former colonies, for instance, Hart could thus write, descriptively, that at the end of the process "the new rule [of recognition] rests simply on the *fact* that it is accepted and used as

---

[72] John Finnis, "Natural Law and Legal Reasoning" in Robert P. George (ed.), *Natural Law Theory*, Oxford: Clarendon Press, 1992, p. 134, at 150.

[73] *Ibid.* On the importance of legal forms, see *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1981, pp. 311-13, 354-62. On the "bridging" of natural law and positive law theories, see *Natural Law and Natural Rights*, pp. 21-49, 363-66; and Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in George, *supra*, p. 105.

such a rule in the judicial and other official operations of a legal system".[74] But the external perspective there adopted by Hart makes things look more tidy than they are. For the explanation says nothing of the question, a great deal more tricky, of what the matter might look like from what Hart himself named the "internal point of view". Hart simply eludes this problem when he states, in a way reminiscent of Kelsen, that upon reaching "the rule that what the Queen in Parliament enacts is law, we are brought to a stop in inquiries concerning validity", and that this rule is special because "there is no rule providing criteria for the assessment of its own legal validity".[75] As was seen earlier, Hart did improve legal theory's grasp of the phenomenon of legal emancipation. But he did so from outside the legal systems concerned, treating "context" as a purely factual matter, a position which directly threatened his stance against legal realism. If rules cannot be satisfactorily accounted for without due regard being had for their "internal aspect", as he otherwise so elegantly showed, why should we treat the rule of recognition differently? Surely the rule of recognition also has an intelligible purpose from the internal point of view. Why is Hart's otherwise fruitful use of the internal viewpoint here put to the side?[76] For our purposes, the typical insider is the judge in a newly independent country who has to explain the switch from one ultimate rule of recognition or competence to another. More is expected of a judge than a "factual" statement of the type "it is so

---

[74] *CL*, at 117. He writes, on the same page: "... we have at the end of this development two independent legal systems. This is a factual statement, and not the less factual because it is one concerning the existence of legal systems".

[75] *CL*, at 103-04.

[76] See the discussion of Nigel E. Simmonds, "Practice and Validity" (1979) 38 *Camb. L.J.* 361, 369-70.

because it is so".[77] Judges have to *justify* their decisions; they have to provide *reasons* that are intelligible intra-systemically.

To the extent that the *reasons* offered by judges must relate to the system as it exists, the explanation of fundamental change from their perspective will inevitably involve a measure of circularity. In *The Concept of Law*, Hart acknowledged that the explanation of a judicial decision on the ultimate rules of the system could appear somewhat problematical:

> At first sight, the spectacle seems paradoxical: here are courts exercising creative power which settle the ultimate criteria by which the validity of the very laws, which confer upon them jurisdiction as judges, must itself be tested. How can a constitution confer authority to say what a constitution is?[78]

In a sense, this is the inevitable result of having put aside the requirement of derivation down from the historically first constitution. One could say that the unappealing quest for the historically first constitution was basically traded for a form of circularity in the

---

[77] John W. Salmond's *Jurisprudence*, 7th ed. (last by author), London: Stevens, 1924, para. 48, is often quoted to justify statements of that type: "Before there can be any talk of legal sources, there must be already in existence some law which establishes them and gives them their authority. The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal. The historians of the constitution know its origin, but lawyers must accept it as self-existent. *It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of*" (emphasis added). This reflects Salmond's first formulation of this in *The First Principles of Jurisprudence*, London: Stevens and Haynes, 1893, p. 222: "there must in every system of law be one or more ultimate principles, the existence of which is not deduced from any other principle; rules which exist, but for the existence of which the law provides no reason". He mentions three such rules: one for statutes, one for common law and one for custom (at pp. 220-23).

[78] *CL*, at 148.

explanation of law.[79] Hart was conscious of this and was of the opinion that the picture thus offered was an improvement. Answering his own question, laid down above, he writes:

> But the paradox vanishes if we remember that though every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points. The possibility of courts having authority at any given time to decide these limiting questions concerning the ultimate criteria of validity, depends merely on the fact that, at that time, the application of those criteria to a vast area of the law, including the rules which confer that authority, raises no doubt, though their precise scope and ambit do.[80]

The picture here sketched is one that integrates circularity as a useful explanatory tool for law.[81] What is found, I would suggest, at the ultimate level – or in the *ensemble* of constitutional standards – is a number of interdependent standards that support and shape one another in a complex network of justification which is partly circular. Any one of those standards can be challenged in some of its elements on the basis of other accepted standards. This process being effected mostly through judicial decisions made on a case by case basis, each affecting a usually small element of the network, the circular movements of justification are but very rarely exposed.

---

[79] This is particularly obvious in Raz's jurisprudential criterion for a norm's membership in a legal system. The system is said to contain "only those norms which its primary organs are bound to obey". The legal system is thus defined as containing only norms that are "binding" on "primary organs" of the system, where "binding" and "primary organs" are, more or less directly, defined by norms of the system, that is, norms binding on primary organs of the system: *Practical Reason and Norms*, London: Hutchison, 1975, p. 142. Joseph Raz provides a semi-formal representation of such a circle of justification in *The Concept of a Legal System*, Oxford: Clarendon Press, 1970, pp. 138-40.

[80] *CL*, at 149.

[81] See François Ost and Michel Van de Kerchove, *Legal System Between Order and Disorder*, tr. Iain Stewart, Oxford: Clarendon Press, 1994, pp. 65-72, 118-22. See also Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford, Clarendon Press, 1978, pp. 54-55, 245-46.

This is not to say, however, that the system is closed. If it were, there could never be a change in the *ensemble* of constitutional standards; there could not be a change, for instance, in the ultimate rule of formal validation. And such changes do occur. At all levels, external elements are constantly being brought into the system.[82] Those elements may be provided by unrestricted moral reasoning in the community. The sense in which the legal system's claim to "closedness" must be understood is that any external element needs intra-systemic grounds to be received into the system. One may refer here to MacCormick's "toe-hold" doctrine: a judicial decision is a legal decision insofar as grounds are found in the existing legal materials to justify it. It is the role which external elements are allowed to play in a legal system's evolution that keeps the acknowledged circular justificatory processes of that system from being "vicious".

The foregoing discussion of the modelling of constitutional change provides a survey of the various difficulties involved in the explanation of legal change at the fringe of a system. It should be useful at this point to sum up my findings.

Starting with Ross' puzzle, I showed that a logical representation of formal constitutional self-amendment would require tools not provided by the traditional system of first-order logic which Ross was apparently using. It was suggested, further, that adopting the orthodox British notion of continuing parliamentary sovereignty on the basis of this limited system of logic was misconceived. Considering the real-world context in which constitutional change is understood and acted upon,

---

[82] See Niklas Luhmann, "The Unity of the Legal System" in Gunther Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society*, New York: de Gruyter, 1988, p. 12.

however, it appeared that the time factor, which basic first-order logic cannot handle, was essential. The time factor is part of the unwritten data lawyers make use of when considering what standard is to be applied in a particular case. I noted that Finnis provided a convincing account of the rules of "pragmatics" surrounding legal change. Those rules, which Finnis fitted under one general principle, make formal self-amendment intelligible in the practice. The present validity of all formal norms adopted in the past – including those adopted under a rule of competence no longer in force, and whose continuing validity is not explained by Hart's model – can be said to rest on that principle.

I suggested that the type of principle we are here concerned with naturally lies in certain respects outside the formal structure of validation of the system. It defines what it means for a formal norm to be validly created; it regulates the life of the norm through time; it is a part of the matrix in which the whole formal structure of validation moves. Hart's model pointed to the importance of acceptance and emphasised that the structure has ultimately to rest on something which is not formal. And if one looks at that "something" from Hart's "internal point of view", one does not just see the factual aspect of context; one sees *reasons*, i.e.: one sees the *normative* aspect of the context in which the formal structure is embedded. The unity of the legal system, as well as the concomitant notion of all-or-nothing validity, ultimately depend on that normative context.

I emphasised, finally, that the explanation of a change in the ultimate constitutional standards, if it is to be provided in the terms of the system, necessarily involves a measure of circularity. Because the system is not completely self-sufficient as a structure, however, this circularity is only partial. Each one of the accepted constitutional standards, including the ultimate rule of competence, can

be challenged or sustained on the basis of "other elements" of the system. Those "other elements" of the system provide the required toe-holds which make adjudication legal even where established legal standards are being changed.

Before moving on to Part Four, which provides an account of soft standards in constitutional adjudication, I shall briefly discuss some aspects of patriation and independence with the conclusions of this Chapter in mind.

Chapter VIII

Perspectives on Patriation

Patriation was one of those few occasions when a court of law is given an opportunity to pronounce on legal change at the ultimate level. The ultimate rule of competence of the Canadian legal system was at issue and all governments accepted in the end to defer to the judicial opinions sought originally by provincial governments. I should now make clear my opinion that the Supreme Court performed its daunting task on the basis of an unsatisfactory jurisprudence. The *Patriation Reference* will be discussed and further criticised in the next Part where the bearing of principles in constitutional adjudication will be analysed in detail.

This Chapter will simply set out the issue put to the Supreme Court in the *Patriation Reference* and briefly outline the reaction of the Court in view of the perspectives then made available by scholarly opinion in Canada. It concludes that despite an appearance of sticking to the tenets of the traditional continuing sovereignty of the United Kingdom Parliament, the majority of the Supreme Court can be said to have acknowledged or effected a fundamental change in the ultimate rules of the Canadian legal system.

VIII.1 THE LEGAL ISSUE IN THE SUPREME COURT

The central issue in the *Patriation Reference* was whether the legislative supremacy of the United Kingdom Parliament with respect to the Canadian Constitution could be qualified as a matter of law by virtue of Canadian constitutional imperatives such as independence and federalism. The Court (majority and dissent (law)), however, did not openly face this issue, which was addressed only indirectly through an analysis of the legal status of the Canadian procedures that had emerged through constitutional practice as the proper trigger for amendments ultimately passed in London. The legal questions were presented as follows by the majority (law):

> There are two broad aspects to the matter under discussion which divide into a number of separate issues: (1) the authority of the two federal Houses to proceed by resolution where provincial powers and federal-provincial relationships are thereby affected and (2) the role or authority of the Parliament of the United Kingdom to act on the Resolution. The first point concerns the need of legal power to initiate the process in Canada; the second concerns the legal power or want of it in the Parliament of the United Kingdom to act on the Resolution when it does not carry the consent of the provinces.[1]

The second aspect of the matter (2) was not to be fully dealt with because "the authority of the British Parliament or its practices and conventions", the opinion states, "are not matters upon which this Court would presume to pronounce."[2] There is not even the beginning of an

---

[1] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 773 (hereinafter *Patriation Reference*).

[2] *Id.*, at 774.

explanation why this is so; and this limited the range of perspectives open to the Court.[3]

The issue for the Court, then, was whether the Canadian Senate and House of Commons could, without provincial agreement, pass and forward a joint resolution addressed to Her Majesty the Queen requesting that She "cause to be laid before the Parliament of the United Kingdom" a bill effecting an amendment of the Canadian constitution touching upon the powers, rights and privileges of the provinces. Two types of norms could be envisaged as being applicable: conventional and legal. The Court held, as was discussed at length in Part Two, that a constitutional convention cannot crystallise into a hard standard of constitutional law (although it may very well "crystallise" into a judicial pronouncement). The strictly legal question thus left to be answered was whether the resolution (1) could validly be passed, and (2) could be forwarded to London for adoption. There was a widespread opinion in Canada, strongly and publicly advocated by the federal government, that the British authorities would, and should, treat this as a rubber-stamping matter, and this is reflected in the Court's opinion in the form of an implicit assumption that if the joint address was allowed to leave Canada, the Constitution was most likely going to be amended as requested (though this is presented as being outside the Court's jurisdiction).[4]

---

[3] See Peter W. Hogg, "*Constitutional Law – Amendment of the British North America Act – Consent of the Provinces*" (1982) 36 *Can. Bar Rev.* 307, 329. This problem is discussed in more detail in Chapter XI.1.

[4] It turned out in fact that the demure attitude expected of the British authorities by the Canadian government was not unambiguously forthcoming. The First *Kershaw* Report (as hereinafter called) did not take the view that the United Kingdom Parliament was to rubber-stamp any request made by the federal Houses of Parliament, but rather that that Parliament was "bound to exercise its best judgement in deciding whether the request, in all the circumstances, convey[ed] the clearly expressed wishes of Canada as a federally structured whole" (U.K., H.C., "British North America Acts: The Role of Parliament", First Report of the Foreign Affairs Committee, HCP 42 (1980-81), 30 Jan. 1981, para. 14(9)). The

The Court is very quick to dismiss the provincial contentions based on the legality of the resolution itself.[5] The majority (law) takes the position that resolutions are a matter of internal parliamentary proceedings not to be subjected to any judicial scrutiny, and quotes to this effect "a leading treatise on British Parliamentary proceedings".[6] "It would be incompatible", the opinion goes, "with the self-regulating – inherent is as apt a word – authority of Houses of Parliament to deny their capacity to pass any kind of resolution."[7] The Court goes on to quote the *Bill of Rights* of 1688-89, which provides that "...Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".[8] Therefore, the resolution was not legal

---

Canadian government replied to this by presenting its interpretation of the facts of Canadian constitutional history in a paper which claimed with respect to the First *Kershaw* Report that "every major component of the Committee's position can be shown to be mistaken" (Canada, Minister of Justice, "The Role of the United Kingdom in the Amendment of the Canadian Constitution", Background Paper, Ottawa, March 1981, para 81). The Committee responded in a Supplementary Report (HCP 295 (1980-81), 15 Apr. 1981) which showed convincingly that it was the Canadian paper which was demonstrably mistaken and pointed out that the views expressed by the Trudeau government in the paper diverged to a great extent from those of previous Canadian governments. A third report was also prepared by the *Kershaw* Committee following the *Patriation Reference*: (HCP 128 (1981-82), 22 Dec. 1981). Note that the opinions of the *Kershaw* Committee were not officially those of the Government or of the House of Commons. In fact, the Thatcher government's reaction to the First *Kershaw* Report was to issue a statement that the government would act in accordance with a request by the Houses of the Parliament of Canada and would urge the United Kingdom Parliament to do the same (U.K., H.C., "Observations by the Secretary of State for Foreign and Commonwealth Affairs on the First Report from the Foreign Affairs Committee", Cmnd 8450 (1981), para. 13).

[5] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 784-87.

[6] *Id.*, at 785. The treatise is Erskrine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 19th ed. by David Lidderdale, London: Butterworth, 1976. Arthur Beauchesne's *Rules and Forms of the House of Commons of Canada* (5th ed., 1978) is also quoted, as repeating "almost verbatim" the passage cited from May.

[7] *Id.*, at 785.

[8] 9th article.

material for the courts to review and it made little sense to ask whether it was "legally valid".[9]

The Court then turns to the rather less focused issue of whether the unreviewable resolution could be "used" to "obtain" the constitutional amendment from the United Kingdom Parliament without provincial agreement. In dealing with this issue the Court goes over the possible constitutional law limitations and considers arguments of provincial supremacy (with respect to the powers, rights and privileges of legislative assemblies) in the context of federalism. This is where the principle of federalism conceived as a basic precept of the constitution, one that can be used in a legal decision, is dealt with. The provinces suggested many bases to ground the principle of federalism: they made arguments from history, from political studies writings, from the case law and from the preamble to the *British North America Act*. All were rejected. "Arguments from history do not lead to any consistent view", the court states, and theories about Canadian federalism "do not engage the law, save as they might have some peripheral relevance to actual provisions of the *British North America Act* and its interpretation and application".[10] In the reference to federalism made in the preamble to that *Act* the Court found nothing of particular interest regarding the legal question.[11] As for the frequent references to the federal principle in the case law, the Court seems to suggest that the principle had never been used independently to ground a legal decision.[12]

---

[9] A critical analysis of this is offered in Chapter XI.2.

[10] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 803.

[11] *Id.*, at 805-06.

[12] *Id.*, at 804.

The dissenting opinion of Martland and Ritchie JJ. also focuses on the Canadian procedures but comes to a different conclusion. Martland and Ritchie JJ. were of the view put forward by the majority of the provinces that the lack of provincial consent with respect to the projected resolution went to the constitutional legality of patriation. Implicitly referring to the majority opinion (law), the dissenting judges introduce their approach by indicating a significant difference in emphasis:

> At the outset, we would point out that we are not concerned with the matter of legality or illegality in the sense of determining whether or not the passage of the Resolution under consideration involves a breach of the law. The issue is as to the existence of a power to do that which is proposed to be done. The question is whether it is *intra vires* of the Senate and the House of Commons to cause the proposed amendments to the *B.N.A. Act* to be made by the Imperial Parliament by means of the Resolution now before the Court, in the absence of provincial agreement.[13]

Martland and Ritchie JJ. are thus keen to show that the whole matter is not one of the internal procedure of the federal Parliament. This is so because the resolution has direct constitutional repercussions in terms of federalism. On that basis they forcefully reject the reasoning of the majority, which was based partly on the British legal tradition of parliamentary procedure. They argue thus:

> The English authorities, such as Dicey and May, respecting the power of the Houses of Parliament to pass resolutions, and as to their effect, are related to the resolutions of the Houses of Parliament in a unitary state. Under the British constitution, the only limitation on the power of Parliament is that its authority must be expressed in legislation. Any "constitutional amendment" under the British constitution can be passed by normal legislation. Accordingly, these authorities are of no help in determining the limitations, if any, on the authority of one level of government in a federal state, respecting the use of an accepted amending procedure for the purpose of abridging the

---

[13] *Id.*, at 815.

> powers of the other legislative level. *The Resolution under consideration is not a matter of internal procedure. A Resolution of the Senate and the House of Commons has become recognized as the means whereby a request is made to the Imperial Parliament for legislation to effect a constitutional amendment.*[14] [Emphasis added.]

In other words, Canadian constitutional practice has over the years transformed the traditional resolution adopted with provincial consent into (an aspect) of a procedure for amendment with constitutional status in Canada – a constitutional status that can have legal repercussions. They go on to assert that such power as was claimed by the Senate and House of Commons to proceed without provincial consent "is out of harmony with the very basis of the *B.N.A. Act*".[15] The main reason for this is that the lack of provincial consent would violate the principle of federalism.

There follows a careful review of selected precedents showing the use of the precept of federalism in constitutional law adjudication.[16] In all those precedents, the opinion points out, the doctrines and principles appealed to could not be found in written constitutional material, they were all derived from the federal character of the Canadian constitution, they were given full legal force, and there were no directly applicable precedents providing answers. In each case, it was found that the court had denied the assertion of any power which would offend against the basic principles of the constitution. To Martland and Ritchie JJ., the unwritten postulate of federalism could thus be acted upon as authority for the conclusion that "the Canadian Constitution does not empower the Senate and House of Commons to cause

---

[14] *Id.*, at 836-37.

[15] *Id.*, at 839.

[16] *Id.*, at 841-44. Those precedents are reviewed in Chapter XI.2.

the Canadian Constitution to be amended in respect of provincial legislative powers without the consent of the provinces".[17] This will be discussed in more detail in Part Four.

Federalism, envisaged as a fundamental principle of the Canadian constitution, was the central basis for the opinion of Martland and Ritchie JJ. The majority (law), on the other hand, implied that the one and only standard available for decision on the process for the amendment of the Canadian Constitution was that of the sovereignty of the United Kingdom Parliament and not some vague notion of federalism. This sharp difference of opinion may be explained by the different weight given in the two opinions to the fact that Canada had become a distinct political community with a distinct legal system underpinned by its own paramount values and principles.

VIII.2 PATRIATION AND FACTUAL INDEPENDENCE

Professional and scholarly attitudes about patriation can be summarily outlined around two poles of ideas on the ultimate rule for Canadian constitutional amendment. Most professionals articulated their view during and following the judicial episode of patriation in 1981; the basic positions, however, can be gathered from the writings (available to the Court) of the few scholars who were interested in the matter before it got much heat from the expression of the federal government's intention to go ahead with patriation unilaterally if provincial consent could not be secured.[18]

---

[17] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 848.

[18] Comments on patriation that are not otherwise referred to in this thesis include: Robert Décary, "Le pouvoir judiciaire face au jeu politique" *in* Peter H. Russell *et al.* (eds), *The Court and the*

The "traditional" vision, on the one hand, focused on the untrammelled power left with the United Kingdom Parliament to amend the constitution of Canada: a United Kingdom statute was both necessary and, to many, sufficient for "patriation" to be effected. The "independence" vision, on the other hand, stressed that an autochthonous Canadian amending procedure had emerged over the years, prompted by the political developments that had lead to Canada's status as an independent state. That domestic procedure was now ripe for judicial endorsement in Canada and the legislative role of the United Kingdom Parliament was seen, at best, as a formal step required by Canadian law.[19]

Constitution: Comments on the Supreme Court Reference on Constitutional Amendments, Kingston: Institute of Intergovernmental Relations (Queen's Univ.), 1982, p. 33; Peter W. Hogg, "Constitutional Reform" (1981) 19 *Alta L.R.* 335; J. Kerr, "Constitutional Act 1980: Is it Constitutional?" (1981) 30 *U.N.B. L.J.* 73; Richard H. Latouche, "Les calculs stratégiques derrière le Canada Bill" (1982) 45 *Law & Contemp. Probs* 165; William R. Lederman, "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32 *Am. J. of Comp. Law* 339; W.H. McConnell, "Cutting the Gordian Knot: The Amending Process in Canada" (1981) 44 *Law & Contemp. Probs* 195; Edward McWhinney, *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights*, Toronto: Univ. of Toronto Press, 1982; Gil Rémillard, "Historique du rapatriement" (1984) 25 *C. de D.* 15; Roy Romanow, *Canada Notwithstanding: The Making of the Constitution 1976-1982*, Toronto: Carswell, 1984; Peter H. Russell, "Bold Statescraft, Questionable Jurisprudence" in Keith Banting and Richard Simeon (eds), *And No One Cheered: Federalism, Democracy and the Constitution Act*, Toronto: Methuen, 1982, p. 210; Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, Toronto: Univ. of Toronto Press, 1992; Filippo Sabetti, "The Historical Context of Constitutional Change in Canada" (1982) 45 *Law & Contem. Probs* 11; Bryan Schwartz, "General National Agreement: The Legal Sanction for Constitutional Reform in Canada" (1981) 6 *Queen's L.J.* 513a.

[19] The most thorough discussion of these theories is Peter Oliver, *The Patriation and Amendment of the Constitution of Canada*, Doctoral thesis, Oxford, 1992, pp. 25ff. See also his "The 1982 Patriation of the Canadian Constitution: Reflections on Continuity and Change" (1994) 28 *R.J.T.* 875, 881-91, and his "Cutting the Imperial Link – Canada and New Zealand" in Philip A. Joseph (ed.) *Essays on the Constitution*, Sydney: The Law Book Co, 1995 (forthcoming). I am much indebted to Dr Oliver for my treatment of patriation; the evolution of my thinking on the subject greatly benefited from my reading his work, and from discussing aspects of it with him. On the theoretical underpinnings of the federal and provincial arguments put to the courts in the references, see Rainer Knopff, "Legal Theory and the "Patriation" Debate" (1981) 7 *Queen's L.J.* 41.

Within the traditional school of constitutional theory, Gérin-Lajoie's classic study, *Canadian Constitutional Amendment*, published in 1950, provided a thorough treatment of the issues surrounding patriation from a historical perspective.[20] Its clear exposition of the traditional view, which one can quite reasonably speculate had a certain influence on the majority of the Supreme Court, is neatly encapsulated in this short summary of the legal situation, to be found at the beginning of the fourth chapter:

> The Constitution is embodied in, or rests upon, Acts of the British Parliament. Under the Colonial Laws Validity Act, 1865, the legislature or parliament of a "colony" has no power to pass any law repugnant to the provisions of any British Act extending to the "colony" unless it does so in accordance with a constituent or amending power provided by a British act. No such power regarding the Constitution of Canada was ever granted to any parliament, legislature, or other agency in Canada. On the other hand, the Statute of Westminster, 1931, has not removed Canada from the operation of the Colonial Laws Validity Act insofar as the Constitution – as defined in Chapter I – is concerned. The only means left to alter the Constitution is then, in each case, a further enactment by the Parliament of the United Kingdom. *The necessity of such an enactment at Westminster is the one feature of the amending process which is determined entirely by law and does not result in any way from convention. Any attempt to alter the Constitution or to override it by other means would be repudiated and declared null and void by the courts.*[21] [Emphasis added.]

In his mind, the constitutional repercussions of the emancipation of Canada, insofar as constitutional amendment was concerned, could only be a matter for convention since any legal change had to be effected by the United Kingdom Parliament, and, legally, that parliament could effect any change whatsoever. This position, surely, had the advantage of apparent

---

[20] Paul Gérin-Lajoie, *Canadian Constitutional Amendment*, Toronto: Univ. of Toronto Press, 1950. This was the first book-length study of the matter.

[21] *Id.*, at 135-136.

simplicity and the majority (law) of the Supreme Court probably felt the sway of such appearance.

Despite their puzzling initial assertion that "the authority of the British Parliament" is not a matter "upon which this Court would presume to pronounce",[22] the majority (law) do manage to state at least three times in their opinion that the United Kingdom Parliament has untrammelled legal authority regarding the amendment of the *B.N.A. Act*.[23] In the majority's view, that authority remains untrammelled despite the acknowledged political developments that have made Canada an independent state and a subject of international law. Such developments are reflected, again, only in convention. Apart from apparent simplicity, the position of the majority (law) had the rhetorical advantage of reflecting a popular belief, then fostered by the Canadian government, that the Canadian constitution, unlike those of other countries, was not the result of a break in legal continuity but that of a growth marked by a time-honoured obedience to the law. The following passage can be found in the White paper published in March 1981 by the government of Canada:

> Canadians take pride in the fact that our Constitution, unlike those of many nations, is entirely lawful in both its origins and its subsequent development. The Constitution of Canada was not the product of armed revolution, as in the case of the United States. It was created instead by legal devolution from the Parliament of the United Kingdom. Since then, every stage in the growth of the Canadian Constitution has been marked by scrupulous adherence to the rule of law. An unbroken chain of legality extends from the time Canada

---

[22] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 774.

[23] *Id.*, at 799, 801, 807.

> was a British colony to its present status as a fully autonomous member of the world community.[24]

Here is a typically Canadian notion of pride, one might say, as the "scrupulous adherence to the rule of law" (not the Rule of Law) mentioned in the passage might very well mean "the continuing acceptance of the Imperial Parliament's legal sovereignty" in Canada. The absence of a domestic amending formula had provided a reason for this awkward situation. But on the eve of patriation, the question surfaced again of how traditional constitutional theory could explain that the "scrupulous adherence to the rule of law" would not imply the continued recognition of the Imperial Parliament's legal sovereignty after a domestic amending formula had been adopted. For theorists of the orthodox school, the question still lingers after patriation even though it has no practical consequences.[25]

The short answer to that question is that a traditional theory which insists on continuing sovereignty does involve the continued recognition of the United Kingdom Parliament's legal sovereignty.[26] In 1950 Gérin-Lajoie implied there was no way around the notion that the United Kingdom Parliament would *always* have the legal power to legislate for Canada.[27] The recognition of Canada's independence by unbending

---

[24] Canada, Minister of Justice, *The Role of the United Kingdom in the Amendment of the Canadian Constitution*, Background Paper, Ottawa, March 1981, para. 11.

[25] See the discussion in Geoffrey Marshall, *Constitutional Conventions*, Oxford: Clarendon Press, 1984, pp. 206ff.

[26] See Dan Soberman, "The Opinions of the Supreme Court: Some Unanswered Questions" in Banting & Simeon, *supra*, p. 67.

[27] This is suggested by his comment, *supra*, at p. 241, on a proposal made by Maurice Ollivier before a Committee of the House of Commons in 1935: "The main object of this step would be to bring about the repeal of the British North America Acts and to have the Canadian Constitution embodied exclusively in a Canadian Act in order that it might not be any more subject, in law, to amendment by the Parliament of the United

constitutional convention was then perhaps thought sufficient by many. But not every one thought this satisfactory. For the "independence vision" of the Canadian constitution was also present in the scholarly writings of the period.

In a paper read at the Annual Meeting of the Royal Society of Canada in 1950, F.R. Scott spoke for the first time of the possibility of Canada eventually having "its own *Grundnorm*" at the basis of "a totally distinct" system of law.[28] The metaphorical language he used is now famous:

> To borrow another analogy from the well-known eastern myth, we may say that until now all legal rules in Canada, from municipal bylaws to whole codes of law like the Quebec Civil Code or the Criminal Code, have derived their validity from the elephant of the B.N.A. Act, which stood firmly upon the turtle of the sovereignty of the United Kingdom Parliament. Beneath the turtle nothing further has existed to support a stable universe. Now the various Dominions are getting their own turtles, and we are looking for a Canadian turtle.[29]

Kingdom. [Gérin-Lajoie here continues in a footnote] Dr. Ollivier seems to have forgotten that, as a matter of abstract law, Westminster could amend or repeal any Canadian Act as well as any British Act relating to Canada. [...] The enactment in Canada of a Canadian Constitution (for instance, by concurrent statutes of the federal Parliament and the provinces) and the repeal of the present British Acts on the subject would therefore operate only a change in form. This change is, no doubt, highly desirable in many respects. But it would not affect at all, from a strictly legal and abstract point of view, the supremacy of the Parliament of the United Kingdom over the Canadian Constitution".

[28] "The Redistribution of Imperial Sovereignty" in *Transactions of the Royal Society of Canada*, 44, series III, June 1950, 27; reprinted in Frank R. Scott, *Essays on the Constitution*, Toronto: Univ. of Toronto Press, 1977, p. 244 (hereinafter cited to 1977 reprint). Scott was apparently influenced by Richard T.E. Latham, *The Law and the Commonwealth*, London: Oxford University Press, 1949 (first published in 1937), pp. 521ff (on legal unity in Commonwealth law and the notion of *Grundnorm*).

[29] Note that the reality is here somewhat distorted for rhetorical effect: the statement that "all legal rules in Canada ... have derived their validity from the ... B.N.A. Act" is in fact very far from being accurate. Consider, for instance, British statutes other that the B.N.A. Act still in force in Canada, pre-confederation statutes of B.N.A. colonies still in force, and all of the common law.

To him conventions, however well established, were not enough.[30] This seems to have eventually convinced Gérin-Lajoie, who stated, in an article published the following year in the *Canadian Bar Review*, that the domestication of the amending formula could mark the end of Westminster's *legal* sovereignty over Canada.[31] How that would be so was not explained. Some ten years later a former justice of the Supreme Court of Canada, Ivan Rand, delivered the Oliver Wendell Holmes Lecture at the Harvard Law School and argued that the independence of Canada had consequences that should be recognised by the Canadian judiciary as legal.[32] "Should, for example, the British Parliament, of its own initiative, purport to repeal the Act of 1931 what would be the position of Canadian legislation and of Canadian courts?", he asked.[33] Perhaps an American audience was best prepared for the answer. That answer was

---

[30] Scott seems to have been concerned more with the behaviour of Canadian authorities than that of their British counterparts: "Some people may feel impatient with this analysis of a legal theory that appears to have little practical importance. Does it make any difference whether a British Statute can extend to Canada whenever the preamble says Canada has requested it, or whether no such statute can have the force of law unless it has been enacted in identical terms by the Canadian Parliament? [...] Suppose Canada takes to herself a power to amend the B.N.A. Act, by procuring in London the addition of a clause describing how amendments may be adopted. What is to prevent a future British Parliament amending the Act *on Canadian request* by a separate statute which pays no attention to the amending procedures? Since the procedure rests on a British statute, the procedure itself can in future be amended in Britain. We should have no certainty or stability, unless the entire constitution were to become a Canadian constitution, binding on all future Canadian legislatures, and incapable of being altered save by a process which derives its validity from the will of the Canadian people alone" (at p. 248; the emphasis is mine).

[31] Paul Gérin-Lajoie, "Du pouvoir d'amendement constitutionnel au Canada" (1951) 29 *Can. Bar Rev.* 1136, 1178. He there refers to Scott's article but does not discuss the nation-wide convention-cum-referendum strategy which Scott appears to think necessary for the establishment of a new "Grundnorm" (see quotation in previous note).

[32] Ivan C. Rand, "Some Aspects of Canadian Constitutionalism" (1960) 38 *Can. Bar Rev.* 135.

[33] *Id.*, at 139.

"that the purported repeal would not be recognised".[34] This trend was followed with two articles by Lederman published in 1967[35] and 1978,[36] which culminated in an argument that Canadian legal rules governing constitutional amendment did exist. The 1978 article put forward a convincing but controversial picture in which the various principles regarding the independence and federal structure of Canada (broadly speaking, the set of conventions later recognised in the *Patriation Reference* respecting constitutional amendment) are treated as "basic constitutional laws in every sense".[37] His explanation for such an assertion was particularly straightforward:

> For me, constitutional law arises out of our whole history and tradition as a people, and one must constantly relate these rules and principles of law and government to the organic ongoing life of our national community, from which they derive their validity.[38]

The crucial point in Lederman's position is what he considers to be "our national community". As was noted in the previous Chapter, even positivist analysts agree that the unity and identity of a legal system cannot depend on formal considerations alone.[39] It partly depends on the political community, on the polity which the legal system is believed to serve and regulate. The independence vision recognises that the Canadian legal system is the system of a distinct political community

---

[34] *Ibid.*

[35] "The Process of Constitutional Amendment for Canada" (1967) 12 *McGill L.J.* 371.

[36] "Constitutional Amendment and Canadian Unity" [1978] *Special Lectures L.S.U.C.* 17.

[37] *Id.*, at 23.

[38] *Id.*, at 20.

[39] See Chapter VIII.2; particularly Joseph Raz, *The Authority of Law*, Oxford: Clarendon, 1979, pp. 97-102.

with its own principles and concerns *even if* an ultimate rule of competence points to the United Kingdom Parliament for constitutional amendments.[40] That ultimate rule has survived independence only because it is required by the Canadian system: it was a constitutional imperative of the Canadian constitutional system which made political actors decide in 1931 that the *B.N.A. Act* would be excluded from the purview of the *Statute of Westminster*. The power of the United Kingdom Parliament was maintained because Canadian federalism required it in spite of Canadian independence.

The purported reluctance of the majority (law) to pronounce on the power of the United Kingdom Parliament is a sign of the traditional approach which considers the continued power of the United Kingdom Parliament in the same terms as it was envisaged in the days of the Empire when Canada was merely a fragment of a broader polity with paramount concerns and principles ultimately shaped and decided upon in London. For Lederman, the adoption of a statute by the United Kingdom Parliament was still legally required for constitutional amendment, but it was required merely as a formality imposed *by and within* the now paramount Canadian legal system, which could impose further conditions.

Martland and Ritchie JJ.'s dissent perhaps represents a version of this "independence" vision of the ultimate legal rules governing Canada. To them, the issue was to be resolved in terms of the independent Canadian constitutional system. If a statute of the United Kingdom Parliament was still formally necessary for constitutional amendment, it was because Canadian law required it. And under Canadian law, the proper exercise of the formal power left in London could be subjected to other

---

[40] See generally Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth*, Oxford: Clarendon Press, 1957, pp. 88-89.

requirements derived from the basic structure of the Canadian constitution, most importantly federalism.[41]

Martland and Ritchie JJ.'s opinion does not articulate the case for the "independence" vision very clearly or strongly. They regarded the role of the United Kingdom Parliament as one of rubber-stamping,[42] and they found the consent of the provinces to be legally required for constitutional amendment by virtue of the constitutional principle of federalism, upon which the gist of their opinion is based. But they failed to address directly the supremacy of the United Kingdom Parliament as a Canadian rule of law open to overruling or revision in the highest court of the Canadian system. Their underlying assumptions were clear, however. Constitutional law, for them, is not a self-sufficient structure of hard standards to be applied without regard to other norms or facts. They recognise that constitutional law is not completely severed from the evolution of constitutional practice, that is, from the social and normative context in which hard standards are embedded. As I said earlier they had no trouble in seeing the requirement of provincial consent as both a conventional and a legal requirement. They assumed that courts of law can have a look at the normative context and evolve the rules of constitutional law, in the same way, perhaps, as they evolve ordinary rules of common law. This meant that the Canadian normative context which supported the maintenance of the powers of the United Kingdom could have legal repercussions in a legal decision; it meant that the formal requirement of a United Kingdom statute could be

---

[41] See Noel Lyon, "Constitutional Theory and the Martland–Ritchie Dissent" in *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendments*, *supra*, p. 57.

[42] They write that "the Imperial Parliament by a firm and unbending convention must comply" with a request made by the Houses of Parliament: *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 845.

supplemented with further requirements of the independent Canadian legal system under which such a statute was formally required.

For the *Patriation Reference* Court, this was a matter of acknowledging that the rule of the supremacy of the United Kingdom Parliament is based on the constitutional understanding, the social and normative context that made it appear and makes it last; it has no special claim to perpetuity or exclusivity in the face of change in such understanding.[43] The context of the British Empire which supported the notion of an imperial commonweal of which colonies were fragments gradually vanished and was supplanted by one of independent communities which the *Statute of Westminster* recognised. From then, any support for the authority of the United Kingdom Parliament with respect to the *B.N.A. Act* had to be found in the Canadian context and that authority could be subjected to requirements flowing from the principles found in that normative context. In the *Patriation Reference*, the provinces that were opposed to the federal resolution argued in substance that the post-independence normative context required provincial consent as part of the ultimate rule of competence. In the result, Martland and Ritchie JJ. endorsed that claim of the provinces.

We may here recall the conclusions of the previous Chapter to point out that the matter was not one of whether or not a change in the ultimate rule of competence was best left with the legislative power. As Roberts-Wray aptly put it, "where Parliament possesses legislative authority it requires no assertion; where Parliament has no power to make laws it could not, by making one, give itself the power".[44] At that

---

[43] See Richard S. Kay, "The Creation of Constitutions in Canada and the United States" (1989) 7 *Canada-U.S. L.J.* 23.

[44] Kenneth Roberts-Wray, *Commonwealth and Colonial Law*, London: Stevens, 1966, p. 140.

level, Parliament can always make a bid, which, if successful, can be seen as partly grounding the result. But the courts have to endorse it with a view to what principles are available in that context. In the case of patriation, the Supreme Court was perhaps in a better position than were British authorities to make an assessment of the requirements of the Canadian normative context. Nobody claimed that a notion of imperial commonweal was still relevant to the assessment, and even the majority (law) acknowledged the relevance of the Canadian social and normative context when it stated that going ahead with patriation without the measure of provincial consent required by federalism would amount to "unconstitutional" behaviour.

But the majority (law) apparently asserts that if the basic constitutional understanding has changed in Canada, it is enough that it be reflected in constitutional convention. Here the law, the opinion seems to imply, cannot change. Indeed, how could the rule of the supremacy of the United Kingdom Parliament ever change when "expression in imperative constitutional text or statute" is deemed required?[45] Under orthodox theory, no legislative body, including Parliament, can change the supremacy rule. Is one to conclude that, according to the Supreme Court, the sovereignty of the United Kingdom Parliament is still with us after patriation? The short answer is no, not necessarily.

---

[45] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 784 (majority (law)).

VIII.3 THE MAJORITY OPINION AND CONTINUING SOVEREIGNTY

There are two possibilities as to how the sovereignty of Parliament can be envisaged after the *Reference* and the actual "patriation".

The first possibility may seem at first sight to be implied in the majority opinion (law) of the *Reference*. This flows from the apparent assertion that the orthodox assumption of continuing sovereignty still applies in Canada, with the usual proviso that the potentiality of a resumption of authority by Westminster is only "theoretical", being prohibited by unbending convention. The attitude here is to consider the legal question as one that is not really worth pondering over because it has no practical consequences. But the obvious problem with the survival of orthodox theory in Canada after patriation is that it is very much at odds with some basic data of Canadian reality – that is, of the moral and political deliberations, aspirations and self-perceptions of Canadians. For my purpose here, the central datum is the consensus that "Canadian courts, in point of fact, would disregard any United Kingdom law enacted for Canada after 1982".[46] This first possibility, therefore, fails in one important function of legal theorising, i.e.: that of providing concepts that can explain basic data of our legal experience.

The second possibility lies in the proposition that Canada has evolved an understanding of its constitution which has abandoned the continuing sovereignty of the United Kingdom Parliament as the ultimate rule of competence for Canada. What the situation might be in British law and theory, then, is no longer directly relevant. This Canadian understanding can be said to have been prompted by political developments

---

[46] *Constitutional Conventions*, *supra*, at 207; Peter W. Hogg, *Constitutional Law of Canada*, 3d ed., Toronto: Carswell, 1992, para 3.5(d).

and to have been gradually articulated by constitutional observers such as Lederman. These political developments are filtered into legal materials through principles which in Canada can have a double status as political and legal principles.

At first sight it may seem difficult to explain how this can be made compatible with the majority opinion (law) of the *Patriation Reference*. The opinion can legitimately be criticised for its failure *openly* to recognise the emerging Canadian thinking on the constitution with respect to the ultimate (legal) rule of competence of the system. To many, this failure was the sad but inevitable result of the overly conservative membership of the Court,[47] a result which (it was feared) might stifle progressive theorising about the Canadian constitution in the future.[48] But there is another way of looking at the opinion which emphasises the fact that the possibility of an independent, judicially recognised Canadian understanding was actually not excluded by the majority (law). What really stands out in the opinion of the Supreme Court is the often repeated assertion that Westminster has complete authority over the Canadian constitution. The Court states, for example, that "[t]he legal competence of [the United Kingdom] Parliament ... remains unimpaired",[49] that "in law", the *Statute of Westminster*, and the events that culminated in its adoption, have not affected "the undiminished authority of the Parliament of the United Kingdom over the

---

[47] See the generally negative comments in *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendments*, *supra*. A reply to these is Barry L. Strayer's book review at (1983) 15 *Ottawa L.R.* 231.

[48] See Eric Colvin, "Constitutional Jurisprudence in the Supreme Court of Canada" (1982) 4 *Sup. Ct. L.R.* 5.

[49] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 799.

British North America Act",[50] and that "the one constant since the enactment of the *British North America Act* in 1867 has been the legal authority of the United Kingdom Parliament to amend it".[51] Such insistence leaves the impression that the traditional theory of continuing parliamentary sovereignty is being irremediably nailed into Canadian law as the ultimate constitutional rule of competence. But the language of the opinion sometimes seems at odds with that impression. The Court, for instance, speaks about "the process in question [concerning] ... the completion of an incomplete constitution", or of it being "a finishing operation".[52] Of course the "finishing" and "completion" may just refer to the inclusion of the missing amending procedure. But under the traditional theory, taken to its full extent, the possibility of a resumption of authority by the United Kingdom cannot be terminated and patriation cannot be a "finishing operation" in the legal sense. This points to the possibility that patriation may have been envisaged in the *Reference* as the termination in law of Westminster's authority. But if one is to assert "the undiminished authority of the Parliament of the United Kingdom" the day before patriation and recognise in the same breath that patriation will effectively terminate that authority, the range of options in terms of explanation is drastically reduced. The one available explanation is that the "abdication clause" which was part of the patriation package is legally effective in Canadian law.

The effectiveness in law of abdication is perhaps the most puzzling aspect of the problem of explaining independence with respect to former

---

[50] *Id.*, at 801.

[51] *Id.*, at 807.

[52] *Id.*, at 799.

colonies. Given the opinion of the Supreme Court in the *Patriation Reference*, it is suggested that the best explanation for Canada is that between 1931 and 1981 Canadian courts had come to adopt a Canadian understanding of the constitutional system, an understanding according to which the United Kingdom Parliament could abdicate as a matter of Canadian law. In Canada the ultimate rule of competence had changed, in other words, from the time-honoured "continuing" sovereignty of Parliament perhaps still prevailing in the law of the United Kingdom,[53] to the "self-embracing" sovereignty under which an "abdication statute" can be considered legally effective.

That explanation best accounts for both the Supreme Court's assertion of the "undiminished sovereignty" of Westminster before patriation, and the consensus that no Canadian court today would recognise an attempted resumption of authority by Westminster. The sovereignty of the United Kingdom over the *B.N.A. Act*, in those terms, was in 1981 "undiminished", but not unmodified. Abdication could now be legally effective. The sovereignty was "undiminished" in the sense that the powers of Parliament were actually "extended" to include that of abdication. But the undiminished sovereignty had changed from continuing sovereignty to self-embracing sovereignty. This change appears quite clearly in the subsequent *Quebec Veto Reference*, where the Supreme Court was asked to give its opinion after the *Canada Act 1982* had come into force. The Court there states, speaking about the *Canada Act* 1982, that the "new procedure for amending the Constitution ... entirely replaces the old one".[54] Though couched as a reform to constitutional amendment

---

[53] *See Manuel v. Attorney General* (1982), [1983] Ch. 77, 86-87, 89; note that on appeal ([1983] Ch. 95) the case was decided on other grounds.

[54] *Reference re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, 806.

this means that recourse to the old procedure, which was used to enact the new one, is no longer possible; it means that a self-embracing sovereign has effectively and irremediably used its power of abdication.

About the moment of this fundamental change in the ultimate rule of competence (that is, the switch from continuing to self-embracing sovereignty), little can be said. It had surely occurred at the time of the *Patriation Reference*, shortly before Canada got its final "independence statute" in 1982. It is interesting to note in this respect that the language of the Supreme Court in the *Reference* can account for the view that the *Statute of Westminster* was then – in the early eighties – to be considered a legally enforceable abdication of authority by the United Kingdom Parliament over Canadian matters *other than* those pertaining to the amendment of the *B.N.A. Act*. In the *Reference*, thus, the Court usually refers to the sovereignty of the United Kingdom Parliament "over the *British North America Act*", not over "Canada" or "Canadian law".[55] Such an understanding of the *Statute of Westminster* was apparently not forthcoming in the thirties.[56] But as

---

[55] See for instance pp. 801 and 807: *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753. The power of constitutional amendment may perhaps be interpreted as including the power over any other matter. As should become clear in the next part, however, constitutional principles preclude that interpretation. Note that the Supreme Court does not clearly distinguish "Constitution" (formal, written document) from "constitution" (all standards of constitutional status).

[56] Hogg, *Constitutional Law of Canada, supra*, at 3.5(a), 3.5(d); see also the opinion of the Parliamentary Counsel of the Senate in 1939: "It is not open to doubt that the Imperial Parliament may, so far as constitutional *law* is concerned, legislate for Canada, notwithstanding the British North America Act, and without Canada's consent or request, indeed, against Canada's will, to as full an extent as it may see fit. Nor can there be any doubt that, notwithstanding the Statute of Westminster, the Imperial Parliament may so far as such *law* is concerned, as fully, freely and extensively so legislate. The British North America Act and the Statute of Westminster, alike, are, in the eye of the law, merely statutes of Parliament and – at law – no Parliament can bind either itself or a future Parliament" from "Notes on the Statute of Westminster", in Canada, Senate, "Report on the British North America

Oliver suggested, the emergence in legal scholarship of a Canadian understanding of sovereignty – an understanding that allows for abdication – can be said roughly to coincide with the period following the abolition of appeals to the Privy Council in 1949.[57] In one sense, one could say that an ultimate constitutional rule independent from the British rule was more difficult to conceive before, and naturally followed, if only gradually, from the operational independence (from the United Kingdom) of the Canadian judiciary. In this respect, if the Australian experience shows that a complete severance of formal ties with the Judicial Committee of the Privy Council is not a necessary condition to legal independence,[58] it does not negate that the development of an independent conception of constitutional law may be much fostered by a constitutional case-law tradition entirely developed outside the United Kingdom.[59]

Canadian judicial statements before patriation had revealed little about the general question of parliamentary sovereignty. The main occasion for those statements was the case-law which stemmed from the adoption of the *Canadian Bill of Rights, 1960.*[60] The Bill, a statute of the federal parliament, provides that other federal statutes "shall,

---

Act", by W.F. O'Connor, Ottawa, 1939 (reprinted 1961), annex 5, p. 17.

[57] Oliver, *supra*, at 177.

[58] The Judicial Committee had clearly recognised the independence of the Australian common law system when they declined to follow for Australia a House of Lords precedent: *Australian Consolidated Press v. Uren*, [1969] 1 A.C. 590; the House of Lords precedent had allowed punitive damages for libel: *Rookes v. Barnard*, [1964] A.C. 1129.

[59] The High Court of Australia was in practice always the final court of appeal on most constitutional questions because distribution of powers cases ("*inter se* questions") required the leave of the High Court to be submitted to the Privy Council, and leave was refused as a rule (there was only one exception, long ago).

[60] R.S.C. (1985), App. III.

unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe ... any of the rights and freedoms herein recognized and declared...".[61] This could be envisaged as an effective "manner and form" requirement for legislation which courts would act upon in declaring future statutes invalid, and this is how the matter was approached in scholarly discussions.[62] But many, at the time, agreed with Bora Laskin, who was to become Chief Justice of Canada, that "it simply cannot be that an unentrenched non-constitutional enactment will be given force to limit Parliamentary action".[63] Given a very limited number of occasions to pronounce, the Supreme Court has not yet clearly solved the question. But it is now generally assumed that the *Bill of Rights* is effective as against subsequent statutes. Following his appointment as Chief Justice, Laskin stated on three occasions, in *dicta*, that statutes adopted after the *Bill of Rights* were in fact on the same footing as those adopted before – which meant that they could be declared "inoperative" under the *Bill*.[64] After the *Patriation Reference*, Beetz J. effectively relied on the *Bill of Rights* in a Supreme Court decision declaring inoperative an administrative arbitration procedure provided by a 1976 immigration

---

[61] *Id.*, s. 2.

[62] Walter S. Tarnopolsky, *The Canadian Bill of Rights*, 2d ed., Toronto: McClelland & Stewart, 1975, p. 143.

[63] Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights" (1959) 37 *Can. Bar. Rev.* 77, 132; see for instance Douglas A. Schmeiser, *Civil Liberties in Canada*, London: London & Co., 1964, p. 42; D.M. Gordon, "The Canadian Bill of Rights" (1961) 4 *Can. Bar J.* 431, 440.

[64] *Curr v. The Queen*, [1972] S.C.R. 889, 893; *Lavell v. A.G. Can.*, [1974] S.C.R. 1349, 1388; *R. v. Miller and Cockriell*, [1977] 2 S.C.R. 680, 688.

statute, but other judges relied on the now "entrenched" constitutional *Charter*.[65]

The *Bill of Rights* experience shows that the question whether a British-style parliament could bind its successors, if only procedurally, was not absolutely settled in the sixties. The most orthodox theory of continuing sovereignty, which does not even admit manner-and-form limitations, was still a force to be reckoned with in the ranks of the judiciary as well as in scholarly opinion. The implications of orthodox theory perhaps did not seem too problematical when applied to the federal parliament with respect to the *Bill of Rights*; it merely hampered the development of a human-rights constitutional tradition to which many were still opposed. But in the more recent context of patriation, where continuing sovereignty was going to be applied to the "Mother Parliament", the implications of that traditional theory in terms of such principles as independence (as self- and representative government) and federalism were brought out in the open. And there, the Supreme Court showed no hesitation, as became explicit in the *Quebec Veto Reference*, to move all the way from continuing sovereignty (with or without a manner-and-form-exception) to full-blown self-embracing sovereignty. The "abdication provision" of the *Canada Act 1982* offered no hold for a half-way house position.[66]

The crucial point to be made here is that the Supreme Court's position involved the existence of a judicial point of view, with respect to the United Kingdom Parliament, from which the move was possible from

---

[65] *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177. The significance of Beetz J.'s judgment is noted in Geoffrey Marshall, "Overriding a Bill of Rights" [1987] *P.L.* 9, 10-11.

[66] The abdication provision which was ultimately adopted is in s. 2 of the *Canada Act 1982*, 1982, c. 11 (U.K.): "No Act of the Parliament of the United Kingdom after the Constitution Act 1982 comes into force shall extend to Canada as part of its law.".

traditional continuing sovereignty, around which there was yet no way in the thirties, to self-embracing sovereignty. That point of view was that of an independently conceived Canadian legal system which was not dependent upon, or subjected to, British constitutional law and theory. Where British courts might (or might not) decide that they would not question the validity of an Act of the United Kingdom Parliament,[67] the Canadian Supreme Court felt free to indicate clearly that a post-abdication statute of that Parliament would not be considered valid constitutional law in Canada,[68] The recognition of that judicial point of view from which the Supreme Court could assert the rule of self-embracing sovereignty is an assertion of the life of a body of unwritten constitutional law surrounding the written constitution. The United Kingdom Parliament surely did retain a formal power of amendment over the *B.N.A. Acts* after the *Statute of Westminster*, but once the Canadian legal system was considered independently of British law in terms of its paramount and distinct principles and purposes, the unwritten rules and principles of that system escaped the scope of that power, a power which those rules and principles may have recognised but could also qualify.

---

[67] See *Manuel v. Attorney General* (1982), [1983] Ch. 77, 86-87, 89 (Ch.D.). The judgment contains this passage on former colonies (at 795): "As a matter of law the courts of England recognise Parliament as being omnipotent in all save the power to destroy its own omnipotence. Under the authority of Parliament the courts of a territory may be released from their legal duty to obey Parliament, but that does not trench on the acceptance by the English courts of all that Parliament does". Note, however, this important qualification (at 86): "*If I leave on the side the European Communities Act 1972 and all that flows from it, and also the Parliament Acts 1911 and 1949*, which do not affect this case, I am bound to say that from first to last I have heard nothing in this case to make me doubt the simple rule that the duty of the court is to obey and apply every Act of Parliament, and that the court cannot hold any such Act to be ultra vires". On appeal the case was decided on other grounds: [1983] Ch. 95 (C.A.).

[68] *Reference re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, 806.

The adjudicative setting in which the *Patriation Reference* was decided did not compel the Supreme Court to explain whether the asserted undiminished sovereignty of the United Kingdom Parliament was of the "continuing", or of the "self-embracing" type. The Court said nothing of the matter but for the allusion that patriation purported to be a finishing operation. As we have seen, in the *Quebec Veto Reference*, where the Court was asked to give its opinion (on the convention of provincial consent) after the *Canada Act 1982* had purportedly come into force, the Court declared, without the slightest effort of explanation, that the "new procedure for amending the Constitution" ... "entirely replaces the old one".[69] As there can be no doubt that continuing sovereignty was once the accepted rule in Canada it is clear that a crucial move was involved in that assertion[70]. And unless the change is to be described as arbitrary, there must have been reasons to justify it, reasons which the majority (law) did not care to mention. Those reasons were quite clearly provided by the social and normative context in which legal rules such as parliamentary sovereignty, or those of the *B.N.A. Acts*, are embedded. Those reasons had to do with such notions as independence (as self- and representative government), and federalism, notions which the Court described as principles of the Canadian constitution in the course of their opinion on convention.[71]

---

[69] *Ibid.*

[70] *Vauxhall Estates Ltd v. Minister of Health*, [1932] 1 K.B. 733; *Ellen Street Estates Ltd v. Minister of Health*, [1934] 1 K.B. 590; *British Coal Corp. v. British Columbia Electric Co.*, [1935] A.C. 500 (P.C.).

[71] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 880, 905 (the majority (convention) opinion begins at p. 874).

Now, the problem with the Supreme Court's approach lay in this: if underlying principles of the Canadian constitution such as independence and federalism could justify that fundamental change in the legal rule of parliamentary sovereignty, why could they not also justify other changes? Why could they not also justify a decision that, say, provincial consent was *legally* required for amendment under the Canadian constitution? The Court's rigid analysis of the relation between law and convention, which was thoroughly criticised in Part Two, should also have meant that continuing sovereignty, envisaged as a legal rule, *could not change*. And the change was more than amply justified, if not called for, under the principles underlying the Canadian constitution.

PART FOUR

Constitutional Principle in the Adjudication of Change

Canada is an *independent*, *democratic*, *federal* state governed by the *Rule of Law*. Nothing very controversial so far; each and every component of the statement was duly acknowledged as a matter of course by the Supreme Court in the *Patriation Reference*.[1] That which is not clear is the role those broad precepts about the state can be made to play in constitutional adjudication. This is what Part Four attempts to deal with.

The subject is not easy. It opens up a Pandora's box of questions about the legitimacy of judicial constitutional review and touches upon a number of other issues of legal theory. My aim here is limited. It is to provide a picture of how the actual use in Canadian higher courts of the precepts of the constitution can be explained and applied to fundamental constitutional change without challenging the general structure of formal validation which makes a normative system a legal system.

---

[1] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753. See, for instance, pp. 774, 802, 805-06, 879-80.

The discussion will start with and eventually go back to my running example, the *Patriation Reference*, where the issue of the role of precepts in constitutional adjudication comes to a head. The *Manitoba Language Rights Reference* of 1985 provides, as it were, the other pole of the discussion: it is arguably the most straightforward judicial authority for the use of the postulates of the constitution in adjudication.

Chapter IX

Poles of the Debate in the Supreme Court

In the *Patriation Reference* a majority[1] of the Supreme Court makes it quite clear that broad features of the Canadian constitutional system such as "federalism", or "the federal principle", cannot provide independent ground for a legal decision. *Qua* constitutional "principles" or "precepts", they thrive, the majority would say, in the realm of conventions where the notion of judicial enforcement is not present. A surprisingly sharp distinction between law and politics is apparently drawn here. "What is desirable as a political limitation", the opinion states, "does not translate into a legal limitation, without imperative expression in constitutional text or statute."[2] The arguments made on behalf of the provinces on the basis of the "federal principle" were therefore not quite intelligible in law; they did not speak to the legal issue. The majority (law) was very clear that theories of federalism "operate in the political realm, in political science studies" and "do not engage the law, save as they might have some peripheral relevance to actual provisions of the *British North America Act* and its interpretation

---

[1] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (hereinafter the *Patriation Reference*). As noted earlier, the *Patriation Reference* does not have a majority opinion running through the issues. There are two separate majority opinions, one on convention (hereinafter majority (convention)) and one on law (hereinafter majority (law)). Of nine judges on the bench, only four signed both opinions (Dickson, Beetz, Chouinard and Lamer JJ.).

[2] *Id.*, at 784.

and application".[3] In trying to justify this rather stark position, the opinion adds that even if considerations about federalism could be taken into account they would not be of any use in reaching a decision. "There is not and cannot be", the opinion goes, "any standardized federal system from which particular conclusions must necessarily be drawn".[4] This could have been left unsaid, if only for the sake of aesthetic consistency, since another majority of the Court does draw conclusions, expressly, from the "principle of federalism" in the opinion given on the issue of convention. In that opinion, as was seen in Part Two, the majority uses the federal principle as a basis for a judicial declaration that "a substantial degree of provincial consent" was conventionally required for the attempted amendment to be constitutional. "The federal principle" the Court states, "cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities".[5] But that had nothing to do with law; the distinction was clear.

The facts at issue in the *Manitoba Language Rights Reference*[6] gave the Supreme Court a new perspective on such distinctions. The Court found itself in the extraordinary position where it had to declare all the enactments of the province unconstitutional, void *ab initio,* because they had failed to meet, for approximately one hundred years, the constitutional requirement of bilingualism in legislation. In removing the colour of law thus far enjoyed by the invalid legislation, the Court

---

[3] *Id.*, at 803.

[4] *Id.*, at 806.

[5] *Id.*, at 905-06. Compare with the following statement from the majority on law, at 806: "There is not and cannot be any standardized federal system from which particular conclusions must necessarily be drawn".

[6] *Reference re Manitoba Language Rights,* [1985] 1 S.C.R. 721.

understandably feared the chaos that would ensue in legal relations and looked for a way of keeping things under control. Common law doctrines such as *res judicata* and *de facto* authority were reviewed and put to use; but these were not found sufficient to cope with such a large-scale situation of irregularity.[7] So the Court turned to the basic principles of the constitution and found that the notion of the Rule of Law could justify a court order that the legislation had to be obeyed as if it had always been valid, for the period of time the legislature would need to translate every single piece of legislation passed over a hundred years and adopt it in its bilingual form with retrospective effect.[8]

For my purposes, the most interesting aspect of the *Manitoba Reference* is that the Court managed to quote the *Patriation Reference* as authority. This is surprising because the majority opinion on the legal issue in the *Patriation Reference* seemingly rejected the idea that a general principle of the constitution, like federalism, could speak to legal issues, and that it could provide valid grounds for decision. In a remarkable passage which has generally been taken to be good, high-profile judicial reasoning and turns out to be rather misleading, cleverly perhaps, the *Manitoba Reference* Court quotes for support a passage from the *Patriation Reference* which is actually part of the majority opinion *on the issue of convention* without even alluding to the fact that the Court's majority opinion *on the issue of law* apparently

---

[7] See Fabien Gélinas, "La primauté du droit et les effets d'une loi inconstitutionnelle" (1988) 67 *Can. Bar Rev.* 455. The Court also analysed necessity, and error of law (as a bar to recovery under the doctrine of restitution for unjust enrichment).

[8] The formal order is at [1985] 2 S.C.R. 347; there is a delay-extension order at [1990] 3 S.C.R. 1417, and qualifications on the opinion and a further extension order, at [1992] 1 S.C.R. 212.

stood for the opposite proposition.[9] The Court, speaking both unanimously and anonymously in the *Manitoba Reference*, begins with introductory generalities on constitutional interpretation in the Supreme Court:

> This Court cannot take a narrow and literal approach to constitutional interpretation. The jurisprudence of the Court evidences a willingness to supplement textual analysis with historical, contextual and purposive interpretation in order to ascertain the intent of the makers of our constitution.[10]

The language then becomes more precise and refers to constitutional principles not formally laid down in written constitutional materials:

> The Court has in the past inferred constitutional principles from the preambles to Constitutional Acts and the general object and purpose of the Constitution.[11]

The problematical passage then appears where the *Patriation Reference* is quoted as supporting the previous proposition:

> In the *Patriation Reference*, the Court found the federal principle to be inherent in the Constitution in this way. At pages 905-06, the Court said:[12]

And here the *Manitoba Reference* Court cites a passage in which the "federal principle" is presented as a founding principle of the Canadian constitution "recognized in innumerable judicial pronouncements". This

---

[9] This remarkable inconsistency between the majority (law) of the *Patriation Reference* and the unanimous Court in the *Manitoba Reference* has generally passed unnoticed in doctrinal comments. An unpublished doctoral thesis alludes to it: Luc Tremblay, *The Cement of the Constitution: The Rule of Law*, Doctoral thesis, Oxford, 1992, pp. 293-94.

[10] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 751.

[11] *Ibid.*

[12] *Ibid.*

passage from pages 905-06 of the *Patriation Reference* – this, again, is not mentioned – comes from the majority opinion on convention. This is followed by a reference to the dissenting opinion given by Martland and Ritchie JJ. on the legal issue.[13] The way that opinion is presented makes one believe it was given in dissent to the Court's opinion (on convention) quoted just before, which leaves the unwary reader with the impression that there was a form of consensus on the point being discussed:

> Martland and Ritchie JJ. in their dissent stated (at p. 841):
>
> > However, on occasions, this Court has had to consider issues for which the *B.N.A. Act* offered no answer. In each case this Court has denied the assertion of any power which would offend against the basic principles of the Constitution.
>
> They went on to discuss a number of the more important decisions rendered by this Court and conclude with the following (at pp. 844-45):
>
> > It may be noted that the above instances of judicially developed legal principles and doctrines share several characteristics. *First*, *none is to be found in express provisions of the British North America Acts or other constitutional enactments.* Second, all have been perceived to represent constitutional requirements that are derived from the federal character of Canada's Constitution. *Third*, *they have been accorded full legal force in the sense of being employed to strike down legislative enactments.* Fourth, each was judicially developed in response to a particular legislative initiative in respect of which it might have been observed, as it was by Dickson J. in the *Amax (supra)*[14] case at p. 591, that: "There are no Canadian constitutional law precedents addressed directly to the present issue..."[15] [Emphasis added.]

---

[13] *Id.*, at 752.

[14] *Amax Potash Ltd v. Government of Saskatchewan*, [1977] 2 S.C.R. 576.

[15] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 752.

The wrapping-up of this selective reading of the *Patriation Reference*, finally, draws the conclusion by now expected with respect to the *Manitoba Reference*:

> In other words, in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada. In the case of the *Patriation Reference (supra)*, this unwritten postulate was the principle of federalism. In the present case it is the principle of rule of law.[16]

In this important passage of the *Manitoba Reference* the Court may be trading on a confusion between convention and law by employing words that can apply to both. Phrases such as "process of Constitutional adjudication" and "unwritten postulates of the Constitution" could technically reflect, in their broad sense, the reality of the Court's pronouncements in the *Patriation Reference* on both law and convention. The conclusion is thus astutely phrased at a level which covers all constitutional adjudication, including reference proceedings; and all constitutional principles, including conventional principles. In other words, the opinions quoted from the *Patriation Reference* in the *Manitoba Reference* (the majority on convention and the dissent on law) do stand, technically, for the proposition that "in the process of Constitutional adjudication", one "may have regard to unwritten postulates which form the very foundation of the Constitution". But this seems hard to reconcile with the majority (law) opinion in the *Patriation Reference* insofar as "constitutional principles" not laid down in written constitutional material were there rejected as improper grounds for legal decision.

---

[16] *Ibid.*

The incompatibility between the majority (law) of the *Patriation Reference* and the unanimous opinion given in the *Manitoba Reference* is not altogether clear. The *Patriation* majority (law) apparently asserts the broad notion that unwritten constitutional principles cannot speak to the law unless they are legislatively adopted in a constitutional document. Explicitly, as I noted earlier, the opinion goes as far as this (when dealing with the issue of crystallisation):

> The leap from convention to law is explained almost as if there was a common law of constitutional law, but originating in political practice. That is simply not so. *What is desirable as a political limitation does not translate into a legal limitation, without expression in imperative constitutional text or statute.*[17] [Emphasis added.]

As I argued earlier however, interpreting this passage as denying the existence of unwritten constitutional law, or as denying the role of courts in its evolution, would make little sense of basic legal notions and precedents. The passage should rather be taken merely as a rejection of the passive crystallisation thesis, saying nothing about the role of courts in the evolution of unwritten constitutional law.[18] As I noted, this would make sense of the otherwise clear statements of the Supreme Court that a "part of the Constitution of Canada consists of the rules of the common law",[19] and that these rules "are subject to modification and even reversal by the courts which gave them birth".[20] But one is left to wonder how such "modification" or "reversal" can be effected in a legal decision if resort cannot be had to constitutional principles.

---

[17] *Id.*, at 784.

[18] See Chapter VI.1.

[19] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 876 (majority on convention).

[20] *Id.*, at 775 (majority on law).

What the majority opinion (law) of the *Patriation Reference* technically stands for, to put it as narrowly as possible, is the proposition that federalism, recognised as a basic principle of the constitution, has no legal implications save as it might be of some peripheral use in interpreting written constitutional material.

The *Manitoba Reference*, on the other hand, *prima facie* stands for the general proposition that "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution",[21] even when "[t]here are no Canadian constitutional law precedents addressed directly to the ... issue".[22] More particularly, it stands for the proposition that the Rule of Law as a basic postulate of the constitution can actually be given force in adjudication over and above written constitutional requirements.

As both "judgments" under review are advisory opinions, one cannot technically speak in terms of "stare decisis" and "overruling". The search for a *ratio* is in such cases affected by the level of abstraction at which the proceedings are conducted. I suggested in Part One that advisory opinions should nevertheless be taken as providing, under a broad doctrine of precedent, materials with law-quality at the level of principle. To that extent, one may inquire about the degree to which the *Manitoba Reference* Court meant to override the majority (law) of the *Patriation Reference*.[23] Rather than making any attempt to "distinguish" the *Patriation Reference* majority (law), the *Manitoba Reference* Court

---

[21] *Id.*, at 752.

[22] *Id.*, at 752; quoted from the *Patriation Reference*, at 845 (Martland and Ritchie JJ.).

[23] Luc Tremblay, *supra*, p. 293, concludes that "the dissenting view [that of Martland and Ritchie JJ.] seems to have ultimately prevailed in 1985" (in the *Manitoba Reference*).

chose to quote and endorse the dissenting opinion on the matter and to assert that the principle of federalism was a basic precept of the constitution, like the Rule of Law, that could be – and had actually been – used in adjudication. The question why the *Manitoba Reference* Court elected to ignore the *Patriation* majority (law), a recent, politically sensitive opinion that had played a crucial role in Canadian constitutional history, can be answered by pointing to the unsatisfactory jurisprudence on which it was based.

It may be tentatively suggested that one of the basic problems with the majority (law) opinion in the *Patriation Reference* consists in its failure to recognise that the fundamental precepts of the constitution are in fact treated by courts as appropriate justifications for decisions in constitutional law. As was suggested in Part Two, courts make use of such precepts in evolving the unwritten law of the constitution as well as in interpreting constitutional documents. The most fundamental difficulty in the opinion lay in this: one of its essential premises was that constitutional principles such as federalism or self-government must be taken to evolve in the realm of conventions and can only speak to the law "peripherally" as an aid to the interpretation of "imperative constitutional text", and yet, its general approach otherwise implies, as I have argued in Chapter VIII, that an important change in a fundamental rule of the Canadian constitution has actually occurred, a change that had not been, and indeed could not effectively have been, expressed in "imperative constitutional text". That change could only have been explained in legal terms by an appeal to the unwritten principles of constitutional law.

Chapter X

Legal Forms and Normative Content

The notion of principles was discussed in Chapter IV where I showed that the *Patriation Reference* Supreme Court did not envisage "soft standards" in its treatment and rejection of the crystallisation thesis. It was suggested that the jurisprudential distinction between rules and principles, that is, hard and soft standards, is directly reflected in the basic common law distinction between binding and persuasive materials. Hard standards operate in an all-or-nothing fashion, they are either valid or invalid and either applicable or not to a particular case; where valid and applicable, they are binding. Soft standards, on the other hand, have a weight dimension, they can be more or less relevant and are often said to be "considered" rather that applied. Soft standards have persuasive force, they provide guidance and justifications rather than all-or-nothing obligation-propositions.

It was noted that the duties of a judge in making a legal decision were not limited to the mechanical application of binding rules. At common law, it is probably fair to speak of a judicial "obligation to consider" soft standards where relevant. For this and other reasons, it was concluded that soft standards have law-quality; the suggestion was that any account of law ignoring them would be unacceptably reductive. It is clear that if one is not to limit oneself to superficial discussions, the tag put on soft standards has ultimately little importance. My substantive claim, which I will further articulate in

this Chapter, is simply this: the use of soft standards in adjudication is not an open gate to the unrestricted flow of moral reasoning which takes place outside the law. Legal reasoning makes extensive use of principles but it remains constrained reasoning, that is, reasoning constrained by law.

The elucidation of the relation between soft and hard standards is a task which has given rise to much controversy in British legal theory. The failure to account for the actual importance of soft standards in adjudication has been perceived as a major weakness of the dominant rule-of-recognition framework of Hart's theory of law. The debate engendered by this perception may be described as one ultimately concerning how much power should be left to the judiciary in the development of the law: putting the emphasis on soft standards in a theory of adjudication is saying that judges have a major role to play in that development.[1]

The notion of black-and-white validity fostered by positivism has pervaded common law theory by means of a strict conception of *stare decisis* which has allowed, to a certain extent, the application of a "sources" thesis to unwritten standards. The rule of recognition is here seen as pointing to a court ruling as the source of a binding common law rule much in the same way as it points to enactment as the source of a valid legislative rule. But a tension remains between rule-based and principle-based reasoning which ultimately raises the question whether common law should or should not survive in the face of the contemporary role of legislation. Few people openly claim that it should not.[2] And if common law (or judge-made law), is to survive, the matter is one of

---

[1] See John Finnis, *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1981, p. 356.

[2] H.L.A. Hart claims that some common law rules are now so determinate that they "can now only be altered by statute": *The Concept of Law*, Oxford: Clarendon Press, 1961, p. 132.

how judges can reconcile rules and principles in applying and evolving it. This thesis deals with Canadian constitutional adjudication, where (constitutional) legislation, mostly a motley collection of largely outdated British statutes, is a far cry from "covering the field". Constitutional law, as was demonstrated in Chapter VI.1, includes unwritten law, and the unwritten principles used in adjudication must be accounted for in a valid interpretive endeavour.

X.1 FORM AND CONTENT IN LAW

I suggested earlier that form is what makes law a distinct kind of social order; that directly or indirectly, form is what provides "content" with law-quality. And as Esser noted, there is a distinct relation between "content" and "principles" on the one hand, and "form" and "rules" on the other.[3]

MacCormick suggests that principles, which he does not doubt belong to the genus 'law', derive their law-quality by virtue of their relation to the rules of the system, which are in turn legal by virtue of their pedigree, that is, their formal relation to the rule of recognition. To him, principles are "the conceptualized general norms whereby its functionaries rationalize the rules which belong to the system in virtue

---

[3] Joseph Esser, *Grundsatz und Norm in der richterlichen Vorbildung des Privatrechts*, Tübingen: Mohr, 1956. Esser explains principles in terms of content behind the formal validity of rules (here "legal norms"):

> ... a legal principle is not a proposition of law or legal norm in the technical sense as long as it does not contain a binding direction of an immediate kind for a specific range of questions: it requires or presupposes the judicial or legislative definition of these directions. Legal principles, as opposed to legal norms, are content as opposed to form.

(*Id.*, at 50; translation quoted from Hans Kelsen, *General Theory of Norms*, tr. Michael Hartney, Oxford: Clarendon Press, 1991, p. 117).

of criteria internally observed".[4] Tying this in with Hart's original theory, he explains, as I noted earlier, that a rule-of-recognition framework can thus indirectly account for the principles of a legal system:

> There is a relationship between the 'rule of recognition' and principles of law, but it is an indirect one. The rules which are rules *of law* are so by virtue of their pedigree; the principles which are principles *of law* are so because of their function in relation to those rules, that is, the function which those who use them as rationalizations of the rules thus ascribe to them.[5]

I have said that MacCormick's picture is to my mind the most convincing account of soft standards which preserves the Hartian rule-of-recognition framework. It provides a satisfactory response to the main thrust of the systematic attack mounted against Hart's "model of rules" by the early Dworkin.[6] Whatever is left of Dworkinian criticism in this respect in less focused and harder to grasp. In an attempt to encapsulate the leftover disagreement, I would follow MacCormick in saying that "[i]f the question is, 'Can we do without a rule of recognition?', the answer is 'No'".[7] It is one thing to open one's eyes to the pervasiveness of soft standards in a legal system; it is another to ignore the legal forms which alone can set up and maintain with sufficient precision and

---

[4] Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978, p. 155 (hereinafter *LRLT*).

[5] *Id.*, at 233.

[6] Ronald Dworkin, *Taking Rights Seriously*, London: Duckworth, 1977 (Essays I and II); the original publication is Ronald Dworkin, "The Model of Rules" (1967) 35 *U. Chi. L. Rev.* 14. Hart had nearly completed a formal reply when he died: *The Concept of Law*, 2d ed. with postscript, ed. by Joseph Raz & Penelope A. Bulloch, Oxford: Clarendon Press, 1994 (hereinafter *Postscript*).

[7] *LRLT*, at 242. The same answer applies to the notion of "system": Neil MacCormick, "Beyond the Sovereign State" (1993) 56 *Mod. L.R.* 1, 9-10.

certainty the structure of adjudication in which soft standards can thrive.[8] The secondary rules of adjudication found in modern legal systems can only exist by virtue of legal forms, and such rules are presupposed in any discussion of the relative importance of soft standards in a legal system.[9]

If one is clear about the foregoing, the remaining difficulty is one of emphasis. The main source of discomfort in MacCormick's account (and this may seem rather trite) is the primary role given to the framework of formal validation in defining law. In any human endeavour, form is usually conceived of as serving content, and this makes it somewhat unsettling to describe content-bearing legal principles as "depending" on their relationship with rules formally validated. The relationship between form and content is never set on a one-way street, so why pick form as somehow primary in the case of law? One can go a long way towards answering this by pointing out that principles are here and there discussed, formulated, and applied in the free flow of practical reasoning which guides human action independently of law. What makes a principle legal and what makes legal reasoning a distinct form of practical reasoning can only be form. Formal legal frameworks are set up, maintained and fostered to provide certainty and foreseeability in the resolution of disputes, ultimately in the name of an open-ended notion of justice.

The fear of forms in general is typically that they may stray from the purpose they serve. The ultimate purpose of legal forms being an open-ended notion constantly put in question, its tenor always remains

---

[8] On legal forms and constitutional principles and morality, see generally Neil MacCormick, "Institutional Morality and the Constitution" in Neil MacCormick and Ota Weinberger (eds), *An Institutional Theory of Law: New Approaches to legal Positivism*, Lancaster: Kluwer, 1986, p. 171.

[9] See *Postscript*, at 266.

controversial as does the extent to which legal forms actually work to serve it. The emphasis put on legal principles by some legal theorists reflects this fear of legal forms and suggests that formal rules have to be checked by means of the flexible standards which provide tentative formulations of the abstract purposes underlying a legal system, formulations that should be intelligible intra-systemically. In order to keep legal forms in check, formally validated rules must also somehow depend on the principles which can be said to underpin them.

MacCormick, in fact, makes room for much of this. He writes, as I noted in the Introduction, that "it would be false to argue that the principles are themselves determined by the 'rule of recognition'".[10] "There may be, he continues, more than one set of normative generalizations which can be advanced in rationalization of the rules which 'belong' to the system concerning a certain subject-matter...".[11] The formulation "haltingly and hesitatingly and subject to improvement" of legal principles is a matter of "making sense" of the law, he notes, as much as of finding what is there; and in this endeavour, judges have an eye on such things as "political opinion", "common sense" and "community consensus", so that legal principles may feed onto "political" or "moral" discussions about the ultimate end of justice.[12] With respect to rules, in turn, MacCormick's view of the role of principles in adjudication is neatly encapsulated in this passage:

> ... in all the ways discussed in this book, the principles interact with the rules, underpin them, hedge them in,

---

[10] *Id.*, at 234.

[11] *Id.*, at 234-35.

[12] *Id.*, at 234, 236.

> qualify them, justify the enunciation of new rulings as tested by consequentialist arguments, and so on.[13]

MacCormick then refers to the "circle" which I described in Chapter VIII.4 as a useful explanatory tool for law:

> Is it a paradox then to claim that there are principles which are *legal* only given their indirect relationship to the institutive rules ('rule of recognition'), but that these very rules and the other rules validly instituted are in turn qualified in the light of and fully understandable only by reference to the aforesaid principles? There is apparently a logical circle here, but is it a vicious one?
> I think not.[14]

Hart had acknowledged this circle at the level of his rule of recognition, perhaps only with respect to unwritten rules;[15] MacCormick recognises that there is a circle of justification at all levels. The question here is how a full acknowledgement of this can convincingly be made compatible, intra-systemically, with the notion of formal validity organised around the rule of recognition. If "valid" rules somehow depend on their relationship with "justificatory" principles which function in terms of "weight", how can "all-or-nothing" validity survive? If one is willing to say that even validity, considered intra-systemically, can sometimes be affected by principles, the only plausible answer seems to be that which MacCormick articulated in a different context: *the rule of recognition must be understood as providing no more than "ordinarily necessary and presumptively sufficient" criteria of validity.*[16] This answer preserves the all-or-nothing notion of validity

---

[13] *Id.*, at 244.

[14] *Id.*, at 245.

[15] *The Concept of Law*, *supra*, at 148.

[16] Neil MacCormick, "Law as Institutional Fact" (1974) 90 *L.Q.R.* 102, 123.

while recognising fully the role played by principles in adjudication. It takes account of the general Rule-of-Law purpose underlying formal validation while giving due regard to other values related to "substantive justice". Hard standards remain either valid or invalid, but the formal criteria of validity are not fully conclusive; they must be applied in light of the soft standards which link legal rules to their general purpose. This answer, it is suggested, can be stated intra-systemically, from the internal viewpoint of the Canadian judge.

The Canadian Supreme Court had an occasion to bear out my suggestion in a *Charter* context which called for an intra-systemic, working definition of "law". The need for that definition flowed from the *Charter* requirement that limitations imposed on rights and freedoms must, in order to be valid, be "prescribed by law". The requirement is expressly stated in the limitation provision of the *Charter*,[17] and it is also interpreted as flowing from the right not to be deprived of one's liberty "except in accordance with the principles of fundamental justice".[18] This is generally taken to mean that legislative provisions involving a limitation on rights and freedoms will not pass muster if they are too "vague". As the Court noted, this requirement relates to the Rule of Law principles "that form the backbone of our polity"[19] in expressing a concern for fair notice and the necessity to circumscribe executive discretion in law enforcement.[20] In *R. v. Nova Scotia*

---

[17] Section 1.

[18] Section 7.

[19] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 640.

[20] Fair notice is taken to require "accessibility" (formal notice) and "foreseeability" (substantive notice): *Id.*, at 637. This was borrowed from the *Sunday Times* case in the European Court of Human Rights (26 April 1979, Series A, No 30).

Pharmaceutical Society,[21] the central issue was whether the time-honoured provisions of the *Combines Investigation Act*[22] which make it an offence to enter an agreement that "unduly" prevents or lessens free-market competition violated the principles of fundamental justice. The relative vagueness of the provision, note, does not necessarily make it a soft standard: the direction is given in an all-or-nothing fashion. As Dworkin remarked with respect to a generic standard in the same field, "[t]he rule that unreasonable restraints of trade are invalid remains a rule if every restraint that is unreasonable is invalid...".[23] The Supreme Court found that the Canadian provision was not too vague to be upheld and had in this connection interesting things to say about what a working definition of "law" should be like. The following passage sums up the Court's position:

> A vague provision does not provide *an adequate basis for legal debate*, that is for reaching a conclusion as to its meaning *by reasoned analysis applying legal criteria*. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision *is not intelligible*, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary.[24] [Emphasis added.]

My argument should be clear: in the case of a provision turning on a term such as "unduly", the materials which ultimately provide the "legal criteria" necessary for a "legal debate" resulting in a "reasoned analysis" can hardly be anything but the soft standards underpinning the provision. If the surrounding provisions of the Act and the case law are

---

[21] *Id.*

[22] R.S.C. (1985), c. C-34, mod. c. 19 (2d suppl.).

[23] Ronald Dworkin, *supra*, at 79 ("The Model of Rules II").

[24] *Id.*, at 639.

relevant to the assessment – and the Court notes that they are, and can ground the conclusion that "unduly" is not unconstitutionally vague in this case – it is necessarily through the filter of the principles which are believed to underlie the whole set of rules in the field.[25] As I argued in Chapter IV, what makes neighbouring hard standards relate to one another is the set of principles which are believed to underpin them. The assessment ultimately relates, as the Court put it, to "the substratum of values underlying the legal enactment".[26] The validity of a relatively vague provision depends upon how well it can be understood and rationalised in the context of these values.

To go back to MacCormick's analysis, the principles here not merely provide "the light" in which rules are "qualified" and the "reference" necessary to make them "fully understandable". The principles which make the rules "intelligible" in the legal system as a whole here act, ultimately, as intra-systemically effective checks on whether rules "validly instituted" are after all "legal" or "valid" in the legal system. This does not affect the all-or-nothing character of a rule if it passes muster, but it makes formally validated rules ultimately subject to principles just as principles are subject to the condition that they remain intelligible generalisations of formally validated rules. The relationship is not set on a one-way street; it is circular.

The general dependence of formally validated rules upon the underlying principles of the system is more generally exemplified by the *Charter* requirement that limitations on rights and freedoms must be "reasonable" as can be "demonstrably justified in a free and democratic

---

[25] *Id.*, at 633, 657.

[26] *Id.*, at 634.

society".[27] This requirement is a symptom of the difficulty of setting out in writing the principles underpinning a free and democratic society; it refers to a normative pool deeper and more complex in composition than a written constitutional document can ever hope to hold.[28] As I suggested in Chapter II, this reference may mean that "policy" considerations, taken as reflecting the collective good of society, may be set against individual "rights" in a judicial exercise of balancing that ultimately determines what the constitution demands. This balancing undeniably takes place in *Charter* adjudication. But individual rights are also often taken to express "democratic" values, and in this sense the reference to "a free and democratic society" can be taken to express the open-endedness of the concepts, including individual rights, which the Constitution attempts to formulate; it points to the limitations inherent in the formal means of expressing underlying values in a written legal document. The reference to reasonableness in a free and democratic society provides a check on formal *Charter* provisions by telling the judge to keep an eye on the broader normative context in which any enactment, howsoever fundamental, is necessarily embedded.

The reader may have misgivings about my using the *Charter* to bear out the argument that formally validated rules ultimately depend on principles just like principles may be said to depend on rules. One may point out the fact that, after all, the *Charter* requirements are formally validated requirements, and that the role of principles in this context may be said to exist only by virtue of formal enactment. My position, as should be clear from Part Three, is that this formal requirement merely replicates a phenomenon which is perceivable independently. In

---

[27] Section 1.

[28] See T.R.S. Allan, *Law, Liberty and Justice: The Foundations of British Constitutionalism*, Oxford: Clarendon Press, 1993, pp. 135-64.

the *Charter* context, I need only ask the further question of whence the formal validity of that constitutional document to show the point. Is that validity derived from the rule that "whatever the United Kingdom Parliament enacts is law"? And is this rule still in force? In answering this, courts are on their own. And if they are to address the issue in a legal fashion they have nothing to turn to but principles.

I will go back to this question when I analyse the *Patriation Reference* with a fuller understanding of principles. Before that, the more technical aspects of how principles function in adjudication will be addressed.

X.2 PRINCIPLES AND LEGAL REQUIREMENTS

The notion of "legal debate" put forward by the Court in *Nova Scotia Pharmaceutical* can be described as an expression of the general requirement that judicial decisions must have some minimal grounding in existing law even in cases where the creative role of the judge is acknowledged to be important. An unlikely provision which would make it an offence to "unduly" refrain from killing blue-eyed babies would certainly be found invalid on grounds of vagueness (if that were the basis of the challenge), even if the wording is similar to that of the provision on restraints of trade.[29] The reason is that such a provision does not relate to anything in the legal system that could possibly make it intelligible as a basis for a legal debate and decision. In a system which makes extensive provisions against murder and sets up comprehensive schemes for the protection and welfare of children, "the substratum of

---

[29] The blue-eyed babies example is adapted from Leslie Stephen, *The Science of Ethics*, London: Smith, Elder & Co., 1882, p. 143. The example was made popular in constitutional law by Dicey.

values underlying the legal enactment"[30] would be entirely absent. The set of surrounding statutes and decisions which through normative generalisations can often make a vaguely worded provision reasonably precise would in this case make the provision utterly unintelligible.

Outside the realm of statutory law, the requirement that judicial decisions must result from a *legal* debate, which finds expression under the *Charter*, reflects the reality, at once more puzzling and more familiar, that unwritten law can evolve and change in *legal* decisions. Decisions which lay down new rules or extend the established scope of existing rules must be justified by existing law. The square and open overruling of a precedent in a higher court, it is suggested, does not entirely escape this requirement.

My discussion of the contribution of convention to unwritten law in Chapter VI.2 provided an occasion to introduce the more technical aspects of the functioning of principles with respect to the evolution of unwritten law. The *Patriation Reference* Court had rejected the *Crossman diaries*[31] case as an instance of crystallisation on the basis that the English court "was applying its own legal principles as it might to any question of confidence, however it arose".[32] This was saying that the decision, which extended the doctrine of wrongful breach of confidence to matters of cabinet secrecy, was exclusively determined by law, not convention. I argued that the Supreme Court's blunt statement missed the point by merely referring to the legal justification required of any judicial decision. A more subtle analysis would recognise that the equitable doctrine which had been developed to restrain the wrongful

---

[30] *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 634.

[31] *Attorney-General v. Jonathan Cape Inc.*, [1976] Q.B. 752.

[32] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 779.

use of commercial and domestic secrets afforded a legal basis for protecting cabinet secrecy but did not strictly cover the case, which had a new public law dimension; legal protection had never been given to cabinet secrets. The existing convention on cabinet secrecy provided a reason, that is, a justification, for extending the doctrine to a public law field. The principle behind the convention (the reason for the rule) could be said to fit into a broader understanding of the existing doctrine against breaches of confidence, and a new hard standard appeared (or a hard standard was extended) under the broader principle, in order to protect cabinet secrecy. The decision was legally *justified*, not legally *determined*.

The demand for justification is that which I have referred to as MacCormick's "toe-hold" requirement. "New values" can validly determine a legal decision, but they "come in only where old principles and analogies can give them a toe-hold". A legal principle can be well-established enough to provide the required toe-hold without any direct reference to rules, but on analysis one can always find hard standards that relate to the principle. For a soft standard is established only insofar as it can provide a rationalisation for established hard standards. MacCormick summarises the requirement as follows:

> Counsel who advanced an argument *solely* based on the reason and justice of some novel principle in favour of his client would rightly be told that a Court is the wrong place for such arguments. There must also be some basis for the decision he seeks in the legal system as it already stands. *Ex Hypothesi* that basis need not be an established valid rule directly applicable to the instant case. But, perhaps it will be sufficient if there exists some convincing analogy with some existing established rule, or if some relevant general principle of the law exists or can be framed – all the better if dicta of judges formulating and appealing to such general principles can be found. The

> closer the analogy and the more authoritative the statement of principle, the stronger the argument...[33]

This is how developments in the unwritten law of the constitution can be said to be regulated by law in well-articulated constitutional adjudication. It indicates the importance of analogy in common law reasoning. As MacCormick and Eisenberg have nicely shown, the use of analogy, or reasoning from examples, necessarily involves an appeal to principles.[34] For no example or analogate can yield a conclusion in a case which it does not directly cover before a maxim or principle is drawn from the example, to be applied in the instant case. The *Crossman Diaries* case can be explained in such terms: the case was not strictly covered by the existing rules governing breaches of confidence, but the general principle inferred from them, if framed at a sufficiently abstract level, could be said to justify the decision. The case of *Finlay* in the Supreme Court of Canada also provides an apt example.[35] The plaintiff in that case challenged the validity of government action under a federal statute providing the terms of a federal-provincial cost-sharing scheme for social benefits. Under the traditional rules governing standing the plaintiff did not have the direct, personal interest required to seek a declaration. Applicable rules thus directed that the action should be rejected for lack of standing. But the Supreme Court considered the *Thorson, McNeil, Borowsky* trilogy which had evolved a notion of "public interest" standing for cases where the constitutional validity of a statute was at stake, and now decided to extend that notion

---

[33] *LRLT*, at 120.

[34] *LRLT*, at 163; Melvin Eisenberg, *The Nature of the Common Law*, Cambridge (Ma): Harvard University Press, 1988, p. 77.

[35] *Canada (Minister of Finance) v. Finlay*, [1986] 2 S.C.R. 607.

to challenges of government action under statute.[36] The analogy was clear; Finlay was granted public interest standing. The recognised principle underlying the trilogy, i.e. that a serious issue of constitutional validity should not escape judicial scrutiny, was framed at a higher level of abstraction to include the legal validity of public acts in general: no serious justiciable issue in which there is a recognisable public interest should be immune from judicial scrutiny.[37]

Reasoning by analogy can be seen, therefore, as an established way of putting settled hard standards to "the test of principles". Positivism may show a strong reluctance to acknowledge this, but if the fact that unwritten law evolves in legal decisions is fully recognised, there then can be no doubt that established hard standards can be subjected to the test of principles and be eventually abandoned or changed in a ruling justified by law. This reality does not challenge the rules of *stare decisis*: precedents can be openly set aside only in higher courts not bound by them.

Another example here is the way in which the time-honoured parliamentary privilege of excluding strangers from the House was put to the test in *New Brunswick Broadcasting*.[38] The privilege was a clear case of a hard standard of the common law in the public field; it qualified, as much as an unwritten rule possibly can, as a rule formally validated under the rules of recognition through *stare decisis*. Courts

---

[36] *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575.

[37] The general principle behind public interest standing was later clearly stated by the Supreme Court in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, 252: "The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge.".

[38] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319.

had always recognised that necessity was the principle grounding specific rules of privilege, and the Supreme Court subjected the established privilege in question to the test of principles. Necessity was assessed with a view to the 1992 context of the Canadian constitution, which was found to support the principle of parliamentary democracy in much the same way as the British context had for hundreds of years. This principle found expression in the surrounding legal rules which set up and regulate parliamentary institutions in Canada. The most important of those was perhaps section 33 of the *Charter*, which preserves a measure of parliamentary supremacy in the face of constitutional rights. The adoption of a constitutional charter of rights clearly had affected the Canadian principle of parliamentary democracy, but the power of legislative derogation could be said to support the principle to an extent sufficient for the privilege to survive under the principle of necessity. The rule was ultimately maintained because it still matched the underlying principles of the constitution; the validity of the rule was intra-systemically made dependent on principles.

The first category of rules which I said were being subjected to the test of principles was that of enactments which could be described as invalid for failing to match legal principles under the *Charter*. No serious difficulties could be said to arise here. The second category was that of established unwritten hard standards, at the constitutional level, being subjected to the test of principles in the ongoing revision of judge-made law. Such rules are in the hands of the judiciary and it seems natural that they should be, as the *Patriation Reference* Supreme Court put it, "subject to modification and even reversal by the courts which gave them birth".[39] Higher courts are free to set aside

---

[39] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 775.

established precedents which do not strictly bind them. The more difficult category is that of the written rules of the Constitution.

At first sight, one may feel that there cannot be any scope for subjecting such rules to the test of principles because there is nothing "higher" to subject them to. This feeling comes from the pyramidical Kelsenian picture of the law which I argued should be supplemented by one of partial circular justifications. The Supreme Court decided in *New Brunswick Broadcasting* that parliamentary privileges would not be formally subjected to the *Charter* because no hierarchical relation existed between rules enjoying the same constitutional status. But the privilege was nevertheless tested under the principle of necessity, in light of the broader constitutional principle of parliamentary democracy as embodied in the whole constitutional set-up of Canadian institutions, including the *Charter*. The subjection of the rule to the test of principles was effected at that one constitutional level which courts treat as constitutional law. If one acknowledges, as one is bound to, and as did the Supreme Court in *New Brunswick Broadcasting*, that the unwritten standards of the constitution do not have a lesser constitutional status than constitutional enactments, and if one rejects the notion, as I think one should, that the rule of competence under which the Constitution is validated is somehow "above" the constitution (either as mere political fact or as superior law[40]), then one also has to accept that every constitutional rule, written or not, can be subjected to the test of principles in a complex structure of justification which is ultimately, but not viciously, circular. This picture has the distinct advantage of ridding the field of the general problem addressed in Part Three: it does so by condemning any reference

---

[40] See H.W.R. Wade, "The Basis of Legal Sovereignty" [1955] *C.L.J.* 172, 189, 196.

to a "legally absolute" power as a contradiction in terms. It puts behind us the Blackstonian notion "that there is and must be", in all forms of government, "a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside".[41] The principles which can be said to surround or underpin a formal enactment are never irrelevant; the technique of formal validation merely provides "ordinarily necessary and presumptively sufficient" criteria.[42] This is not to say, of course, that the "presumption" can easily be rebutted.[43]

Subjecting a written rule of the Constitution to the test of principles is what the Supreme Court effectively did in the *Manitoba Language Rights Reference*.[44] The relevant rule in that case directed the result that all the enactments of the province should be declared of no effect because they had failed to meet the constitutional requirement of bilingualism in legislation. Section 52 of the Constitution clearly stated that such enactments were "of no force or effect". But as I pointed out earlier, in removing the colour of law thus far enjoyed by the invalid legislation, the Court feared the chaos that would certainly ensue in legal relations and looked for ways of minimising the adverse effects of the declaration. So the Court turned to the basic principles of the constitution and found that the notion of the Rule of Law could

---

[41] William Blackstone, *Commentaries on the Laws of England*, Book I, 8th ed. (last in Blackstone's life), Oxford: Clarendon Press, 1778, p. 49. See also p. 91.

[42] "Law as Institutional Fact", *supra*, at 123.

[43] *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, 375-76 (*per* McLachlin J.): "there is eminent academic support for taking a cautious approach to the recognition of unwritten or unexpressed constitutional powers. Yet the matter is not susceptible to categoric exclusions..."

[44] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

justify a general court order that the legislation should be considered effective and beyond challenge for the period of time required for translation and re-enactment with retrospective effect.[45] Although the ruling is cast as a limited "suspensive" order with respect to the effect of the written supremacy provision of the constitution, that ruling presumably invloves that the new provisions making bilingually re-enacted penal legislation retrospective will have to be immune from constitutional challenge under the fundamental-justice provision of the Charter.

This case provides the neatest of examples of a situation where legal forms can be said to stray from their purpose. If formally validated rules prescribe a judicial response which involves the breakdown of the legal order, the application of such rules can only be described as self-defeating. One of the central points of Part Four is that a judge can in such cases make a *legally justified* decision which gets around the self-defeating exercise. The reference to a well-established legal principle is normally sufficient to make a judicial decision a ruling *at law*. But the more precise the formulation of a principle gets, the stronger the legal justification becomes. The opinion of the Supreme Court nicely shows how a general appeal to a principle can be strengthened by pointing to the established hard standards which this principle can be said to underpin. In the context of the *Manitoba Language Rights Reference*, as the Court pointed out, the Rule of Law principle could also be said generally to underlie the supremacy provision whose mechanical application was to be avoided.[46]

---

[45] The formal order is at [1985] 2 S.C.R. 347; there is a delay-extension order at [1990] 3 S.C.R. 1417, and qualifications on the opinion and a further extension order, at [1992] 1 S.C.R. 212.

[46] *Id.*, at 748.

But a reference to other established rules also rationalisable under the Rule of Law principle and governing more particular analogical circumstances could bolster the principle-based justification of the opinion. Thus, the Supreme Court took great care to review the various common law doctrines which could more or less directly bear on the issue. The well-established doctrines of *de facto* authority, *res judicata*, and mistake of law (in the field of taxation) were all analysed and declared applicable as far as they could go. The doctrine of state necessity was also discussed, and though the reviewed precedents were found not to cover the case, the Supreme Court found that they supported the proposition "that the courts will not allow the Constitution to be used to create chaos and disorder".[47] The Rule of Law principle thus found instantiation in established doctrines which served to minimise the possible adverse effects of a legal requirement also underpinned by the Rule of Law. The rules of those established doctrines were not sufficient to cope with the wide-scale situation of irregularity; so the general reason, the principle behind those doctrines, was directly appealed to as a necessary ground of justification for the Court order.

The *Manitoba Reference*, note, cannot be explained away by pointing to the very exceptional circumstances of the case. The opinion of the Court has already been quoted as authority for "suspensive orders" in several Supreme Court decisions,[48] one of them in a setting of ordinary *Charter* adjudication.[49] The Supreme Court, indeed, already speaks in terms of a general *suspensive power* with regard to declarations of

---

[47] *Id.*, at 766.

[48] *R. v. Schachter*, [1992] 2 S.C.R. 679; *Sinclair v. Quebec*, [1992] 1 S.C.R. 579; *Rodriguez v. B.C. (A.G.)*, [1993] 3 S.C.R. 519, 570 (*per* Lamer C.J., dissenting)

[49] *Schachter, id.*

invalidity.[50] It is best to accommodate that case, as I have attempted to do, in a general framework of subjection of formally validated rules to the test of principles.

It will be remarked that there was no question in the *Manitoba Language Rights Reference* of questioning the legal validity of the constitutional prescription whose application according to its own terms would have been self-defeating. The Rule of Law principle was brought to bear on the *applicability* of that rule. Suspending the applicability of the formal constitutional prescription (or, put another way, ordering the application of invalid legislation) was found sufficient to satisfy the principle. But there is no reason why a different situation might not warrant a more drastic judicial response where a fundamental constitutional principle is believed to affect the competence of the constitutional legislative authority. If the ultimate rule of competence of the system is not seen as an isolated rule placed above constitutional law but as a part of constitutional law which participates in the circular movements of justification, it becomes clear that principles can ultimately affect the validity of a constitutional enactment, e.g. a constitutional amendment made conformably to the amending procedure provided in Part V of the Constitution. The Supreme Court of India openly faced this issue in a series of cases which triggered a succession of extensive conceptual peregrinations in the judiciary.

---

[50] *Sinclair v. Quebec*, [1992] 1 S.C.R. 579, at 581: "This is an appropriate case for this Court to exercise its suspensive power by declaring that the instruments in this appeal, while invalid for non-compliance with s. 133, shall continue in force for a period of time in order to permit the National Assembly to take whatever steps it sees fit to remedy the constitutional defects". One may speculate that this "suspensive power" will be made to play the role in Canadian law which "prospective lawmaking" plays in American law. See Fabien Gélinas, "La primauté du droit et les effets d'une loi inconstitutionnelle" (1989) 67 *Can. Bar Rev.* 455, 476-77.

The question generally envisaged in these cases was whether the power of Parliament to amend the Constitution was limited as to substance. The Court was first faced with the question whether the supremacy clause of Part III of the Constitution (fundamental rights) contained in art. 13(2) applied to a formal constitutional amendment made under art. 368. Article 368, on the one hand, sets out the general amendment procedure which makes no express reference to any limits of substance; on the other, art. 13(2) prohibits the passing of any law taking away or abridging the fundamental rights. In *Shankari Prasad v. Union of India*,[51] a unanimous bench of five ruled that art. 368 confers on Parliament the power to amend any provision of the Constitution, including the provisions of Part III, and that art. 13(2) only applies to the exercise of ordinary legislative power (as opposed to constituent power). Fourteen years later, the *Shankari Prasad* decision was questioned by a minority in *Sajjan Singh v. State of Rajasthan*,[52] and in 1967 was overruled by a majority of 6 to 5 in *Golak Nath v. State of Punjab*.[53] In that last case, the Court held that constitutional amendments fall within the meaning of "law" in art. 13(2) and that, consequently, fundamental rights cannot be amended. The Court, in other words, interpreted art. 13(2) as an express limitation on the power of constitutional amendment with respect to Part III (fundamental rights). *Golak Nath* survived the Court's changing moods until the *Kesavananda* case in which the Supreme Court refused to read art. 13(2) as a limitation on the amending power, but introduced instead the controversial and far-

---

[51] [1951] A.I.R. 458 (S.C.).

[52] [1965] A.I.R. 845 (S.C.).

[53] [1967] A.I.R. 1642 (S.C.).

reaching doctrine of the basic structure or framework of the Constitution.[54]

The case turned on whether there were any limits to the power of constitutional amendment mentioned in art. 368, the pertinent portion of which read thus:

> (i) Notwithstanding anything in this Constitution, Parliament may, in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution...

In view of the importance of the matter at hand and the need for an authoritative statement of the law surrounding constitutional amendment, the Court constituted a special bench of 13 judges to hear the *Kesavananda* case. Unfortunately, the result was a mass of hundreds of pages, divided into 11 judgements with very little running through a majority of them. In an attempt to make some sense of the confused bulk of reasons, the Court issued a summary signed by 9 justices, the substance of which reads as follows:

> 1. Golak Nath's case is overruled;
>
> 2. Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution;...

The summary was less helpful than had been hoped because its second proposition was not unambiguously supported by a majority. The majority is led by Sikri C.J., who holds that the word "amend" (or "amendment") has a connotation of change, not abrogation, and that the power of "amendment" is accordingly limited; the power of "amendment" does not include the power to affect the basic structure of the Constitution. It follows that art. 368, *as it reads at the time of judgement*, "does not

---

[54] *Kesavananda v. State of Kerala*, [1973] A.I.R. 1461 (S.C.).

enable Parliament to alter the basic structure or framework of the Constitution". On that, six judges agreed with the Chief Justice and could be said to form a majority on the second proposition. But the reasons of Sikri C.J. go further and assert that the limitations on the power of amendment not only follow from the connotation of the word "amend", but can be inferred from the whole structure of the Constitution, independently of the somewhat circumstantial wording of art. 368. Only four judges clearly follow him that far,[55] which means that the doctrine of the basic structure adopted by the majority can only be founded on the possibly unstable wording of art. 368. Jaganmohan Reddy J. expressly reserves his opinion on the existence of implied or inherent limitations to the power of amendment, and Khanna J. seems to reject the idea. The unsettling possibility thus formally left open was that of a substitution by constitutional amendment of the word "amend" with words like "replace", "abrogate", "reconstruct" and so on, followed by a modification of the basic structure formerly but no longer protected by the wording of art. 368.[56]

The Court once more addressed the question of the basis of the doctrine seven years later in the *Minerva Mills* case.[57] Parliament had attempted to qualify the meaning of the word "amend" in art. 368, and to

---

[55] See the discussion by John Finnis in *Annual Survey of Commonwealth Law* (1973), ed. by H.W.R. Wade, London: Butterworths, 1974, at 33-39. He argues, if I understand correctly, that Khanna and Jaganmohan Reddy JJ. should not be counted as forming a majority with Sikri C.J. and his four followers, because the *narrow* textual basis of the doctrine of the basic structure given by the former is not *included* in the *broader* basis given by the latter so as to form the coherent common denominator required for a majority acceptance of the second proposition.

[56] *Kesavananda v. State of Kerala*, [1973] A.I.R. 1461 (S.C.).

[57] *Minerva Mills Ltd v. Union*, [1980] A.I.R. 1789 (S.C.). The Court had applied the doctrine in the meantime in *Indira v. Rajnarain*, [1975] A.I.R. 2299 (S.C.).

exclude judicial review of constitutional amendments by adding the following clauses:

> 368(4) No amendment of this Constitution made or purporting to have been made under this article shall be called in question in any court on any ground.
>
> (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

The Court had no difficulty in finding that the express exclusion of judicial review was an illegal attempt to modify the basic structure of the Constitution. It further held, more importantly, that the *limited* nature of the power of amendment – the connotation of the word amend – was itself part of the basic structure of the Constitution and that, consequently, Parliament could not enlarge its amending power by its mere exercise. This decision put to rest the doubts left by *Kesavananda*.

The Indian Supreme Court therefore endorsed the position which one strand of my argument supports, a position which rejects the possibility of an "absolute legal" power. Constitutional enactments are subject to the normative context in which they are embedded, and can be put to the test of principles, insofar as such principles are foundational in the basic constitutional structure. This basic structure is in turn inferred from the whole constitution, including written constitutional provisions. The "basic structure" of the Indian constitution clearly includes parliamentary democracy, federalism and the Rule of Law,[58] all of which can also be described as fundamental Canadian constitutional principles.

---

[58] There is very little consensus on the Court as to what is included in the basic structure. For a list of features that have been acknowledged as "basic" by various judges, see Durga Das Basu, *Shorter Constitution of India*, 10th ed., New Delhi: Prentice-Hall, 1988, p. 1037.

It is a matter of speculation whether the Canadian Supreme Court would fully endorse such reasoning if given the occasion.[59] The general justification of the *Manitoba Language Rights Reference* certainly suggests that it might:

> ... in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form *the very foundation* of the Constitution of Canada.[60] [Emphasis added.]

As was suggested at the outset of this Part, this is the most straightforward judicial recognition of the role of principles in constitutional adjudication. But the use of the *Patriation Reference* in the above quotation implies a hopeful reading of that opinion. The *Patriation Reference* Court, at least on the surface, ignored principles where they could have been brought to bear on the determination of unwritten law, a matter less controversial than that of subjecting written constitutional rules to the test of principles.

I now proceed to an analysis of the *Patriation Reference* with the more precise grasp afforded by this Chapter of the role constitutional principles can play in practice.

---

[59] Canadian courts have thus far decided that a Constitutional amendment validly made under Part V of the *Constitution Act, 1982* cannot be challenged under the Charter, the latter being at the same constitutional level: *Penikett v. R.*, [1988] 2 W.W.R. 481 (Y.T.C.A.); *Sibbeston v. N.W.T. (A.G.)*, [1988] 2 W.W.R. 501 (N.W.T.C.A.).

[60] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 751.

Chapter XI

Principles and the Adjudication of Change

XI.1 THE ISSUE FOR A PRINCIPLED DECISION

In terms of the possible effects of constitutional principles on the outcome of the *Patriation Reference*, the central issue put to the courts was whether such principles had affected, or added to, the unwritten legal rule (asserted time and again by the Supreme Court in the majority (law) opinion)[1] that what the United Kingdom Parliament enacted regarding the Canadian constitution was law, constitutional law which Canadian courts were bound to enforce. In terms of the legal requirements governing judicial decisions, the previous Chapter suggested that this should indeed have been considered an unwritten rule of law binding on Canadian courts in general, but one which the Supreme Court was free to set aside or qualify as it would any other judge-made rule of law.[2] As the previous Chapter also suggested, there is no obvious reason why the ultimate rule of competence of a system should be considered to be "above" constitutional law, either as a "political fact" or as a "superior", somehow unchangeable rule of law. That rule, like

---

[1] See for example pp. 799, 801 and 807: *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

[2] This can be done in a reference opinion, as suggested in Part One, through the technique of "announcing" that the rule would be set aside or qualified in a real case.

any other rules, and most clearly unwritten rules, can be put to the test of principles in a higher court.

The importance of the ultimate rule of competence in the legal system suggests, it is true, that it should not be disturbed without good reasons. But the importance of the rule can also be said to intimate that it should not be allowed to become outdated, to survive as a misfit in the broad structure of constitutional principles surrounding it. And the rule that certain Canadian constitutional amendments could not be effected by Canadian action alone was acknowledged as an "anomaly" by the Supreme Court.[3]

As I pointed out, however, the unwarranted assumption is made at the beginning of the Court's opinion (law) that the authority of the United Kingdom is not a matter upon which the Court "would presume to pronounce".[4] The Court does not say why this should be so and leaves the impression that it would be inappropriate to make statements about the powers of a foreign parliament. But a minute of reflexion should be enough to see that the question was not an abstract issue of what the United Kingdom can or cannot formally pass as a statute (a question, in fact, on which even British courts, arguably, do not pronounce); the question was one of the extent to, and the conditions under which a United Kingdom statute could be considered valid Canadian law. If there is a Canadian legal system separate from the British legal system (which the Court does not otherwise deny), what tribunal could possibly be expected authoritatively to pronounce on its rules if not the Supreme Court of Canada? Even if appeals to the Privy Council had not been abolished in 1949, one would expect the Supreme Court to make such

---

[3] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 774, 787.

[4] *Id.*, at 774.

pronouncements, subject to reversal on appeal; and the Privy Council would clearly decide such appeals as a matter of *Canadian law*.[5] As was noted in Chapter IX, the Court dealt with the issue in terms of whether the resolution of the Canadian Senate and House of Commons could validly be passed and forwarded to London as a matter of *Canadian constitutional law*. It is clear that if the untrammelled authority of the United Kingdom Parliament to modify the *B.N.A. Act* is *fully* acknowledged, the validity of the resolution (or of its being forwarded to London) could not make any difference in the result. Any one, or any body, one might say, was free to write to the Queen and request an amendment. On this position, taken by the federal government before the Supreme Court, the resolution was indistinguishable as a matter of law from "a parliamentary birthday greeting to the Queen".[6] If and when the United Kingdom Parliament decides to enact the amendment, whatever may have happened before should be legally irrelevant. The lengthy consideration given by the Court to the question of whether the resolution and address leading to enactment were constitutionally valid (in the legal sense) suggests, however, that they did consider Canadian law as separate and potentially capable of qualifying the effect of United Kingdom statutes in Canada. This conclusion is borne out, as was shown in Chapter IX.3, by the switch to self-embracing sovereignty indicated in the *Quebec Veto Reference*, a

---

[5] The situation of Australia, which, at least as to some jurisdictions and matters, retained appeals to the Privy Council until 1987, provides a good indication of this. In *Australian Consolidated Press v. Uren*, [1970] A.C. 590, the Privy Council refused to follow a House of Lords decision allowing punitive damages for libel at common law (*Rookes v. Barnard*, [1964] A.C. 1129 (H.L.(E.)). The Privy Council was sitting on appeal from New South Wales; the decision was taken as a matter of the common law of Australia, which need not, as was then recognised, be the same as that of England.

[6] See Ronald J. Zukowsky, "Struggle over the Constitution: From the Quebec Referendum to the Supreme Court", Kingston (Ont.), Institute of Intergovernmental Relations (Queen's Univ.), 1981, p. 100.

switch that could only be effected from the viewpoint of a separate Canadian legal system. What the Court was (rather strangely) reluctant to do, I would suggest, was to make a statement on the abstract authority of the United Kingdom Parliament as a matter of "colonial" or "imperial" law which might concern other common law jurisdictions in the world. As a matter of colonial (or imperial) law, that abstract authority was considered to be out of the Court's reach. This is suggested by the following passage of the opinion (law):

> The stark legal question is whether this Court can enact by what would be judicial legislation a formula of unanimity to initiate the amending process *which would be binding not only in Canada but also on the Parliament of the United Kingdom* with which amending authority would still remain.[7] [Emphasis added.]

The Court was clearly reluctant to make a ruling that might be perceived as imposing a limitation formally binding on the United Kingdom Parliament. But the ultimate effect of a United Kingdom statute on Canadian law was duly questioned in terms of the Canadian procedures leading to its enactment. It was questioned on the basis of an unsatisfactory jurisprudence which failed to appreciate fully the role of principles in the evolution of unwritten law.

A better treatment of the matter would have recognised that the authority of the United Kingdom Parliament respecting the *B.N.A. Act* was based upon an unwritten, binding rule of Canadian law, a rule which the Supreme Court was free, in its capacity as the highest court of a common law jurisdiction, to qualify or even, perhaps, to set aside in view of legal principles. But since no one claimed in the Patriation episode that a British statute was not even legally necessary (as opposed to

---

[7] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 788.

merely sufficient) for amendment, it should not make much difference, apart from awkwardness, to discuss the case in the terms chosen by the Court (including Martland and Ritchie JJ.), that is, in terms of whether Canadian procedures leading to amendment could be said to legally qualify the effect of a United Kingdom statute so as to make it insufficient (though necessary) for valid Canadian constitutional amendment.

One last thing should shortly be discussed before that discussion begins. In doctrinal comments about the *Reference* there is a widespread confusion which should here be clarified. For some weighty commentators of English Canada in the Patriation episode, the primary concern was that *Canadian* consent be recognised as a legal prerequisite to a United Kingdom statute affecting Canadian law. With respect to provincial consent, they were content to say (in agreement with the Supreme Court) that it was a matter for politics, for convention only.[8] It is not absolutely clear what the Court's position was on this. The requirement of provincial consent was addressed and rejected as a mere convention with no legal consequences, but the possibility of a unilateral United Kingdom statute passed without the assent of even Canadian federal authorities was not directly faced. So it may seem possible to say that the question of "Canadian consent" in the form of a request by the federal Senate and House of Commons was left open. But this would be

---

[8] I am thinking of Peter Hogg, Brian Slattery and Barry Strayer, quoted below. Different concerns can be perceived in the following comments published in French: Nicole Duplé, "La Cour suprême et le rapatriement de la constitution: La victoire du compromis sur la rigueur" (1981) 22 *C. de D.* 619; Pierre Blache, "La Cour suprême et le rapatriement de la constitution: l'impact des perceptions différentes de la question" (1981) 22 *C. de D.* 649; José Woehrling, "Les renvois relatifs au rapatriement de la constitution canadienne" (1984) 14 *R.D.U.S.* 391. William R. Lederman notes and comments the divergence of opinion that could be perceived between commentators of English and French Canada in "The Supreme Court of Canada and Basic Constitutional Amendment" in Keith Banting and Richard Simeon (eds.), *And No One Cheered: Federalism, Democracy and the Constitution Act*, Toronto: Methuen, 1982, p. 176, at 182-83.

difficult to reconcile with the Court's statement which concluded the analysis of provincial consent at law: "the one constant since the enactment of the *British North America Act* in 1867 has been the legal authority of the United Kingdom Parliament to amend it".[9] Further, the requirement of Canadian consent for the appropriate enactment of a United Kingdom statute extending to Canada unquestionably originates in a constitutional convention. How had it turned into a legal requirement, one may ask, if conventions, by nature, cannot do so? Here, the Court's analysis of crystallisation implies that the convention requiring a Canadian request was still a convention, no more.

Strayer, who was a key figure in the Patriation episode as the federal Deputy-Minister of Justice, indirectly illustrated this problem in a book review which attempted to defend the majority (law) opinion.[10] He writes:

> If the British had ever acted unilaterally to legislate for us [Canadians], it would have been open to the proper authorities in Canada (those responsible for our external relations) to have declared "independence" from this last vestige of British control. The world would hardly have taken notice, and to the extent that it did it would have applauded. *Under the circumstance a Canadian court would have been quite justified in refusing to recognize the British statute.*[11] [Emphasis added.]

He does not even attempt to reconcile this with his claim made a few further lines down that the Court in the *Patriation Reference* was bound in law to recognise the authority of the United Kingdom Parliament. He

---

[9] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 807.

[10] Review of *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment*, Kingston (Ont.), Institute of Intergovernmental Relations (Queen's Univ.), 1982, at (1983) 15 *Ottawa L.R.* 231.

[11] *Id.*, at 235.

merely says that the context was one in which Britain had not acted unilaterally, implicitly recognising thereby that the breach of a convention can have legal repercussions, which he otherwise denies. This matches the Prime Minister's fierce reaction to the first *Kershaw* report which had recommended that United Kingdom authorities should not act automatically on a unilateral federal request.[12] Trudeau maintained in the House of Commons that British authorities had no discretion in the matter and that their rubber-stamping obligation existed not only as a matter of "custom and tradition", but also as one of "*constitutional law*".[13] This was clearly inconsistent with the position which the federal government was going to take before the Supreme Court.[14]

Our commentators would reply that no matter the convention, the legal requirement of Canadian consent was a simple and direct consequence of the fact of independence.[15] I would suggest at the outset that this falls short of the mark when it comes to providing a legal justification for a judicial decision; it refers to intricate and complex developments in institutional arrangements as a brute fact, altogether ignoring the importance of legal justification in judicial decisions. And their answer to the question "what counts as Canadian consent?" does not fare better, to say the least. It appeals unaccountably to international law,

---

[12] U.K., H.C., "British North America Acts: The Role of Parliament", First Report of the Foreign Affairs Committee, HCP 42 (1980-81), 30 Jan. 1981.

[13] Canada, House of Commons, *Debates*, (1980-81), Vol. VI, at 6682.

[14] The Prime Minister's reaction was soon qualified (but by no means mollified): Canada, Minister of Justice, "The Role of the United Kingdom in the Amendment of the Canadian Constitution", Background Paper, Ottawa, March 1981.

[15] Slattery, "The Independence of Canada" (1983) 5 *Sup. Ct. L.R.* 369, 399; Hogg, "Constitutional Law – Amendment of the British North America Act – Role of the Provinces" (1982) 60 *Can. Bar R.* 309, 330n (quoting Slattery).

under which, it is said, "it is the federal government which has the exclusive authority to speak for Canada as a whole".[16] Hogg continues as follows:

> The principle of Canadian independence would thus suggest that the request from Canada to the United Kingdom should come from the *federal government*. Moreover, that is the way in which the request has always been made in the past: since 1896 every request has taken the form of a joint address by *the two federal Houses of Parliament*.[17] [Emphasis added.]

It is astonishing that in a serious discussion the "federal government" contemplated by international law should thus be confounded with the "Houses of the federal Parliament" which the Canadian constitutional practice pointed to. One may wonder, more to the point, whether "the principle of Canadian independence" alluded to is also a norm of international law, and if so, how it could automatically determine a matter of Canadian constitutional law. The power to make treaties enjoyed by the federal government (in line with international law) was never recognised as involving the power to implement them as a matter of Canadian constitutional law.[18] International law may influence Canadian law in some cases; it does not determine outcomes. The appeal to international law as determining the issue is unwarranted and misleading; it does not support the argument that the issue of *Canadian* consent was on a different footing in constitutional law than that of *provincial* consent. The issue was on a different footing merely as a matter of "Canadian sensibilities" in the Patriation episode, sensibilities here

---

[16] Hogg, *id.*, at 332; Slattery, *id.*, at 399-400.

[17] *Ibid.*

[18] *A.G. Can. v. A.G. Ont.* (Labour Conventions), [1937] A.C. 326 (P.C.).

expressed by a makeshift argument of little value in a Canadian court of law.[19]

Hogg finds that "Canadian" consent was legally required but "provincial" consent was not. His reason is that a requirement of "provincial" consent might have demanded a real assessment in London, not just rubber-stamping, a possibility which he finds insuperable because of independence. On the requirement of provincial consent, he concludes:

> The question is difficult, but I resolve it by giving priority to the principle of Canadian independence to the extent that it comes into conflict with the principle of federalism.[20]

By excluding the *B.N.A. Act* from the application of its crucial provisions, the *Statute of Westminster* had unambiguously done *the exact opposite*. The conflict between federalism and independence was a serious problem for both Canadian and British authorities at the Imperial Conference of 1930[21] and was the main object of the Dominion-Provincial

---

[19] The inconsistency in Hogg's position was well brought out by Robert Stanfield before the 1978 Joint Parliamentary Committee. Hogg had testified that any requirement of provincial consent in the making of requests to Westminster for amendment was merely conventional. Stanfield asked him what the Supreme Court would do if Westminster acted alone. Hogg then changed his discourse: "That is a very difficult question. [...] it is possible that the Supreme Court of Canada would say that a convention that is so fundamental to the independence of the country is one that would simply have to be recognised now as having full legal status". Stanfield then observed that there might be, therefore, conventions which so exactly reflect "the fundamental order and principles of the nation" that they are, for all intents and purposes, law; to which Hogg reluctantly agreed. Canada, Parliament, "Minutes and Proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada", 30th Parl. (1978) 3d Session, 19 Sept 1978, 15, at 19-20.

[20] *Id.*, at 333.

[21] U.K., Secretary of State for Dominion Affairs, "Summary of Proceedings", Imperial Conference, 1930, Cmd 3717 XIV (1930-31), at 20.

conference of 1931.[22] Priority was in the end given to federalism, insofar as the protection of provincial powers and rights was concerned, over independence.

Under the Canadian constitution, the issues of "Canadian" and "provincial" consent were intimately related. Consent in both cases was considered established by convention. The "reason for the rule" in the case of "Canadian" consent was the principle of independence as self- and representative government; in the case of "provincial" consent it was federalism. Independence and federalism could both be described as fundamental principles of the Canadian constitution. The issue in the *Reference* was the bearing of those principles *of the Canadian constitution* on the legal determination of the ultimate rule of competence. If independence could yield or justify a legal requirement, so could federalism. And if independence was indeed believed to yield or justify a legal requirement of Canadian consent, the further question of what should count as Canadian consent had to be determined not under international law but under the principles of the Canadian constitution, most importantly federalism.

The rest of this Chapter will show how soft standards, bolstered by hard standards through analogy, could justify a decision that the abstract authority of the United Kingdom Parliament to amend the Canadian constitution was qualified, as a matter of Canadian constitutional law, by requirements of consent. It will not be argued that such a decision was legally necessary, only that it would have been legally justified, and that the relevant principles suggested that it should be made.

---

[22] See Canada, House of Commons, "Debates", (1931) Vol. III, pp. 3191-3208 (presentation and discussion of the "Resolution for an address to His Majesty requesting the enactment of an Imperial Statute" following the Dominion-Provincial conference of 1931).

XI.2 PRINCIPLES FROM THE SUPREME COURT'S PERSPECTIVE

I shall here follow the pattern of the majority (law) opinion and show what justificatory resources were available to the Court from its limited perspective. The Court first addressed the question of whether the resolution passed in both Houses of the federal parliament was valid; they then turned to the less focused issue of whether that resolution could be used to procure the amendment.

The Court is very bold indeed in addressing the first question. The discussion begins with the question-begging statement that "[t]here is no limit anywhere in law, either in Canada or in the United Kingdom ... to the power of the Houses to pass resolutions".[23] The Court then quotes a passage of May's treatise describing what a resolution is, and refers to the Canadian work of Beauchesne which reproduces the British description.[24] The passage quoted has no direct bearing on the issue; the reason for the ruling is in the following passage:

> How Houses of Parliament proceed, how a provincial legislative assembly proceeds is in either case a matter of self-definition, subject to any overriding constitutional or self-imposed statutory or indoor prescription. It is unnecessary here to embark on any historical review of the "court" aspect of Parliament and the immunity of its procedures from judicial review. Courts come into the picture when legislation is enacted and not before (unless references are made to their opinion on a bill or a proposed enactment). It would be incompatible with the self-regulating – inherent is as apt a word – authority of the Houses of Parliament to deny their capacity to pass any kind of resolution.[25]

---

[23] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 784.

[24] *Id.*, at 785.

[25] *Ibid.*

Now, if "courts come into the picture when legislation is enacted and not before", one may wonder what the Court of Queen's Bench was doing in the celebrated case of *Stockdale v. Hansard*,[26] when it asserted that common law courts must enquire in appropriate cases whether a claim of privilege is warranted. And more recently, one may wonder what the Supreme Court was doing in the 1993 case of *New Brunswick Broadcasting*, where a claim of parliamentary privilege was duly assessed as a matter of common law. The definition and extent of a parliamentary privilege is undeniably a matter for the courts; it is a matter of constitutional law. Before *Stockdale v. Hansard*, a court could very well say that "[i]t doth not belong to the judges to judge of any law, privileges, or customs of parliament",[27] which effectively condoned a situation where public acts could remain entirely above the law administered by courts of common law jurisdiction. The ultimate rationale of *Stockdale* was that no public power should be above the common law; it was the same rationale as that of the *Proclamations case*, where the king was told that he "hath no prerogative, but that which the law of the land allows him".[28] This rationale had been neatly expressed by Lord Chief Justice Holt, dissenting in *R. v. Paty* for reasons which Lord Denman C.J. describes in

---

[26] (1839), 112 E.R. 1112 (Q.B.).

[27] *R. v. Paty* (1703), 14 How. St. Tr. 849 (Q.B.), *per* Powell J.. See the related case of *Ashby v. White* (1703), 14 How. St. Tr. 695. The confusion of the law at that time is nicely reflected in the Queen's Bench opinion (all judges meeting) on a petition for a Writ of Error in *Paty*, at 862: "In obedience to your majesty's command, we have considered of the Petition hereunto annexed; and we are humbly of opinion that a Writ of Error in this case ought to be granted of right, and not of grace. But we give no opinion whether a Writ of Error does lie in this case; because it is proper to be determined in parliament, where the Writ of Error and record are returned and certified. In *Stockdale*, at 1166, Lord Denman C.J. states that he does not consider himself bound by his predecessors.

[28] (1611), 12 Co. Rep. 74, 76.

Stockdale as "easier to outvote than answer":[29] "It is the law gives the queen her prerogative; It is the law gives jurisdiction to the House of Lords; and it is the law limits the jurisdiction of the House of Commons".[30] The *Stockdale* ruling brought the law into line with a perceived requirement of the Rule of Law.

In general, resolutions are merely declaratory and have not the tangible effect that the exercise of a privilege usually has. In the case of a resolution meant to procure an amendment of the Constitution, however, the tangible effect which a clearly recognised constitutional practice brought about was to enable federal authorities to achieve what the law denied them the authority to achieve; it put a public act of considerable importance above the law.

But *the law*, it will be said, was that the United Kingdom Parliament had the exclusive legal authority to pass the amendment. Perhaps; but that cannot be the end of the matter. For *the law* before *Stockdale* was probably that a claim of privilege could not be directly reviewed in court; and the law was judicially shaped in that case to meet a perceived requirement of the Rule of Law. In Canada, this same requirement had at the time of the *Reference* been acted upon in the development of the rules of standing effected in the trilogy *Thorson, McNeil, Borowsky*,[31] a development later explained by the Supreme Court by virtue of the Rule of Law desideratum that "the immunization of legislation or *public acts* from any challenge" be prevented.[32] Before

---

[29] *Stockdale v. Hansard* (1839), 112 E.R. 1112, 1164.

[30] (1703), 14 How. St. Tr. 849, 860.

[31] *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575.

[32] *Council of Churches v. Canada (M.E.I.)*, [1992] 1 S.C.R. 236, 252.

the evolution of the rules of standing, *the law* did immunise a number of public acts from being challenged in court; and the matter was not left to rest at that: the law was changed by the Supreme Court so as to meet the perceived Rule of Law requirement.

This Rule of Law requirement, further, was bolstered in the Canadian context by the principle of federalism, a principle pointing to the singular importance of legal rules which no one order of government could change unilaterally. "The federal principle", the majority (convention) stated, cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities".[33] The recognised principle strongly suggested, I would argue, that the Court should make a move similar to the ruling in *Stockdale* in order to bring such resolutions under judicial scrutiny. As in the case of privileges, the court review could have been left at the jurisdictional level: the Houses could pass any resolution unconditionally, provided the subject-matter was within the constitutional competence of the federal parliament (and the challenged resolution, in substance, was not). That type of judicial review had been practised since confederation with respect to legislation, a practice clearly justified by requirements of the Rule of Law and of federalism.

The *Patriation Reference* majority (law) concludes its short analysis of the resolution with a general appeal to the *Bill of Rights*:

> Reference may appropriately be made to art. 9 of the *Bill of Rights* 1689, undoubtedly in force as part of the law of Canada, which provides that "Proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament".

---

[33] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, at 905-06.

This should be read, to begin with, in light of the authoritative interpretation indirectly provided by the *Stockdale* ruling and followed in Canada, an interpretation which allows a measure of judicial review in matters claimed to be of exclusive parliamentary jurisdiction. From there, one may inquire by virtue of what this section of the *Bill of Rights* was thought to be "undoubtedly in force as part of the law of Canada". As I have suggested in Chapter VI.1, it is clear that the ninth article of the *Bill of Rights* is part of a broadly defined Constitution of Canada. With respect to the powers and privileges of some of the provincial legislatures the ninth article was received before confederation in the law of the founding provinces under the general principles of reception. By virtue of the common law, British statutes were received insofar as they were considered "applicable" to "the condition of an infant colony". The colonial situation was believed to justify the reception of only some of the privileges enjoyed by the Houses at Westminster; reception was therefore not unqualified.[34] With respect to the Houses of the federal parliament instituted by the *B.N.A. Act*, the matter is different.

The matter of parliamentary powers and privileges in that case was expressly left to federal legislation, subject to the limitation that the legislated powers and privileges should not exceed those held, enjoyed and exercised at Westminster at the time of the *B.N.A. Act* (the definition of which must presumably take account of the 1839 ruling in *Stockdale*). The relevant federal legislation passed after confederation simply refers back to the powers and privileges known at Westminster, with the clear acknowledgement that the *B.N.A. Act* may perhaps not allow them to their full extent:

---

[34] See Chapter VI.1.

> 4. The Senate and House of Commons respectively, and the Members thereof respectively, shall hold, enjoy and exercise such and the like privileges, immunities and powers as, at the time of the passing of the *British North America Act*, 1867, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the Members thereof, *so far as the same are consistent with and not repugnant to the said Act.*[35] [Emphasis added.]

The federal parliament could obviously not legislate privileges and powers for itself that would be inconsistent with the Act under which they were legislated. And with respect to constitutional amendment, the *Senate Reference*[36] had clearly indicated before the *Patriation Reference* what the federal parliament could and could not do under the *B.N.A. Act*. In that case, the federal government wanted to know whether the Senate could validly be abolished or reformed by legislation under the federal competence to amend the "Constitution of Canada". That competence had been legislated into the *B.N.A. Act* in 1949 in order to obviate the necessity of resorting to a United Kingdom statute for every minor amendment. The Supreme Court interpreted this power restrictively as referring to federal "housekeeping" matters only.[37] This was endorsing the fundamental conventional category of amendments "directly affecting federal-provincial relationships" formulated in the 1965 federal White Paper published under the authority of Guy Favreau, the then Minister of Justice.[38] The category was meant to distinguish those requests for

---

[35] *Senate and House of Commons Act*, R.S.C. 1970, c. S-8, repeating in substance the provisions of *An Act to define the privileges, immunities and powers of the Senate and House of Commons, 1868*, 32 Vict. c. 23 (Can.); now the *Parliament of Canada Act*, R.S.C. (1985) c. P-1.

[36] *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 S.C.R. 54.

[37] *Id.*, at 65.

[38] Canada, Minister of Justice, "The Amendment of the Constitution of Canada", by Hon. Guy Favreau, Ottawa, February 1965.

amendment by Westminster which conventionally required provincial consent from those which did not. The Supreme Court found that this conventional principle was reflected in the legal provisions of the *B.N.A. Act* which determined the legal power of the federal parliament with respect to amendment. The "Constitution of Canada" which the federal parliament could unilaterally amend therefore referred to federal "housekeeping" matters which did not directly affect federal-provincial relationships. The Senate, because of its "vital role as an institution forming part of the federal system created by the Act", was protected from unilateral federal change. The federal parliament's powers with respect to amendment thus circumscribed, it is difficult to conceive how parliament could grant its constitutive Houses the power to procure by resolution an amendment which it could not itself pass. Thus interpreted, s. 91(1) of the *B.N.A. Act* provided a good analogy, under the federal principle, for the Court to embark on the review of parliamentary resolutions in a fashion supported by the established judicial review of privileges.

The majority (law) apparently escapes this conclusion (reached in substance by Martland and Ritchie JJ., dissenting) by assuming that the federal Houses were exercising "inherent" powers (a possibility not considered by the dissenters). It is indeed possible to argue that the federal Houses enjoy inherent powers and privileges independently of federal legislation. The common law provided that the institution of a colonial legislative assembly (as the federal parliament then was) implies the grant of the powers and privileges necessary to its functioning.[39] For my present purposes, this means that the "inherent" powers and privileges enjoy a constitutional status which "legislated" powers and privileges do not. But this should not disturb the argument.

---

[39] *Kielly v. Carson* (1842), 13 E.R. 225 (P.C.).

It is clear that the powers and privileges received by colonial legislatures are not the same as those enjoyed at Westminster.[40] The determination at common law of such powers and privileges implied in the grant of a legislative assembly follows the pattern set for the reception of English law in colonies. English law is received, as I said, insofar as it is considered "applicable" to the local situation.[41] The preamble to the *B.N.A. Act* can be said to reflect this pattern insofar as it states the expressed desire of the colonies to be "federally united" with a Constitution "similar in Principle to that of the United Kingdom". A *federal* constitution could not be identical to that of the United Kingdom and the provisions of the Act show in what ways the Canadian Constitution was going to be different. The most fundamental point of divergence is the division of powers, with its clear implication that no one level of jurisdiction could unilaterally modify it. The instituted federal structure provides the materials with which to assess the "applicability" of English law. It provides the local context in light of which the determination of the inherent powers and privileges of the federal Houses thus created must be made, and the English *Bill of Rights* be interpreted and qualified. And in that context, it would make little sense if federal authorities could effectively achieve by resolution what they are emphatically precluded to effect by legislation. This suggests that the federal Houses did not have the "inherent" power to pass that kind of resolution unilaterally; and such power could not have been granted by a federal parliament which did not have the competence to achieve what such resolutions were meant to achieve. In asserting that the resolution was not justiciable, the Court arguably shrank from its common law duty

---

[40] *Id.*, at 235-36.

[41] *Uniacke v. Dickson* (1848), 2 N.S.R. 287, 299-300.

of assessing what, if any, were the "inherent" powers and privileges of the federal Houses.

All of the above goes to show that the *Patriation Reference* Supreme Court could have brought resolutions under judicial review without violating the general requirement of legal justification for court decisions. The decision would have been amply supported by analogy, notably with *Stockdale*, and by established legal principles. Those principles at least suggested, further, that the legal rules should be brought into line with the structure of the system.

When the Supreme Court asserts that "the federal principle cannot be reconciled with a state of affairs where the modification of provincial legislative powers could be obtained by the unilateral action of the federal authorities",[42] and that this state of affairs is nevertheless dictated by the legal rules which a court is bound to apply, a problem of coherence is thereby acknowledged. When the Court asserts that the powers of the United Kingdom over the Canadian Constitution amount to an "anomaly"[43] in the face of Canadian independence, it recognises that a legal rule has become a misfit in the structure of principles under which courts now rationalise the rules of constitutional law. And if courts are expected to evolve the unwritten rules of constitutional law in order to maintain a coherent legal system over time, these assertions amount to a recognition that there is a need for change. The Supreme Court was in a position to overrule any precedent that might have resisted that change.

Adopting the Court's purported approach in the preceding paragraphs, an approach which focuses on Canadian instrumentalities and

---

[42] *Id.*, at 905-06.

[43] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 774, 787, 788.

blocks out the question of Westminster's powers, I argued that the Supreme Court could very well have brought the federal resolution under judicial scrutiny in the same way as parliamentary privileges had been. This might have caused problems in deciding what form the requirement of provincial consent should take: legal criteria have to be manageable in a court of law, and provincial consent had not, as a rule, been formally recited in past resolutions.[44] But this did not seem to cause difficulties to the Court in their opinion on convention, where provincial consent as it then stood was duly and openly assessed and found insufficient.

Beyond the formal adoption of the resolution, an adoption which the Court found was not justiciable, there is obviously very little scope for a legal argument short of the straightforward questioning of the rule that the United Kingdom Parliament's legal powers are unlimited. The one possible step on which a legal requirement could be brought effectively to bear was the act of sending the formal address to Her Majesty in London. The fact that such act of "sending" could be the object of legal rules is perhaps exemplified by s. 56 of the *B.N.A. Act*, which deals with Imperial disallowance. That section requires that an authentic copy of every Act assented to by the Governor General be sent to one of Her Majesty's principal secretaries of state in London; this dispatching is to be done by the Governor General at the first convenient opportunity.[45] It is not clear that s. 56 created a legal obligation

---

[44] The one exception is the resolution which led to the *British North America Act, 1930*. *Id.*, at 786.

[45] The dispatching has generally been done "in the name of the Governor General" until the creation of the Department of the Secretary of State for External Affairs following the Imperial Conference of 1926. The copies were thereafter sent to London in the name of the Secretary of State for External Affairs: Canada, House of Commons, *Debates*, (1947) Vol. IV, at 3533.

which courts would at any time have undertaken to consider with a view to declaration or enforcement. Two things are now clear, however.

First, the Supreme Court has been willing to enforce a constitutional duty of a Lieutenant Governor by issuing a writ of mandamus against the Attorney General who was responsible for advising him.[46] If section 56 were perceived as imposing a legal obligation, the same technique could provide the means for court enforcement. By analogy, one could argue that the sending to Her Majesty in London of the resolution at issue in the *Patriation Reference* could conceivably have been prevented by means of a prerogative writ. The second point is that the enforcement of s. 56 would now run against an established constitutional principle. For since 1930 at the latest, an unbending constitutional convention precludes the Imperial disallowance of Canadian statutes,[47] and disallowance had been the only reason for sending copies to London. The reason for that convention is the principle of independence in its final, consummated form. This will provide my second analogy.

It is arguable that a constitutional principle supported by unbending convention has made it the case, as I hinted in Chapter V, that s. 56 is simply no longer part of the law of Canada. The Supreme Court has suggested in the *Manitoba Reference* that the language of obligation, "*shall*", yields in the context of the *B.N.A. Act* a fully enforceable

---

[46] *Air Canada v. A.G. B.C.*, [1986] 2 S.C.R. 539.

[47] U.K., Secretary of State for Dominion Affairs, "Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation", Cmd 3479 XVI (1929-30), para. 23, approved: U.K., "Summary of Proceedings", Imperial Conference, 1930, Cmd 3717 XIV (1930-31), at 18.

legal obligation.[48] The Court, indeed, went out of its way to emphasise that constitutional provisions could not easily be discarded as merely "directory":

> "There is no authority in Canada for applying the mandatory/directory doctrine to constitutional provisions. [...] It would do great violence to our Constitution to hold that a provision on its face mandatory, should be labelled directory on the ground that to hold otherwise would lead to inconvenience or even chaos".[49]

But the language of obligation there at issue, "*shall*", is precisely the language used by s. 56, a fact which is not less a fact because it goes unmentioned in the *Manitoba Reference*. As I pointed out earlier, the Canadian government decided in 1942, "in view of the complete obsolescence of the power of disallowance, and in order to bring the actual practice into conformity with the constitutional position",[50] to stop the transmission of copies to London. Section 56 is still on the statute book today, and, to mirror the Court's treatment of the "mandatory" constitutional provision at issue in the *Manitoba Language Rights Reference*, "there is no authority in Canada for applying the

---

[48] *Reference re Manitoba Language Rights in Manitoba*, [1985] S.C.R. 721, 737: "the word 'shall' is presumptively imperative" and must be interpreted as such unless such interpretation "would be utterly inconsistent with the context in which it has been used and would render the section irrational or meaningless".

[49] *Id.*, at 741-42

[50] Declaration of the Prime Minister in the House: Canada, House of Commons, *Debates*, (1943) Vol II, at 1829. This issue was discussed at length in the House of Commons when s. 6 of the *Publication of Statutes Act, 1925*, 15 & 16 Geo. V c. 22; R.S.C. (1927) c. 2, was repealed in 1947 (*An Act to Amend the Publication of Statutes Act*, 11 Geo. VI c. 44, s. 2). That section of the 1925 Act imposed a duty on the Clerk of Parliaments to deliver bound copies of all statutes to the Governor General "for transmission to Her Majesty's Principal Secretaries of State, as required by the *British North America Act*". The government's *legal* explanation for disregarding s. 56, offered by the Secretary of State for External Affairs, was based on the "obsolescence" of s. 56: Canada, House of Commons, *Debates*, (1947) Vol. IV, at 3433-34.

obsolescence doctrine to constitutional provisions".[51] Yet, the normative context afforded by the principle of independence makes it very unlikely that a court would, at any time after 1930, have treated s. 56 in the same way. The "right of the citizenry to constitutional behaviour" mentioned in *Thorson*[52] would, on this argument, be interpreted as referring to constitutional principles supported by convention, not to a statutory provision which constitutional developments have rendered nugatory. My analogy is this: if constitutional principle could be said to affect a requirement of an Imperial statute respecting the sending of a formal document to Her Majesty in London, constitutional principle could also be invoked as yielding an unwritten legal rule precluding that such a resolution as was at issue in the *Patriation Reference* be sent to Her Majesty without provincial consent. That rule could have been enforced by means of a prerogative writ and would have been supported by the same principles which could have justified a "*Stockdale*" review at a prior stage. If such enforcement would have involved "judicial law-making", it would nonetheless have been solidly grounded on established legal principles. How would unwritten rules emerge and evolve if not in the rulings of the Supreme Court, in cases where legal principles provide solid justification?

The foregoing perhaps makes the best case that could have been made for the provinces within the narrow approach of the Court: it attempts

---

[51] In fact, there is not even authority for the application of that doctrine to statutes. See *R. v. Ruddick* (1928), 62 O.L.R. 248, 253-54 (S.C). The federal *Interpretation Act*, (1985) R.S.C. c. I-21, ss. 2(2), can be said to have introduced this notion in Canadian law, with respect to federal statutes (in 1968): "an enactment that has expired or lapsed or otherwise ceased to have effect shall be deemed to have been repealed".

[52] *Thorson v. A.G. Can.*, [1975] 1 S.C.R. 138, 163.

to tack a legal qualification of the ultimate rule of competence onto Canadian instrumentalities leading to a United Kingdom statute. The Supreme Court majority (law) glided over this and failed to see the available legal resources that would have both justified and circumscribed judicial review at that stage. The Court's analysis did not stop there, however. The principles of federalism and independence were in fact discussed both by the majority and the dissenters at an abstract level which can be accommodated in a "first hand" approach which directly considers the bearing of such principles on the United Kingdom Parliament's legal supremacy.

XI.3 FEDERALISM BEYOND THE COURT'S MAJORITY

A series of cases was cited to the Supreme Court which arguably showed how that Court and the Judicial Committee of the Privy Council had used the federal principle to justify decisions in cases where no directly applicable hard standard could be found. The dissenters (law) carefully analysed them in their opinion and found that they provided convincing analogies supporting their decision under the federal principle.

The cases are introduced as follows by Martland and Ritchie JJ.:

> ... on occasions, this Court has had to consider issues for which the *B.N.A. Act* offered no answer. In each case this Court has denied the assertion of any power which would offend against the basic principles of the Constitution.[53]

---

[53] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 841.

It is then pointed out, as was previously noted, that the doctrines and principles recognised in the reviewed cases have the following characteristics:[54]

1. none was to be found in written constitutional material;

2. all had been derived from the federal character of the Canadian constitution;

3. all had been given full legal force;

4. each had been judicially developed in a context where there were no precedents addressed directly to the issue.

The majority (law), however, did not agree. The "innumerable judicial pronouncements" that recognised the "federal character of the Canadian constitution" were acknowledged by one majority (convention),[55] but the other majority (law) suggested that federalism had never been used independently to ground a legal decision:

> ...there is nothing in the reference to theories of federalism reflected in some case law that goes beyond their use as an aid to a justiciable question raised apart from them.[56]

What this means is not at all clear. As I previously noted, one can fairly assume that "an aid to a justiciable question" here means "an aid to *the resolution of* a justiciable question". Now, aiding "the resolution of a justiciable question" is what the provinces claimed the constitutional precept of federalism should be used for. But the majority (law) was perhaps bent on not making any use of it at all. One may recall here that the issue of justiciability in Canadian law is entangled with that of whether there is an ascertainable standard that

---

[54] *Id.*, at 844-45.

[55] *Id.*, at 905.

[56] *Id.*, at 804.

can be applied to the case.[57] The answer, therefore, to the question whether a standard is ascertainable and can be applied is at least partly determinative of whether a question is justiciable. The Court's reference to justiciability is thus question-begging and confusing. The Court probably meant, then, that there existed in each case submitted by the provinces and thoroughly analysed in the dissenting opinion (law) an established, applicable (hard) standard "apart" from the principle of federalism, or that in each case the court would have somehow arrived at the same result had it not resorted to that principle. This would tie in with the Court's statement that "theories" of federalism "do not engage the law, save as they might have some peripheral relevance to actual provisions of the *British North America Act* and its interpretation and application".[58]

Soft standards tell judges, for example, what rules to apply, they guide the interpretation of those rules, they help them find the right development for judge-made rules and the like. With this in mind, it seems trite to say that when soft standards are quoted in a judgment there are also hard standards, "apart from them", that provide some basis for decision. Even when a soft standard provides a direction for a solution where apparently no rules cover the case, the matter can sometimes be presented as the application of a harder standard newly introduced with the soft one officially serving merely as a backdrop, "an aid" to the resolution of an independently justiciable question. This is just saying that soft standards are actualised, made more specific, that they "harden" when they are used to justify a ruling, a ruling that might serve thereafter as a binding hard standard in similar cases. In

---

[57] See *supra*, Chapter II.2.

[58] *Id.*, at 803.

most cases where a ruling is based on a soft standard, an explanation can be provided through analogy, in terms of the surrounding rules which the soft standard appealed to could be said to underlie. But as I suggested, reasoning by analogy necessarily involves this appeal to principle: if it is called analogy, it is precisely because the available hard standards do not cover the case and a principle is necessary to justify the decision. Insisting on the existence of surrounding hard standards does not diminish the essential role which constitutional precepts actually play in decisions. The majority (law)'s reasons for rejecting the adduced list of persuasive precedents, therefore, does not pass muster. I need to do here what that majority failed to do: duly analyse those cases.

In *Amax Potash v. Government of Saskatchewan*,[59] the plaintiff sued for a declaration that *The Mineral Taxation Act*[60] and related regulations were partly *ultra vires*, and sought the recovery of monies paid under the regulations. The Government of Saskatchewan argued that the disputed provisions were valid, and that in any case s. 5(7) of the *Proceedings against the Crown Act*[61] precluded the recovery of monies from the Crown through judicial proceedings. The relevant portion of s. 5.(7) read as follows:

> 5.(7) No proceedings lie against the Crown under this or any other section of the Act in respect of anything heretofore or hereafter done or omitted and purporting to have been done in the exercise of a power or authority under a statute or a statutory provision purporting to confer or to have conferred on the Crown such power or authority, which statute or statutory provision is or was or may be beyond the legislative jurisdiction of the Legislature...

---

[59] [1977] 2 S.C.R. 576.

[60] R.S.S. (1965), c. 64.

[61] R.S.S. (1965), c. 87.

The validity of s. 5.(7) was questioned in collateral proceedings. On appeal the Supreme Court had to decide whether s. 5.(7) could effectively bar the recovery of monies paid under assumedly invalid legislation. The answer was no. Dickson J. delivered the judgment of the Court, reasoning as follows:

> A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle, that is undoubtedly correct, but the general principle must yield to *the requisites of the constitution in a federal state*. By it the bounds of sovereignty are defined and supremacy circumscribed. The Court will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.
>
> Section 5.(7) of *The Proceedings against the Crown Act*, in my opinion, has much broader implications than mere Crown immunity. In the present context, it directly concerns the right to tax. It affects, therefore, the division of powers under *The British North America Act, 1867*. It also brings into question the right of a Province, or the federal Parliament for that matter, to act in violation of the Canadian Constitution.
>
> [...]
>
> To allow moneys collected under compulsion, pursuant to an *ultra vires* statute, to be retained would be tantamount to allowing the provincial Legislature *to do indirectly what it could not do directly*, and by covert means to impose illegal burdens.[62] [Emphasis added.]

Dickson J. goes on to state that "[t]here are no Canadian Constitutional law precedents addressed directly to the present issue", which does not stop him from deciding against the Government. Stating this was saying that no hard standard covered the case and that an appeal to principle would justify the decision. Deep down, the justification of the decision can be said to flow from a clear requirement of constitutionalism tied to the Rule of Law. But in the Canadian context of a "Constitution similar in principle to that of the United Kingdom", it is federalism

---

[62] *Id.*, at 590-91.

which gives constitutionalism its full meaning. In the words of the Court, it is the "requisites of the constitution in a federal state", which pointed to the answer. No hard standard directly covered the case and the Court found that it was its "high duty" to make a decision safeguarding the federal principle.

The decision further bore on the issue of the *Patriation Reference* in that the Court found that a legislature could not be allowed "to do indirectly what it could not do directly". This is substantially what the federal legislature was about to do in effecting an amendment by a resolution sent to London which it could not effect by legislation. And if the federal legislature could not legislate the amendment directly, it was because of the federal principle.

In *British Columbia Power v. British Columbia Electric*,[63] the question before the Supreme Court was whether a receivership order could be made to preserve assets during proceedings about the constitutional validity of legislation purporting, *inter alia*, to give title to the Crown respecting those assets. Chief Justice Kerwin delivered the judgment of the Court. He said:

> In a federal system, where legislative authority is divided, as are also the prerogative of the Crown, as between the Dominion and the Provinces, it is my view that it is not open to the Crown, either in right of Canada or of a Province, to claim a Crown immunity based upon an interest in certain property, where its very interest in that property depends completely and solely on the validity of the legislation which it has itself passed, if there is any reasonable doubt as to whether such legislation is constitutionally valid. To permit it to do so would be to enable it, by the assertion of rights claimed under legislation which is beyond its powers, to achieve the same results as if the legislation were valid. In a federal system it appears to me that, in such circumstances, the Court has the same jurisdiction to preserve assets whose

---

[63] [1962] S.C.R. 642.

> title is dependent on the validity of the legislation as it has to determine the validity of the legislation itself.[64]

Here again, there were no precedents directly covering the case and a notion of the importance of the division of powers in Canadian federalism manifestly provided the basis for decision. A failure of the Court to act on the federal principle would have involved, again, that the legislature could "achieve the same result" as it would have by means of a piece of legislation invalid under the federal distribution of powers.

In *A.G. Nova Scotia v. A.G. Canada*,[65] the Court considered the constitutional validity of a federal-provincial scheme whereby some legislative powers were to be delegated by the provincial legislatures to the federal parliament, and *vice versa*. The Supreme Court considered the issue on appeal from an advisory opinion given by the Nova Scotia Court of Appeal about the provincial aspect of the matter. The Supreme Court considered the matter as a whole and rejected the scheme as unconstitutional. Chief Justice Rinfret wrote:

> The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of that protection that Parliament can legislate only on the subject matters referred to it by section 91 and that each Province can legislate exclusively on the subject-matters referred to it by section 92. The country is entitled to insist that legislation adopted under section 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures. In each case the Members elected to Parliament or the Legislatures are the only ones entrusted with the power and the duty to legislate concerning the

---

[64] *Id.*, at 644-45.

[65] [1951] S.C.R. 31.

> subjects exclusively distributed by the constitutional Act to each of them.[66]

Since no provision of the Constitution spoke to the issue plainly and no precedents were available, it is a notion of federalism inferred from the whole constitution which provided an answer. Direct legislative inter-delegation was found incompatible with the Canadian principle of federalism and this could be acted upon in Court to declare the scheme illegal under the constitution.

In *Reference re Alberta Statutes*,[67] the question of the constitutional validity of the *Accurate News and Information Act* of Alberta was referred to the Court by the Governor General. The Act, which had been reserved by the Lieutenant-Governor for the signification of the Governor General's pleasure, imposed certain duties of publication on newspapers published in Alberta. Chief Justice Duff (Davis J. concurring), finding that the subject matter of the Act was entirely within federal authority, wrote:

> That authority rests upon the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from the *British North America Act* as a whole ... and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.[68]

No written provision of the Constitution could provide an answer in this case, but the Court could act upon a "necessary implication" arising "from the *British North America* as a whole". This means that the hard standards of the constitution taken "as a whole" are underpinned by

---

[66] *Id.*, at 34.

[67] [1938] S.C.R. 100.

[68] *Id.*, at 133-34.

general principles which can provide adequate justifications for judicial decisions.

Also of considerable weight in the argument of Martland and Ritchie JJ. which I am here recasting is the decision of the Privy Council in the *Labour Conventions* case.[69] The opinion of the Supreme Court in that case was discussed in Chapter V with respect to the crystallisation of conventions. On appeal to the Privy Council, Counsel for Canada had argued that the power of the federal executive to enter into international treaties on behalf of a sovereign Canada enabled the federal parliament to legislate treaty obligations into Canadian law notwithstanding provincial exclusive constitutional domains. Lord Atkin first noted that the distribution of powers between centre and provinces "is one of the most essential conditions, probably the most essential condition, in the inter-provincial compact to which the British North America Act gives effect".[70] He continued:

> It would be remarkable that while the Dominion cannot initiate legislation, however desirable, which affected civil rights in the Provinces, yet its government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of provincial constitutional autonomy.
>
> It follows from what has been said that no further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions.[71]

---

[69] *A.G. Can. v. A.G. Ont.* (Labour Conventions), [1937] A.C. 328 (P.C.).

[70] *Id.*, at 351.

[71] *Id.*, at 352.

The Privy Council's notion of Canadian federalism as founded, in one meaningful legal sense, upon a compact, here provides the Board with a reason for decision in a case where the absence of precedents or express direction from the provisions of the *B.N.A. Act* could not be gainsaid. The federal government's contentions in both the *Labour Conventions* case and the *Patriation Reference* included a reference to the accession of Canada to independence as a basis for curtailing provincial powers guaranteed by federalism.[72] The Judicial Committee safeguarded the principle of federalism despite the new external powers exercised by Ottawa just like the *Statute of Westminster* had ensured, by excluding the *B.N.A. Act* from its scope, that independence would not jeopardise the principle of federalism.

What can one conclude from the foregoing review? One can safely say that the Supreme Court and the Privy Council have made use of federalism as a principle for decision in constitutional adjudication.[73] It was a matter of creating and evolving binding rules of unwritten constitutional law under legal principles. The *Patriation Reference* majority (law) clearly failed to distinguish those precedents;[74] the Supreme Court later unanimously confirmed this in the *Manitoba Reference* by endorsing Martland and Ritchie JJ.'s analysis of the cases[75] and concluding, as we have seen, that courts "may have regard to unwritten

---

[72] The contentions in the *Labour Conventions* case are reproduced at [1937] A.C. 326, 330.

[73] Other cases involving an appeal to federalism are numerous but most are about the interpretation of a written provision of the Constitution. The most notorious, perhaps, were the *Senate Reference*, *Blaikie*, and *Forest*: *Reference re Legislative Authority of the Parliament of Canada in relation to the Upper House*, [1980] 1 S.C.R. 54; *A.G. Que. v. Blaikie*, [1979] 2 S.C.R. 1016; *A.G. Man. v. Forest*, [1979] 2 S.C.R. 1032.

[74] See Gil Rémillard, "Legality, Legitimacy and the Supreme Court" in Banting & Simeon, *supra*, p. 189, at 205.

[75] *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

postulates which form the very foundation of the Constitution", and that federalism was one such postulate.[76]

To Martland and Ritchie JJ., then, the unwritten postulate of federalism could thus be acted upon as authority for the conclusion that as a matter of law "the Canadian Constitution does not empower the Senate and the House of Commons to cause the Canadian Constitution to be amended in respect of provincial legislative powers without the consent of the provinces".[77] Their analysis, however, does not go far enough: the matter was left at that and they said nothing of the perceived rule of the legal supremacy of the United Kingdom Parliament, which could be analysed as a hard standard of Canadian constitutional law binding on Canadian courts. And in the event – not unlikely at the time of the *Reference* – of an amendment ultimately passed by the United Kingdom Parliament in disregard of the Canadian legal procedure (as formulated by Martland and Ritchie JJ.), one was left wondering about the result as a matter of Canadian law. This is why a well-rounded judgment appealing to constitutional principles in the *Patriation Reference* would have gone further and addressed the sovereignty of the United Kingdom Parliament directly.

It is abundantly clear that a British statute now purporting to apply to Canada would not be recognised by Canadian courts. The Supreme Court declared in the *Quebec Veto Reference* that the "new procedure for amending the Constitution ... entirely replaces the old one",[78] thus indicating that the 1982 "abdication" could not be taken back by

---

[76] *Id.*, at 752.

[77] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 848.

[78] *Reference re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, 806.

Westminster. But no reasons were offered for this. The reasons which might have been provided in the *Quebec Veto Reference*, I would suggest, could have been used in the *Patriation Reference* to qualify directly the supremacy of the United Kingdom Parliament as a matter of Canadian law.

The supremacy of the United Kingdom Parliament indirectly clashed with federalism insofar as it affected the value of self-government which underpins any federal structure. But British authorities, particularly the Privy Council, had for a long time been perceived by provincial governments as the guardians of Canadian federalism; and the maintenance of the United Kingdom Parliament's supremacy over the *B.N.A. Act* had been chosen as the legal means to safeguard federalism when the *Statute of Westminster* was drafted. If the supremacy of the United Kingdom Parliament needed to be qualified as a legal rule, therefore, it is mainly because that rule, now fully understood as a matter of Canadian law, clashed with the Canadian constitutional principle of independence.

XI.4 INDEPENDENCE BEYOND THE COURT'S MAJORITY

Too much vagueness has perhaps been tolerated so far on the status of independence as a legal principle. Independence may at first sight appear as a matter of fact, not principle. But as I suggested, saying that a legal requirement necessarily follows, without more ado, from the fact of independence is making an argument which falls short of the requirement of legal justification for a judicial decision.[79] The fact of independence, like any other political reality, is certainly capable of legitimately influencing outcomes in a court of law. My argument does not deny this. What is being argued is that the *fact* or political

---

[79] This is the major flaw of the otherwise helpful article on Canadian independence by Slattery discussed in section 1, *supra*.

reality of independence cannot suffice as the *sole* justification for a judicial decision; a toe-hold onto established law is needed.

Independence as a legal notion is contingent on the existence of a distinct legal system. As was shown at length in Chapter VII, the identity of a distinct legal system cannot rest solely on its ultimate rule of competence. Canadian law may have pointed to a foreign body as part of its ultimate constitutional structure, but that did not make Canada a part of the British legal system. A legal system's identity depends on less formal considerations such as the identity of the polity as perceived by its officials and the underlying principles under which formal legal rules can be judicially rationalised as a coherent whole. In former British colonies, the relevant polity has gradually shifted in judicial considerations from the notion of a paramount Imperial commonwealth, through one of independent communities with partially distinct needs, to one of independent polities with separate and possibly conflicting commonweals. The existence of Canadian law as a distinct legal system was not doubted in the Patriation episode, though the Supreme Court's reluctance to deal directly with the sovereignty of the United Kingdom Parliament as a separate Canadian rule of law much obscured the issue. In legal materials, the existence of a distinct system was unambiguously recognised in the *Statute of Westminster*, which stated that future Acts of the United Kingdom Parliament would not extend "to a Dominion *as part of the law of that Dominion*".[80] This was only a belated recognition, however. With respect at least to statute law, that recognition can be said to have been made earlier in colonial law, first at common law through the rules of reception (of English law in the "law of the colony") and eventually in the *Colonial Laws Validity Act* of 1865.

---

[80] Section 4.

With respect to common law, rules of reception also existed, and the Supreme Court clearly asserted the independence of that body of law in Canada when in 1959 it declared an English common law rule "inapplicable" in Ontario.[81] That had always been a possibility.[82] Even in the case of Australia, which had retained appeals to the Privy Council in some cases, the Judicial Committee recognised that the common law there was not the same as that which governed in England.[83] This was not the problem in the *Patriation Reference*. The difficulty was how the remaining powers of the United Kingdom Parliament could be handled as a matter of Canadian law. My answer is that independence as a legal principle could be invoked to qualify those powers in a legal decision imposing Canadian consent as a prerequisite to valid United Kingdom legislation (as Canadian law).

Independence takes its meaning as a principle from the underlying value of self- and representative government. Self-government may be said to involve that important collective decisions should be made by members of the community concerned, including judges. Representative

---

[81] *Fleming v. Atkinson*, [1959] S.C.R. 513, 533-34. The English rule was that in *Searle v. Wallbank*, [1947] A.C. 341 (H.L.(E.).

[82] This decision was made after the abolition of appeals to the Privy Council. It is not clear how that body would have reacted. It had stated in a 1927 Ontario *per saltum* appeal that the House of Lords was "the supreme tribunal to settle English law", but there had been no contention that the law of Ontario was different for reasons pertaining to reception: *Robins v. National Trust Co.*, [1927] A.C. 515, 519 (P.C.). Insofar as that statement meant that the law of a British colony need be the same as English law, it was clearly set aside by *Australian Consolidated Press v. Uren* (1967), [1969] 1 A.C. 590 (P.C., on appeal from Australia). For comments, see H.H. Marshall, "The Binding Effect of Decisions of the Judicial Committee of the Privy Council" (1968) 17 *I.C.L.Q.* 743; G.W. Bartholomew, "Authority of Privy Council Decisions" (1952) 1 *I.C.L.Q.* 392; Roberts-Wray, *Commonwealth and Colonial Law*, London: Stevens, 1966, pp. 572-75.

[83] *Australian Consolidated Press v. Uren*, above, in which the Privy Council refused to follow the House of Lords decision in *Rookes v. Barnard*, [1964] A.C. 1029 (H.L.(E.).

government directly relates to one aspect of the democratic principle as a requirement of political accountability. Those values are recognised through numerous rules in the Canadian legal system. Examples include the rules governing the compulsory meeting of Parliament and the elections, the rules imposing conditions for holding judicial office (which require a long-standing membership in one of the provincial bars), the statutory judicial hierarchy and related common law rules (which prevent appeals beyond the Canadian Supreme Court and provide that that Court is not bound by judicial decisions, past and present, of the Privy Council), the Letters Patent of 1947[84] (which provide that all of the powers held by the Crown with respect to the United Kingdom can be similarly exercised by the Governor General with respect to Canada), and of course, the *Statute of Westminster*.[85] All those legal rules can be rationalised under the principle of self- and representative government.

To a great extent, the history of British Imperial law is that of the gradual process of implementing those values in the emerging polities throughout the Empire. Those values were clearly behind the ruling of Lord Mansfield in *Campbell v. Hall* which decided that the grant of a local legislative assembly carried the termination of the legislative powers of the Crown in the colony.[86] No Act of Parliament was thought necessary: the court ruling could be legally justified, in conformity with established rules of adjudication, under the emerging principle of self- and representative government implicit in the legal materials which

---

[84] *Letters Patent constituting the Office of Governor General*, reproduced in R.S.C. (1985), App. II, No 31.

[85] 1931, 22 Geo. V, c. 4. One may add the following federal statutes to this list: *Great Seal Act, 1939*, 3 Geo VI c. 22; *Canadian Citizenship Act, 1946*, 10 Geo. VI, c. 15; *Diplomatic Immunities Act, 1953*, 1-2 Eliz. II, c. 54.

[86] (1774), Lofft 655, 746.

set up and organised the local power-structures. From there, this principle could be appealed to as a matter of unwritten constitutional law (common law, if you will).

Campbell v. Hall changed an important rule of competence in several colonies by virtue of principles, as a matter of common law. It did not affect the continued recognition of the sovereignty of Parliament at Westminster, however. The principle of self- and representative government was at that time qualified by a notion of Imperial commonweal. The identity of the relevant polity remained the Empire in many respects, and the ultimate responsibility over that polity lay in the Imperial Parliament and the Privy Council. But that notion gradually withered away and was supplanted by that of "autonomous communities ... equal in status" expressed in the Balfour declaration.[87]

Since the ruling in *Campbell v. Hall*, courts have not been given many occasions on which to expand on the principle of self- and representative government. The popularity of "positivist" legal theory certainly made judges more reluctant to reason from principles in the period of decolonisation than they had been in the days of Lord Mansfield. This relatively static period in the development of judge-made law around independence was compensated for by the rapid growth of constitutional conventions which duly qualified the powers of the United Kingdom Parliament conformably to the principle of independence, the consummated form of self- and representative government. As the Supreme Court put it in the opinion on convention, "the constitutional value or principle which anchors the conventions regulating the relationship

---

[87] U.K., "Summary of Proceedings", Imperial Conference, 1926, Cmd 2768 XI (1926), at 14. On this development as officially recorded, see also U.K., Secretary of State for Dominion Affairs, "Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation", Cmd 3479 XVI (1929-30), paras 22, 49.

between the members of the Commonwealth is the independence of the former British colonies".[88] This evolving principle behind the conventions is at bottom the same as that which justified the common law ruling in *Campbell v. Hall*. The "reason for the rule", the principle behind the convention that the United Kingdom Parliament could not legislate without the Dominions' consent, is a reason that can be appealed to at common law; it is an open-ended *legal* principle.

Courts have recognised this in some cases regarding the independence of the great Dominions. The opinion of Chief Justice Duff in the *Labour Conventions* case, which was discussed at length in Chapter V, is one of them.[89] He found that the developments towards independence could be given recognition in law. One clear recognition of independence as a *legal* principle is found in a judgment of Isaacs J. in the 1926 Australian case of *Commonwealth v. Krelinger and Fernau Ltd and Bardsley*.[90] The question arose in that case whether the Commonwealth Parliament could indirectly regulate appeals to the Privy Council from state supreme courts by diverting them to the High Court in matters of federal jurisdiction. The majority of the High Court, on appeal from the Supreme Court of Victoria, decided the case in favour of the High Court's jurisdiction on a purportedly narrow basis which is here immaterial. Isaacs J., however, agreeing with the majority, went on to provide further grounds for the decision (Rich J. concurring) and made much of the principle of self- and representative government. He notes that the High Court "is necessarily as well acquainted with the advance

---

[88] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 880.

[89] *Reference re Weekly Rest in Industrial Undertakings Act*, [1936] S.C.R. 461.

[90] (1926), 37 C.L.R. 393.

of constitutional rule and practice, *which largely make constitutional law*, as the rest of the community", and that "[a]s a living coordinate branch of Government it cannot stand still and refuse in interpreting the law to recognize the advancing frontiers of public thought and public activity, and above all of constitutional doctrines within the Empire".[91] He continues:

> I speak with special reference to the influence of the introduction of responsible government and its development in creating the now well-recognised inter-Imperial status of the great self-governing Dominions. Unless the constitutions granted by Imperial authority are to be read by the full light of responsible government, the effective development of the principle itself would be arrested and the basic purpose of the grant frustrated.[92]

Isaacs J. goes on to find that the Constitution of Australia,[93] rather than be read in light of the *Judicial Committee Act, 1844*,[94] an earlier Imperial enactment, should be read as modifying that earlier Act to the extent that the Commonwealth must have power to control "civil rights" in Australia in relation to matters of federal jurisdiction.[95] Two months earlier the Privy Council, paying no attention to self-government, had decided in *Nadan* that the Canadian parliament could not regulate appeals to the Privy Council even though the *B.N.A. Act*, also a later Imperial Act, conferred a more specific jurisdiction on the federal parliament in this respect than the Australian Constitution did: the Canadian Act was void because it had extra-territorial effect, and it was

---

[91] *Id.*, at 412 (emphasis added).

[92] *Ibid.*

[93] Being s. 9 of the *Commonwealth of Australia Constitution Act*, 1901, 63 & 64 Vict., c. 12 (U.K.).

[94] 7 & 8 Vict., c. 69 (U.K.).

[95] (1926), 37 C.L.R. 393, 414-15.

repugnant to the *Judicial Committee Acts*.[96] The failure of the Privy Council in that case to take account of constitutional principle is known as one of the determinant factors which prompted the further political developments that immediately followed.[97]

Isaacs J.'s judgment shows that self- and representative government may be seen as a principle which courts can take account of in developing public law. And the natural culmination of this development in the British Empire can only be full legal independence. As an Australian scholar aptly put it, "[i]t would be strange indeed if the common law having demonstrated its capacity to respond to the development of the colonisation process failed to respond to the exigencies of the quite natural culmination of that process".[98] The Australian High Court has acted upon the open-ended principle of self-government in its final, consummated form when it decided, as I noted in Chapter VI, that the prerogative power over the acquisition of territory had come to lie with the Crown in right of the Commonwealth.[99] It had clearly lain with the Imperial Crown as a matter of common law and no legislative or prerogative instrument had effected the transfer.[100] The Court took it

---

[96] *Nadan v. R.*, [1926] A.C. 482 (P.C.). The grounds of decision in *Nadan* are thus expressed in *British Coal Corp.* v. R., [1935] A.C. 500 (P.C.).

[97] See Peter W. Hogg, *Constitutional Law of Canada*, 3d ed., Toronto: Carswell, 1992. The Privy Council took account of self-government and independence in interpreting the *B.N.A. Act* in the later case of *A.G. Ont. v. A.G. Can.* (Re Appeals), [1947] A.C. 127, 154-55 (P.C.).

[98] Michael J. Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution*, Sydney: The Law Book Co., 1985, pp. 96.

[99] *Bonser v. La Macchia* (1969), 122 C.L.R. 177, 223-24; *New South Wales v. The Commonwealth* (1975), 135 C.L.R. 337, 338.

[100] On the original situation, see Philip Noel Baker, *The Present Juridical Status of the British Dominions in International Law*, London: Longman, 1929, p. 227.

upon itself to change that common law rule of significant constitutional status on the basis of independence.

What *Campbell v. Hall* achieved under the principle of self-government, as a matter of common law, was a change in a fundamental rule of competence, an essential part of a rule of recognition. What the provinces proposed the Supreme Court should do in the *Patriation Reference* involved nothing more. When the *Statute of Westminster* came about, it is suggested that the most natural reaction for a Canadian court would have followed the same pattern: when the Crown granted a colonial legislature it meant at common law that legislative powers under the prerogative were irremediably terminated; when Parliament granted the Dominions complete legislative powers in all matters, including the power to repeal United Kingdom statutes, it meant at common law that Imperial legislative powers were irremediably terminated. The notion of an Imperial commonweal which was still present at the time of *Campbell v. Hall* and still qualified the legal principle of self- and representative government had vanished entirely, which is emphasised in the *Statute* by the insistence on the extra-territorial powers of the Dominion legislatures (those powers meant that the independent polities could assert their priorities as against Great Britain, a state of affairs incompatible with the survival of a paramount Imperial commonweal under the responsibility of the United Kingdom Parliament).[101]

One may argue that the United Kingdom Parliament did not relinquish its legislative powers. Indeed, the *Statute of Westminster* even falls short, in form, of requiring the consent of Dominions for the enactment of legislation intended to extend to them. Section 4, as is well known, provides that no future United Kingdom Statute shall extend or be deemed

---

[101] Section 3.

to extend to a Dominion unless "it is expressly declared" in that statute that the Dominion concerned has requested and consented to its enactment. The legal condition, if valid, is the declaration and not the actual consent.[102] What the United Kingdom Parliament did purport to do, however, was to relinquish its supremacy in favour of the laws of the Dominions. Section 2(1) of the *Statute* first declares that the *Colonial Laws Validity Act* shall not apply to future enactments of the Dominions. But that might not have been sufficient since that Act purportedly replicated the state of affairs then prevailing at common law; common law rules to the same effect might conceivably still be there. Subsection 2(2) attempts to deal with this as follows:

> No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any *existing or future* Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of *the law of the Dominion*.[103]

The subsection sets aside the perceived rule of common law which had governed constitutional law in the Empire on the basis that Imperial statutes were paramount. With respect to each Dominion, this paramountcy was for the future purportedly transferred to *the law of the Dominion*, thereby challenging the notion of continuing supremacy. As should be clear from Part Three, this could only amount to a legislative bid which

---

[102] The *Manuel* case was ultimately decided on that basis on appeal, the Court having granted without deciding that the *Statute* might have been binding on the United Kingdom Parliament: *Manuel v. Attorney General* (1982), [1983] 1 Ch. 95 (C.A.), leave to appeal to the House of Lords denied, at 110.

[103] Section 7(2) extends s. 2 to the Canadian provinces.

courts could accept or reject. What were courts left with in the event of having to decide whether to endorse such a bid?

They were left with the evolving legal principle of self- and representative government which had justified the ruling in *Campbell v. Hall*, a principle no longer qualified by a notion of Imperial commonweal. That notion had been the only support for the supremacy of the United Kingdom Parliament, and that support was no longer available. If courts were to *ask* themselves the question whether ss. 2(2) was to be maintained in the event of a future United Kingdom statute purporting to take it back, *no binding rule*, such as the rule of continuing supremacy in the United Kingdom Parliament (the very rule at issue), could provide an answer. Courts would have had to turn to principles, which in this case would have yielded a clear direction and provided a valid justification for decision.

Now, what is one to make of the exclusion of the *B.N.A. Act* from the application of the *Statute of Westminster*? The Supreme Court put the effect of that provision in the following terms:

> What s. 7(1), reinforced by s. 7(3), appeared to do was to maintain the *status quo ante*; that is, to leave any change in the *British North America Act* (that is, such changes which, under its terms, could not be carried out by legislation of the provinces of the Dominion) to the prevailing situation, namely, with the legislative authority of the United Kingdom Parliament being left untouched.[104]

If we go beneath the superficial correctness of this description, we find that the "prevailing situation" in 1931 included the legally intelligible fact that the paramountcy of British legislation, in general, could no longer be supported by underlying principles. For the *raison d'être* of that paramountcy had vanished with the notion of Imperial commonweal that

---

[104] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 794.

had qualified the principle of self- and representative government throughout the history of the Empire. The rule of paramountcy was maintained with respect to the *B.N.A. Act* for other reasons, at the request of Canadian authorities fully backed by the provinces.[105] And since the long-standing rule of the United Kingdom Parliament's supremacy cannot claim full legal status without judicial endorsement, one may ask what reasons courts might have to enforce it. If courts *ask* themselves the question whether and to what extent that supremacy should be recognised judicially, they have nothing to turn to but principles. The notion of Imperial commonweal no longer being available to qualify the principle of self- and representative government, the only possible support for the supremacy of the United Kingdom Parliament with respect to the *B.N.A. Act* was the federal principle. For Canadian courts, a decision to enforce that rule in the face of a challenge properly put before it could only be justified under the Canadian constitutional law principle of federalism as expounded in such cases as those analysed in the previous section. There is no other possibility. The supremacy of the United Kingdom Parliament over constitutional amendment was maintained because Canadians could not agree on an amending formula, and the federal principle precluded that such supremacy be handed over to the federal parliament.

In making decisions on such issues, courts cannot be said to be restricted to all-or-nothing options. Their decisions are a matter of unwritten law which affords a great measure of flexibility. Legislative supremacy need not be envisaged as absolute and judges may find that underlying principles, some of which justify the recognition of that

---

[105] The conclusions of the Dominion-Provincial conference of 1931 were unanimous: Canada, House of Commons, "Debates", (1931) Vol. III, p. 3191.

supremacy, demand that it be qualified. With respect to the supremacy of the United Kingdom Parliament over the *B.N.A. Act*, a requirement of Canadian consent might very well have been decided to flow from the principle of independence, a principle freed from any limitations tied to the notion of Imperial commonweal. Formalistically speaking, consent was not legally required by the *Statute of Westminster* for United Kingdom statutes extending to Dominions. But this did not clash with the principle of independence because Dominions were given the power to repeal such Acts insofar as Dominion law was concerned. With respect to the *B.N.A. Act*, however, no such power of repeal was granted, and the continued legislative power of the United Kingdom Parliament *did* clash with the principle of independence insofar as that power was considered legally paramount. That continued legislative power was meant to safeguard the principle of federalism, and in that sense it was given priority over the principle of independence. But a requirement of Canadian consent was not incompatible with federalism, so long as Canadian consent was conceived as the consent of "Canada as a federally structured whole",[106] that is, so long as provincial consent was also required. In the *Patriation Reference*, a dual requirement of federal and provincial consent was perhaps the only way of reconciling the continued sovereignty of the United Kingdom Parliament with both independence and federalism as fundamental principles of Canadian constitutional law.

The conventions of the constitution could be said to have pointed to such requirements as constitutional imperatives derived from federalism and independence. Just as the finding of a legal requirement of provincial consent implied the finding of a legal requirement of Canadian consent (an implication which Martland and Ritchie's JJ.'s

---

[106] *The British North America Acts: The Role of Parliament* (the *Kershaw* report), *supra*, paras 14.3, 14.8, 14.9, 86, 111, 114.

dissent failed directly to address), so the majority's finding of a conventional requirement of provincial consent implied the finding of a requirement of Canadian consent at least as a matter of convention. Again, as the Supreme Court aptly put it, conventions "ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period".[107] With respect to provincial consent, the principle was federalism.[108] With respect to the requirement of Canadian consent which it involved, the principle was independence.[109] The finding of the Court on the issue of convention was a straightforward recognition that those principles were fundamental principles of the Canadian constitution. Could the Supreme Court make that recognition and stop short of acknowledging that those Canadian constitutional principles might have a bearing on legal rules? My answer is no.

As was noted in Chapter III, the federal "Constitution similar in Principle to that of the United Kingdom" referred to in the preamble to the *B.N.A. Act* must be taken as a coherent whole which the Supreme Court rightly recognised includes both convention and law.[110] There is only one set of principles which can be said to underlie the Canadian constitution, not two. Any other position involves an unwarranted diagnosis of constitutional schizophrenia.

Such diagnosis cannot come from the Supreme Court because that Court has, as was argued in Part one, taken up the role of "protector and

---

[107] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 880.

[108] *Id.*, at 905-09.

[109] *Id.*, at 880: "[T]he constitutional value or principle which anchors the conventions regulating the relationship between the members of the Commonwealth is the independence of the British colonies".

[110] *Id.*, at 883.

preserver" of the total constitution. This was done with the general consent of other political actors, to which the general respect paid to the Court's pronouncements by public authorities testifies. The total constitution, to use the metaphor of the Court, is the sum of constitutional law and constitutional convention.[111] In taking up that role beyond the traditional judicial resolution of "cases and controversies" involving individuals, the Court has effectively assumed for the Canadian polity the primary role in the open-ended task of shaping a coherent interpretation of the constitution.[112]

This task involves an "attempt to determine and give effect to the broad objectives and purposes of the Constitution";[113] it is the ongoing task of assessment and re-assessment, articulation and re-articulation, formulation and re-formulation of the open-ended principles underlying the constitutional structure. It is a matter, to use, again, the words of MacCormick, of *making sense* of the constitutional system as much as of finding and declaring what is already there.[114] This is the reason why the Court's pronouncement on the *reason* for a convention, the pronouncement that there is a constitutional principle making a practice *normative and obligatory*, cannot be a non-committal statement about a state of affairs which an external observer could observe and report. It is a participation in the shaping, or at least in the adopting, of that principle. The Court's pronouncement that federalism (and, indirectly, independence) was a fundamental principle of the Canadian

---

[111] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 883-85.

[112] See Chapter II.

[113] *Reference re Residential Tenancies Act*, [1981] 1 S.C.R. 714, 723.

[114] Neil MacCormick, *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978, p. 234.

constitution and could not be reconciled with unilateral action by federal (or British) authorities was a paradigmatic case of a statement from the internal viewpoint. It was the normative pronouncement of those who are by definition and *par excellence* committed to the principles (reasons, objectives and purposes) of the constitution.

Those principles afford the only normative material which courts can turn to when it comes to assess, in the principled fashion mandated by basic rules of adjudication, what the legal rules are at the level of the ultimate rule of competence. When it comes to that rule, as Hart put it, "there is no rule providing criteria for the assessment of its own validity".[115] But judges – this is one of the central arguments of this thesis – are not thereby thrown into a normative void. They are not thrown, either, into the unrestricted flow of normative reasoning which would result in a decision to which prevailing legal conceptions would attach, at least in a weak sense, the label of arbitrariness. The making of such decisions is regulated by fundamental rules of adjudication which require legal justification. While there are no legal rules for the assessment of the ultimate rule of competence, there are legal principles. The same rules of adjudication, it is suggested, require that a court of law engage in such assessment when the ultimate rule of competence is duly challenged in legal arguments properly put to a court (as was the case in the *Patriation Reference*). The Supreme Court might have refused to answer the questions put to them under the rules of adjudication prevailing in reference proceedings; but it was not open to them to answer and simply restate the challenged legal rule, the very rule at issue, without due consideration of the arguments of principle. And as I have argued, no principle could support the maintenance of

---

[115] H.L.A. Hart, *The Concept of Law*, Oxford: Clarendon Press, 1961, p. 104.

unqualified legislative supremacy vested in the United Kingdom Parliament. An unwritten legal rule which cannot survive the test of principles should go: effecting such changes is one of the most important functions of the highest court in a common law jurisdiction. And due consideration of surrounding conventions in the determination of the legal issue would have provided the Supreme Court with a very clear idea of what rules should replace or qualify the outdated rule: the conventions indicated the requirements of "the prevailing constitutional values or principles of the period",[116] that is, the constitutional principles now underlying the *ensemble* of constitutional rules, legal and conventional.

---

[116] *Reference re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753, 880.

TABLE OF CASES

Adair v. United States (1908), 208 U.S. 161 13
Aeronautic, Reference re, [1932] A.C. 54 (P.C.) 49
Agricultural Products Marketing Act, Reference re, [1978] 2 S.C.R. 1198 . . . . . 51, 58
Air Canada v. A.G. B.C., [1986] 2 S.C.R. 539 170
Alabama State Federation of Labor v. McAdory (1945), 325 U.S. 450 30
Alberta Statutes, Reference re, [1938] S.C.R. 100 322
Amax Potash Ltd v. Government of Saskatchewan, [1977] S.C.R. 576 . . . . . 55, 170, 260, 318
Arseneau v. R., [1979] 2 S.C.R. 136 130
Ashby v. White (1703), 14 How. St. Tr. 695 303
A.G. B.C. v. A.G. Can., see *British Columbia (A.G.)*...
A.G. Can. v. A.G. Alta, see *Canada (A.G.)*...
A.G. Can. v. A.G. B.C., see *Canada (A.G.)*...
A.G. Can. v. A.G. Ont. (Labour Conventions), see *Canada (A.G.)*...
A.G. Can. v. Atts G. Ont., Que, N.S., see *Canada (A.G.)*...
A.G. Can. v. Higbie, see *Canada (A.G.)*...
A.G. Hong Kong v. Ngyuen Shiu, [1983] 2 A.C. 629 (P.C.) 183
A.G. Man. v. Forest, see *Manitoba (A.G.)*...
A.G. New South Wales v. Trethowan, see *New South Wales (A.G.)*...
A.G. N.S. v. A.G. Can., see *Nova Scotia (A.G.)*...
A.G. Ont. v. A.G. Can., see *Ontario (A.G.)*...
A.G. Ont. v. Canada Temperance Federation, see *Ontario (A.G.)*...
A.G. Ont. v. Hamilton Street Ry, see *Ontario (A.G.)*...
A.G. Que v. Blaikie, see *Quebec (A.G.)*...
A.G. v. Jonathan Cape Inc., [1976] Q.B. 752 . . . . . 177, 277
Auckland Harbour Board v. R., [1924] A.C. 318 (P.C.) 147, 152, 155, 185
Australian Conservation Foundation v. The Commonwealth (1980), 146 C.L.R. 493 47
Australian Consolidated Press v. Uren, [1970] A.C. 590 (P.C.) 248, 294, 328
Authority of Parliament in Relation to the Upper House, Reference re, [1980] 1 S.C.R. 54 . . . . . 307, 324

Baker v. Carr (1962), 369 U.S. 186 46
Bank of Montreal v. Hall, [1990] 1 S.C.R. 121 119
Beauregard v. Canada, [1986] 2 S.C.R. 56 162
Bentley (ex parte), R. v. Secretary of State for the Home Department (1993), [1994] Q.B. 349 (D.C.) 181
Bhatnager v. Canada (Minister of Employment and Immigration), [1986] 2 F.C. 3 (T.D.); [1988] 1 F.C. 171 (A.D.); [1990] 2 S.C.R. 217 103
Binus v. R., [1967] S.C.R. 594 . . . . . 51, 58, 62
Blaikie, Quebec (A.G.) v., see *Quebec (A.G.)*...
Bonser v. La Macchia (1969), 122 C.L.R. 177 . . . . . 176, 333
Borowsky, Minister of Justice v., [1981] 2 S.C.R. 575 . . 66, 279, 304
Brant Dairy v. Milk Commission of Ontario, [1973] S.C.R. 131 . . . 58
British Columbia Motor Vehicle Act, Reference re,

[1985] 2 S.C.R. 486 80
British Coal Corp. v. R., [1935] A.C. 500 (P.C.) 252, 333
British Columbia (A.G.) v. Canada (A.G.), [1914] A.C. 153 (P.C.) . 45
British Columbia Power Corp. v. British Columbia Electric Co., [1962] S.C.R. 642 170
British Railway Board v. Pickin, [1974] A.C. 765 (H.L.) 73

Campbell v. Hall (1774), Lofft 655 . . . . . 174, 329
Can. Post Corp. v. L.C.U.C., Local 12 (1987), 15 B.C.L.R. (2d) 356 (S.C.) 102
Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 236 . . . . . 67, 70, 86, 122, 280
C.P.R. v. Town of Estevan, [1957] S.C.R. 365 . . . . . 50, 53
Canada (A.G.) v. Alberta (A.G.), [1916] 1 A.C. 588 (P.C.) 49
Canada (A.G.) v. British Columbia (A.G.), [1930] A.C. 111 (P.C.) . 49
Canada (A.G.) v. Higbie, [1945] S.C.R. 385 50
Canada (A.G.) v. Ontario (A.G.) (Labour Conventions), [1937] A.C. 328 (P.C.) 140, 299, 323
Canada (A.G.) v. Ontario, Quebec & Nova Scotia (Atts G.), [1898] A.C. 700 (P.C.) 47, 49
Canada (Minister of Finance) v. Finlay, [1986] 2 S.C.R. 607 . . 54, 279
Chic Fashions (West Wales) Ltd v. Jones, [1968] Q.B. 299 64
Churchward v. R. (1865), L.R. 1 Q.B. 173 149
Coffin, R. v.; Reference re, [1956] S.C.R. 186 53
Collins, R. v., see *R. v. ...*
Commonwealth and Central Wool Committee v. Colonial Combing, Spinning and weaving Co. (1922), 31 C.L.R. 421 175
Commonwealth v. Krelinger and Fernau Ltd (1926), 37 C.L.R. 393 . . 331
Copyright Owners Reproduction Society Ltd v. E.M.I. (Australia) Pty (1958), 100 C.L.R. 597 . . . . . 96, 130
Council of Civil Service Unions v. Minister for the Civil Service, [1985] A.C. 374 (H.L.(E.)) 180
Criminal Code, Reference re (1910), 43 S.C.R. 434 48
Criminal Injuries Compensation Board, ex parte Lain,, see *R. v. ...*
Crossman Diaries, see *A.G. United Kinmdom v. Jonathan Cape Inc.*
Cunningham v. Canada, [1993] 2 S.C.R. 143 85
Curr v. R., [1972] S.C.R. 889 249

Dersch, R. v., see *R. v. ...*
Disallowance and Reservation of Provincial Legislation, Reference re, [1938] S.C.R. 71 . . . . . 93, 144
Dyson v. United Kingdom (A.G.), [1911] K.B. 410 66

Eadie v. Township of Brandford, [1967] S.C.R. 573 55
Ellen Street Estates Ltd v. Minister of Health, [1934] 1 K.B. 590 252
Everett (ex parte), R. v. Secretary of State for Foreign and Commonwealth Affairs (1988), [1989] Q.B. 811 181

Fielding v. Thomas, [1896] A.C. 600 161
Finlay, Canada (Minister of Finance) v., [1986] 2 S.C.R. 607 . . . 279
Finlay v. Canada (Minister of Finance), [1990] 2 F.C. 790 (A.D.) . 54
Fitzgerald v. Muldoon, [1976] 2 N.Z.L.R. 615 164

Fleming v. Atkinson, [1959] S.C.R. 513 328
Foreign Secretary, ex parte Everett, R. v., see *R. v.* ...
Forest, Manitoba (A.G.) v., see *Manitoba (A.G.)*...
Frey v. Fedoruk, [1950] S.C.R. 517 168

Golak Nath v. State of Punjab, [1967] A.I.R. 1642 (S.C.) 287
Gouriet v. Union of Post Office Workers, [1978] A.C. 435 (H.L.(E.)) 68
Greffe, R. v., see *R. v.* ...

Hammer v. Dagenhart (1918), 247 U.S. 252 13
Hours of Labour, Reference re, [1925] S.C.R. 505 50
Hull v. M'Kenna, [1926] I.R. 402 (P.C.) 111, 132, 134

Ibralebbe v. R., [1964] A.C. 900 (P.C.) 216
Indian Association of Alberta (ex parte), Secretary of State for Foreign and Commonwealth Affairs; R. v., [1982] Q.B. 892 . . . 152, 185
Indira v. Rajnarain, [1975] A.I.R. 2299 (S.C.) 289
In re M. see *M. v. Home Office*.
Irwin, R. v., [1926] Ex. C.R. 127 73

Jonathan Cape Inc., A.G. v., [1976] Q.B. 752 . . . . . 177, 277
Judiciary and Navigation Acts, In re (1921), 29 C.L.R. 257 . . 45, 69

Kerley v. London and Lake Erie Transportation Co. (1912), 6 D.L.R. 189 (Ont. H.C.) 40
Kesavananda v. State of Kerala, [1973] A.I.R. 1461 (S.C.) 287
Kielly v. Carson (1842), 13 E.R. 225 (P.C.) 308

Lain (ex parte), R. v. Criminal Injuries Compensation Board, [1967] 2 Q.B. 864 181
Landers v. Woodworth (1878), 2 S.C.R. 158 166
Lavell v. Canada (A.G.), [1974] S.C.R. 1349 249
Linkletter v. Walker (1965), 381 U.S. 618 82
London and Westminster Bank Case (1834), 6 E.R. 1127 44
Lount Corp. v. Canada (A.G.), [1984] 1 F.C. 332 (T.D.), affd. [1985] 2 F.C. 185 (C.A.) 54
Lovibond v. Governor General of Canada, [1930] A.C. 717 170
Lower Mainland Dairy Products Sales Adjustment Committee v. Crystal Dairy, [1933] A.C. 168 58

M. v. Home Office (1993), [1994] 1 A.C. 377 (H.L.(E.)) 54
Macbeath v. Haldimand (1786), 99 E.R. 1036 149
M'Naghten's Case (1843), 8 E.R. 718 44
Madzimbamuto v. Lardner-Burke, [1969] 1 A.C. 645 (P.C.) 93, 95
Manitoba (A.G.) v. Forest, [1979] 2 S.C.R. 1032 324
Manitoba Education, Reference re (1894), 22 S.C.R. 577 . . . . 47, 52
Manitoba Language Rights, Reference re, [1985] 1 S.C.R. 721 . . 47, 56, 65, 71, 88, 108, 111, 146, 257, 283, 291
Manuel v. Attorney General (1982), [1983] Ch. 77 (Ch.D.);

95 (C.A.) 246, 251
Mapp v. Ohio (1961), 367 U.S. 643 82
Marbury v. Madison (1803), 1 Cranch 137 71
Marriage Laws, Reference re (1912), 46 S.C.R. 132 47
McNeil, Nova Scotia Board of Censors v., [1976] 2 S.C.S. 265 . . . 66, 279, 304
Milk Board v. Hillside Farm Dairy Ltd (1963), 43 W.W.R. 131 (B.C. C.A.) 62
Miller and Cockriell, R. v., [1977] 2 S.C.R. 680 249
Minerva Mills Ltd v. Union, [1980] A.I.R. 1461 (S.C.) 289
Minister of Justice v. Borowsky, [1981] 2 S.C.R. 575 . . 66, 279, 304
Mitchell v. Director of Public Prosecutions, [1986] L.R.C. Const. 35 205
Moore v. Hewitt, [1947] K.B. 831 60
Multiple Access Ltd v. McCutcheon, [1982] 2 S.C.R. 161 118
Muskrat v. United States (1911), 219 U.S. 346 45

Nadan v. R., [1926] A.C. 482 (P.C.) 332
Natural Products Marketing Act, Reference re, [1936] S.C.R. 398 . . 49
New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319 . . . . . 73, 159, 210
New South Wales v. Bardolph (1934), 52 C.L.R. 455 149
New South Wales v. The Commonwealthh (1975), 135 C.L.R. 337 . 176, 333
Nicholas v. Penny, [1950] 2 K.B. 466 60
Nova Scotia (A.G.) v. Canada (A.G.), [1951] S.C.R. 31 321
Nova Scotia (Board of Censors) v. McNeil., [1976] 2 S.C.S. 265 . . 66, 279, 304
Nova Scotia Pharmaceutical Society, R. v., [1992] 2 S.C.R. 606 . 272, 276, 280

Oakes, R. v., [1986] 1 S.C.R. 103 85
Objection to a Resolution to Amend the Constitution, Reference re, [1982] 2 S.C.R. 793 . . . . . 97, 105, 246, 251, 325
Ontario (A.G.) v. Canada (A.G.), [1894] A.C. 189 (P.C.) 49
Ontario (A.G.) v. Canada (A.G.), [1896] A.C. 348 (P.C.) 49
Ontario (A.G.) v. Canada (A.G.), [1912] A.C. 571 (P.C.) 49
Ontario (A.G.) v. Canada (A.G.), [1947] A.C. 127 (P.C.) 333
Ontario (A.G.) v. Canada Temperance Federation, [1946] A.C. 193 (P.C.) 51
Operation Dismantle v. R., [1985] 1 S.C.R. 441 . . . . . 66, 75, 87

Patriation Reference, see *Reference re Resolution to Amend the Constitution.*
Paty, R. v., (1703), 14 How. St. Tr. 849 303
Penikett v. R., [1988] 2 W.W.R. 481 (Y.T. C.A.) 291
Pickin, British Railway Board v., [1974] A.C. 765 73
Practice Statement (Judicial Precedent), [1966] 3 All E.R. 77 (H.L.) 61
Prebble v. New Zealand Television Ltd (1994), [1995] 1 A.C. 321 (P.C.) 164
Proclamations Case (1611), 12 Co. Rep. 74 181
Prohibitions del Roy (1607), 12 Co. Rep. 63 175
Provincial Fisheries, Reference re (1896), 26 S.C.R. 444 . . . 47, 52

Quebec Veto Reference, see *Reference re Objection to a Resolution to Amend the Constitution*.
Quebec (A.G.) v. Blaikie, [1979] 2 S.C.R. 1016 324
Quebec (A.G.) and Canada (A.G.) (Re renvoi à la Cour d'appel relatif à une résolution concernant la constitution du Canada), [1982] C.A. 33 (Que. C.A.) 58
Questions concerning the Amendment of the Constitution of Canada, Reference re, [1981] 2 W.W.R. 193 (Man. C.A.) 174

R. v. Collins, [1987] 1 S.C.R. 265 83
R. v. Criminal Injuries Compensation Board, ex parte Lain, [1967] 2 Q.B. 864 181
R. v. Dersch, [1993] 3 S.C.R. 768 84
R. v. Greffe, [1990] 1 S.C.R. 755 84
R. v. Irwin, [1926] Ex. C.R. 127 73
R. v. Knuller, [1973] A.C. 435 61
R. v. Miller and Cockriell, [1977] 2 S.C.R. 680 249
R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606 . . 272, 276, 280
R. v. Oakes, [1986] 1 S.C.R. 103 85
R. v. Paty (1703), 14 How. St. Tr. 849 303
R. v. Ruddick (1928), 62 O.L.R. 248 (S.C.) 314
R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta, [1982] Q.B. 892 . . . . 152, 185
R. v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett (1988), [1989] Q.B. 811 181
R. v. Secretary of State for the Home Department, ex parte Bentley (1993), [1994] Q.B. 349 (D.C.) 181
R. v. Swain, [1991] 1 S.C.R. 933 85
Re the Judiciary and Navigation Acts (1921), 29 C.L.R. 257 . . 45, 69
Re Shoesmith, [1938] 2 K.B. 637 57
Reference re Aeronautic, [1932] A.C. 54 49
Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198 . . . . . 51, 58
Reference re Alberta Statutes, [1938] S.C.R. 100 322
Reference re Authority of Parliament in Relation to the Upper House, [1980] 1 S.C.R. 54 . . . . . 307, 324
Reference re British Columbia Motor Vehicle Act, [1985] 2 S.C.R. 486 80
Reference re Criminal Code (1910), 43 S.C.R. 434 48
Reference re Disallowance and Reservation of Provincial Legislation, [1938] S.C.R. 71 . . . . . 93, 144
Reference re Hours of Labour, [1925] S.C.R. 505 50
Reference re Manitoba Education (1894), 22 S.C.R. 577 . . . . . 47, 52
Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 . . 47, 56, 65, 71, 88, 108, 111, 146, 257, 283, 291
Reference re Marriage Laws (1912), 46 S.C.R. 132 47
Reference re Natural Products Marketing Act, [1936] S.C.R. 398 . . 49
Reference re Objection to a Resolution to Amend the Constitution, [1982] 2 S.C.R 793 . . . . . 97, 105, 246, 251, 325
Reference re Provincial Fisheries (1896), 26 S.C.R. 444 . . . . 47, 52
Reference re Questions concerning the Amendment of the Constitution of Canada, [1981] 2 W.W.R. 193 (Man. C.A.) 174
Reference re R. v. Coffin, [1956] S.C.R. 186 53
Reference re References (1910), 43 S.C.R. 543 . . . . . 43, 47, 108
Reference re Residential Tenancies Act, [1981] 1 S.C.R. 714 . . 63, 109

Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 . . . . . 54, 88, 105, 116, 130, 160, 227, 240, 247, 262, 277, 292, 302, 310, 315, 325, 331, 336
Reference re Saskatchewan Natural Resources, [1931] S.C.R. 263 . . 50
Reference re Sunday Labour (1905), 35 S.C.R. 581 48
Reference re Wartime Leasehold Regulations, [1950] S.C.R. 124 . . . 50
Reference re Waters and Water-Powers, [1929] S.C.R. 200 63
Reference re Weekly Rest in Industrial Undertakings Act (Labour Conventions), [1936] S.C.R. 461 . . . . . 49, 139, 168, 331
References, Reference re (1910), 43 S.C.R. 543 . . . . . 43, 47, 108
Residential Tenancies Act, Reference re , [1981] 1 S.C.R. 714 . . . . . 63, 109
Resolution to Amend the Constitution, Reference re, [1981] 1 S.C.R. 753 . . . . . 54, 88, 105, 116, 130, 160, 227, 240, 247, 262, 277, 292, 302, 310, 315, 325, 331, 336
Robins v. National Trust Co, [1927] A.C. 515 58
Rodriguez v. B.C. (A.G.), [1993] 3 S.C.R. 519 . . . . . 85, 285
Rookes v. Barnard, [1964] A.C. 1129 328
Ruddick, R. v., (1928), 62 O.L.R. 248 (S.C.) 314

Sajjan Singh v. State of Rajasthan, [1965] A.I.R. 845 (S.C.) . . . 287
Saskatchewan Natural Resources, Reference re, [1931] S.C.R. 263 . . 50
Schachter v. Canada, [1992] 2 S.C.R. 679 . . . . . 56, 285
Searle v. Wallbank, [1947] A.C. 341 328
Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta, R. v., [1982] Q.B. 892 . . . . 152, 185
Senate Reference, see *Reference re Authority of Parliament in Relation to the Upper House*.
Shankari Prasad v. Union of India, [1951] A.I.R. 458 (S.C.) 287
Shoesmith, In re, [1938] 2 K.B. 637 57
Sibbeston v. N.W.T. (A.G.), [1988] 2 W.W.R. 501 (N.W.T.C.A.) . . . 291
Sinclair v. Quebec, [1992] 1 S.C.R. 579 285
Singh v. Canada (Minister of Employment and Immigration), [1985] 1 S.C.R. 177 250
Solosky v. R., [1980] 1 S.C.R. 821 67
State v. Dosso, [1958] S.C. Pak. 533 207
Stockdale v. Hansard (1839), 112 E.R. 1112 (Q.B.) . 159, 166, 169, 303
Stuart v. Bank of Montreal (1909), 41 S.C.R. 516 58
Sunday Labour, Reference re (1905), 35 S.C.R. 581 48
Sunday Times Case (1979), Eur. Ct. H.R. Ser. A, No. 30; (sub nom. Sunday Times v. United Kingdom) 2 E.H.R.R. 245 272
Swain, R. v., [1991] 1 S.C.R. 933 85

Thorson v. Canada (A.G.), [1975] 1 S.C.S. 138 . . . . 66, 86, 279, 304

Uganda v. Matovu, [1966] E. Afr. L.R. 514 (Uganda) 205
Uniacke v. Dickson (1848), 2 N.S.R. 287 (S.C. N.S.) 164, 309
Union Colliery Co. v. British Columbia (A.G.) (1897), 27 S.C.R. 637 . . . . . 43, 62
United Australia Ltd v. Barclays Bank Ltd, [1941] A.C. 1 (P.C.) . . 184
Uren, Australian Consolidated Press v., [1970] A.C. 590 . . . . . 248, 294, 328

Valley Forge Christian College v. Americans United for Separation of Church and State Inc. (1982), 454 U.S. 752 69
Vauxhall Estates Ltd v. Minister of Health, [1932] 1 K.B. 733 . . . 252

Wartime Leasehold Regulations, Reference re, [1950] S.C.R. 124 . . 50
Waters and Water-Powers, Reference re, [1929] S.C.R. 200 63
Weekly Rest in Industrial Undertakings Act (Labour Conventions), Reference re, [1936] S.C.R. 461 . . . . . 49, 139, 168, 331
Wynne-Finch v. Chaytor, [1903] 2 K.B. 475 57

Young v. Bristol Aeroplane Co. Ltd, [1944] K.B. 718 . . . . . 57, 61

STATUTORY AND PREROGATIVE INSTRUMENTS

Bill of Rights, 1688, 1 Gul. & Mar., c. 2 (Eng.).
British North America (No. 2) Act, 1949, 13 Geo. VI., c. 81 (U.K.), now repealed.
British North America Act, 1867, now *Constitution Act, 1867.*

Canada Act 1982, 1982, c. 11 (U.K.).
Canadian Bill of Rights, R.S.C. (1985), App. III.
Canadian Citizenship Act, 1946, 10 Geo. VI, c. 15 (Can.).
Colonial Laws Validity Act, 1865, 28 & 29 Vict., c. 63 (U.K.).
Commonwealth of Australia Constitution Act, 63 & 64 Vict., c. 12 (U.K.).
Constitution Act, 1867, 30 & 31 Vict., c. 63 (U.K.).
Constitution Act, 1982, being Schedule B of the *Canada Act 1982*, 1982, c. 11 (U.K.).

Diplomatic Immunities Act, 1953, 1-2 Eliz. II, c. 54 (Can.).

European Communities Act 1972, 1972, c. 68 (U.K.).

Great Seal Act, 1939, 3 Geo VI c. 22 (Can.).

Interpretation Act, R.S.C. (1985), c. I-21.

Judicial Committee Act, 1833, 3 & 4 Wm IV, c. 41 (U.K.).

Letters Patent constituting the Office of Governor-General and Commander-in-Chief of the Commonwealth of Australia, Statutory Rules and Orders (1900), Appendix, p. 928 (U.K.); Gazette, 1st Jan. 1901, No 1, p. 2, reproduced in Commonwealth Rules, Regulations and By-Laws, (1901-05), Vol. 1, p. 3.
Letters Patent constituting the Office of Governor General of Canada, Statutory Rules and Orders (1947), Vol I, Part 2, p. 2679 (U.K.); Canada Gazette (1947) Part I, Vol. 81, p. 3104, reproduced in R.C.S. (1985) App. II, No 31.

Mineral Taxation Act, R.S.S. (1965), c. 64 (Sask.).

Parliament of Canada Act, R.S.C. (1985), c. P-1.
Parliament Act, 1911, 1 & 2 Geo. V, c. 13 (U.K.).
Parliament Act, 1949, 12, 13 & 14 Geo VI, c. 103 (U.K.).
Proceedings Against the Crown Act, R.S.S. (1965), c. 87 (Sask.).
Publication of Statutes Act, R.S.C. (1927), c. 2, now R.S.C. (1985), c. S-21.
An Act to Amend the Publication of Statutes Act, (1947) 11 Geo. VI, c. 44 (Can.).

Senate and House of Commons Act, R.S.C. (1970), c. S-8, now *Parliament of Canada Act.*
An Act to define the privileges, immunities and powers of the Senate and House of Commons, 1868, 32 Vict. c. 23 (Can.).
Act of Settlement, 1701, 13 & 14 Gul. III, c. 6 (Eng.).
Statute of Westminster, 1931, 22 Geo. V, c. 4 (U.K.).
Statute of Westminster Adoption Act, 1942, (1942), No. 56 (Aus.).

An Act to establish a Supreme Court and a Court of Exchequer for the Dominion of Canada, 1875, 38 Vict. c. 11 (Can.), now *Supreme Court Act*.

An Act to amend the Supreme Court Act and the Criminal code, 1956 4 & 5 Eliz. II, c. 48 (Can.).

Supreme Court Act, R.S.C. (1952), cc 259; 335, now R.S.C. (1985) c. S-26.

Supreme Court Act, R.S.C. (1985) c. S-26.

Supreme Court of Judicature Act, 1873, 36 & 37 Vict. c. 66, amnd (1875) 38 & 39 Vict., c. 77 (U.K.).

Act for the Union of the Two Kingdoms of England and Scotland, 1708, 6 Ann., c. 11 (Eng.); (1707), Ann., c. 7 (Scot.).

Act for the Union of Great Britain with Ireland, 1800, 40 Geo. III, c. 67 (U.K.).

OFFICIAL DOCUMENTS

Australia, Law Reform Commission, "Access to the Courts. Standing: Public Interest Suits", Paper No 4, Canberra, 1977.

Canada, House of Commons, "Debates", (1931), Vol. III, pp. 3191-3208.

Canada, Senate, "Report on the British North America Act", by W.F. O'Connor, Ottawa, 1939 (reprinted 1961).

Canada, House of Commons, "Debates", (1943), Vol. II, p. 1829.

Canada, House of Commons, "Debates", (1947), Vol. IV, p. 3433.

Canada, Minister of Justice, "The Amendment of the Constitution of Canada", by Hon. Guy Favreau, Ottawa, February 1965.

Canada, Parliament, "Final Report of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada", Ottawa, 16 March 1972.

Canada, Federal-Provincial Relations Office, "The Canadian Constitution and Constitutional Amendment", by Hon. Marc Lalonde & Hon. Ron Basford, Ottawa, August 1978.

Canada, Parliament, "Minutes and Proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada", 30th Parl. (1978) 3d Session, 19 Sept. 1978.

Canada, Prime Minister's Office, "Proposed Resolution for a Joint Address to Her Majesty the Queen respecting the Constitution of Canada", Ottawa, 2 Oct. 1980.

Canada, House of Commons, "Debates", (1980-81), Vol. VI, p. 6682.

Canada, Minister of Justice, "The Role of the United Kingdom Parliament in the Amendment of the Canadian Constitution", Background Paper, Ottawa, March 1981.

Canada, Department of Justice, "Proposed constitutional resolution filed by the Deputy Attorney General of Canada with the Supreme Court of Canada", Ottawa, 24 April 1981.

Canada, Minister of Justice, "Reform of the Senate", A discussion paper presented to the Special Joint Committee of the Senate and House of Commons on Senate Reform, Ottawa, 16 June 1993.

U.K., "Summary of Proceedings", Imperial Conference, 1926, Cmd 2768 XI (1926).

U.K., Secretary of State for Dominion Affairs, "Report of the Conference on the Operation of Dominion Legislation and Merchant Shipping Legislation", Cmd 3479 XVI (1929-30).

U.K., Secretary of State for Dominion Affairs, "Summary of Proceedings", Imperial Conference, 1930, Cmd 3717 XIV (1930-31).

U.K., H.C., "British North America Acts: The Role of Parliament", First Report from the Foreign Affairs Committee, HCP 42 (1980-81), 30 Jan. 1981 (Chair: Anthony Kershaw).

U.K., H.C., "Supplementary Report on the British North America Acts: The Role of Parliament", Second Report from the Foreign Affairs Committee, HCP 295 (1980-81), 15 Apr. 1981 (Chair: Anthony Kershaw).

U.K., H.C., "Third Report on the British North America Acts: The Role of Parliament", First Report from the Foreign Affairs Committee, HCP 128 (1981-82), 22 Dec. 1981 (Chair: Anthony Kershaw).

U.K., H.C., "Observations by the Secretary of State for Foreign and Commonwealth Affairs on the First Report from the Foreign Affairs Committee", Cmnd 8450 (1981).

BIBLIOGRAPHY

Alchourrón, C.E. & E. Bulygin, "Limits of Logic and Legal Reasoning" in A.A. Martino (ed.), *Expert Systems in Law*, London: North-Holland, 1992, p. 9.

Alexander, L.A. & M.D. Bayles, "Hercules or Proteus? The Many Theses of Ronald Dworkin" (1980) 5 *Social Theory and Practice* 267.

Allan, T.R.S., "Law, Convention, Prerogative: Reflections Prompted by the Canadian Constitutional Case" (1986) 45 *Cambridge Law Journal* 305.

Allan, T.R.S., *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism*, Oxford: Clarendon Press, 1993.

Annual Survey of Commonwealth Law (1973), ed. by H.W.R. Wade, London: Butterworths, 1974.

Anonymous, "Advisory Opinions on the Constitutionality of Statutes" (1956) 69 *Harvard Law Review* 1302.

Attwooll, E. (ed.), *Shaping Revolutions*, Aberdeen: Aberdeen University Press, 1991.

Bakan, J., "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 *Osgood Hall Law Journal* 123.

Bale, G., "Casting Off the Mooring Ropes of Binding Precedent" (1980) 58 *Canadian Bar Review* 255.

Banting, K.J. & R. Simeon (eds), *And No One Cheered: Federalism, Democracy and the Constitution Act*, Toronto: Methuen, 1982.

Bartholomew, G.H., "Authority of Privy Council Decisions" (1952) 1 *International and Comparative Law Quarterly* 392.

Barwise, J. & J. Etchemendy, *The Liar: An Essay on Truth and Circular Propositions*, Oxford: Oxford University Press, 1987.

Basu, D.D., *Shorter Constitution of India*, New Delhi: Prentice-Hall, 1988.

Beetz, J., "Le contrôle juridictionnel du pouvoir législatif et les droits de l'homme dans la constitution du Canada" (1958) 18 *Revue du Barreau* 361.

Bell, J., *Policy Arguments in Judicial Decisions*, Oxford: Clarendon Press, 1983.

Berryman, J. (ed.), *Remedies: Issues and Perspective*, Toronto: Carswell, 1991.

Bickenbach, J.E., "Legal Hermeneutics and the Possibility of Legal Critique" in E. Simpson (ed.), *Anti-foundationalism and Practical Reasoning: Conversations between Hermeneutics and Analysis*, Edmonton: Academic Printing & Publishing, 1987, p. 217

Bingham, J.W., "What is the Law?" (1912) 11 *Michigan Law Review* 1.

Blache, P., "La Cour suprême et le rapatriement de la constitution: l'impact des perceptions différentes de la question" (1981) 22 *Cahiers de Droit* 649.

Blackshield, A., "'Practical Reason' and 'Conventional Wisdom': The House of Lords and Precedent" in L. Goldstein (ed.), *Precedent in Law*, Oxford: Clarendon Press, 1987, p. 107.

Blackstone, W., *Commentaries on the Laws of England*, Book I, 8th ed., Oxford: Clarendon Press, 1778.

Bradley, A.W., "The Sovereignty of Parliament - in Perpetuity?" in J. Jowell & D. Oliver (eds), *The Changing Constitution*, 2d ed., Oxford: Oxford University Press, 1989, p. 25.
Brierly, J.E.C. & R. David, *Major Legal Systems in the World Today*, 1st ed., London: Stevens, 1966.
Bronaugh, R., "Persuasive Precedent" in L. Goldstein (ed.), *Precedent in Law*, Oxford: Clarendon Press, 1987, p. 217.
Bulygin, E., "Time and Validity" in A.A. Martino (ed.), *Deontic Logic, Computational Linguistics and Legal Information Systems*, London: North-Holland, 1982, p. 65.

Cahill, B., "How Far English Laws are in Force Here: Nova Scotia's First Century of Reception Law Jurisprudence" (1993) 42 *University of New Brunswick Law Journal* 111.
Cappelletti, M., *The Judicial Process in Comparative Perspective*, Oxford: Clarendon Press, 1989.
Cairns, A.C., "The Judicial Committee and its Critics" (1971) 4 *Canadian Journal of Political Science* 301.
Chevrette, F. & H. Marx, *Droit constitutionnel*, Montreal: P.U.M., 1982.
Cohen, M. (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth, 1984.
Colvin, E., "Legal Theory and the Paramountcy Rule" (1979) 25 *McGill Law Journal* 82.
Colvin, E., "Constitutional Jurisprudence in the Supreme Court of Canada" (1982) 4 *Supreme Court Law Review* 3.
Conklin, W.E., "*Pickin* and its Applicability to Canada" (1975) *University of Toronto Law Journal* 193.
Cote, J.E., "The Reception of English Law" (1977) 15 *Alberta Law Review* 29.
Cross, R., *Precedent in English Law*, 3d ed., Oxford: Clarendon Press, 1977.
Curtis, G.F., "Stare Decisis at Common Law in Canada" (1978) 12 *University of British Columbia Law Review* 1.

David, R., *Les grands systèmes de droit contemporains*, 1st ed., Paris: Dalloz, 1964.
Davis, E., *Representations of Commonsense Knowledge*, San Mateo (Ca): Morgan Kaufmann, 1990.
DeMontigny, Y., "Preuve d'une convention constitutionnelle devant les tribunaux - Modification de l'Acte de l'Amérique du Nord - Rôle du Québec" (1983) 43 *Revue du Barreau* 1133.
Detmold, M.J., *The Australian Commonwealth: A Fundamental Analysis of its Constitution*, Sydney: The Law Book Co., 1985.
Décary, R., "Le pouvoir judiciaire face au jeu politique" in P.H. Russell et al. (eds), *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment*, Kingston: Institute on Intergovernmental Relations (Queen's Univ.), 1982, p. 33.
Dias, R.W.M., *Jurisprudence*, 5th ed., London: Butterworths, 1985.
Dicey, A.V., *Introduction to the Law of the Constitution*, 8th ed., London: MacMillan, 1927.
Dixon, O., "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *Australian Law Journal* 240.
Douzimas, C. & R. Warrington, *Postmodern Jurisprudence: The Law of Text in the Texts of Law*, London: Routledge, 1991.

Duplé, N., "La Cour suprême et le rapatriement de la constitution: la victoire du compromis sur la rigueur" (1981) 22 *Cahiers de Droit* 619.
Dworkin, R., "The Model of Rules" (1967) 35 *University of Chicago Law Review* 14.
Dworkin, R., *Taking Rights Seriously*, London: Duckworth, 1977.
Dworkin, R., "'Natural' Law Revisited" (1982) 34 *University of Florida Law Review* 165.
Dworkin, R., "A Reply by Ronald Dworkin" in M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth, 1984, p. 247.
Dworkin, R., *Law's Empire*, London: Fontana, 1986.
Dworkin, R., *A Matter of Principle*, Oxford: Clarendon Press, 1986.
Dworkin, R., "Legal Theory and the Problem of Sense" in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy*, Oxford: Clarendon Press, 1987, p. 1.
Dworkin, R. "Hart's Posthumous Reply", Paper circulated in the *Program for the Study of Law, Philosophy & Social Theory* at New York University School of Law, September 1994.

Eekelaar, J.M., "Principles of Revolutionary Legality" in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence*, 2d series, Oxford: Clarendon Press, 1973, p. 22.
Esser, J., *Grundsatz und Norm in der richterlichen Vorbildung des Privatrechts*, Tübingen: Mohr, 1956.

Favoreu, L. (ed.), *Cours constitutionnelles européennes et droits fondamentaux*, Paris: Economica, 1982.
Finnis, J., "Revolutions and Continuity of Law" in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence*, 2d series, Oxford: Clarendon Press, 1973, p. 44.
Finnis, J., "Scepticism, Self-Refutation and the Good of Truth" in P.M.S. Hacker & J. Raz (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, Oxford: Clarendon Press, 1977, p. 247.
Finnis, J., *Natural Law and Natural Rights*, Oxford: Clarendon Press, 1980.

Finnis, J., "The Responsibilities of the United Kingdom Parliament and Government under the Australian Constitution" (1983) 9 *Adelaide Law Review* 91.
Finnis, J., "A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence" (1985) 71 *Proceedings of the British Academy* 303.
Finnis, J., "Natural Law and Legal Reasoning" in R.P. George (ed.), *Natural Law Theory*, Oxford: Clarendon Press, 1992, p. 134.

Gavison, R. (ed.), *Issues in Contemporary Legal Philosophy*, Oxford: Clarendon Press, 1987.
George, R.P. (ed.), *Natural Law Theory*, Oxford: Clarendon Press, 1992.
Gélinas, F., "La primauté du droit et les effets d'une loi inconstitutionnelle" (1988) 67 *Canadian Bar Review* 455.
Gérin-Lajoie, P., *Canadian Constitutional Amendment*, Toronto: University of Toronto Press, 1950.
Gérin-Lajoie, P., "Du pouvoir d'amendement constitutionnel au Canada" (1951) 29 *Canadian Bar Review* 1136.
Goldstein, L., "Four Alleged Paradoxes in Legal Reasoning" (1979) 38 *Cambridge Law Journal* 373.

Goldstein, L. (ed.), *Precedent in Law*, Oxford: Clarendon Press, 1987.
Gordon, D.M., "The Canadian Bill of Rights" (1961) 4 *Canadian Bar Journal* 431.
Gray, C.B., "Amendment: Legal Continuity and Ongoing Revolution" in E. Attwooll (ed.), *Shaping Revolutions*, Aberdeen: Aberdeen University Press, 1991, p. 47.

Hacker, P.M.S. & J. Raz (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, Oxford: Clarendon Press, 1977.
Halsbury's Laws of England, 4th ed., Vol. 6 (Reissue 1991).
Hart, H.L.A., *The Concept of Law*, Oxford: Clarendon Press, 1961.
Hart, H.L.A., "Self-Referring Laws" in F. Lejman et al. (eds), *Festskrift Tillägnad Karl Olivecrona*, Stockholm: Kungl, Boktryckeriet, Norstedt & Söner, 1964,
Hart, H.L.A., "Comment on 'Legal Theory and the Problem of Sense'" in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy*, Oxford: Clarendon Press, 1987, p. 35.
Hart, H.L.A., *The Concept of Law*, 2d ed. with postscript, ed. by J. Raz & P. A. Bulloch, Oxford: Clarendon Press, 1993.
Heard, A., *Canadian Constitutional Conventions: The Marriage of Law and Politics*, Toronto: Oxford University Press, 1991.
Hicks, J.C., "The Liar Paradox in Legal Reasoning" (1971) 29 *Cambridge Law Journal* 275.
Hoerster, N., "On Alf Ross' Alleged Puzzle in Constitutional Law" (1972) 81 *Mind* 422.
Hogg, P.W., "Constitutional Reform" (1981) 19 *Alberta Law Review* 335.
Hogg, P.W., "Constitutional Law - Amendment of the British North America Act - Role of the Provinces" (1982) 60 *Canadian Bar Review* 307.
Hogg, P.W., *Constitutional Law of Canada*, 3rd ed., Toronto: Carswell, 1992.
Hohfeld, W.N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, ed. by W.W. Cook, Westport (Ct): Greenwood Press, 1919.
Holdsworth, W.S., "The conventions of the eighteenth century constitution" (1932) 17 *Iowa Law Review* 161.
Honoré, A.M., "Legal Reasoning in Rome and Today" (1973) 4 *Cambrian Law Review* 58.
Honoré, A.M., *Making Law Bind*, Oxford: Clarendon Press, 1987.
Hood Phillips, O., "Constitutional Conventions: A Conventional Reply" (1964) 8 *Journal of the Society of Public Law Teachers* (New Series) 60.
Hood Phillips, O., "Constitutional Conventions: Dicey's Predecessors" (1966) 29 *Modern Law Review* 137.
Hudson, M.O., "Advisory Opinions of National and International Courts" (1924) 37 *Harvard Law Review* 970.
Huffman, J.L. & M. Saathoff, "Advisory Opinions and Canadian Constitutional Development: The Supreme Court's Reference Jurisdiction" (1990) 74 *Minnesota Law Review* 1251.

Jackett, W.R., "Foundations of Canadian Law in History and Theory" in O.E. Lang (ed.), *Contemporary Problems of Public Law in Canada*, Toronto: University of Toronto Press, 1968, p. 3.
Jennings, I., *The Law and the Constitution*, 5th ed., London: University of London Press, 1959.
Joseph, P.A. (ed.), *Essays on the Constitution*, Sydney: Law Book Co., 1995 (forthcoming).

Kay, R.S., "Courts as Constitution-Makers in Canada and the United States" (1982) 4 *Supreme Court Law Review* 21.
Kay, R.S., "The Creation of Constitutions in Canada and the United States" (1989) 7 *Canada - United States Law Journal* 23.
Kelsen, H., *General Theory of Law and State*, tr. Anders Wedberg, New York: Russell & Russell, 1945.
Kelsen, H., *Pure Theory of Law*, tr. Max Knight, London: Cambridge University Press, 1967.
Kelsen, H., *General Theory of Norms*, tr. Michael Hartney, Oxford: Clarendon Press, 1991.
Kennedy, D., "The Turn to Interpretation" (1985) 58 *South California Law Review* 251.
Kerr, J., *Matters for Judgment*, London: MacMillan, 1979.
Kerr, "Constitutional Act 1980: Is is Constitutional?" (1981) 30 *University of New Brunswick Law Journal* 73.
Kerruish, V., *Jurisprudence as Ideology*, London: Routledge, 1991.
Knopff, R., "Legal Theory and the "Patriation" Debate" (1981) 7 *Queen's Law Journal* 41.
Kronman, A.T., *Max Weber*, London: Arnold, 1983.

Lane, P.H., *A Manual of Australian Constitutional Law*, 5th ed., Sydney: The Law Book Co., 1991.
Lang, O.E. (ed.), *Contemporary Problems of Public Law in Canada*, Toronto: University of Toronto Press, 1968.
Laskin, B., "Tests for the Validity of Legislation: What's the 'Matter'?" (1955) 11 *University of Toronto Law Journal* 114.
Laskin, B., "An Inquiry into the Diefenbaker Bill of Rights" (1959) 37 *Canadian Bar Review*
Latham, R.T.E., *The Law and the Commonwealth*, London: Oxford University Press, 1949 (reprinted from W.K. Hancock, Survey of Commonwealth Affairs, Vol. 1, 1937).
Latouche, R.H., "Les calculs stratégiques derrière le Canada Bill" (1982) 45 *Law and Contemporary Problems* 165.
Lawson, F.H., *Remedies of English Law*, 2d ed., London: Butterworths, 1980.

Lederman, W.R., "The Process of Constitutional Amendment for Canada" (1967) 12 *McGill Law Journal* 371.
Lederman, W.R., "Constitutional Amendment and Canadian Unity" [1978] *Special Lectures of the Law Society of Upper Canada* 17.
Lederman, W.R., "The Supreme Court of Canada and Basic Constitutional Amendment" in K.J. Banting & R. Simeon (eds), *And No One Cheered: Federalism, Democracy and the Constitution Act*, Toronto: Methuen, 1982, p. 176.
Lederman, W.R., "Canadian Constitutional Amending Procedures: 1867-1982" (1984) 32 *American Journal of Comparative Law* 339.
Lejman, F. et al. (eds), *Festskrift Tillägnad Karl Olivecrona*, Stockholm: Kungl, Boktryckeriet, Norstedt & Söner, 1964.
Létourneau, S., "L'autorité d'un jugement prononçant l'inconstitutionnalité d'une loi" (1989) 23 *Revue Juridique Thémis* 173.
Loughlin, M., *Public Law and Political Theory*, Oxford: Clarendon Press, 1992.
Luhmann, N., "The Unity of the Legal System" in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society*, New York: de Gruyter, 1988, p. 12.

Lyon, N., "Constitutional Theory and the Martland-Ritchie Dissent" in K.J. Banting (ed.), *The Court and the Constitution*, Kingston (Ontario): Institute of Intergovernmental Relations (Queen's University), 1982, p. 57.

MacCormick, "Law as Institutional Fact" (1974) 90 *Law Quarterly Review* 102.

MacCormick, N., "Rights in Legislation" in P.M.S. Hacker & J. Raz (eds), Law, Morality and Society: Essays in Honour of H.L.A. Hart, Oxford: Clarendon Press, 1977, p. 189.

MacCormick, N., *Legal Reasoning and Legal Theory*, Oxford: Clarendon Press, 1978.

MacCormick, N., "Does the United Kingdom Have a Constitution? Reflections on MacCormick v. Lord Advocate" (1978) 29 *Northern Ireland Legal Quarterly* 1.

MacCormick, N., *Legal Rights and Social Democracy: Essays in Legal and Political Philosophy*, Oxford: Clarendon Press, 1982.

MacCormick, N., "Institutional Morality and the Constitution" in N. MacCormick & O. Weinberger (eds), *An Institutional Theory of Law*, Lancaster: D. Reidel, 1986, p. 171.

MacCormick, N. & O. Weinberger (eds), *An Institutional Theory of Law*, Lancaster: D. Reidel, 1986.

MacCormick, N., "Why Cases have *Rationes* and what these are" in L. Goldstein (ed.), *Precedent in Law*, Oxford: Clarendon Press, 1987, p. 155.

MacCormick, N., "Natural Law and the Separation of Law and Morals" in R.P. George (ed.), *Natural Law Theory*, Oxford: Clarendon Press, 1992, p. 134.

MacCormick, N., "Beyond the Sovereign State" (1993) 56 *Modern Law Review* 1.

Mackie, J.L., "Evil and Omnipotence" (1955) 64 *Mind* 212.

Magnet, J.E., "Validity of Manitoba Laws after *Forest*" (1980) 10 *Manitoba Law Journal* 241.

Mahmud, T., "Jurisprudence of Successful Treason: Coup D'Etat and Common Law" (1994) 27 *Cornell International Law Journal* 49.

Maingot, J., *Parliamentary Privilege in Canada*, Toronto: Butterworths, 1982.

Marshall, G., *Parliamentary Sovereignty and the Commonwealth*, Oxford: Clarendon Press, 1957.

Marshall, G. & G. Moody, *Some Problems of the Constitution*, London: Hutchison, 1959.

Marshall, G., *Constitutional Theory*, Oxford: Clarendon Press, 1971.

Marshall, G., "Positivism, Adjudication, and Democracy" in P.M.S. Hacker & J. Raz (eds), *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, Oxford: Clarendon Press, 1977, p. 133.

Marshall, G., "The United Kingdom Parliament and the British North America Acts" (1981) 19 *Alberta Law Review* 352.

Marshall, G., *Constitutional Conventions*, Oxford: Clarendon Press, 1984.

Marshall, G., "Overriding a Bill of Rights" [1987] *Public Law* 9.

Marshall, G., "Impugning Parliamentary Impunity" [1994] *Public Law* 509.

Marshall, H.H., "The Binding Effect of Decisions of the Judicial Committee of the Privy Council" (1968) *International and Comparative Law Quarterly* 743.

Martino, A.A. (ed.), *Deontic Logic, Computational Linguistics and Legal Information Systems*, London: North-Holland, 1982.

Martino, A.A. (ed.), *Expert Systems in Law*, London: North-Holland, 1992.

May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 21st ed. by C.J. Boulton, London: Butterworth, 1989.
McBride, W.L., *Fundamental Change in Law and Society: Hart and Sartre on Revolution*, The Hague: Mouton, 1970.
McCarthy, J., "Programs with Common Sense" [1959] *Proceedings of the Symposium on Mechanisation of Thought Processes* 1.
McConnell, W.H., "Cutting the Gordian Knot: The Amending Process in Canada" (1981) 44 *Law and Contemporary Problems* 195.
McLachlin, B., "The Role of Judges in Modern Commonwealth Societies" (1994) 110 *Law Quarterly Review* 260.
McWhinney, E., *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights*, Toronto: University of Toronto Press, 1982.
Moore, M.S., "The Interpretive Turn in Modern Theory: A Turn for the Worse?" (1989) *Stanford Law Review* 871.
Moore, M.S., "Law as a Functional Kind" in R.P. George (ed.), *Natural Law Theory*, Oxford: Clarendon Press, 1992, p. 188.
Munro, C., "Laws and Conventions Distinguished" (1975) 91 *Law Quarterly Review* 218.
Munro, C., "Dicey on Constitutional Conventions" [1985] *Public Law* 637.
Munzer, S., "Validity and Legal Conflicts" (1973) 82 *Yale Law Journal* 1140.
Murray-Jones, A., "The Tests for Inconsistency under Section 109 of the Constitution" (1979) 10 *Federal Law Review* 25.

Noel Baker, P., *The Present Juridical Status of the British Dominions in International Law*, London: Longman, 1929.

Oliver, P., *The Patriation and Amendment of the Constitution of Canada*, Doctoral thesis, Oxford: 1992.
Oliver, P., "The 1982 Patriation of the Canadian Constitution: Reflections on Continuity and Change" (1994) 28 *Revue Juridique Thémis* 875.
Oliver, P., "Cutting the Imperial Link - Canada and New Zealand" in P.A. Joseph (ed.), *Essays on the Constitution*, Sydney: Law Book Co., 1995 (forthcoming),
Ost, F., "Entre ordre et désordre: le jeu du droit" (1986) 31 *Archives de philosophie du droit* 133.
Ost, F. & M. Van de Kerchove, *Legal System Between Order and Disorder*, tr. I. Stewart, Oxford: Clarendon Press, 1994.
Otis, G., "La Charte et la modification des programmes gouvernementaux: l'exemple de l'injonction structurelle en droit américain" (1991) 36 *McGill Law Journal* 1348.

Petter, A., "Maître Chez Who? The Quebec Veto Reference" (1984) 6 *Supreme Court Law Review* 387.
Pigeon, L.-P., "L'effectivité des décisions de justice en droit public interne (constitutionnel)" (1985) 26 *Cahiers de Droit* 995.
Pound, R., *Jurisprudence*, Vol. IV, St Paul (Minn.): West Publishing Co., 1959.

Rand, I.C., "Some Aspects of Canadian Constitutionalism" (1960) 38 *Canadian Bar Review* 135.
Raz, J., *The Concept of a Legal System*, Oxford: Clarendon Press, 1970.
Raz, J., "Professor A. Ross and Some Legal Puzzles" (1972) 81 *Mind* 415.

Raz, J., *Practical Reason and Norms*, London: Hutchison, 1975.
Raz, J., *The Authority of Law*, Oxford: Clarendon Press, 1979.
Raz, J., "Legal Principles and the Limits of Law, A Postscript" in M. Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, London: Duckworth, 1984, p. 81.
Raz, J., "The Relevance of Coherence" (1992) 92 *Boston University Law Review* 273.
Raz, J., *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford: Clarendon Press, 1994.
Regan, D.H., "Glosses on Dworkin: Rights, Principles and Policy" (1978) 76 *Michigan Law Review* 1213.
Rémillard, G., "Legality, Legitimacy and the Supreme Court" in K.J. Banting & R. Simeon (eds), *And No One Cheered: Federalism, Democracy and the Constitution Act*, Toronto: Methuen, 1982, p. 189.
Rémillard, G., "Historique du Rapatriement" (1984) 25 *Cahiers de Droit* 15.
Ripert, G., "Les règles du droit civil applicables aux rapports internationaux: Contribution à l'étude des principes généraux du Droit visés au Statut de la Cour permanente de Justice internationale" (1933) 44 *Recueil des cours (Académie de droit international)* 569.
Roach, K., "Constitutional Remedies as 'Constitutional Hints'" (1991) 36 *McGill Law Journal* 1.
Roberts-Wray, K., *Commonwealth and Colonial Law*, London: Stevens, 1966.
Romanow, R., J. White & H. Leeson, *Canada Notwithstanding: The Making of the Constitution 1976-1982*, Toronto: Carswell, 1984.
Roos, N.H.M., "The Identity of Legal Systems in the Light of Some Paradoxes of Constitutional Law" in E. Attwooll (ed.), *Shaping Revolutions*, Aberdeen: Aberdeen University Press, 1991, p. 56.
Rorty, R., *Philosophy and the Mirror of Nature*, Oxford: Blackwell, 1980.
Rorty, R., *Consequences of Pragmatism*, Brighton: Harvester, 1982.
Ross, A., *On Law and Justice*, London: Stevens, 1958.
Ross, A., *Directives and Norms*, London: Routledge & Kegan Paul, 1968.
Ross, A., "On Self-Reference and a Puzzle in Constitutional Law" (1969) 78 *Mind* 1.
Russell, P.H., "Bold Statescraft, Questionable Jurisprudence" in K. Banting & R. Simeon (eds), *And No One Cheered: Federalism, Democracy and the Constitution Act*, Toronto: Methuen, 1982, p. 210.
Russell, P.H. et al. (eds), *The Court and the Constitution: Comments on the Supreme Court Reference on Constitutional Amendment*, Kingston, Institute on Intergovernmental Relations (Queen's Univ.): 1982.
Russell, P., *Constitutional Odyssey: Can Canadians Become a Sovereign People?*, Toronto: University of Toronto Press, 1992.

Sabetti, F., "The Historical Context of Constitutional Change in Canada" (1982) 45 *Law and Contemporary Problems* 11.
Salmond, J.W., *The First Principles of Jurisprudence*, London: Stevens & Haines, 1893.
Salmond, J.W., *Jurisprudence*, 7th ed., London: Stevens, 1924.
Sampford, C. & D. Wood, "Codification of Constitutional Conventions in Australia" [1987] *Public Law* 231.
Sampford, C., "Coup D'Etat and Law" in E. Attwooll & Z. Bankowsky (eds), *Shaping Revolutions*, Aberdeen: Aberdeen University Press, 1991, p. 161.
Schmeiser, D.A., *Civil Liberties in Canada*, London: London & Co., 1964.
Schwartz, B., "General National Agreement: The Legal Sanction for Constitutional Reform in Canada" (1981) 6 *Queen's Law Journal* 513.

Scott, F.R., *Essays on the Constitution*, Toronto: University of Toronto Press, 1977.
Scott, F.R., "Constitutional Amendment and Canadian Unity" [1978] *Special Lectures of the Law Society of Upper Canada* 17.
Sharpe, R.J., *Injunctions and Specific Performance*, 2d ed., Toronto: Canada Law Book Inc., 1992.
Simmonds, N.E., "Practice and Validity" (1979) 38 *Cambridge Law Journal* 361.
Simpson, A.W.B. (ed.), *Oxford Essays in Jurisprudence*, 2d series, Oxford: Clarendon Press, 1973.
Simpson, A.W.B., "The Common Law and Legal Theory" in A.W.B. Simpson (ed.), *Oxford Essays in Jurisprudence*, 2d series, Oxford: Clarendon Press, 1973, p. 77.
Simpson, E. (ed.), *Anti-foundationalism and Practical Reasoning: Conversations between Hermeneutics and Analysis*, Edmonton: Academic Printing & Publishing, 1987.
Slattery, B., "The Independence of Canada" (1983) 5 *Supreme Court Law Review* 369.
Soberman, D., "The Opinions of the Supreme Court: Some Unanswered Questions" in K.J. Banting (ed.), *The Court and the Constitution*, Kingston (Ont.): Institute of Intergovernmental Relations (Queen's University), 1982, p. 67.
Sopinka, J., "Constitutional Remedies and their Limitations" in J. Berryman (ed.), *Remedies: Issues and Perspectives*, Toronto: Carswell, 1991, p. 357.
Stephen, L., *The Science of Ethics*, London: Smith, Elder & Co., 1882.
Strayer, B.L., "Book Review" (1983) 15 *Ottawa Law Journal* 231.
Strayer, B.L., *The Canadian Constitution and the Courts*, 3d ed., Toronto: Butterworths, 1988.
Suber, P., *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change*, New York: Peter Lang, 1990.
Swinton, K., "Challenging the Validity of an Act of Parliament: The Effect of Enrolment and Parliamentary Privilege" (1976) 14 *Osgoode Hall Law Journal* 345.

Tammelo, I., "The Antinomy of Parliamentary Sovereignty" (1958) 44 *Archiv für Rechtz- und Sozialphilosophie* 495.
Tammelo, I., *Modern Logic in the Service of Law*, New York: Springer-Verlag, 1978.
Tarnopolsky, W.S., *The Canadian Bill of Rights*, 2d ed., Toronto: McClelland & Stewart, 1975.
Teubner, G. (ed.), *Autopoietic Law: A New Approach to Law and Society*, New York: de Gruyter, 1988.
Tremblay, L., *The Cement of the Constitution: The Rule of Law*, Doctoral thesis, Oxford, 1992.
Tremblay, A., *Droit constitutionnel: Principes*, Montreal: Thémis, 1993.
Tribe, L.H., *American Constitutional Law*, 2d ed., Mineola (N.Y.): Foundation Press, 1988.

Vaughan, F., "Critics of the Judicial Committee of the Privy Council: The New Orthodoxy and an Alternative Explanation" (1986) 19 *Canadian Journal of Political Science* 495.
Virally, M., *La pensée juridique*, Paris: L.G.D.J., 1960.
Voegelin, E., *The Nature of Law*, London: Louisiana State University Press, 1991 (from 1957 copyrighted mimeograph).

von Wright, G.H., "Deontic Logic" (1951) 60 *Mind* 1.
von Wright, G.H., *Logical Studies*, London: Routledge & Kegan Paul, 1957.
von Wright, G.H., *Norm and Action: A Logical Inquiry*, London: Routledge & Kegan Paul, 1963.
von Wright, G.H., "Is there a Logic of Norms?" (1991) 4 *Ratio Juris* 266.

Wade, H.W.R., "The Basis of Legal Sovereignty" [1955] *Cambridge Law Journal* 177.
Wade, H.W.R. & A.W. Bradley, *Constitutional and Administrative Law*, 10th ed. by Bradley, London: Longman, 1985.
Weber on the Methodology of the Social Sciences, ed. & tr. by E.A. Shils & H.A. Finch, Glencoe (Ill.): Free Press, 1949.
Weber on Law and Economy in Society, ed. by M. Rheinstein & E.A. Shils, tr. M. Rheinstein, Cambridge (MA): Harvard University Press, 1954.
Weinberger, O. & N. MacCormick (eds), *An Institutional Theory of Law*, Lancaster: D. Reidel, 1986.
Weinberger, O., *Law, Institution and Legal Politics - Fundamental Problems of Legal Theory and Social Philosophy*, tr. C. Brown and M.C. Peutsch-Moore, London: Kluwer Academic Publishers, 1991.
Wheare, K.C., *The Statute of Westminster and Dominion Status*, Oxford: Oxford University Press, 1953.
Wheare, K.C., *The Constitutional Structure of the Commonwealth*, Oxford: Clarendon Press, 1960.
Wheare, K.C., *Modern Constitutions*, 2d ed., Oxford: Oxford University Press, 1966.
Winterton, G., "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92 *Law Quarterly Review* 591.
Winterton, G., "Is the House of Lords Immortal?" (1979) 95 *Law Quarterly Review* 386.
Winterton, G., "The Evolution of a Separate Australian Crown" (1993) 19 *Monash University Law Review* 1.
Woehrling, J., "La Cour suprême et les conventions constitutionnelles: Les renvois relatifs au «rapatriement» de la constitution canadienne" (1984) 14 *Revue de droit de l'Université de Sherbrooke* 391.

Zukowsky, R.J., *Struggle over the Constitution: From the Quebec Referendum to the Supreme Court*, Kingston (Ont.): Institute of Intergovernmental Relations (Queen's Univ.), 1981.