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**The 1982 Patriation of the Canadian
Constitution: Reflections on Continuity
and Change**

Peter Oliver^[1]

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I have taken part of the title of this essay from a published lecture by then Professor Jean Beetz which appeared in 1972[2]. The main concern of that lecture was reform of ordinary legislation, but much of what he said could be applied to the long-standing Canadian fascination with reform of the constitution.

As an adviser to the federal government on constitutional matters and later as a judge on the Supreme Court of Canada Jean Beetz was especially well-placed and well-equipped to observe and understand the momentous constitutional reform project represented by the word "patriation". His duties usually required him to focus on legal issues, but that did not prevent him from drawing on the broader perspectives provided by history and literature, politics and theology.

This essay will not be as far-ranging, unfortunately. It will, however, attempt to understand the 1982 patriation in a broad perspective. One of the paradoxes of patriation is that the legal continuity represented by Canada's strict adherence to existing legal procedure (in this case, proceeding via the United Kingdom Parliament at Westminster) is widely assumed to have achieved a break in continuity. No one to my knowledge has argued that the Westminster-based legislative process remains an alternative to the new amendment procedures set out in Part V of the *Constitution Act, 1982*[3]. How does such a radical change in the ultimate rule of the Canadian legal system square with Canada's respect in 1982 for continuity and the traditional rule of law[4]?

I will argue, first, that there is no point in denying the historical link with the United Kingdom Parliament. It is that link which in and until 1982 accounted in strictly legal terms for the validity of the enacted part of Canada's constitution. At one time, British and other general theories of law and legal system appeared to require that as a matter of logic, a logic often as complicated as theological proofs, the undoubted historical link was also an enduring and essential *legal* link. Apparently, only revolution could counter this stubborn rule, a solution which clearly suited the American colonies but which had little appeal to twentieth-century Canadians.

How then can we explain or justify the widely-held Canadian assumption that a patriation process routed through the United Kingdom Parliament had successfully amended the constitution, adding to it a new *Charter of Rights and Freedoms* and a domestic method of making constitutional changes[5], and had at the same time terminated the link to Westminster? Perhaps there is no definitive explanation. Perhaps in the context of frustrated constitutional reform Canadians could still return to Westminster in order to modify what some see as the straightjacket of the present amending formula. Fortunately there are explanations available which correspond more closely to Canadian understandings of a final and irreversible 1982 patriation process. It seems highly likely that the Supreme Court of Canada would favour such an explanation if ever it were asked to decide the matter, and ideally it would like to do so in a manner which conformed with logic, precedent and common sense.

In this essay I argue that logic does not so much dictate one legal answer as provide a range of coherent alternatives[6]. Regarding the 1982 patriation, the logical problems relate to sovereignty and self-

reference. Traditionally in British constitutional theory it was thought that if Parliament were truly sovereign, as was assumed to be the case, it had to be able to legislate on any matter whatever, and, by way of corollary, that no one Parliament could be permitted to bind a future Parliament. On the face of it this meant that even if the United Kingdom Parliament at one time passed a law terminating its power to legislate for Canada, a later gathering of that Parliament could repeal or ignore the earlier law and pass new legislation, and any court which recognized that Parliament's sovereignty would have to take notice.

Other Dominions and former colonies of the British Empire had however apparently succeeded in acquiring legal independence, and, not surprisingly, this phenomenon coincided with a re-evaluation of the traditional theory of parliamentary sovereignty. Perhaps, it was contended, the United Kingdom Parliament could either terminate its power to legislate for a particular territory, thereby abdicating only part of its sovereignty; or perhaps that Parliament could bind a future Parliament as to the manner and form of its legislation, in this case adding the legislature of the newly "independent" country to the definition of "Parliament" were new legislation for that country ever to be required.

Elsewhere in the Commonwealth, these improvements on British constitutional theory seemed to provide an adequate account of an essentially abstract and unlikely legal question, for in any event one could be sure that the courts of the newly independent country would ignore any post-independence legislation emanating from Westminster and intended to apply to that country. But in Canada, it was more difficult to come to that conclusion. When the Supreme Court of Canada in the 1981 Patriation Reference acknowledged that the United Kingdom Parliament's powers to legislate for Canada, preserved by section 7 of the *Statute of Westminster, 1931* [7], were unlimited and undiminished, this appeared to endorse the traditional theory of sovereignty and possibly even place in doubt Canadians' expectations of complete legal independence.

A solution to the sovereignty dilemma acceptable to Canadian understandings required that British constitutional theory be reconsidered in the context of more general theories of law and legal systems, and here we encounter the logical problem of self-reference. From a Canadian point of view, the United Kingdom Parliament had always been the ultimate law-making or amending process in its legal system. The Supreme Court of Canada in the Patriation Reference had acknowledged that Westminster's powers were unimpaired, but it had not stated whether that Parliament's powers were sovereign in a "continuing" or "self-embracing" sense.

It is possible to view the United Kingdom Parliament -- or any other ultimate amending process in a legal system -- as sovereign in the continuing sense: that is, even where the ultimate process is used to provide for its own replacement in the form of a new process, the older process still prevails. It is also possible to understand this ultimate law-making process in self-embracing terms, meaning that, in the above example, the new process truly replaces the old. In the "continuing" alternative the enactment providing for the new process is subordinate to the amending process; in the "self-embracing" version the enactment providing for the new process acquires its validity from the old process but then replaces and is no longer subordinate to it. Logically, one or the other alternative must apply, but both are coherent [8].

Accordingly, it is *possible* on one view to interpret the United Kingdom Parliament's powers in a self-embracing way and therefore to offer a coherent explanation of the irreversible transformation by which Part V of the *Constitution Act, 1982* on amendment came to replace Westminster as the ultimate law-making process in the Canadian legal system.

It will also be argued that the true nature of the United Kingdom's sovereignty, though over-worked as a

matter of constitutional theory, is still an open question as a matter of law, certainly as a matter of Canadian law. Although some theories of law and legal systems give the impression that the content of the ultimate or basic norm of the legal system must be known at all times, the view preferred here is that the basic norm, otherwise known as the ultimate rule of recognition, may be to some extent uncertain, and that it would be a "formalist error"[\[9\]](#) to assume in advance of judicial determination that its content must be precisely defined. If that is so, then it seems reasonable to assume that until a court comes to pronounce on the matter, the possible interpretations of the ultimate rule of recognition must be in a constant state of evolution, conditioned not just by the stark rules of logic but also by social and political developments in the legal system in question[\[10\]](#). It is the most natural thing, then, for Canadian legal theory to predict a self-embracing interpretation of the United Kingdom Parliament's powers, even while British theory clings to a version of continuing sovereignty. And it should have been open to the Supreme Court of Canada, at least since 1949 when the Privy Council appeals ended and certainly since 1982, to adopt this distinctly Canadian understanding, regardless of whether it was the view accepted in the United Kingdom and across the Commonwealth[\[11\]](#).

This argument leads to the prediction that even in the event of severe constitutional paralysis caused in part by a rigid amendment procedure, the Supreme Court of Canada would not be at all bound to recognize "remedial" legislation passed for Canada by the United Kingdom Parliament, even following the request and consent of what had formerly been the appropriate Canadian authority[\[12\]](#). The Court would be able to argue, with reference to Canadian social and political facts and without offending logic or its own precedents, that in 1982, as a matter of Canadian law, the United Kingdom Parliament replaced itself by Part V of the *Constitution Act, 1982* and did so in an irreversible or self-embracing way.

A good number of ideas identified in this introduction require unpacking. I will begin in Part I with a brief history of the Canadian amendment process pre-1982, focussing throughout on Canadian attitudes to the prospect or even the possibility of patriation. I will then consider the trilogy of Supreme Court of Canada cases in the late 1970s and early 1980s in which the Court discussed for the first time the rules regarding the amendment and, eventually, patriation of the Canadian constitution. In Part II, I will deal with the difficulties which are encountered in trying to explain patriation. I will consider British theory on the sovereignty of Parliament as well as more general theory regarding law and legal systems. I will also discuss some new thinking on continuity and change in legal systems, before concluding with an account of the patriation process which relies more heavily on relevant Canadian socio-political factors, while still placing appropriate emphasis on the rule of law.

I. THE HISTORICAL LINK: AMENDMENT AND PATRIATION OF THE CANADIAN CONSTITUTION PRE-1982

A brief historical review serves a number of purposes. First, it shows to those unfamiliar with Canadian constitutional amendment how it came to be that a general procedure for amendment of the constitution of Canada was not included in the *Constitution Act, 1867*. Secondly, it reveals the extent to which traditional British understandings of parliamentary sovereignty dominated early Canadian constitutional thinking, with the result that patriation in any full sense was often thought to be legally impossible. Thirdly, more recent history indicates that even though patriation ceased to be seen as a theoretical impossibility, the traditional theory of parliamentary sovereignty retained its force and appeared, in seemingly unadulterated form, in the 1981 Patriation Reference. This Reference, together with the other judgments of the Supreme Court of Canada in the trilogy on amendment and patriation, made it difficult

to explain the purported replacement of the United Kingdom Parliament with Part V of the *Constitution Act, 1982*.

A. Canadian Understandings of Amendment and the Possibility of Patriation

1. The absence of a general amendment procedure in the 1867 Act

The United States constitution provided for its own amendment in Article V, and the Australian constitution of 1900 would do likewise by section 128. The absence of such a procedure for Canada was not likely to have been an oversight[13]. After all, the 1867 *Act* included a provision dealing with the amendment of provincial constitutions[14] as well as individual sections providing for their own amendment, either by the federal Parliament or by one of the provincial legislatures[15]. It seems most likely that the absence of a general procedure for amendment of the constitution suited many different, even conflicting concerns: centralists could hope to control the amendment process by appropriating to the federal Parliament the power to initiate amendments, while provincial interests could rely on the friendly "arbitrament" of the British authorities to resist the centripetal tug[16]; some could see potential for constitutional "elasticity" in the continuing link to the Westminster Parliament[17], while others could find in the Imperial connection "the basis of permanency for our future government"[18].

Whatever the reasons for the absence of an express provision on amendment, its exclusion made clear that a range of legislative competence, most significantly the power to modify the 1867 *Act*, remained in the hands of the Imperial Parliament. In fact, the unquestionably significant events of 1867 did not alter the hierarchy of Imperial and colonial statutes that had been so recently confirmed and clarified by the *Colonial Laws Validity Act, 1865*[19].

Following 1867, Canada from time to time requested legislation by the United Kingdom Parliament in order to accomplish that which could not be done by Canadian legal processes. As Dr Paul Gérin-Lajoie has noted, legally speaking and in accordance with the 1865 *Act*, the Westminster Parliament could enact any legislation for Canada whether such legislation was of a constitutional nature or not, and on occasion it did so, dealing with matters as varied as copyrights and lighthouses[20]. Of course, in reality, Canada was not as subordinate as the legal picture indicates. A convention gradually developed whereby Westminster would only legislate at the request and with the consent of Canada, usually expressed in a Joint Resolution of the Senate and House of Commons[21].

Nonetheless, by the early part of this century, many voices called for an end to the legal relationship of Empire and colony. The self-governing dominions sought to acquire the full attributes of nationhood. In order to deal with this issue and others, the Imperial Conference met in 1926 and 1930 and agreed on what were to become known as the Balfour Declaration and the *Statute of Westminster, 1931*[22]. The Balfour Declaration of 1926 acknowledged that Great Britain and the Dominions were "autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic and external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations"[23]. As Professor W.P.M. Kennedy has pointed out, this description of relationships within the Empire corresponded to the understanding put forward by Americans in their disputes with Great Britain leading up to the American War of Independence[24]. That understanding was that "colonial" legislatures were not subordinate to the United Kingdom Parliament but rather coordinate and united by a common allegiance to the Crown.

As we know and as we have seen, the subtle distinction between allegiance to the British Parliament and allegiance to the British Crown was not accepted by the British authorities leading up to the war with the American colonies, and subordination to the Imperial Parliament became the nineteenth-century norm. But the Balfour Declaration proposed a new relationship whereby each Dominion was deemed to be equal to Great Britain.

In order to bring the legal and constitutional state of affairs into line with this new political understanding, the *Statute of Westminster, 1931* was enacted. The most important requirement was to provide each Dominion with the power to repeal, alter or abolish Imperial statutes, as defined by the *Colonial Laws Validity Act, 1865*. Subsection 2(1) of the *Statute of Westminster, 1931* provided that the 1865 Act would not apply to any law made in future by the Parliament of a Dominion. Subsection 2(2) stated that no law made by the Parliament of a Dominion would be declared void or inoperative on the basis of repugnancy to the law of England or any Act of the United Kingdom Parliament. This last provision was thought necessary in order to avoid the inference that simple repeal of the 1865 Act might have the effect of restoring the old common law doctrine regarding the paramountcy of Imperial Acts.

Regarding our central preoccupation, the power to amend or patriate the constitution, the *Statute of Westminster, 1931* appeared to maintain the *status quo ante*. Federal and provincial representatives had met in Canada as early as 1927 in order to devise a mutually satisfactory domestic amendment procedure, but no agreement had been reached by 1930-1 and, of course, such agreement was to prove highly elusive. As a result it was necessary to retain the possibility of recourse to the Parliament at Westminster in order to accomplish at any moment in the future amendments to the United Kingdom legislative texts which formed part of the Canadian constitution. After much discussion, a provision which eventually became subsection 7(1) of the 1931 *Statute* was approved: "7. (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder." This provision effectively left the United Kingdom Parliament at the apex of the Canadian legal system, and, as we know, it would take over fifty years before Canadians could settle on a new procedure to amend the constitution of Canada and repeal subsection 7(1).

It was not until the latter part of this century that it became widely accepted that the United Kingdom Parliament's power to legislate for a former colony could be effectively terminated. The *Statute of Westminster, 1931* itself had side-stepped the issue. The preamble to the *Statute* set out the new position of the Dominions *vis-à-vis* the United Kingdom as recognized by the Balfour Declaration in 1926. The text of the *Statute* did not, however, terminate the ability of the United Kingdom to legislate for the Dominions; instead, it set out the newly restricted terms on which the United Kingdom Parliament could do so^[25]. Section 4 of the *Statute* provided as follows:

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

In *British Coal Corporation v. The King*, Lord Sankey interpreted this provision as if it kept alive the legal (if unlikely) possibility of unrequested and unconsented to Imperial legislation for a Dominion, insisting that "the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute"^[26].

Where did this stubborn legal theory come from? If it were still in effect might it not mean that the United Kingdom Parliament could, as a matter of abstract law, repeal or disregard even section 2 of the *Canada Act 1982* which purported to terminate the power of the United Kingdom Parliament to legislate for Canada?

2. The legacy of Dicey

The roots of the British theory of Parliamentary sovereignty can be traced back at least as far as the Glorious Revolution of 1688-89, but for our purposes it will not be necessary to look any further than the highly influential turn-of-the-century writings of Professor A.V. Dicey. Very briefly, Dicey argued that Parliament (that is, the King or Queen, the House of Lords and the House of Commons acting together) has the right to make or unmake any law, and that no person or BODY BGCOLOR="#FFFFFF", not even a court, has the power to override or set aside the legislation of Parliament[27]. A corollary of this premise was that no one Parliament could effectively bind a future Parliament or prevent it from legislating with absolute freedom of action[28]. Dicey reasoned that a sovereign power could not, while retaining its sovereign character, restrict its own powers by any particular enactment[29].

Dicey's sphere of influence was at least as broad as the Empire. When, for instance, Chief Justice Draper of Ontario suggested in 1875 that the "exclusive" grant of legislative power in sections 91 and 92 of the 1867 *Act* might exclude the Imperial Parliament altogether[30], Professor Dicey's eventual reply was dogmatic and unforgiving. He wrote that this "curious idea" would not have presented itself to Chief Justice Draper "if even learned lawyers had not occasionally failed to realise that the parliament at Westminster is a Sovereign legislature"[31].

By the turn of the century, the "misunderstanding" had been cleared up. W.H.P. Clement could state in 1916 that "[i]n the study of the Canadian Constitution the first fact which challenges attention is that the Dominion of Canada is a British colony"[32] and that all powers which it possessed were held under a statute passed by the Imperial Parliament, "the only constituent assembly in the full sense within the Empire"[33].

Among the advantages of an Imperial Parliament which seemed to be Canada's perpetual sovereign was that Parliament's ability to amend the Canadian constitution. But if Clement could be taken literally in describing the Imperial Parliament as a colony's "constituent assembly" would it not be possible for that assembly to provide in a new constitution for the colony that further recourse to the original constituent BODY BGCOLOR="#FFFFFF" would be excluded, amendment of the constitution being governed from that time onward by a new, domestic amending formula? And was it not in the natural order of things that a colony mature into an emancipated nation? These notions, especially the latter, are familiar and perhaps uncontroversial to late twentieth century ways of thinking, but earlier in this century they were packed with theoretical difficulties, spawned in large part by Dicey himself.

3. Canadian responses to the patriation problem

The enduring influence of Dicey was evident in the widespread Canadian assumption (at least amongst those who had considered the matter) that even if Canada obtained a domestic procedure for amending the constitution, it would remain possible for the Westminster Parliament to assert its continuing

sovereignty. One might have thought that after the passage of the *Statute of Westminster, 1931* the Canadian view regarding its constitutional position would have been that the United Kingdom Parliament could legislate for Canada only to repeal, amend or alter the constitution. However, the main tenets of Dicey's constitutional theory dictated that the Westminster Parliament's legislative ambit remain unrestricted[34]. It could, so the theory went, legislate inconsistently with, or even repeal the 1931 *Statute*. Even the Parliamentary Counsel of the Canadian Senate, writing in 1939, eight years after the passage of the *Statute of Westminster, 1931*, adopted this Diceyan point of view:

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.[35]

Such a view seemed not only to make the emerging legal independence of Canada precarious, but also to make true "patriation" impossible.

Far more important than the theoretical vulnerability of Canada to unwanted legislative interference by the Westminster Parliament was the apparent impossibility of replacing the United Kingdom Parliament as the supreme law-maker of the Canadian constitutional system. Gérin-Lajoie described how, in 1935, the Ontario government presented to the Federal-Provincial Conference a proposal for a Canadian amending procedure in which the United Kingdom Parliament's role was to cease except regarding amendments to the amending process. Gérin-Lajoie noted that "[t]his peculiar feature was considered necessary in order to ensure the continuance of the method of amendment proposed"[36].

The Ontario government wished in so far as possible to remove the United Kingdom Parliament as the ultimate legislative authority of the Canadian constitution, but it seems that the continued role of Westminster was deemed necessary in order to ensure the continuing validity of the new amending formula and, presumably, to accomplish any future alteration of the amending process itself. It appears that the Ontario government saw the British, Diceyan notion of what came later to be known as continuing sovereignty as the only model available to Canada. If a self-embracing version of parliamentary sovereignty had been thought possible at that time then presumably the Ontario proposals would have called for a permanent replacement of the United Kingdom Parliament by a new, entirely domestic amendment procedure[37]. However, under the dominant Diceyan view of the matter, the only viable option was to maintain the Imperial link[38].

The prevalence of the traditional understanding of parliamentary sovereignty in later generations of Canadian constitutional scholars can be seen in Gérin-Lajoie's account in 1950 of Dr Maurice Ollivier's 1935 patriation and constitutional amendment proposals. Ollivier had suggested that Canadians should draft a new constitution based on the 1867 *Act*. As Gérin-Lajoie reported, the main object of this proposal was "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 Kingdom"[39]. Gérin-Lajoie pointed out that "Dr. Ollivier seems to have forgotten that, as a matter of abstract law, Westminster could amend or repeal any

Canadian acts as well as any British acts relating to Canada", and that however desirable the proposed change might be "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"[40]. Once again, it can be seen how the Diceyan theory of parliamentary sovereignty was seen apparently to eliminate the possibility of cutting the Imperial link by legal means.

Gérin-Lajoie had a proposal of his own which was inspired in part by the report of a sub-committee to the Federal-Provincial conferences of 1935-6. The sub-committee had proposed that the *Statute of Westminster, 1931* be amended to remove subsection 7(1) and to empower the Parliament of Canada to enact a consolidated constitution (a proposed amending clause having already been enacted as section 148 of the 1867 *Act*) which would not operate as new law but would be construed as declaratory of the law as existing at the time of such enactment[41]. Gérin-Lajoie specified that the consolidated constitution should only be a rearrangement of the 1867 *Act* not a restatement or reform, and that it be brought into force by and act of the federal Parliament concurred in by the legislatures of all the provinces of Canada. He did not mention the removal of subsection 7(1) of the 1931 *Statute*. Instead, he concluded with a reference to the comments set out above that this scheme "would not remove, in strict law, the supremacy of the Parliament of the United Kingdom over the Constitution of Canada"[42].

To these views we could add many others, including those of Professor Frank Scott who stated that, despite the 1949 appropriation by the federal Parliament of a greater share of the power to amend the Canadian constitution[43], the ultimate power remained with the United Kingdom Parliament. In fact, he went further, insisting that "[i]n strict legal theory ... the Parliament of the United Kingdom would still have a ghostly legal authority over Canada even when full power to amend the constitution has been provided"[44].

At the same time, however, Scott suggested that Canada could escape from the seemingly irresistible Imperial pull once the new amending procedures were determined and adopted together with statutory renunciation by the United Kingdom of its authority over Canada: "the concept of legal sovereignty in the British Parliament, the Kelsenian *grundnorm* of the whole Canadian constitution, may well be considered to have disappeared"[45]. In a later article this same idea was expressed in more colourful terms. Likening the "Kelsenian *grundnorm*" to the turtle upon which, according to an eastern myth, the elephant (constitution) sits, he stated that Canadians must "pull out the old turtle and slip a new one in its place, so that not even a tremor need be felt in the superstructure"[46]. Some aspects of Kelsen's *grundnorm* will be discussed later in this essay. Scott's analysis was important in that it pointed out the route to patriation which was eventually chosen. In indicating that the hold of Westminster sovereignty could be broken by a shift of *grundnorm*[47], he did not however explain how that process came about, nor did he indicate how it could be explained by a court of law after the fact. A possible explanation of that process will be proposed in the conclusion to Part II.

As increasing numbers of former British colonies gained independence by means of apparently effective independence acts, the issue of sovereignty came to be seen as less troublesome. However, perhaps due to a lack of direct judicial authority on this point, the judicial advisers to the Canadian government were naturally preoccupied with the patriation problem right up until 1982. A particularly good example of this preoccupation can be found in the final report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada[48]. The Committee reported that even though the 1867 *Act* had served the country well, it was "the constitution of a colony"[49]. In order to remove the anachronistic role of the United Kingdom Parliament, the Committee recommended a novel procedure which had apparently been agreed to at the meetings prior to the failed 1971 initiative[50]. The idea was "to have the negative action which removes Canada from the jurisdiction of the British Parliament and

the positive action by which we proclaim our new Constitution occur simultaneously so that both legal continuity and national autonomy are safeguarded"[51]. The Committee explained the complexity of its recommended procedures by "the desire, on the one hand, to avoid having a new Canadian Constitution brought into being solely by an act of the British Parliament, and the fear, on the other hand, that, if it was not so grounded, there might be a legal gap which might conceivably lead to a court's invalidating the whole new Constitution"[52].

The Special Joint Committee's observations and these complex procedures resembled somewhat the proposals of the 1936 Federal-Provincial Conference and the suggestions of Dr Gérin-Lajoie in 1950. If the Canadian constitution was truly colonial, then the Committee was justified in taking care to safeguard national autonomy. But unless the colonial theory of continuing Westminster parliamentary sovereignty could be discarded along with it, then it was hard to see how even these ingenious procedures could accomplish the task. In the end, the Committee placed its faith in the Canadian courts; however, it was not clear by what theory the courts could be expected to avoid the theoretical possibility of recourse to the United Kingdom Parliament. Unfortunately, a series of important references to the Supreme Court of Canada provided no obvious answer.

B. The View from the Courts ,, The Upper House, Patriation and Quebec References

Although patriation and constitutional amendment issues generally had been discussed in political circles and in academic textbooks since the early days of Confederation, the courts had had little reason to pronounce on these matters until the late 1970s and early 1980s. Then, a trilogy of references to the Supreme Court of Canada seemed to make clear that the ultimate rule of the Canadian legal system pre-1982 was that the United Kingdom Parliament's powers were absolute, subject only to certain constitutional conventions which did not engage the law. It may be useful to look at these cases briefly before considering how they reflect on the post-1982 constitutional position.

1. The Upper House Reference

Perhaps the most important development regarding constitutional amendment after 1931 was the adoption of the *British North America (No. 2) Act, 1949*[53] which was designed to allow certain amendments to the constitution by means of the federal Parliament alone. The Supreme Court of Canada in the Upper House Reference had to consider whether it was within the legislative authority of the federal Parliament, as expanded by the *1949 Act*, to abolish, or enact a whole slate of changes to, the Senate of Canada. The detailed reasons provided by the Court need not concern us here, except to say that the Supreme Court of Canada was of the view that most of the changes contemplated were beyond the competence of the federal Parliament acting alone. That which was most significant for our purposes was the Court's view of how these changes *could* have been accomplished. The Court confirmed that prior to 1949 changes to what was then called the *British North America Act, 1867* had to be accomplished via Westminster[54]. And given that the Supreme Court of Canada reasoned in the Upper House Reference that the *1949 Act* did not authorise the federal Parliament alone to enact the proposed changes to the Senate, the obvious inference was that such changes could only be accomplished by the pre-1949 method, that is, by means of the United Kingdom Parliament. This conclusion was confirmed in the Patriation Reference[55].

2. The Patriation Reference

In the Patriation Reference the Supreme Court of Canada was asked whether the federal authorities could unilaterally accomplish an amendment to the constitution of Canada affecting the powers, rights or privileges of the provinces without the consent of those provinces. The Reference was framed and answered in two separate contexts: first, regarding the law of the constitution; and second, regarding the conventions of the constitution. A majority of the Court answered the second question by stating that a convention existed requiring the consent of a substantial number of provinces to amendments affecting provincial rights, powers or privileges. A different, but overlapping majority of the Court concluded that as a matter of law there was nothing in the constitution of Canada which could be said to prevent the Senate and House of Commons from initiating such constitutional amendments without the consent of the provinces; and furthermore, that the authority of the United Kingdom Parliament to bring such amendments into force by means of legislation at Westminster was "unimpaired"[\[56\]](#) and "undiminished"[\[57\]](#).

Effectively the Court was saying that it was not willing to impose, by means of judicial legislation, a domestic, federal and binding amending formula for Canada, and that, as long as the United Kingdom Parliament remained the appropriate procedure for amendment of the constitution of Canada, the Supreme Court of Canada would not presume to pronounce on the validity of that Parliament's enactments[\[58\]](#). The Court adopted a judicial posture which was consistent with a hierarchical and subordinate view of Canada's position in the (Imperial or pan-Commonwealth) legal system: as long as the United Kingdom Parliament maintained its role in the Canadian legal system, Canadian courts would apparently not review the validity of that sovereign BODY BGCOLOR= "#FFFFFF"'s legislation for Canada, just as a British court such as the House of Lords or Judicial Committee of the Privy Council would refuse to do so. However, it was not at all clear how the United Kingdom Parliament might cease to have a role in the Canadian legal system so long as the Supreme Court of Canada accepted the traditional idea of unimpaired sovereignty residing in the Parliament at Westminster, remembering that Dicey had said that it was inconsistent with the idea of a sovereign Parliament for one parliament to bind another later parliament.

In the end, the federal government chose to respect the constitutional convention and to seek a higher level of provincial approval for the constitutional package. The negotiations came together in the *Canada Act 1982* which came into force in April 1982 and, by section 2, purported to terminate the power of the Parliament of the United Kingdom to legislate for Canada. If the Supreme Court of Canada accepted the Diceyan version of unimpaired continuing sovereignty then it would be difficult for it to explain how the Westminster Parliament's power had been terminated; that BODY BGCOLOR= "#FFFFFF" would necessarily remain the legal (if habitually inactive) sovereign. The Patriation Reference left the matter undetermined, the majority referring only to the apparently unlimited powers of the Westminster Parliament. This characterization begged qualification, but that was not forthcoming[\[59\]](#).

At the end of that year the Supreme Court of Canada handed down the third of its trilogy on constitutional amendment „, the Quebec Reference „, in which it considered, amongst other things, the validity of the 1982 *Act*.

3. The Quebec Reference

Following the constitutional negotiations of November 1981 which produced an agreement backed by the federal government and nine of ten provinces, the dissenting province, Quebec, sent a reference case to the Quebec Court of Appeal asking whether the consent of the Province of Quebec was required by convention before the federal authorities adopt a resolution requesting an amendment to the constitution of Canada affecting the rights of that province. The Court of Appeal decided that there was no such convention: Quebec could neither benefit from a convention requiring unanimous provincial consent nor could it count on a convention requiring at least Quebec's consent. The Supreme Court of Canada agreed with those conclusions.

Perhaps the most interesting part of the Supreme Court's judgment is the passage where it considers whether the constitutional question should be answered. In the end it decided that in the interest of dispelling any doubts on the existence of the alleged conventions it would be appropriate to consider the matter, but it agreed that in truth the constitutional question had become moot:

The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable. It contains a new procedure for amending the Constitution of Canada which entirely replaces the old one in its legal as well as in its conventional aspects. Even assuming therefore that there was a conventional requirement for the consent of Quebec under the old system, it would no longer have any object or force.[\[60\]](#)

The Quebec Reference only asked whether the 1981-82 patriation process violated the conventions of the constitution, but the passage quoted above seemed to exclude even the possibility of objections based on the law of the constitution: "its legality is [not] assailable". This legal conclusion was consistent with the Court's view in the Patriation Reference that it could not review the legality of enactments of the United Kingdom Parliament, but it did not easily explain in what sense the new procedure for amending the constitution of Canada had "entirely replace[d]" the United Kingdom Parliament. If the constitutional hierarchy was to be taken seriously and if the United Kingdom Parliament at the pinnacle of that system had unimpaired and undiminished legal competence, then what was to stop it from ignoring section 2 and amending the *Canada Act 1982* which was after all simply one of its own statutes? Would the Supreme Court of Canada have to accept once again that ultimately the United Kingdom Parliament prevailed? If the new amending procedures had entirely *and irreversibly*[\[61\]](#) replaced the United Kingdom Parliament as the ultimate legal authority[\[62\]](#) in the Canadian legal system, as is widely assumed in Canada, then neither the Patriation nor Quebec References explained how this could be so.

In most Commonwealth countries which have achieved their independence by means of provisions similar to those included in the introductory sections of the *Canada Act 1982*[\[63\]](#), the assumption has been that whatever the view of a British court regarding post-independence legislation passed by the United Kingdom Parliament, the view of the local court would be that that legislation was irrelevant. However, in Canada the highest court had, just one year before patriation, apparently subscribed to the notion that the Canadian legal system was not coordinate with but rather subordinate to the British Parliament, at least in the ultimate sense which concerns us, and that Westminster's powers *vis-à-vis* Canada were unlimited[\[64\]](#).

Even if the likelihood of United Kingdom legislation for Canada in the future is practically nil, it may be

worthwhile to explore and try to explain this crucial moment of constitutional transition in order to see if it cannot be more satisfactorily understood, even on the difficult terms set out by the Supreme Court of Canada in the Patriation Reference. If no explanation is available then we would be forced to conclude that the federal Houses of Parliament could at any time in the future avoid the present amending procedures (perhaps in a period of constitutional paralysis) and proceed once again by way of Westminster. Unless something special can be found in the patriation process, the 1981 Patriation Reference would seem to be reliable authority for that course of action, assuming, that is, that the British authorities would be willing to cooperate.

The question at hand comes down to a consideration of where, now, we can find the source and ultimate rule of the Canadian legal system. Historically, both lay with the United Kingdom Parliament, and it would be as idle to deny that as to claim that someone never had a mother. But the historical source is not necessarily the continuing legal source and ultimate rule, as many other constitutions show. The Irish constitution, for example, is no longer connected to Westminster; it now has a root in popular sovereignty, but this came about by an autochthonous and revolutionary process (at least in the legal sense)[65]. Other Commonwealth countries proceeded towards independence without revolution or break in continuity and now consider themselves to be beyond the grasp of Imperial legislation[66]. It is said that this is because the local courts will no longer recognize legislation from Westminster, and this is usually argued on the basis that the United Kingdom Parliament has by the independence legislation limited its powers to legislate for the newly independent country. The Supreme Court of Canada in the Patriation Reference stressed that the United Kingdom Parliament's powers were unlimited, thereby casting doubt on the usual explanation for the acquisition of legal independence.

It is not clear how the Supreme Court of Canada viewed the post-patriation state of affairs. There are no strong clues in the trilogy. I would assume that the Court thought that the routes favoured by other Commonwealth countries would be chosen and that one of the 'new view' explanations set out below would be used to explain this process if necessary. Mostly, the Court put this difficult question to one side. I now wish to consider whether there were not other, better explanations available.

II. AN ESSENTIAL AND PERMANENT LEGAL LINK?: SOVEREIGNTY AND LEGAL SYSTEMS

Section 52 of the *Constitution Act, 1982* indicates that amendments to the constitution of Canada are now governed by Part V of that *Act*, and section 53 directs that section 4 and subsection 7(1) of the *Statute of Westminster, 1931* are now repealed. On the face of the present constitution, it appears that all that is amendable must be amended using the procedures set out in Part V. Subsection 41(e) indicates, furthermore, that any amendments to the amending formula are to be accomplished only with the unanimous consent of all provincial legislatures together with the House of Commons and Senate. Another way of asking the question which is the preoccupation of this essay is: do the procedures of Part V exhaust the possibilities for amendment of the constitution of Canada, or is it still possible to have resort to an ultimate and continuing legal sovereign, that is, the United Kingdom Parliament?

The only satisfactory answer to the above question can be arrived at by reconsidering the patriation process. Is there anything in that process which could be said to terminate, that is truly and irreversibly terminate, the power of the United Kingdom Parliament to legislate for Canada?

Asking the question in this way provokes a standard response. As a matter of United Kingdom law the answer is probably no: Parliament can legislate for Canada just as easily as it can legislate for

Mexico[67], and the British courts will recognize that legislation to the extent possible[68]. As a matter of Canadian law, however, the answer should be yes, and the Canadian courts should be prepared to say so[69]. Where, however, the Canadian courts have confirmed in 1981 that the United Kingdom Parliament is a superior, unimpaired, sovereign legislature which even Canadian courts had to heed, the explanation is more difficult.

Such an explanation can be approached in two different ways: first, as a matter of British constitutional theory regarding the limitations on the allegedly sovereign United Kingdom Parliament; and secondly as a matter of constitutional theory generally.

A. Theories of Sovereignty and of Legal Systems

1. The British theory of sovereignty of Parliament

The dominant British theory of sovereignty of Parliament can be found in the writings of Dicey. The broad lines of this theory have been discussed above. Following Dicey certain writers began to develop a "new view"[70] which suggested that Parliament could shed a part of its sovereignty or at least bind itself as to the manner and form of its future legislation.

As we have seen, if Canadian courts post-1982 continued to be influenced by some of the more traditional aspects of the British constitutional theory, then they might subscribe to the classical version of Westminster parliamentary sovereignty which dictates that the United Kingdom Parliament of 1982 could not bind any future Parliament, and that therefore post-1982 legislation for Canada would have to be recognized. A Canadian court could not declare such legislation *ultra vires* any more than a British court could do so. The conventions of the British and Canadian constitutions would certainly discourage such legislation without Canadian request and consent, and, furthermore, it is easy to imagine that even with Canadian request and consent communicated by the federal authorities acting in their capacity as international representative of Canada, the United Kingdom Parliament might nonetheless refuse to act. This is a precarious peg on which to hang the autonomy of the Canadian legal system, but perhaps there is no better solution. It seems highly unlikely, however, that Canadian courts would accept this argument, despite its classically neat logic, and this has been the opinion of influential commentators on both sides of the Atlantic[71].

The apparent termination of the British link could also be explained within the confines of British theory by means of some of the views of the post-Dicey school. In 1984, Geoffrey Marshall summarized the possibilities[72]. Using the explanations put forward by adherents of the "new view", a Canadian court might reason, first, that the United Kingdom Parliament had in 1982 bound itself to a strong manner and form requirement[73]. That is, it legally obliged itself in future only to legislate for Canada following the appropriate request and consent from Canada which presumably would have to be recited in the legislation. This might be an improvement on the pre-1982 situation which, at least on one reading of the Patriation Reference, left Canada vulnerable at any time to unsolicited legislation from Westminster, but the strong manner and form explanation still left Canada theoretically and legally tied to the United Kingdom Parliament, and this is not what most people in Canada had understood by the 1982 process. More importantly, if this interpretation found favour it would leave open the possibility that in the event of constitutional paralysis in Canada, the federal government, as rightful representative of Canada at the international level according to the majority in the Patriation Reference, could unilaterally seek an amendment to the 1982 *Act* via Westminster. It seems unlikely that a Canadian court would accept an explanation of the patriation process which left the door open to such a possibility.

A second and more popular line of reasoning derived from the "new view" of British parliamentary sovereignty involves the notion that the Westminster Parliament can be seen to have abdicated part of its sovereignty in 1982, more specifically, its power to legislate for Canada[74]. It seems odd that the United Kingdom Parliament should not be able to legislate for Canada when it might certainly legislate for France or Mexico or anywhere else. It has often been said that French or Mexican courts (and citizens) would certainly ignore such legislation but that the British courts (*and* presumably those courts which recognized that Parliament as part of their legal system) would have to recognize it[75]. In the Patriation Reference, the Supreme Court of Canada had taken the attitude of a British court in the face of legislation emanating from the superior and sovereign Parliament at Westminster. Did this mean, then, that Canadian courts were still bound by the logic of the Patriation Reference to accept the continuing sovereignty of the United Kingdom Parliament? If that situation had changed as a result of the *Canada Act 1982* then it seems more appropriate to consider the matter not as a question of British constitutional theory regarding the sovereignty of parliament, but rather as a question of Canadian constitutional theory regarding the evolution of the ultimate legal principle of the Canadian legal system.

Perhaps a more satisfactory explanation could be found beyond the confines of British constitutional theory.

2. General theories of law and legal systems

a) *Dissecting Dicey*

The brief discussion of the British constitutional theory above indicated that while there are various theories on the possibility of limiting the powers of the Westminster Parliament there is no consensus. It may be useful at this point to isolate certain elements of Westminster sovereignty that might be recognizable in more general theories of constitutional law. As noted above, Dicey's notion of parliamentary sovereignty can be divided into at least two aspects. First, there is the notion that Parliament cannot be limited as to the *ambit* of its legislation, the corollary being that the courts will recognize all manner of legislation passed by Parliament. There have always been rumblings which challenge this idea, and clearly it should be conceded that there is nothing inevitable about the all-encompassing Diceyan version, but that the notion is at least comprehensible. A second aspect of Dicey's sovereignty of Parliament is that Parliament cannot bind its successors, for if one Parliament at one moment in time could limit a second Parliament's ability to legislate at a later moment then "Parliament" could no longer be said to be sovereign in the first sense.

It should be noted that the Supreme Court of Canada in the Patriation Reference referred only to the undiminished or unimpaired sovereignty of Parliament prior to 1982. Such expressions imply acceptance of the first aspect of parliamentary sovereignty. Do they necessarily mean that the Canadian court accepted the second aspect? Is there any logical reason why the second should follow from the first? In order to answer these questions it will be necessary to go beyond the confines of the theory relating to the British parliament and to consider the notion of legal sovereignty generally. This discussion takes us into a consideration of the concept of a legal system. The approach favoured here is that the sovereign United Kingdom Parliament at the apex of the Canadian legal system pre-1982 should be treated in the same way as the rules governing validity and continuity in any legal system. Despite initial doubts in some theoretical writing, it seems clear now, in law and logic, that just as one constitutional amending formula can be either permanent or amendable according to its own procedure so may a sovereign United Kingdom Parliament be viewed, at least from a post-1982 Canadian point of

view, as a permanent and continuing sovereign or as one which can provide for its own replacement, that is, a self-embracing sovereign. Both choices are available and consistent with the Patriation Reference, but the wording of the *Canada Act 1982* and relevant Canadian social, political and institutional factors (independence, responsible government, non-colonial judiciary, etc.) seem to support the latter interpretation. The discussion which follows is intended to show the relevance of the latter factors to the determination of the ultimate rule of the Canadian constitution post-1982.

The argument favoured here is that Part V of the *Constitution Act, 1982* has replaced the United Kingdom Parliament as the supreme law-maker of the *Canadian* legal system. Accordingly, it is proper to predict that a Canadian court post-1982 would ignore United Kingdom Parliament legislation for Canada, whether requested or unrequested, and that it could offer a coherent explanation of how this has happened.

Any discussion of the concept of a legal system requires one to consider briefly the highly influential writings of Hans Kelsen who identified the notion of a *grundnorm*.

b) Kelsen's concept of a legal system: the *grundnorm*

In Kelsen's eyes the *grundnorm*, or basic norm, was logically connected to the legal system: "All the norms whose validity may be traced back to one and the same basic norm form a system of norms, or an order"[\[76\]](#). He suggested that all the laws in a legal system can be traced back to "some constitution that is first historically"[\[77\]](#), and that the validity of this first constitution was the "final postulate" upon which the validity of all the norms of the legal system depended: "All these legal norms belong to one and the same legal order because their validity can be traced back, directly to the first constitution"[\[78\]](#). The validity of the first constitution was dependent on the *grundnorm*: "That the first constitution is a binding legal norm is presupposed, and the formulation of the presupposition is the basic norm of this legal order"[\[79\]](#).

Regarding the Canadian patriation problem the *grundnorm* had a potentially liberating effect. Once Canada could acquire its own *grundnorm*, it would be free of the authority of the Imperial sovereign. Professor Frank Scott had had this insight as early as 1950[\[80\]](#). However, if all the norms which could be traced back to the basic norm formed part of the same legal system, then it was difficult to see how the Canadian penchant for following constitutional the rule of law as scrupulously as possible could ever separate Canada from the United Kingdom legal system[\[81\]](#). According to Kelsen, "the State and its legal order remain the same only so long as the constitution is intact or changed according to its own provisions", or viewed in another way, "[a] State remains the same as long as the continuity of the legal order is maintained ..."[\[82\]](#).

Kelsen's theory of the identity of a legal system was found to be quite useful in justifying the fact that a revolution or *coup d'État* had successfully imposed a new legal order by virtue of having violated the provisions of the previous constitutional régime. It was difficult, however, to conceive of the Canadian experience in such terms.

Instead, the Canadian experience indicated that the historically first constitution was the unwritten British constitution, and that it had been followed. How then could it be said that the Canadian legal system was separate and distinct from the British legal system? Kelsen's model appeared to make the fact of a historical legal link determinative.

Rather than try to untangle the analysis according to Kelsen and his (in)famous *grundnorm*, it may be more useful to move on to those following Kelsen who adapted his ideas into what proved to be a more manageable model.

c) *Hart's concept of a legal system: the ultimate rule of recognition*

Professor H.L.A. Hart rejected Kelsen's idea that the validity of a basic norm had to be assumed or postulated. For Hart, validity was a question of fact, specifically "the actual practice of the courts and officials of the system when identifying the law which they are to apply"[\[83\]](#). Hart underlined the importance of habitual and factual use by calling his substitute for the *grundnorm* the "rule of recognition". The most basic of the rules of recognition he referred to as the "ultimate rule of recognition"[\[84\]](#).

In the absence of a revolution, Kelsen's *grundnorm* would not change given its position at the pinnacle and, especially, at the source of the legal system. In contrast, Hart's rule of recognition could apparently change over time, in accordance with the courts' and officials' changing attitudes towards that which should be recognized as valid law in the legal system[\[85\]](#). Kelsen placed considerable emphasis on the horizontal or temporal axis of the legal system, that is, the tracing of validity through time. Hart was far more concerned with what Kelsen's theory had referred to as the vertical "hierarchy of norms" and the question of what was *considered* valid (from the internal perspective) at any given moment in the life of the legal system. It is easy to see how the concept of a *legal system* was quite vital to Kelsen's approach though far less so for Hart. Kelsen's criteria for the existence of a legal system was, as we have seen, a juristic one: unblemished legal connection to the historically first constitution. Hart's analysis did not require a historically first constitution; validity could be determined by reference to the observable facts of the present. Hart gave little indication as to what, in his view, constituted a discrete legal system over time.

The closest Hart came to describing and distinguishing legal systems was in examining what he referred to as "the pathology of the legal system"[\[86\]](#). His discussion of Commonwealth developments provided useful material for our analysis of the Canadian situation. As difficult as it was according to Kelsen's criteria to explain how Canada got out from under the legal authority of the United Kingdom Parliament, on Hart's account the process was as simple as a change in the ultimate rule of recognition. The courts in any former colony simply cease recognising enactments of the Westminster Parliament[\[87\]](#).

According to this theory, then, the transition from the Imperial legal system to a Canadian legal system is clearly possible. That which is not clear is how the courts of the Canadian legal system could explain what has come about, how it is that the ultimate rule of recognition can simply evolve or shift. If the process had been one of true revolution, as Professor Wade had described similar processes[\[88\]](#), one would not necessarily expect such a legal explanation, but the Canadian process (as well as other Commonwealth "decolonization" processes) purported to be scrupulously legal and could presumably be explained in legal terms. We may readily accept that from the Canadian internal perspective, the ultimate rule of recognition now excludes the United Kingdom Parliament, but Hart provided little insight into how that transformation might have taken place.

The ultimate rule of recognition pre-1982 undoubtedly included the United Kingdom Parliament, as the

Supreme Court of Canada indicated in the Patriation Reference. Could it be that even in 1981 the ultimate rule of the Canadian legal system was one of self-embracing Westminster sovereignty, even while the British understanding was one of continuing sovereignty^[89]? The consequence of this interpretation would be that the undiminished and unimpaired United Kingdom Parliament of 1981 could, consistent with its self-embracing powers, simultaneously bestow validity on the *Canada Act 1982* and provide for its own permanent replacement in the form of Part V of the *Constitution Act, 1982* on amendment.

If this explanation of the 1982 process is to be accepted, it will be necessary to consider three questions. First, is a self-embracing conception of the ultimate rule of a legal system a coherent one? There were at one time considerable doubts on this score. Secondly, how can the United Kingdom Parliament simultaneously confer validity on the *Canada Act 1982* and then, without undermining that validity, disappear from the legal map of the Canadian constitutional system? This question is similarly relevant to all other pre-1982 enactments. Finally, on what basis should a Canadian court post-1982 favour a self-embracing interpretation of the United Kingdom Parliament's powers in 1982, especially given that the Canadian understanding earlier in the century had been almost unanimously in support of a "continuing sovereignty" view? This question brings us back to a consideration of how it is that the ultimate rule of recognition evolves.

B. Theories of How Legal Systems Evolve

1. The possibility of self-embracing laws

In his book *On Law and Justice*, the Danish jurist, Alf Ross looked more closely at Kelsen's basic norm and discovered a problem. The basic norm was, in Ross's first opinion on the matter, the norm which provided for the amendment of the constitution, there being no other higher legal norm which provided for the constitution's validity. Ross then argued that the basic norm could not provide for its own amendment without running into problems of self-reference. That is, if the rule on amendment were itself amended and replaced using the original rule then the new rule could not at the same time and without logical transgression both be based on the original rule and be the rule for which there is no higher justification. This complex logical argument produced the disturbing conclusion that self-embracing legal rules such as the constitutional amendment procedures of most countries (which were assumed to govern not only amendment of other constitutional provisions but also the amendment procedures themselves) were in fact logically impossible or contradictory; and in the Canadian case it cast doubt on whether the Queen-in-the-United Kingdom Parliament could in 1982 provide for its replacement by Part V of the *Constitution Act, 1982* on amendment. To the extent that it was commonly believed that the rule on constitutional amendment *could* be used to amend itself, Ross stated that this was not in fact "constitutional change" or change which could be related back to the basic norm, but rather a disguised legal revolution or "magical act"^[90].

In order to understand Ross better we have to remember that he, together with Kelsen, was interested in examining the legal system in the abstract. As a system based ultimately on the basic norm, a legal system by definition changes logically and in accordance with the basic norm. In that way the basic norm could explain the validity of legal rules within the system and, at the same time, explain the coherence of that system over time.

In 1964, Professor Hart replied to Ross. With great care, he pointed out that self-embracing

interpretations of the basic norm or ultimate rule of recognition were indeed possible and logically coherent. Hart observed that Ross had ignored the temporal element which was relevant in legal as opposed to abstract logical problems. When, for example, a rule for constitutional amendment was used to provide for its own replacement, it was correct to view that as a legal change rather than a magical act. The original rule on amendment was valid and effective until it was itself used to provide for a new rule on amendment which only at that moment became valid and effective and so replaced the old[91]. Accordingly, Hart argued as he had before that continuing and self-embracing amendment procedures were "both intelligible as constitutional arrangements"[92].

If we remember Hart's comments regarding the indeterminate nature of the ultimate rule of recognition and the formalist error of assuming that every situation is covered in advance by a rule, his conclusions regarding the so-called problem of self-reference fall neatly into place[93]. Hart was more concerned with the validity in legal systems as a question of fact or observance. He was more interested in momentary systems and validity than in dynamic systems and continuity[94]. Hart observed that the validity of legal rules in a system could be satisfactorily explained without necessarily determining in advance whether the ultimate rule of recognition (that is, the procedure for constitutional amendment) was continuing or self-embracing in nature. That question would only arise if a legal answer became necessary. In the meantime, legal observers might make suggestions and predictions, but the validity of rules in the legal system could not be said to depend on it.

Ross replied to Hart and other critics in 1969. He acknowledged that Hart's "temporal" refutation of the problem of self-reference was accurate in terms of legal considerations. Ross nonetheless insisted that, as a matter of logic, an original basic norm (amendment procedure) would naturally contradict a subsequent basic norm (amendment procedure) which purported to replace it. While Hart was prepared to say that both continuing and self-embracing interpretations were potentially available for the ultimate rule, Ross's logical system required that "the basic norm of the legal system must be unchangeable"[95]. Ross therefore recanted his earlier views identifying the amendment procedure as the basic norm and in its place he offered a norm requiring adherence to the original amendment procedure or to any subsequent amendment procedure derived from and replacing that procedure. This formulation of the basic norm allowed Ross to admit the possibility in law of a self-embracing amendment procedure if not the possibility of a self-embracing basic norm.

In the end, then, both Hart and Ross acknowledged the possibility of self-embracing interpretations of the rule on constitutional amendment. For Hart it was just that, a possible interpretation of the peripheral content of the ultimate rule of recognition. Unless a question of validity arose involving the rule governing amendment, the core of the rule might be quite clear but the periphery (*i.e.*, continuing or self-embracing?) still uncertain. Ross's revised arguments admitted the possibility of a self-embracing amendment procedure, and we can presume that he could also have conceived of its "continuing" alternative[96]. If the Hart-Ross debate was helpful at all, despite its exasperating complexity, it did serve to highlight the fact that neither continuing nor self-embracing versions of sovereignty could be logically preferred but that one or the other version would have to be identified in any legal system if ever a question arose involving the true nature of that sovereignty. Until that moment, at least on Hart's view of the matter, the question could remain safely unresolved; only the legal scientist needed to follow Ross and make predictions from the outset as to which version best fit the legal system in question.

If we return to the question that was being considered before discussing the Hart-Ross debate, it can now be stated with more sophistication. Depending on whether we take the Hart approach or the Kelsen-Ross approach, we will want to know how it is that courts (or legal commentators before them) can determine: 1) what is the ultimate rule of recognition and how, if at all, can it change or evolve?; or

2) what is the basic norm? Before attempting to answer those questions, it may be useful to consider the work of Professors Finnis and Raz, in which the Kelsen-Ross approach is discredited and the Hart approach improved upon.

2. Explaining the change

a) *Continuity and validity*

Professor Finnis's thoughts on this question have also been useful to help explain the type of transition which took place in Canada in 1982. How was it that the *Canada Act 1982* could be said to sever the British legal link without disturbing the validity of existing Canadian laws, constitutional or other, all of these having been brought into force „ directly or indirectly „ by the authority of the Westminster Parliament? He agreed that Ross's problem of self-reference was not an insurmountable obstacle, but Finnis acknowledged that Ross had identified an important question regarding the validity of legal rules which derive from but subsequently replace or eliminate those validating rules^[97]. He proposed that the rule of recognition must include a general principle or rule of identification which could be expressed as follows: "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 repeal*"^[98]. This principle truly seems to "make sense of the history and practice of legal systems and lawyers" and it provides "a present guide to actions which take place and have effect in the future"^[99]. Accordingly, it seems appropriate to adopt it.

In the Canadian context, Finnis's analysis not only confirms the validity of pre-1982 constitutional and ordinary laws passed at Westminster, but it also explains how the *Canada Act 1982* could at one and the same time establish the validity of, *inter alia*, Part V of the constitution on amendment and terminate the power of Westminster to legislate for Canada, thereby leaving matters to be dealt with solely on Canadian terms. Effectively, this was Hart's point, examined above, in defence of self-embracing sovereignty, but Finnis's analysis also made clear that this was a point which applied beyond the self-reflexive provisions of a constitutional amendment procedure.

With Finnis, then, we can see how the "patriation" process required different analysis at the level of history, logic and law. There was clearly no need to deny either the historical link to the Westminster Parliament or the conferral of legal validity which that link provided, and no need to fear that a rule of logic had been violated so as to have rendered the process incoherent and indefensible. In law there was a justification for a Canadian court ignoring any post-1982 enactment by the Westminster Parliament, even one preceded by the repeal of the *Canada Act 1982*. There was nothing inevitable in this legal conclusion, of course, but it would have been surprising had there been no legal explanation for the prevailing Canadian understanding of the strictly legal 1982 "patriation" experience.

b) *Change in the ultimate rule of recognition*

If a self-embracing interpretation of the highest rule in the legal system was logically possible and if that self-embracing process could indeed provide for a new rule and at the same time provide for its validity, then the only questions which remained were, first, how was it that the ultimate rule of recognition

evolved, and secondly, how was it that *Canada's* ultimate rule of recognition had evolved. The writings of Professor Joseph Raz are relevant to the first question and may also be useful in attempting to answer the second.

Raz first gathered together his ideas on this subject in *The Concept of a Legal System*. He rejected Kelsen's criterion of constitutional continuity as the proper criterion for the identity of a legal system:

The continuity of legal systems is not necessarily disrupted by the creation of new original laws. Nor is the fact that the creation of law is authorized by a law belonging to a certain legal system a sufficient proof that the authorized law belongs to that system. A country may be granted independence by a law of another country authorizing its laws; nevertheless, its laws form a separate legal system.[\[100\]](#)

In a subsequent work, Raz also made clear that he rejected Hart's rule of recognition:

Nor does the rule of recognition solve the problem of the continuity of legal systems. That one legal system comes to an end and another takes its place manifests itself in a change of rule of recognition, for each legal system has a different rule of recognition. The rule of recognition, however, is a customary rule; hence it is constantly in a process of change. What changes are consistent with the continued existence of the same rule, and what changes compel the admission that a new rule has replaced the old one? ... Hart's theory provides no clue as to how to draw the conceptual distinction. ... If his theory fails to provide a complete solution to the problem of identity it is because he overlooked not only part of the answer but also a whole question: that of the relation of law and state.[\[101\]](#)

Like Hart, Raz acknowledged the importance of courts or "primary law-applying institutions" and their view of legality from the internal perspective of that legal system[\[102\]](#), but he went further. One needed to know something about the political system and "to distinguish between the courts which are organs of that political system and those which are not"[\[103\]](#). Therefore, in considering whether, and if so how, the ultimate rule of the Canadian legal system has evolved, it is crucial on Raz's terms to recognize that since 1926 or so Canada has been politically independent and that since 1949 she has been judicially independent. The Supreme Court of Canada now considers itself to be a part of the Canadian polity, not, as in the case of its predecessor, the Judicial Committee of the Privy Council, part of a pan-Commonwealth or Imperial system. Raz's observations seem to have a great deal of bearing on the type of prediction that we might wish to make regarding the evolution and present nature of the ultimate rule of the Canadian legal system.

After asserting the fundamental interrelationship of a theory of state and a theory of law, Raz set out his own ideas on the problem of the identity of a legal system:

It follows that since the continuity of a legal system is tied to the continuity of the political system, the former is affected by the fate of the non-legal norms that happen to form part of the political system concerned. However, emphasizing the importance of the fate of the non-legal norms to the continuity of the legal system does not mean that these are the only factors affecting continuity. The substance of my contention is that whatever form one's ultimate account of continuity takes, it

must in view of the relation between law and state, be based on the interaction of legal and non-legal norms, and the extent and manner of their change; and secondly, that among the legal norms concerned some are more relevant than others. Since the continuity of the legal system is fundamentally a function of the continuity of the political system, political laws are more relevant than others.[\[104\]](#)

It seems fair to conclude from Raz that a principle similar to the ultimate rule of recognition is useful but must be supplemented by considerations of the underlying and interrelated presence of the social and the political before an explanation can be had for why the ultimate rule of recognition changes in such a way that it can be said that a new legal system exists independent of an older one.

c) Canada's ultimate rule of recognition and self-embracing change

As we have seen, the Supreme Court in the Patriation Reference referred frequently to the untrammelled powers of the United Kingdom Parliament but it did not say, and was not asked to say, whether those powers were based in continuing or self-embracing sovereignty[\[105\]](#). Understood as a matter of British constitutional theory the answer could only be indefinite or qualified. British legal opinion leaned and arguably still leans toward continuing sovereignty. And one might wish to argue that even for Commonwealth purposes as viewed, say, from the point of view of the Judicial Committee of the Privy Council, it was best to stick to the assumption of continuing sovereignty in the event that any of the former colonies (or their courts) determined that it was politically desirable and legally possible once again to request legislation from the Mother Parliament[\[106\]](#). But in Canadian terms, it seemed that, at least on the eve of Patriation, the near-universal assumption was that the Westminster amendment procedure was being used to replace itself, for all time, with the Part V amendment procedure. If we were to put the assumption into the more obscure language of constitutional theory we could say that there was an assumption of self-embracing sovereignty.

Regardless of popular assumptions, was there any legal explanation for this process of legal continuity characterized by transfer and replacement of amendment powers? We have already seen that, despite Ross's initial doubts on the matter, both continuing and self-embracing understandings of sovereign power were possible. Why then should we say that in Canadian constitutional theory Westminster's powers were self-embracing while in British or even Commonwealth terms they were continuing?

Some Canadian commentators have suggested that political independence or international recognition dictate such a conclusion (if not the same reasoning)[\[107\]](#). It is argued here that independence by itself does not dictate any particular conclusion. There is no reason why a court in a newly independent country could not take the view that according to all relevant indicators it seemed clear that that country had decided to retain a system of constitutional amendment by the legal method of foreign enactment, however anomalous that might seem.

In the Canadian case, as we have seen, there appears to be little reason to assume that the mechanism of Westminster amendment was to be held in reserve even after a domestic procedure for amendment had been found. If one were to make such an assumption one might wish to return to 1931. As Peter Hogg points out[\[108\]](#), at that time it was not thought possible as a matter of law for the Imperial link ever to be

truly severed. If that was the assumption in the past, one might argue, then how can we say that it had changed by 1982?

Even though the fact of political independence did not lead to *necessary* legal results, it seems uncontroversial to say that it should naturally lead to an independent legal theory. While the Judicial Committee of the Privy Council remained the highest court of appeal for Canada the development of such a theory might have been stifled, but certainly by the time the Supreme Court of Canada had taken over the leading role in constitutional interpretation it was natural that the Canadian court would occasionally take different views from the British or other Commonwealth courts on various legal and theoretical questions. And it would also be natural for it to do so on the basis of factors particular to Canadian political and social development.

We have seen how the question of continuing and self-embracing sovereignty had not been resolved even in the United Kingdom. It would have been surprising to see anything different. Such an arcane matter of constitutional theory would seldom be a matter for judicial determination. In the meantime, legal observers in the United Kingdom and Canada could have been expected to make predictions as to the likely view which a court might take^[109]. But until a court pronounced itself on the issue, the true nature of that sovereignty, whether in British or in Canadian terms (and, as we have seen, the two need not have been the same), remained uncertain. In the meantime the matter was left to the constitutional theorists.

In Canada at some time after 1931 (coincidentally, it seems, at about the time of the end of Privy Council appeals), Canadian constitutional commentators and political actors began to assume that there could be a final and irreversible transfer of constituent powers from Westminster to Canada at some time. This view had clearly solidified by 1982. If the ultimate Canadian rule of recognition could ever have been said to contain a rule of continuing Westminster sovereignty (as counter-factual as that statement might be^[110]) then it would seem that it had evolved, and by the 1950s (and certainly by 1982) it could be said to contain a rule of self-embracing Westminster sovereignty with the results that followed.

It may seem contrary to legal ways of thinking to say that the ultimate rule of recognition could have had one form at one time and then evolved into another form. Those who follow Kelsen and Ross's view might argue that the Canadian (and, as it happens, British) *grundnorm* in 1982 would have to be the same as that which existed in 1867 and 1931. There had, after all, been no break in legal continuity. According to that view, the *grundnorm* was probably one of continuing Westminster sovereignty from which there could be no legal escape.

The most telling criticism of Kelsen (and, implicitly, Ross) was suggested in the writings of Professors Finnis and Raz. Finnis observed that the validity of present rules in a legal system was not dependent on unbroken connection to a *grundnorm* lying deep in a country's constitutional past; rather validity was dependent on proper legal process at the time of enactment even if that process no longer applied in the present. Raz pointed out that the continuity and identity of a legal system was not dependent on the *grundnorm*; instead it was tied up with the continuity and identity of the social and political system. If the *grundnorm* of the historically first constitution was not required to govern legal continuity and determine present legal validity, as Hart's and Raz's critiques indicated, then it seemed that it could indeed evolve over time. Of course, if one wished to have the ability to determine all the norms of a legal system at every moment in the life of that legal system then one would have to assign a specific content to the *grundnorm* in advance of judicial determination. But if one agreed with Hart that it was a formalistic error to assume that all rules in a legal system have a predetermined content, and if the most fundamental rules were linked to (changing) social and political factors, then it was possible to assume

that thinking about the ultimate rule of recognition could evolve before a court was ever, if ever, asked to determine the matter conclusively.

If a Canadian court were ever asked to determine whether, in 1982, the ultimate Canadian rule of recognition included a rule of continuing or self-embracing sovereignty, it would naturally deal with the matter differently than the Judicial Committee or other British court might have done. It might note that early Canadian thinking on the matter was conditioned by the perceived limits of British constitutional theory, but that once it had become clear that both continuing and self-embracing sovereignty were logically possible, the Canadian assumption was in favour of the latter. And if the court agreed with Raz that the continuity and content of a legal system is ultimately related to the continuity and content of the political system, then it might consider some of the following factors and add them to its reasons: that Canada had been an independent nation at least since 1926-31 and one which, despite its attachment to the monarchy and the Commonwealth, did not seek to rely unduly on the United Kingdom; that there was a presumption in favour of a close connection or correspondence between the constitution and the political subjects of that constitution; that the close connection between the constitution and the government and governed is all the more important in a system of responsible government and democratic accountability; that ideally the constitution should be perceived not only as legal but also as legitimate; that the larger historical context of a country's constitutional development should be relevant to the interpretation of the constitutions most fundamental rules; and that certainly once the courts of a country are independent of any foreign control or supervision they should be free to develop legal rules and principles which are based on the above factors.

It is submitted that if ever a Canadian court were asked whether following the passage of the 1982 *Act* the United Kingdom Parliament could have a role, with or without request or consent, in the amendment of the Canadian constitution, it would answer no. It could, consistently with the Patriation Reference, conclude that although until 1982 the United Kingdom Parliament had absolute power to legislate for Canada, its powers were, as a matter of Canadian law, self-embracing, and that therefore Westminster could by means of the *Canada Act 1982* both provide a new code on constitutional amendment in the form of Part V of the *Constitution Act, 1982* and at the same time dictate that the Part V process entirely replace it as sovereign constituent legislature for Canada^[111].

If so, we may conclude that there is good reason to suppose that the "patriation" process was successful and that the new amendment provisions set out in the 1982 *Act* are now the only valid means of constitutional amendment.

CONCLUSION

This essay began with the question whether the United Kingdom Parliament is still a part of the Canadian legal system and an institution to which Canadians might have recourse in the event of future constitutional paralysis. An attempt was made to justify the near-unanimous negative answer to that question in terms which conformed with logic, precedent and common sense.

It has been argued that the Patriation Reference is only authority for the view that until patriation the *ambit* of the United Kingdom Parliament's sovereignty was unimpaired or undiminished. The Court was not asked to and did not comment on whether that sovereignty was continuing or self-embracing, although the statement in the Quebec Reference that Part V "entirely replace[d]" the former amending procedure pointed toward the latter interpretation. If the Court were ever asked to rule on the matter it

might raise some of the considerations which have been discussed in this essay: first, that both continuing and self-embracing conceptions of the ultimate rule of the legal system are coherent, there being no need to refer to "magical acts" or "revolutions in legal dress"; secondly, that within the self-embracing conception, the United Kingdom Parliament could simultaneously confer validity on the *Canada Act 1982* and then, without undermining that validity, disappear from the post-patriation Canadian legal system; and thirdly, that the evolution from continuing to self-embracing conceptions as a matter of twentieth-century Canadian constitutional theory could be explained and justified in terms of Canadian social and political development, both inside and outside the legal community. A legal understanding of the patriation process therefore included not only an evident respect for the existing constitutional rule of law routed as it then was through the Parliament at Westminster, but also reference to factors particular and relevant to Canada and Canadians.

What then could Canadians do to extricate themselves from the severe and apparently permanent constitutional paralysis imagined in the Introduction to this essay? If the same occurred in another system following the replacement of one general amending procedure by another, too rigid procedure, for example, the solution would not be to return to the easier procedure, but rather perhaps to return to the type of extra-legal or legitimizing process which created the constitution in the first place, in many cases some combination of constituent assembly and referendum.

In Canada, history does not point to any obvious source of legitimization^[112]. Strictly speaking, the only constituent assembly Canada ever had was the United Kingdom Parliament. Recourse to that BODY BGCOLOR= "#FFFFFF" is now excluded as a matter of law, as argued in this essay; and furthermore, it seems highly inappropriate to return to that foreign Parliament in search of extra-legal grounding or legitimization for the Canadian constitution. It seems more acceptable to say that, beyond the new constitution and Part V on amendment, the Canadian legal system has no easily identifiable roots. Rather, those roots and new roots have been and are being put down slowly ,, in popular sovereignty, in regional or provincial vetoes, in aboriginal consents, etc. ,, and a new Canadian constitutional theory will gradually uncover them^[113].

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^[2]Jean BEETZ, "Reflections on Continuity and Change in Law Reform", (1972) 12 *U. of Toronto L.J.* 129.

^[3]Being Schedule B to the *Canada Act 1982*, (U.K.) 1982, c. 11.

[4] There are those who have argued that a new constitution should have come into force as a result of approval by the Canadian people, rather than by the traditional legal, but less legitimate, method via Westminster. See, for example, Edward McWHINNEY, *Canada and the Constitution, 1979-82*, Toronto, University of Toronto Press, 1982, at p. 46 and Edward McWHINNEY, "The How, When and Why of Constitution-Making: The Machinery for Developing a New Constitution", in Gérald A. BEAUDOIN, ed., *Mécanismes pour une nouvelle constitution*, Ottawa, Éditions de l'Université d'Ottawa, 1981, at pp. 65-88.

[5] Parts I and V respectively of the *Constitution Act, 1982*, *supra*, note 2.

[6] As discussed below, the alternative which best fits Canadian social and political facts is likely to be favoured by the Canadian courts, given that neither logic nor precedent seem to provide any conclusive answer.

[7] 22 Geo. 5, c. 4 (U.K.).

[8] Other in-between positions can be imagined, but it is assumed here that at some point a choice must be made between continuing and self-embracing assumptions.

[9] The expression is taken from Herbert Lionel Adolphus HART, *The Concept of Law*, Oxford, Oxford University Press, 1961, at p. 149.

[10] J. BEETZ, *loc. cit.*, note 1, at p. 132 and note, describes how customary rules, of which this is probably a type, go through tests of "comparison with the ideal of justice, [...] application, [...] interpretation, [...] acceptability" in order to become legitimate. He explains that this is true of all laws but that "[i]n the case of customary law and even of case law as distinct from enacted law, the process is more clear; those tests begin to take place before a rule is considered part of positive law and therefore there is a greater degree of coincidence between positive law and legitimacy". It will be argued in this essay that a "self-embracing" interpretation of the United Kingdom Parliament's powers, though not as yet determined by a Canadian court, has gained a considerable level of "legitimacy" (in Beetz's terms) nonetheless.

[11] In the Patriation Reference (*Reference re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753), a majority of the Supreme Court of Canada referred to the "undiminished" and "unimpaired" sovereignty of the United Kingdom Parliament without qualifying that sovereignty in any way. This will be discussed in greater detail below.

[12] That is, the federal authority, the international representative of Canada, as indicated in the Patriation Reference, *id.*, at p. 799.

[13] In the middle of the nineteenth century, the U.S. Constitution was thought to be highly rigid. In a memorandum to the Secretary of State for the Colonies in 1858, three Canadian politicians pointed out that the proposed Canadian model was more flexible: "It will be observed that the basis of Confederation now proposed differs from that of the United States in several important particulars. It does not profess to be derived from the people but would be the Constitution provided by the imperial parliament, thus affording the means of remedying any defect, which is now practically impossible under the American Constitution". William Paul McClure KENNEDY, *Statutes, Treaties and Documents of the Canadian Constitution 1713-1929*, 2nd ed., Oxford, Oxford University Press, 1930, at pp. 537-538.

[14] Class 1 of section 92 (now repealed) *Constitution Act, 1867*, 30 & 31 Vict., c. 3 (U.K.) (formerly *British North America Act, 1867*; hereinafter the *1867 Act*).

[15] See, for example, sections 35, 40, 41, 47, 78, 83, 84, 105, 122, 130, 131, 135, 136 of the 1867 Act.

[16] See Peter Busby WAITE, *The Life and Times of Confederation, 1864-1867*, Toronto, University of Toronto Press, 1962, at p. 276 and Canada, Senate, *Report*, by W.F. O'CONNOR, Ottawa, Queen's Printer, 1939 (reprinted 1961), Annex II, at p. 29 (hereinafter cited as O'CONNOR).

[17] Sir John A. Macdonald pointed out that the proposed constitution had the great advantage of "elasticity": "It [...] should be a mere skeleton and framework that would not bind us down". See Joseph POPE, *Confederation: Being a Series of hitherto Unpublished Documents Bearing on the British North America Act*, Toronto, Carswell, 1895, at p. 59.

[18] The most frequently cited statement in support of the view that the framers of the constitution intended to leave amendment with the Imperial Parliament is that of Thomas D'Arcy McGee: "We go to the Imperial Government, the common arbiter of us all, in our true Federal metropolis, we go there to ask for our fundamental Charter. We hope by having that Charter that can only be amended by the authority that made it, that we will lay the basis of permanency for our future government". Quoted in William S. LIVINGSTON, *Federalism and Constitutional Change*, Oxford, Oxford University Press, 1956, at p. 21 and Paul GÉRIN-LAJOIE, *Constitutional Amendment in Canada*, Toronto, University of Toronto Press, 1950, at p. 4.

[19] 28 & 29 Vict., c. 63 (U.K.) (hereinafter the *1865 Act*).

[20] P. GÉRIN-LAJOIE, *op. cit.*, note 17, at p. 49.

[21] *Id.*, ch. 4.

[22] 22 Geo. V, c. 4 (U.K.) (hereinafter the *1931 Statute*).

[23] Cmnd 2768 in *Sessional Papers* (1926).

[24] William Paul McClure KENNEDY, *Some Aspects of the Theories and Workings of Constitutional Law*, New York, Macmillan, 1932, at p. 59. This correspondence was not surprising given the fact that Professor Kennedy had prepared a memorandum for the conference of 1926.

[25] The request and consent provisions of section 4 did not apply to Canada by virtue of subsection 7(1). See Geoffrey MARSHALL, *Constitutional Conventions*, Oxford, Oxford University Press, 1984, at p. 188.

[26] [1935] A.C. 500, at 520-522 (P.C.).

[27] Albert Venn DICEY, *An Introduction to the Study of the Law and the Constitution*, 10th ed. by E.C.S. Wade, London, Macmillan, 1967, at p. 39.

[28] *Id.*, at pp. 67-68.

[29] *Id.*, at p. 68.

[30] *R. v. Taylor*, (1875) 36 U.C.R. 183, at 220 (Q.B.).

[31] Albert Venn DICEY, "Book Review", (1898) 14 *L.Q.R.* 199.

[32] William Henry Pope CLEMENT, *The Law of the Canadian Constitution*, 3rd ed., Toronto, Carswell, 1916, at p. 1.

[33] *Id.*, at p. 3.

[34] This may account for the form of section 4 of the *Statute of Westminster, 1931* which made no reference to *termination* of Imperial power, leaving that to be taken care of by the "request and consent" provisions. See Geoffrey MARSHALL, *Parliamentary Sovereignty and the Commonwealth*, Oxford, Oxford University Press, 1957, at p. 146 and note, and Kenneth C. WHEARE, *The Statute of Westminster and Dominion Status*, 5th ed., Oxford, Oxford University Press, 1953.

[35] W.F. O'CONNOR, *op. cit.*, note 15, Annex 5, at p. 17 (O'Connor's emphasis).

[36] P. GÉRIN-LAJOIE, *op. cit.*, note 17, at p. 246.

[37] As under the 1982 formula: see *Constitution Act, 1982*, subsection 41(e).

[38] Ten years before the Ontario proposals, the then Leader of the Opposition, the Right Honourable Arthur Meighen, a highly regarded thinker yet a somewhat ineffectual political leader, had conceded the same point: "When we have [...] our substituted system, when we have obtained the legal right to amend in our several parliaments this British North America Act, the legal foundation is not one iota better than it was before. Why do I say that? Though the British North America Act may be amended, in such a way as to give the Parliament of Canada, after a long series of provincial approvals, the right to amend the act, after that is all done the legal power would still remain in the British parliament to change the act at will". CANADA, HOUSE OF COMMONS, *Debates*, 4th session, 14th Parliament, 19 February 1925, at p. 337 quoted in P. GÉRIN-LAJOIE, *op. cit.*, note 17, at p. 226. The proposed enactment which was the subject of debate did not include a provision limiting the authority of the United Kingdom Parliament to legislate (see P. GÉRIN-LAJOIE, *id.*, at p. 226 and note), but so long as one accepted the Diceyan conception of continuing parliamentary sovereignty, it was difficult to avoid the thrust of Meighen's argument.

[39] *Id.*, at pp. 240-241.

[40] *Id.*, at p. 241 and note. Gérin-Lajoie later recanted and accepted that the United Kingdom Parliament could indeed be replaced as the supreme legislator of the Canadian legal system, but he did not explain in any detail how this could be so. See Paul GÉRIN-LAJOIE, "Du pouvoir d'amendement constitutionnel au Canada", (1951) 29 *Can. Bar. Rev.* 1136, at p. 1178 and note.

[41] P. GÉRIN-LAJOIE, *op. cit.*, note 17, at pp. 247-248.

[42] *Id.*, at pp. 277-278.

[43] See *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.) (now repealed).

[44] Francis Reginald SCOTT, "The British North America (No. 2) Act, 1949", (1949) 18 *U. of Toronto L.J.* 201-207 reprinted in Francis Reginald SCOTT, *Essays on the Constitution*, Toronto, University of Toronto Press, 1977, pp. 202-208, at p. 205.

[45] *Id.*, at 206.

[46] Francis Reginald SCOTT, "The Redistribution of Imperial Sovereignty", in *Transactions of the Royal Society of Canada*, June 1950, pp. 27-34, reprinted in F.R. SCOTT, *op. cit.*, note 43, pp. 244-250, at p. 249.

[47] As discussed below, there was considerable doubt in the 1950s as to whether the *grundnorm* ever "shifted" other than by revolution, a method which was less familiar to Canada and Canadians.

[48] Reprinted in Anne F. BAYEFISKY (ed.), *Canada's Constitution Act, 1982 and Amendments: A Documentary History*, Toronto, McGraw-Hill Ryerson, 1989, *id.*, at pp. 224-308.

[49] *Id.*, at p. 230.

[50] See *Statement of Conclusions, Constitutional Conference*, Working Session no 3, 8-9 February 1971, reprinted in A.F. BAYEFISKY, *op. cit.*, note 47, at pp. 210-213.

[51] *Id.*, at pp. 231-232.

[52] *Id.*

[53] 13 Geo. VI, c. 81 (now repealed).

[54] *Re Authority of Parliament in Relation to the Upper House*, [1980] 2 S.C.R. 54, at 60: "Prior to 1949, in most respects, the Act did not provide for its amendment by any legislative authority in Canada. Accordingly, as it was a statute enacted by the British Parliament, any changes in its content had to be made by way of an amending Act by that Parliament. Many amendments have been made in that way [...]."

[55] This apparently meant that what the federal Parliament could not do directly could be done indirectly, as a matter of law if not convention, by means of a unilateral federal initiative directed through Westminster. Professor F.R. SCOTT, writing in 1949, "The British North America (No. 2) Act, 1949", *loc. cit.*, note 43, at 205, had already pointed out this anomaly.

[56] Patriation Reference, *supra*, note 10, at 799.

[57] *Id.*, at 801.

[58] *Id.*, at 774.

[59] See Eric COLVIN, "Constitutional Jurisprudence in the Supreme Court of Canada", (1982) 4 *Sup. Ct. L. Rev.* 3.

[60] *Re Objection to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793, at 806.

[61] Unless Canada chose by Part V procedures to reinstate the United Kingdom Parliament!

[62] Subject to an argument based on implied limitations internal to the Canadian Constitution.

[63] See Stanley Alexander de SMITH, *The New Commonwealth and Its Constitutions*, London, Stevens & Sons, 1964, at p. 6.

[64] G. MARSHALL, *op. cit.*, note 24, at p. 204.

[65] See Kenneth C. WHEARE, *The Constitutional Structure of the Commonwealth*, Oxford, Clarendon Press, 1960, especially ch. 4.

[66] *Id.*

[67] See S.A. de SMITH, *op. cit.*, note 62, at p. 4.

[68] See *Manuel v. Attorney-General*, [1983] Ch. 77 at 87 (C.A.) per Megarry V.-C.

[69] Regarding the widely held view that Canadian courts would simply ignore any attempt by Westminster to legislate as if its continuing sovereignty justified its doing so, see Geoffrey MARSHALL, *Constitutional Theory*, Oxford, Clarendon Press, 1971, at p. 63; A.W. BRADLEY, "The Sovereignty of Parliament", in Jeffrey JOWELL and Dawn OLIVER (eds.), *The Changing Constitution*, 2nd ed., Oxford, Oxford University Press, 1989, at p. 33; Peter W. HOGG, *Constitutional Law of Canada*, 3rd ed., Toronto, Carswell, 1992, at pp. 58-59.

[70] See, for example, Sir William Ivor JENNINGS, *The Law and the Constitution*, 5th ed., London, University of London Press, ch. 4; G. MARSHALL, *op. cit.*, note 33, chs. 2-4.

[71] See, for example, G. MARSHALL, *op. cit.*, note 24, at p. 205; P.W. HOGG, *op. cit.*, note 68, at p. 56.

[72] G. MARSHALL, *op. cit.*, note 24, at p. 209.

[73] In the *Manuel* case, *supra*, note 67, Megarry V.-C. gave no precise opinion on this argument, but referred instead to an article on sovereignty by Professor H.W.R. Wade ("The Basis of Legal Sovereignty", [1955] C.L.J. 172) in which it was argued that "there is one, and only one, limit to Parliament's legal power: it cannot detract from its own continuing sovereignty" (at p. 174). Wade had strongly rejected Jennings's idea that there could be a "manner and form exception" to the traditional doctrine of parliamentary sovereignty. Slade L.J. in the Court of Appeal, *Manuel, id.*, at 99-110, speaking on behalf of Cumming-Bruce and Eveleigh L.JJ. noted that there was a clear division of opinion as to whether the United Kingdom Parliament could effectively tie the hands of its successors, but he did not find it necessary to deal with the issue. The House of Lords refused a petition for leave to appeal. *Id.*, at 110.

[74] See G. MARSHALL, *op. cit.*, note 24, at p. 209. Furthermore according to the traditional theory of Parliamentary sovereignty, Parliament can only abdicate its sovereignty entirely, that is by dissolving itself or transfer its authority to a new legislative BODY BGCOLOR= "#FFFFFF". See G. MARSHALL, *id.*, and A.V. DICEY, *op. cit.*, note 26, at p. 69.

[75] See sources cited, *supra*, note 68.

[76] Hans KELSEN, *General Theory of Law and State*, Cambridge, Massachusetts, Harvard University Press, 1949, at p. 111.

[77] *Id.*, at p. 115.

[78] *Id.*

[79] *Id.*

[80] See F.R. SCOTT, *loc. cit.*, note 43.

[81] Professor John FINNIS, "Revolutions and Continuity of Law", in A.W.B. SIMPSON (ed.), *Oxford Essays in Jurisprudence*, 2nd ser., Oxford, Oxford University Press, 1973, at p. 52, discusses how other Commonwealth countries deliberately broke the rules so as to sever the link to the Imperial *grundnorm*.

[82] H. KELSEN, *op. cit.*, note 75, at p. 219.

[83] H.L.A. HART, *op. cit.*, note 8, at p. 245 and note.

[84] *Id.*, ch. 6.

[85] *Id.*, at p. 246 and note.

[86] *Id.*, at p. 114.

[87] *Id.*, p. 117:

"At the end of the period of development [from colony to independent nation] we find that the ultimate rule of recognition has shifted, for the legal competence of the Westminster Parliament to legislate for the 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 local system whose rules are generally obeyed".

[88] H.W.R. WADE, *loc. cit.*, note 73, at 191: "the naked fact of revolution [...] beneath its elaborate legal dress".

[89] See H.L.A. HART, *op. cit.*, note 8, at p. 118.

[90] Alf ROSS, *On Law and Justice*, London, Stevens, 1958, at p. 81.

[91] Herbert Lionel Adolphus HART, "Self-Referring Laws", in Herbert Lionel Adolphus HART, *Essays in Jurisprudence and Philosophy*, Oxford, Oxford University Press, 1983, p. 170, at p. 177.

[92] *Id.*

[93] Hart dealt with the self-embracing/continuing sovereignty issue in his discussion of the uncertainty in the ultimate rule of recognition elsewhere in *The Concept of Law*, *op. cit.*, note 8, at p. 144 *et seq.*

[94] See J. FINNIS, *loc. cit.*, note 80, at 55, for an excellent discussion of these concepts.

[95] A. ROSS, "On Self-Reference and a Puzzle in Constitutional Law", (1969) 78 *Mind* 1, at 21.

[96] According to the "continuing" alternative all amendments to the amendment procedure would be viewed only as "statutes" and therefore amendable at all times using the *original* procedure. This corresponds with the system in the United Kingdom according to the prevailing view if one considers the Queen-in-Parliament as an amendment procedure. See also Michael J. DETMOLD, *The Australian Commonwealth: A Fundamental Analysis of its Constitution*, Sydney, The Law Book Company, 1985, at pp. 201-210.

[97] J. FINNIS, *loc. cit.*, note 80, at 54.

[98] J. FINNIS, *loc. cit.*, note 81, at 63 (Finnis' emphasis). Brian SLATTERY proposes a similar principle in "The Independence of Canada", (1983) 5 *Sup. Ct. L. Rev.* 384, at 393.

[99] *Id.*

[100] Joseph RAZ, *The Concept of a Legal System*, 2nd ed., Oxford, Oxford University Press, 1980, at p. 188.

[101] Joseph RAZ, *The Authority of Law*, Oxford, Oxford University Press, 1979, at p. 98.

[102] "[A] momentary legal system contains all, and only all, the laws recognized by a primary law-applying organ which it institutes". J. RAZ, *op. cit.*, note 99, at p. 192.

[103] J. RAZ, *op. cit.*, note 100, at p.80.

[104] *Id.*, at p. 100.

[105] George WINTERTON, "The British Grundnorm: Parliamentary Supremacy Re-examined", (1976) 92 *Law Q. Rev.* 591 argues persuasively that though there are in-between positions which can be identified, there is a fundamental, unavoidable choice between continuing and self-embracing sovereignty.

[106] For an excellent early discussion of the Commonwealth *grundnorm*, see R. T. E. LATHAM, "The

Law and the Commonwealth", 1949, reprinted from William Keith HANCOCK (ed.), *Survey of British Commonwealth Affairs*, vol. 1, London, Oxford University Press, 1937.

[107] See B. SLATTERY, *loc. cit.*, note 96. See also E. COLVIN, *loc. cit.*, note 58.

[108] P.W. HOGG, *op. cit.*, note 68, at p. 43.

[109] Philip A. JOSEPH and Gordon R. WALKER, "A Theory of Constitutional Change", (1987) *Oxford J. Legal Stud.* 155, at 172, have noted the importance of the institutional arrangement of the whole legal community, "the legal profession, the universities, a system of law courts, a judicial hierarchy, various law-making bodies and law reform agencies, parts of the state's political apparatus and the upper echelons of the state bureaucracy" , in the interpretation of the Constitution and, in particular, rules of constitutional change.

[110] Raz points out that constitutional theory often asks questions regarding those laws which, according to the rule of recognition or other criterion, the courts of a particular system would recognize, even though it is only in the rarest sort of case that those courts ever come to consider these matters. See J. RAZ, *op. cit.*, note 99, at p. 196 and J. RAZ, *op. cit.*, note 100, at p. 88.

[111] Accordingly, it may be more appropriate to say that section 52 and especially subsection 52(3) is the key provision in the 1982 legislation rather than the *Canada Act 1982* itself.

[112] This is not to suggest that *any* part of the Constitution could be amended by recourse to a "legitimizing" process. This would violate the constitutional rule of law. Furthermore, fundamental rights and freedoms would be particularly vulnerable to such super-majoritarian legitimizing processes. What is contemplated here is a serious breakdown of the constitutional amendment process as a result of a persistent refusal by one or more provinces even or ever to participate in that process. In that context, a Court might be willing to accept a highly "legitimate" process as an unavoidable alternative in order to preserve the constitutional rule of law. See generally *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721.

[113] See, for example, Brian SLATTERY, "First Nations and the Constitution: A Question of Constitutional Trust", (1992) 71 *Can. Bar Rev.* 261 and Peter H. RUSSELL, *Constitutional Odyssey: Can Canadians Be A Sovereign People?*, Toronto, University of Toronto Press, 1992.