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Modelling Fundamental Legal Change: The Paradox of Context and the Context of Paradox

Fabien Gélinas

1. Introduction

In aiming to model how legal reasoning operates in situations of fundamental constitutional change, this article takes as its starting point the "paradox" of omnipotence. One simple statement of the paradox is as follows: if Parliament (or God, or whatever) is omnipotent, then it can bind itself; if Parliament can be bound, then it is not omnipotent.[1] Focusing more specifically on constitutional change, a formally similar expression of the paradox could read thus: if the constitution-amending body is supreme, then it can deprive itself of its supremacy by amendment; if that body can be deprived of its supremacy, then it is not supreme. With respect to a written constitution, the question becomes whether a constitution-amending body can bind itself by using the constitution's amending provision to enact a new amending provision (for instance, one that names a new constitution-amending body) such that the former provision would be entirely replaced and could no longer serve as a basis for future amendments.

The formulation of omnipotence set out above may be said to be incoherent: in terms of constitutional amendment, it requires that Parliament can exercise the power to bind itself by enacting a new amendment provision if and only if, in accordance with the concept of Parliamentary supremacy, it cannot be bound.[2] The traditional solution[3] to the paradox of omnipotence, advanced by legal theorists

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1. See Ilmar Tammelo, *Modern Logic in the Service of Law* (Vienna: Springer-Verlag, 1978) at 117-18. For Tammelo, the "Paradox of Parliamentary Sovereignty, whereby on the one hand it is postulated that no law is beyond Parliamentary competence, while on the other hand it is claimed that one kind of law is beyond such competence" arises from "[t]wo fundamental principles of constitutional law … : (1) Parliament can make or unmake any law whatsoever. (2) Parliament cannot bind its successor" (*ibid*). See also JC Hicks, "The Liar Paradox in Legal Reasoning" (1971) 29:2 Cambridge LJ 275.

2. One is reminded of the paradox of the barber who can shave himself if and only if he cannot shave himself, notably referenced by Bertrand Russell, "The Philosophy of Logical Atomism" (1919) 29:3 Monist 345 at 354-55. Stated simply, the paradox supposes a society where all men keep themselves clean-shaven either by (1) shaving themselves or (2) being shaved by the barber. If the society's one, clean-shaven barber is defined as one who "shaves all those, and those only, who do not shave themselves" (*ibid* at 355), then by extension, the barber would shave himself if and only if he did not shave himself.

One popular solution to this paradox is to point out that the barber is a woman. Translated into the language of constitutional amendment, this could mean that the ultimate constituent authority is not a legal authority and cannot be changed in legal terms (which roughly corresponds, as will shortly appear, to Alf Ross's solution). See in general Laurence Goldstein, "Four Alleged Paradoxes in Legal Reasoning" (1979) 38:2 Cambridge LJ 373.

3. Or, perhaps more aptly, dissolution. On this solution, see JL Mackie, "Evil and Omnipotence" (1955) 64 Mind 200 at 212; HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 145-49 [Hart, *Concept*]; HLA Hart, "Self-Referring Laws" in Fritjof Lejman, ed, *Festskrift tillägnad professor, juris doktor Karl Olivecrona* (Stockholm: PA Norstedt & Söner, 1964) 307 at 315 [Hart, "Self-Referring"].

and theologians alike, has been to introduce within this single incoherent theory a distinction between two intelligible notions of sovereignty.[4] The first notion, continuing sovereignty, is the view that Parliament is "free at every moment of its existence as a continuing body … from its own prior legislation."[5] The second notion, self-embracing sovereignty, gives the current Parliament the power to limit "irrevocably the legislative competence of its successors."[6] In terms of the present article's objective of presenting a model of legal reasoning, however, it will be argued that neither theory provides a satisfactory logical representation of how constitutional self-amendment is understood in practice.

This article argues instead for a focus on real-world context, in which the logic of formal law is necessarily embedded, in order to gain insight into the paradox regarding the validity of constitutional change set out above. It proposes a model of the formal legal structure as open-ended and therefore permeable to external ideas that, when internalized through legal reasoning, constitute the principles underlying the unity of the legal system and its conception of all-or-nothing legal validity. The article begins with an examination of fundamental constitutional change in terms of continuing sovereignty and self-embracing sovereignty, demonstrating that a representation in terms of first-order logic is not readily available for either notion (Part II). It then posits that the necessity of using second-order logical operators, representing a dimension of time and self-reference, to model constitutional change reflects the reality, captured by legal reasoning, that such change occurs in a dynamic context (Part III). This emphasis on context in turn suggests the importance of the concept of acceptance, a factor external to the formal legal system, in determining validity and supporting the prevailing conception of all-or-nothing formal legal validity (Part IV). Finally, the article presents its model of formal legal structure as semi-open to an external context that may be internalized through legal reasoning and which may sustain or challenge other parts of the system, permitting constitutional change (Part V). In other words, to return to the language of the paradox of omnipotence, accounting for external context gives rise to a more nuanced view of the validity of legal rules enacted by Parliament. By extension, Parliament's supremacy—its ability to enact valid rules on the basis of all-or-nothing formal validity—must be understood to rely on principles shaped by an external normative context that may also serve as the basis for fundamental constitutional change.

2. Logic

Continuing sovereignty has often been considered the most natural understanding of sovereignty. The fact that it has for so long remained the dominant

4. On the proposition that the choice is somehow unavoidable between the two notions of sovereignty, see George Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined" (1976) 92:4 Law Q Rev 591. This is not to say that in-between positions are excluded; they are simply qualified versions of one of the basic positions (for instance, continuing sovereignty *cum* manner-and-form exception, which could also, conceivably, be expressed as self-embracing sovereignty *cum* limits-on-content exception). See also George Winterton, "Is the House of Lords Immortal?" (1979) 95:3 Law Q Rev 386.

5. Hart, *Concept*, *supra* note 3 at 145.

6. *Ibid*.

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interpretation of the powers of the United Kingdom Parliament probably has something to do with an assumption that other interpretations might be logically unsound.[7] Dicey, for one, seemed to think that continuing sovereignty was somehow dictated by logic:

> The *logical reason* why Parliament has failed in its endeavours to enact unchangeable enactments is that a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment. … Every attempt to tie the hands of such a body necessarily breaks down on *the logical* and practical *impossibility* of combining absolute legislative authority with restrictions on that authority.[8]

In other words, the incoherence of the popular concept of "omnipotence", the fact that one cannot have both continuing and self-embracing powers, was believed to involve that self-embracing sovereignty was logically impossible.

Ross succeeded in raising doubts about the logical status of self-embracing powers when he wrote that a typical pattern of constitutional amendment may involve a logical contradiction.[9] He was referring to constitutional amending provisions that are commonly interpreted as providing for their own replacement.[10] He used the example of the amending provision of the Danish constitution to introduce his puzzle, which he explains as follows:

> Now, if we suppose art. 88 to be amended according to its own rules with the result that it is replaced by art. 88' (with a content contrary to that of art. 88) the validity of art. 88' is based on an inference of the following pattern:
>
> art. 88: The constitution may be amended by a process in accordance with conditions C_1, C_2, and C_3, and only by this process;
>
> art. 88' (stating that the constitution may be amended by a process, in accordance with conditions C'_1, C'_2, and C'_3) has been created in accordance with C_1, C_2, and C_3.
>
> Δ art. 88' is valid, that is, the constitution may be amended by a process in accordance with conditions C'_1, C'_2, and C'_3, and only by this process.
>
> As the meaning of art. 88 is to indicate *the only way* in which the constitution may be amended, this is an inference in which the conclusion contradicts one of the premisses, which is a logical absurdity.[11]

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7. See generally Geoffrey Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford: Clarendon Press, 1957) at 60-75. For a recent discussion of the assumption, see Peter C Oliver, "Sovereignty in the Twenty-First Century" (2003) 14:2 King's College LJ 137 at 149-52.

8. AV Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (London: MacMillan, 1915) at 65, n 3 [emphasis added]. Dicey believed, however, that Parliament could conceivably "abdicate", so long as the abdication was complete, so that the "logic" of continuing sovereignty could then be applied to the next "sovereign": *ibid*.

9. Alf Ross, "On Self-Reference and a Puzzle in Constitutional Law" (1969) 78 Mind 1 [Ross, "Self-Reference"]. The general issue of self-reference taken as a logical absurdity, which was also dwelt upon by Ross, will only be addressed indirectly. See also Alf Ross, *On Law and Justice*, translated by Margaret Dutton (London: Stevens and Sons, 1958) at 78-84 [Ross, *Justice*]. More generally, see Jon Barwise & John Etchemendy, *The Liar: An Essay on Truth and Circularity* (Oxford: Oxford University Press, 1987).

10. In a context of parliamentary sovereignty, this corresponds to self-embracing powers.

11. Ross, "Self-Reference", *supra* note 9 at 5.

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Ross believed the reasoning to be irremediably flawed by the apparent contradiction between conclusion and first premise as to how the constitution can be amended. "It is not possible," he writes, "that anything can appear in the conclusion of a valid deductive inference which is in conflict with the premises."[12]

The strategy most often invoked to dissolve the apparent paradox consists in showing that art. 88 and art. 88' do not apply over the same time period, and so do not come into conflict.[13] This strategy embodies the common-sense reaction and, certainly, the reaction most lawyers would have. But Ross was not satisfied with that. He believed that the argument "confounds legal with logical contradiction."[14] The inference could not be made logical by stipulation; the contradiction remained even though the law might have tools to deal with it, such as the *lex posterior* principle.

Another strategy has been to point out that the first premise does not refer to the same constitution as the one mentioned in the conclusion. This is the explanation offered by Goldstein, who refers explicitly to Ross's formulation of the inference:

> The fallacy in this inference stems, I suggest, from a mistaken view about the relation between a constitution and its rules. We say that a constitution *contains* rules and this might lead the unwary to suppose that a constitution is an entity independent of its rules, just like a purse which contains coins is an entity distinct from any of the coins it contains on any particular occasion. The difference is, however, that a constitution is, in part, *determined by* or *constituted by* its rules. Different constitutional rules determine different constitutions. If we call the constitution of which Article 88 is part "CONST," and the constitution of which Article 88' is part "CONST'" (where CONST ≠ CONST' since Article 88 ≠ Article 88') then it is clear that, in the inference pattern exhibited by Ross, the conclusion does *not* contradict the premises since conclusion and first premise predicate contrary things but about *different* objects—CONST and CONST' respectively. By amending the constitution in a way sanctioned by Article 88, a *new* constitution is created of which Article 88' is a part.[15]

The contradiction apparently vanishes because the word "constitution" has a different referent in premise and conclusion. One can readily imagine how Ross would have reacted to this. Applying his system of logic, Ross would have been entitled to say that Goldstein's strategy merely shows how the inference pattern of self-amendment can be interpreted as involving the modification of the first premise in "mid-inference". In Goldstein's version of the example, the referent of "constitution" is modified just as what is taken to be the conclusion is being asserted, thus irremediably vitiating the inference.[16] On this plane, Goldstein's claim that no contradiction is involved because "conclusion and first premise

12. Ross, *Justice*, *supra* note 9 at 82.
13. See Hart, "Self-Referring", *supra* note 3 at 314; J Raz, "Professor A Ross and Some Legal Puzzles" (1972) 81 Mind 415 at 420.
14. Ross, "Self-Reference", *supra* note 9 at 20.
15. Goldstein, *supra* note 2 at 376. See also Norbert Hoerster, "On Alf Ross's Alleged Puzzle in Constitutional Law" (1972) 81 Mind 422.
16. Thus put, the inference violates the canon of Ross's logical system that premises determine the conclusion instantaneously.

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predicate contrary things about *different* objects" would seemingly amount to a claim that the conclusion can simply not be said to follow from premises.[17]

Hart doubted, perhaps more helpfully, that the exercise of legislative power to create new norms could be modelled as a deductive inference of that type. "[I]t is not clear," he writes, "how this logical principle [that 'nothing can appear in the conclusion of a valid deductive inference which is in conflict with the premises'] applies to a legislative act."[18] Although the point was not dwelt upon by Hart, Ross makes the following remark about his suggestion:

> In my opinion there can be no doubt that in legal as well as popular reasoning the legality of the amendment procedure and the validity of the amended article are based on an inference: *As* art. 88 is valid constitutional law and *as* the amendment conditions prescribed in this article are fulfilled, so it *follows* that art. 88' is now valid constitutional law.[19]

The problem, I would suggest, is not whether constitutional self-amendment is, or is believed to be, based on an inference. In one sense, self-amendment certainly is based on some form of inferential pattern. The problem seemingly lies, rather, in the sophistication of the logic used to model the real-world phenomenon of constitutional self-amendment. Ross gives a clear indication of what he takes logic to be when he writes that a "logical inference … knows of no sequence in time."[20] This suggests that his whole argument is based on the most basic first-order logic where the only connectives (or operators) allowed are those of propositional logic (*not*, *and*, *or*, *implies*, *if and only if*, and *exclusive or*).[21] Hart's reaction to Ross's puzzle—pointing out that logic perhaps does not apply to legal reasoning in that way, or that self-amendment does not *really* result in a contradiction—may be a good reflection of the fact that a formal representation of the type of legal reasoning here envisaged requires a more complex system of logical representation.

The basic system used by Ross is known to show very serious shortcomings when it comes to modelling instances of real-life reasoning. The most important limit of that system in the representation of law is probably the fact that it provides no tools to handle statements about sentences.[22] If one takes a close look at Ross's example, one will notice that the conclusion of his inference is not the new amending provision. The conclusion is a statement about the sentence

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17. I would suggest that Goldstein's strategy only differs formally from the time-based strategy. What he is saying in substance is that the first premise applies to the constitution found at $time_1$, and the norm contained in the conclusion applies to the constitution found at $time_2$. Goldstein otherwise asserts that the time-based strategy is invalid.

18. Hart, "Self-Referring", *supra* note 3 at 315.

19. Ross, "Self-Reference", *supra* note 9 at 19.

20. *Ibid* at 6-7.

21. These are sometimes called "Boolean operators".

22. The traditional rule of first-order logic is that predicates can take as an argument only a term, not a sentence (a "sentence" being the representation of a "proposition" that contains a subject and a predicate). A "statement about a sentence" takes the proposition as subject and adds a further predicate (introducing thereby a "second-order" of predication). See Ernest Davis, *Representations of Commonsense Knowledge* (San Mateo: Morgan Kaufmann, 1990) at 83-86.

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taken to be that new amending provision. Consider Ross's formulation of the conclusion:

> Article 88' is valid, that is, the constitution may be amended by a process in accordance with conditions C'_1, C'_2, and C'_3 and only by this process.

And a more accurate version:

> Article 88', that is, "the constitution may be amended by a process in accordance with conditions C'_1, C'_2, and C'_3 and only by this process," is valid.

The general modelling of legal change offered by Ross shows this clearly:

> A norm is valid, when created in accordance with conditions C_1, C_2, and C_3;
>
> The norm N has been created in accordance with the conditions C_1, C_2 and C_3;
>
> Δ The norm N is valid.

The conclusion here is simply "The norm N is valid" and not "The norm N is valid, that is, N." The conclusion is that N is valid whatever its content and not the supplementary predication of that content. Basic first-order logic does not provide the relation between the "statement about the sentence" and the "sentence" itself.[23] Any attempt to express "statements about sentences" directly in that logical system is very likely to lead to trouble such as apparent contradiction.[24] Ross's modelling of self-amendment was such an attempt.[25]

Nothing in the foregoing means, of course, that self-amendment in law is illogical or absurd. What it means is that more powerful tools are certainly needed if a logical representation of the phenomenon is to be provided. Artificial intelligence research has had to deal with the numerous problems involved in the logical representation of real-life reasoning. It has explored various ways in which basic first-order logic can be augmented or extended to that purpose. One of the more obvious strategies has been to provide additional logical connectives or operators for sentences, so that statements about sentences could adequately be

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23. The same applies to the problem of self-reference, taken in isolation, which cannot be translated directly into first-order logic. Consider the classical liar sentence: "This sentence is false". Basic first-order logic has no equivalent of the demonstrative "this" used self-referentially because the latter implies a "second order" of predication. See *ibid*.

24. *Ibid*. This is apparently a common mistake.

25. Note that Ross otherwise rejects that approach to deontic logic which treats directive propositions descriptively in order to ascribe to them truth-value (in terms of legal validity), an approach which directly puts a logic of norms outside the scope of first-order logic: see generally Georg H von Wright, *Norm and Action: A Logical Inquiry* (London: Routledge & Kegan Paul, 1963) [von Wright, *Norm*]. To Ross, "deontic" logic is a system parallel to "indicative" logic, the latter "dealing with the formal conditions for [meaningful] indicative discourse, and the other dealing with the formal conditions for [meaningful] directive discourse"; logic is thus "concerned with the conditions under which the posing of one [directive or indicative proposition] is compatible with the posing of another one [respectively directive or indicative]" (Alf Ross, *Directives and Norms* (London: Routledge & Kegan Paul, 1968) at 180, 29-33, 177-82). For his constitutional law puzzle, at least in the 1969 version, Ross treats his inference as a "directive", or "deontic", inference and concludes, presumably, that taken in isolation it is contradictory and therefore fails to meet the conditions for meaningful direction.

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dealt with.[26] The most important of those connectives in the representation of real-life, or common-sense, reasoning, are probably the time connectives.[27] This is so because "[v]ery few commonsense problems can be formulated in purely static terms."[28] And if that is the case for common-sense problems in general, it is probably even more so with respect to legal problems. In Ross's example of self-amendment, for instance, the present tense used in "the constitution may be amended", in both conclusion and first premise, is not the timeless present it appears to be and that basic first-order logic would *require* it to be.[29]

Let me now go back to where our enquiry into logic started in order to point out that the orthodox British understanding of sovereignty cannot be said to be dictated by logic. Consider a British version of Ross's puzzle. For that purpose, suppose a formal expression of parliamentary sovereignty were found by some lucky analyst in a secret document used by judges only. Article 88 of that document, along the lines of Ross's puzzle, reads thus:

> art. 88: The law and constitution of the United Kingdom can be modified by Acts of Parliament and by no other process.

Suppose Parliament, in some unprecedented effort to modernize British political life, enacted a statute stating that the law and constitution of the United Kingdom can be modified by Acts of, say, the new "House of Citizens", and by no other process. Before even starting to imagine inference patterns that could yield a conclusion, conscientious judges might want to have a second look at art. 88 and wonder whether the sovereignty is continuing or self-embracing. Like Danish judges, they would find that the answer is not really there: art. 88 can be interpreted either way in both cases.[30] Ross assumed for his popular puzzle that art. 88 allowed self-amendment; put in British terms, for our puzzle, the assumption is that the body designated or formed by the amendment procedures enjoys self-embracing powers. The attempt to formulate self-embracing sovereignty in British terms gives a choice between two tactics:

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26. Those additional connectives have to meet a number of formal criteria in order to qualify as "extensional connectives", that is, connectives that can function in legitimate first-order logic. For instance, they have to commute with the traditional connectives: Davis, *supra* note 22 at 52-59.

27. Davis, *supra* note 22. Extensional time operators have been discussed in artificial intelligence research since the late fifties. See John McCarthy, "Programs with Common Sense" in *Mechanisation of Thought Processes: Proceedings of a Symposium Held at the National Physical Laboratory on 24th, 25th, 26th and 27th November 1958* (London: Her Majesty's Stationery Office, 1959) vol 1, 75. A complete set of time operators should at least include a set of "tense operators" covering all the possibilities envisaged by a traditional grammar.

28. Davis, *supra* note 22 at 187.

29. This is the same as saying that "constitution" is a time-varying term in the inference, which the basic system of representation cannot handle. One commentator encapsulates Ross's problem as follows: "His intransigence suggests the assumption that all logical matters are concerned with the timeless and changeless interplay of concepts, which then of course cannot accommodate amendment. This resistance can be met by embedding a logic of process within the scope of logic, or by removing the stigma from the epithet 'illogical' when applied to action under norms, in case one continues to insist upon the narrower scope of logic" (Christopher Berry Gray, "Amendment: Legal Continuity and Ongoing Revolution" in Elspeth Attwooll, ed, *Shaping Revolution* (Aberdeen: Aberdeen University Press, 1991) 47 at 51).

30. I have so far assumed with Ross that his art. 88 does refer to itself but the assumption is not provided by the text.

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(1) Parliament can make any law including a law changing *this* rule

(2) Parliament can make any law *until* it provides otherwise

Since, as already noted, basic first-order logic does not handle time-frames and has no representation for "*this*" used self-referentially, Ross concluded that a contradiction appears whenever one starts from such premises. So my imaginary British court might want to say that in (basic first-order) logic, "Parliament" cannot be a time-varying term in any valid inference, that sovereignty must therefore be continuing, and conclude that, notwithstanding its purported transfer of power to the House of Citizens, the same (old) Parliament can still make law exclusively. But to be consistent, the court would have to assume that continuing sovereignty can validly be expressed in a first-order logical construction. And it cannot. Consider the two corresponding formulations:

(1) Parliament can make any law excepting a law changing *this* rule

(2) Parliament can make any law *at all times*

Here again, one gets the same choice between a self-referential "*this*" and the time operator. And both involve a second-order predicate.[31]

Basic first-order logic is fundamentally a static system, and reality is not static. A common problem in the treatment of "sovereignty" in terms of logic, it seems, has been that of confusing the necessarily static directions of basic first-order logic with the contextual assumption that may have for a long time favoured, in British theory, static answers to real-life legal questions.[32] Very few legal questions can be solved without the help of time-frames, which basic first-order logic ignores.[33] Pointing to the "staticity" of that logic to support the assumption that Parliamentary sovereignty cannot be self-embracing, therefore, would be very much like using a four-equations pocket calculator to disprove Gödel's theorem.

I have assumed so far that reasoning from norms can perhaps be translated into an extended system of logic commensurable with the principles underlying

31. One commentator has claimed that the equivalent of continuing (unchangeable) powers could be formally written into a constitutional document as follows: "All rules concerning the making and change of the rules of the constitution are unchangeable," and that this can be taken as "solving the paradox of the rule of constitutional change" (Nikolas HM Roos, "The Identity of Legal Systems in the Light of Some Paradoxes of Constitutional Law" in Elspeth Attwooll, ed, *Shaping Revolutions* (Aberdeen: Aberdeen University Press, 1991) 56 at 66-68). The paper takes it as "self-evident that any system in its proper sense must have a core of rules that do not change and that define the limits of change compatible with the system" (*ibid* at 66). I would suggest that this is a change-reluctant practical judgment that simply happens to match the "staticity" of first-order logic. The author is mistaken in thinking that a "negatively recursive" rule can therefore be formally self-referential in a first-order logical construction.

32. Note that in other respects self-embracing sovereignty is more "static" than continuing sovereignty. For an original argument showing that the reason most commonly advanced to defend continuing sovereignty (wisdom of future generations) usually involves a self-refutation, see John Finnis, "Scepticism, Self-Refutation, and the Good of Truth" in PMS Hacker & J Raz, eds, *Law, Morality, and Society: Essays in Honour of HLA Hart* (Oxford: Clarendon Press, 1977) 247 at 254-56.

33. For a recent effort at handling time in the modelling of legal rules, see Monica Palmirani, Guido Governatori & Giuseppe Contissa, "Modelling Temporal Legal Rules" in *Proceedings of the 13th International Conference on Artificial Intelligence and Law* (New York: ACM, 2011) 131.

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first-order logic.[34] Under that assumption, I showed that there is no reason to believe that continuing sovereignty is more (or less) "logical" than self-embracing sovereignty.[35] In both cases, a satisfactory representation would clearly require extensional operators on sentences, which basic first-order logic does not provide. Leaving that aside, what I wish to stress now is the fact that constitutional change is already intelligible in the form law presents it. The reason lies in context, which clearly informs the way lawyers envisage the common occurrences of constitutional change, and which logicians must look to in their attempt to offer accurate representations of this real-life phenomenon. This is what is next considered.

3. "Pragmatics"

If lawyers often know that an older amending provision does not conflict, in any relevant sense, with a newer amending provision derived from it, it is because the context in which they find constitutional self-amendment tells them so. It is because in some sense "in" that context there are principles about how words are used around constitutional amendment and, more generally, around legal change.[36] Apart from syntax and semantics, this is the third source of information that logicians have to look to in attempting to provide adequate representations of language-based, real-world reasoning. This is where Ross found a basis for choosing his interpretation of art. 88, which was one of at least two possibilities. For as I suggested, on the basis of syntax and semantics only, he could have taken art. 88 to be immutable, just like Parliamentary sovereignty can be, and has been, viewed as being forever "continuing". But the context directed him to choose the self-embracing interpretation even though he *a priori* thought that it could lead to logical contradiction. The information provided by context is difficult to handle because it is but rarely expressed in the form of words.

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34. Major problems have yet to be overcome for this assumption to prove satisfactory: see generally the special issue (1991) 4:3 Ratio Juris; von Wright, *Norm*, *supra* note 25; Ota Weinburger, *Law, Institution and Legal Politics: Fundamental Problems of Legal Theory and Social Philosophy* (Dordrecht: Kluwer Academic, 1991) at 77-89. Some prominent problems are as follows. First, the applicability of the principle of contradiction to normative systems remains a controversial matter: see Hans Kelsen, *General Theory of Norms,* translated by Michael Hartney (Oxford: Clarendon Press, 1991) at 211-14. Second, a sufficiently differentiated set of extensional sentence operators remains to be developed: see Georg H von Wright, "Is There a Logic of Norms?" (1991) 4:3 Ratio Juris 265 [von Wright, "Logic"]; Tammelo, *supra* note 1. Third, the use of even the most basic truth-functional operators with normative propositions gives rise to serious problems: see Carlos E Alchourrón & Eugenio Bulygin, "Limits of Logic and Legal Reasoning" in Antonio A Martino, ed, *Expert Systems in Law* (Amsterdam: North-Holland, 1992) 9 at 21-22. Fourth, attempts at providing a formal representation of the conceptual structure of reasoning from norms have so far succeeded only with the most primitive patterns: von Wright, "Logic", above, at 266. A significant portion of the efforts dedicated to the formal representation of legal phenomena is now deployed in the area of "defeasible" logic, or "non-monotonic" logic, on which see Christian Strasser & G Aldo Antonelli, "Non-monotonic Logic" in *Stanford Encyclopedia of Philosophy* (2 December 2014), online: *Stanford Encyclopedia of Philosophy* http://plato.stanford.edu/.

35. See generally Peter Suber, *The Paradox of Self-Amendment: A Study of Logic, Law, Omnipotence, and Change* (New York: Peter Lang, 1990) at 25-32.

36. With respect to logic, I refer to this context as the "pragmatics" of legal change ("pragmatics" is a term in contemporary linguistics indicating the branch of the discipline that deals with language in use).

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In order to solve his puzzle, Ross suggested a principle he meant to serve as the immutable "basic norm" of the legal system, from which the amendment provisions could derive their validity:

> Obey the authority instituted by art. 88, until this authority itself points out a successor; then obey this authority, until it itself points out a successor; and so on indefinitely.[37]

This, he thought, would solve his self-reference problem because any amending provision in the future could be said to rest on the general principle rather than on the amending provision(s) preceding it.[38] His principle, however, could certainly not solve the problem of logical representation as he conceived it since the basic logic he was using knows of no time connectives on sentences such as "until". Ross's "basic norm" is nevertheless valid as an attempt to express the unwritten rules that are followed (often unreflectively) when self-amendment of the type implied in art. 88 is in fact understood and acted upon in legal practice. But as such it has serious limitations.

One of the problems with Ross's "basic norm" is that it is assumed to be immune from legal change, which is to say that any change to it must happen outside the law. Its modification must be analyzed as some sort of revolution, perhaps peaceful, entailing a break in the continuing identity of the system. From a descriptive standpoint, this is not entirely satisfactory because it fails to explain how a change in a basic norm can be effected, on a principled basis, using normative materials that are part of the legal system and that survive the change.[39] Moreover, observation tells us that, from the point of view of a judge, the acceptance of a new ultimate rule of competence never entails a total rejection of the "former" legal system.[40] Cases of successful revolutions or coups usually show that the only norm necessarily changed in the "new system" is the ultimate rule of competence; all other norms are generally understood to continue in force, subject to repeal under the new rule of competence.[41] Ross's "immutable basic norm" does not adequately explain the continuing validity of most norms in cases where a break in legal continuity is believed to have occurred. The surviving norms usually include the ultimate rules of adjudication, and rules of identification envisaged separately from the rule of competence.[42] When courts are called upon to settle constitutional matters in cases of revolutions or coups, as

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37. Ross, "Self-Reference", *supra* note 9 at 24.

38. He also relied on the idea that an inference from his principle was a delegation, as opposed to a "self-destroying transference of competence" that is postulated from outside the principle: *ibid* at 22.

39. JM Eekelaar, "Principles of Revolutionary Legality" in AWB Simpson, ed, *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Clarendon Press, 1973) 22.

40. Charles Sampford, "Coups d'Etats and Law" in Elspeth Attwooll, ed, *Shaping Revolution* (Aberdeen: Aberdeen University Press, 1991) 161 at 162-67.

41. For an exhaustive survey of judicial responses to coups d'état in post-colonial common law jurisdictions, see Tayyab Mahmud, "Jurisprudence of Successful Treason: Coup d'Etat & Common Law" (1994) 27:1 Cornell Int'l LJ 49.

42. For an account of the various modes of validity with respect to time, see Eugenio Bulygin, "Time and Validity" in Antonio A Martino, ed, *Deontic Logic, Computational Linguistics and Legal Information Systems*, vol 2 (Amsterdam: North-Holland, 1982) 65.

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they were, for instance, in Pakistan,[43] Uganda,[44] and Grenada,[45] it is generally assumed by all that former rules of adjudication are to continue in force and that a rule of identification points to enactments of the former regime (under the former rule of competence) as valid law for the adjudication of ordinary disputes.[46] Some of those surviving rules may perhaps be changed under the new rule of competence, but it is clear that a new rule of competence does not otherwise affect them. The case of legal devolution shows the same phenomenon where a British-style independence statute is understood to bring about a "new" (independent) legal system. Ceylon provides a good example. The Privy Council found in 1964 that even though the *Independence Act, 1947* was "irrevocable"[47] and made the legal system completely independent, it did not "alter the existing corpus of law in Ceylon,"[48] so that appeals to the Privy Council remained possible under the law of Ceylon. Ultimate rules of adjudication and identification had survived the acknowledged change in the ultimate rule of competence.

Finnis helped clarify the unwritten rules surrounding legal change in general, at least in the Anglo-American literature, when he proposed a more convincing formulation of what lawyers actually apply, more or less consciously but quite consistently, when they have to handle the "life" of formal legal norms through time.[49] He managed to shape his conclusion into one rule-like principle (which can be said to include Ross's basic norm):

> A law once validly brought into being, in accordance with criteria of validity *then in force*, remains valid until *either* it expires according to its own terms or terms implied at its creation, *or* it is repealed in accordance with conditions of repeal in force *at the time of its repeal*.[50]

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43. *State v Dosso*, [1958] SC 533.
44. *Uganda v Matovu*, [1966] E Afr LR 514.
45. *Mitchell v Director of Public Prosecutions*, [1986] LRC (Const) 35.
46. For other cases see Mahmud, *supra* note 41 at 54-99.
47. *Ibralebbe v R* [1964] AC 900 at 918.
48. *Ibid* at 922.
49. John Finnis, "Revolutions and Continuity of Law" in AWB Simpson, ed, *Oxford Essays in Jurisprudence (Second Series)* (Oxford: Clarendon Press, 1973) 44 at 63-65 [Finnis, "Revolutions"]. Finnis says that his formulation makes sense of the practice and offers the further justification of practical reasonableness. French legal philosopher Michel Virally had reached a substantially similar conclusion, though in a mode that never gets beyond the description of practice: Michel Virally, *La pensée juridique* (Paris: Librairie générale de droit et de jurisprudence, 1960) at 188-98.
50. Finnis, "Revolutions", *supra* note 49 at 63. Compare with Virally who, speaking of legal continuity in cases of revolution, secession, or annexation, writes: "La continuité de l'ordre juridique, dans ces diverses hypothèses, pour remarquable qu'elle soit, n'a rien de mystérieux. Elle va de soi pour toute la partie de cet ordre qui est d'origine coutumière ou jurisprudentielle: sa validité n'a jamais été déduite d'une quelconque norme fondamentale. Elle résulte du fonctionnement de l'ordre juridique, c'est-à-dire de l'ensemble des rapports sociaux, qui ne sont pas immédiatement affectés par un changement d'institutions politiques ou d'appareil étatique, dans la mesure où ils sont compatibles avec les règles dominant les institutions nouvelles. Mais il faut en dire autant du droit écrit. Comme nous l'avons vu, il bénéficie d'une validité permanente à partir du moment où il est créé. Cette validité lui est conférée par l'acte qui l'a posé et qui l'empruntait lui-même à la norme supérieure en vertu de laquelle il a été pris. La validité du droit écrit—c'est là la grande différence avec le droit coutumier—lui est attribuée par l'acte qui le pose, dans l'instant et de façon définitive. Il n'est donc pas nécessaire que la norme supérieure conserve sa validité pour que la norme inférieure soit maintenue dans la sienne" (Virally, *supra* note 49 at 193 [footnote omitted]).

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Here as with Ross's principle, it is easy to see how an amendment provision can effectively provide for its own replacement if that principle is taken to be part of the normative context in which self-amendment takes place. The present validity of the new amending provision, which is in one sense "derived" from a provision no longer in force, can be said to rest on the general principle, which has remained untouched throughout the change. Like Ross's basic norm, the principle solves any problem of self-reference there may be by providing an external ground for the expiration, "according to its own terms", of the old amending provision. But Finnis's principle is broader and can be said to apply to any situation of formal legal change, including constitutional self-amendment; it explains the continuing validity of all formal norms adopted under a rule of competence no longer in force, whether or not it is believed that a "new system" was introduced upon a change of the ultimate rule of competence. Any attempt at formalizing the actual reasoning that surrounds legal change would have to take account of this principle, which unlike Ross's basic norm, is not tied to any particular system.

The degree to which such contextual considerations "surrounding" legal change can usefully be given formal legal expression, however, is not clear. This type of information has an ambiguous status. It can usually be formalized to a certain extent, but because of the dynamic character of context, it can never be reduced effectively to its formal expression.[51] An example of a paradigmatic case of this is afforded by certain rules of statutory construction. Those "rules" are about the ways in which language is used in and around statutes. Case law has worked them out to an extent where it seemed at one point possible to put some of them down in a statute, and this is what many common law jurisdictions have done. Have the *Interpretation Act*s stopped the possible evolution of the rules of interpretation they express? Surely not. The context has not disappeared, and the *Interpretation Act*s may themselves need a contextual framework for their interpretation. The evolution of the practice will inevitably affect, among other things, the use of language in legislation and, in turn, the rules of interpretation that will actually be in use.[52] Finnis's principle itself is also a case in point. At first sight it may appear as a timeless principle quite independent from context.

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51. The formalization of the rules of "pragmatics" poses the same problem in the logical representation of ordinary, real-life reasoning. For building such rules into a system of representation will usually mean cutting off that system from the real-world situation it is meant to represent. After a period of time, real-world reasoning may evolve into new rules of pragmatics and the system may cease to provide adequate representations. In order to avoid this, one may want to keep the rules of pragmatics separate in the system of logical representation and provide a "window out on the real world" through which those rules can be updated. This is one of the difficulties in evolving a computer expert-system meant to give legal advice. See, e.g., Edwina L Rissland & M Timur Friedman, "Detecting Change in Legal Concepts" in *Proceedings of the 5th International Conference on Artificial Intelligence and Law* (New York: ACM, 1995) 127. This difficulty is also linked to the problem of accounting for soft standards and values in legal decisions, on which see generally Trevor Bench-Capon, "Relating Values in a Series of Supreme Court Decisions" in Katie M Atkinson, ed, *Legal Knowledge-Based Systems* (Amsterdam: IOS Press, 2011) 13; Trevor Bench-Capon et al, "Argument Schemes for Reasoning with Legal Cases Using Values" in *Proceedings of the Fourteenth International Conference on Artificial Intelligence and Law* (New York: ACM, 2013) 13.

52. It is significant in this respect that the *Interpretation Act*s in Canada seem to be largely ignored by lawyers and judges alike.

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But as Finnis himself points out, a common law rule provided otherwise, in a certain respect, for a very long time, and that which perhaps seems obvious today may have looked odd in a different context.[53]

It would appear, then, that there is a type of normative material surrounding the hierarchical structure through which legislative norms are formally validated, material that resists attempted reduction to formal expression. The formal structure of legal validation, often seen as a pyramid, is embedded in a context that is essentially dynamic and cannot be reduced to a set of rigid rules. The formal structure can attempt to draw up the entire context in which it is embedded only at the price of quickly losing its grip on reality, that is, the social reality *for* which and *in* which it exists. It is fair to say that the formal structure can replicate the surrounding or underpinning informal materials but can never appropriate them. It is perhaps at the constitutional level that this is most apparent. Consider the absurdity of a constitution attempting to exclude all unwritten rules or principles that judges may want to use in constitutional adjudication. The attempt would simply fail. Even Kelsen thought that a formal constitutional enactment would be powerless to exclude the paramount application of customary law at the constitutional level.[54] The very notion of the supremacy of written constitutional law over "unexpressed concepts" could only come from the pervasive, unwritten normative surroundings of the formal constitution. The rules of a formal constitution can in no way be "superior" to the reasons why that constitution was adopted and the principles under which it is understood and upheld.

4. Validity, Acceptance, and Reasons

The importance of "context", broadly understood, is one of the reasons why the "acceptance model" of the foundation of a legal system offered by Hart was so popular. The model relieves ultimate norms from their Kelsenian "hypothesized", "presupposed", or eventually, "fictional" character.[55] The model explains that the basic rules of a system ultimately rest on the *fact* of their *present* recognition by officials, most importantly judicial organs, given a background of general obedience to the rules of that system. They rest, in other words, on something found outside the formal structure. Hart elaborates this in connection with the emergence and development of independent legal systems in the colonial context:

> At the end of the period of development we find that the ultimate rule of recognition has shifted, for the legal competence of the Westminster Parliament to legislate

53. In England, prior to 1850, the common law understanding of repeal included the rule that the repeal of a repealing Act revived the Act originally repealed: Finnis, "Revolutions", *supra* note 49 at 61, 63, n 47. Note that this position was peculiar to the relationship between common law and statute law. The position of British imperial law was otherwise consistent with the principle. As expounded in *Campbell v Hall* (1774), 1 Cowp 204 at 209, 98 ER 1045 (KB), the laws of a conquered or ceded colony were taken to "continue in force, until they [were] altered by the conqueror."

54. Hans Kelsen, *Pure Theory of Law,* 2d ed translated by Max Knight (Berkeley: University of California Press, 1967) at 226-27.

55. Hans Kelsen, *General Theory of Law and State*, translated by Anders Wedberg (New York: Russell & Russell, 1961) at 115.

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> for the former colony is no longer recognized in its courts. It is still true that much of the constitutional structure of the former colony is to be found in the original statute of the Westminster Parliament: but this is now only an historical fact, for it no longer owes its contemporary legal status in the territory to the authority of the Westminster Parliament. The legal system in the former colony has now a "local root" in that the rule of recognition specifying the ultimate criteria of legal validity no longer refers to enactments of a legislature of another territory. The new rule rests simply on the fact that it is accepted and used as such a rule in the judicial and other official operations of a local system whose rules are generally obeyed.[56]

The ability better to account for the emancipation of British colonies was one of the strengths of Hart's rule of recognition when it was formulated. The existence of independent legal systems throughout the Commonwealth had become a basic datum to be accounted for in legal theory when Hart published *The Concept of Law*. One can fairly say, therefore, that Hart's rule of recognition was a move forward in that it drew attention to the importance of acceptance, that is, the importance of the context in which formal law is embedded. With respect to the hierarchical structure of formal validation, which Hart insisted had to be accounted for, the acceptance model highlighted the fact that formal validity has ultimately to rest on something other than formal.[57]

But Hart's account also shows well-known weaknesses. Because the model recognizes the possibility of direct acceptance as sufficient for some norms, one is led to ask if it is not the case that all norms are law by virtue of their being directly accepted, whether or not they meet the criterion of validity posed by the rule of recognition.[58] The reliance on acceptance as mere "fact" thus seriously threatens Hart's overall position against legal realism: if the rule of recognition can be accounted for as mere fact, why should we not treat other rules of the system in the same way?

A related problem is that of the continuing unity and identity of the legal system. At first sight, and envisaged statically, Hart's rule of recognition may seem to provide a good basis for saying that this or that is an independent legal system. One is tempted to say that a legal system is the set of rules unified by a distinct rule of recognition. But on analysis, the "rule of recognition" inevitably appears, rather, as a set, not fully defined, of various rules held together by nothing in particular.[59] This is already noticeable in *The Concept of Law* where Hart has to discuss the "rule*s* of recognition" of a system, despite his usual reference to "the" rule of recognition.[60] And there seems to be nothing bringing these rules together but for the fact that they are part of the same system, which begs the question. The explanation is even more problematic with respect to the further problem of unity and identity regarded through time, that is, the unity and

56. Hart, *Concept*, *supra* note 3 at 120.
57. This contrasts with his staunch insistence as a logician that formal rules of change *can* be self-reflective and provide for their own amendment. His position on acceptance, as a legal theorist, means that a new ultimate rule of competence is valid *whether or not* it can be formally brought about by self-reference.
58. Finnis, "Revolutions", *supra* note 49 at 59.
59. See generally *ibid* at 65-70.
60. Hart, *Concept*, *supra* note 3 at 116 [emphasis added].

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identity of dynamic systems. Nothing formal, first of all, brings together a rule of identification of rules and a rule of competence distinct from it.[61] Further, the rule of recognition being on the whole a customary law, it is subject to changes that are, Hart tells us, to be authoritatively determined by courts.[62] Some elements of the rule, therefore, will appear and others will vanish over time, thus generating a series of sets of ultimate rules deprived of a unifying element.

As I said earlier, Hart's model makes the highest rule of the formal structure rest on acceptance and makes other formal rules derive their validity from that highest rule. Finnis goes further and gives more importance to that which happens outside the formal structure in making the continued validity of *all* formal rules rest individually on a principle "of the practical and theoretical understanding of law," which stands outside the formal structure of validation and refers to it. This principle provides an illuminating perspective on the important but clearly limited place actually taken by the hierarchical structure of formal validation in a broader understanding of law. That perspective reverses a familiar picture and treats context as a phenomenon prior to, and as necessarily embedding, formally validated law.[63]

At one end, there can be no doubt, as even positivist analysts agree, that the unity and identity through time of legal systems lie, at least in part, somehow "outside" the structure of formal validation. They ultimately rest on the unity and identity of the society whose legal system it is taken to be.[64] They depend on the maintenance of the *ensemble* of social relations;[65] they lie in the political system and its continuity[66] and hinge on a smooth evolution of its "dominant ideology".[67] These inform the context in which the structure of formal validation is embedded.

At the other end, a parallel conclusion should follow with respect to the very notion of legal validity applied to norms. All of the analysts quoted above have, more or less openly, taken the positivist notion of validity as their starting point in showing how the unity and identity through time of legal systems cannot rest exclusively on formal considerations.[68] Finnis, to take the most meticulous, begins with this assertion: "No lawyer will deny that every rule in a legal system

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61. One example of this is afforded by British statutes still applied in Canada: the rule that identifies some British statutes as valid Canadian law today is distinct from the ultimate rule of competence that does not recognize British law-making power for Canada.

62. Hart, *Concept*, *supra* note 3 at 152.

63. Contrast this with Raz's second attempt to account for "rules of discretion" (soft standards) in Hartian terms: the normative context is outside "the law", but is pointed to as relevant in adjudication by formally validated law: Joseph Raz, "Legal Principles and the Limits of Law: A Postscript" in Marshall Cohen, ed, *Ronald Dworkin and Contemporary Jurisprudence* (Totowa: Rowman & Allanheld, 1984) 81. The picture taking shape in the text above reads the other way: it is not the law that points to external considerations as relevant for legal decisions; it is those external considerations reflected upon by human beings in society that point to certain acts and facts as presumptively conclusive for decisions.

64. Finnis, "Revolutions", *supra* note 49 at 65-70.

65. Virally, *supra* note 49.

66. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 100.

67. Ross, *Justice*, *supra* note 9 at 83.

68. That conclusion does not involve that self-reference, as a means of constitutional change, is illogical: it means that even if it were free of logical flaws, it could not be sufficient.

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is equally valid."[69] From there, he works his way up to the "radical" conclusion that "*the legal system, considered simply as a set of 'valid rules', does not exist*" because there is *nothing* (formal) that provides (and secures) its unity and identity through time.[70] He then points out that the unity and identity of a legal system are, like the all-or-nothing notion of legal validity, "a basic phenomenon of legal experience," and goes on to find that "there seems only one conclusion: the continuity and identity of a legal system [are] a function of the continuity and identity of the society in whose ordered existence in time the legal system participates."[71] All of this would seem to imply more than our analysts mentioned. For there is apparently no reason that could stop more sceptical analysts who would take the notion of validity as no more than an assumption for discussion, from working their way *down* from the absence of a unifying formal master rule. Starting from the *formal disunity* of the system, the absence of a *formal* test of membership that could give the system an identity through time, one could go all the way down to show, "radically", that "validity", considered simply as the characteristic of all the rules making up a "unified and identifiable" legal system, *cannot exist*. Since all-or-nothing validity may nevertheless be considered "a basic phenomenon of legal experience" and cannot be grounded on a formal master rule, "there seems only one conclusion," one might say: the legal validity of a rule is a function of the validity of that rule considered in the broader context of the society that it is meant to regulate.

As with the case of the legal system's identity, however, stepping out of the formal structure means that black-and-white certainty is no longer afforded: all-or-nothing validity turns into relative worth or value; it becomes a matter of justification.[72] Some may perhaps say that, empirically speaking, all-or-nothing legal validity is not, after all, such an important phenomenon of legal experience. They may say that the notion of justification may provide a better account of the actual use of norms in adjudication than does the notion of all-or-nothing validity. But few would deny that there are weighty normative reasons in favour of adopting and maintaining an all-or-nothing notion of legal validity. There are weighty reasons, that is, in favour of adopting and maintaining a framework of formal validation. Showing the limits of that framework, as I tried to do here, is simply pointing to the underlying reasons that sustain it. Those reasons are part of the context in which the whole structure of formal validation moves; they make up the *normative* aspect of that context. Those reasons often take the form of principles that play a justificatory role in adjudication. The often undeniable "political" status of principles does not disqualify them from also having a status as legal principles.

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69. Finnis, "Revolutions", *supra* note 49 at 66.

70. *Ibid* at 69. The mimeographed work from which Finnis drew this insight is now published. See Eric Voegelin, "The Nature of Law" in Robert Anthony Pascal, James Lee Babin & John William Corrington, eds, *The Collected Works of Eric Voegelin: The Nature of Law and Related Legal Writings*, vol 27 (Baton Rouge: Louisiana State University Press, 1991) 1.

71. Finnis, "Revolutions", *supra* note 49 at 69.

72. See François Ost, "Entre ordre et désordre : le jeu du droit ; discussion du paradigme autopoiétique appliqué au droit" (1986) 31 Archives de philosophie du droit 133.

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5. Permeability and Circularity

The need for security and predictability in social relations is an obvious enough reason for maintaining legal forms. But it is perhaps fairness as impartiality that provides the most basic drive toward the adoption of legal forms:

> In the working of the legal process, much turns on the principle—a principle of fairness—that litigants (and others involved in the process) should be treated by judges (and others with powers to decide) *impartially*, in the sense that they are as nearly as possible to be treated by each judge as they would be treated by every other judge. It is this above all, I believe, that drives the law towards the artificial, the *techne* rationality of laying down and following a set of positive norms identifiable as far as possible simply by their "sources" (i.e., by the fact of their enactment or other constitutive event) and applied so far as possible according to their publicly stipulated meaning, itself elucidated with as little as possible appeal to considerations which, because not controlled by facts about sources (constitutive events), are inherently likely to be appealed to differently by different judges.[73]

This drive is what brought about such models as Kelsen's, under which judges are said to derive the validity of standards in a formal way down from the historically first constitution *beyond which no court can go*. Hart attempted to trade this past-tense cascade of validation for a notion of the acceptance of the present rules of recognition that would not otherwise disturb the "source" thesis at the lower levels. I noted that "informal" considerations cannot be eliminated completely even at the lower levels of the structure of formal validation. As Finnis remarks, from a position that can only be characterized as one of outstanding awareness of the importance of legal forms, the "drive to insulate legal from moral reasoning can never … be complete."[74]

Hart was concerned with preserving the moral neutrality of the ultimate rules and attempted to treat their existence as a factual matter. Regarding the emancipation of the former colonies, for instance, Hart could thus write, descriptively, that at the end of the process "[t]he new rule [of recognition] 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."[75] But the external perspective there adopted by Hart makes things look tidier than they are. For the explanation says nothing of the question, a great deal trickier, of what the matter might look like from what Hart himself named the "internal point of view". Hart simply eludes this problem when he states, in a way reminiscent of Kelsen, that upon reaching "the rule that what the Queen in Parliament enacts is law, we are

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73. John Finnis, "Natural Law and Legal Reasoning" in Robert P George, ed, *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 134 at 150.

74. *Ibid.* On the importance of legal forms, see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 311-13, 354-62. On the "bridging" of natural law and positive law theories, see *ibid* at 23-49, 363-66; Neil MacCormick, "Natural Law and the Separation of Law and Morals" in Robert P George, ed, *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992) 105.

75. Hart, *Concept*, *supra* note 3 at 120 [emphasis added]. He wrote, on the following page: "[W]e have at the end of this development two independent legal systems. This is a factual statement, and not the less factual because it is one concerning the existence of legal systems."

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brought to a stop in inquiries concerning validity," and that this rule is special because "there is no rule providing criteria for the assessment of its own legal validity."[76] As was seen earlier, Hart did improve legal theory's grasp of the phenomenon of legal emancipation. But he did so from outside the legal systems concerned, treating "context" as a purely factual matter, a position that directly threatened his stance against legal realism. If rules cannot be satisfactorily accounted for without due regard being had for their "internal aspect", as he otherwise so elegantly showed, why should we treat the rule of recognition differently? Surely the rule of recognition also has an intelligible purpose from the internal point of view. Why is Hart's otherwise fruitful use of the internal viewpoint put to the side here?[77] For our purposes, the typical insider is the judge in a newly independent country who has to explain the switch from one ultimate rule of recognition or competence to another. More is expected of a judge than a "factual" statement of the type "it is so because it is so."[78] Judges have to *justify* their decisions; they have to provide *reasons* that are intelligible intra-systemically.

To the extent that the *reasons* offered by judges must relate to the system as it exists, the explanation of fundamental change from their perspective will inevitably involve a measure of circularity. In *The Concept of Law*, Hart acknowledges that the explanation of a judicial decision on the ultimate rules of the system could appear somewhat problematical:

> At first sight, the spectacle seems paradoxical: here are courts exercising creative power which settle the ultimate criteria by which the validity of the very laws, which confer upon them jurisdiction as judges, must itself be tested. How can a constitution confer authority to say what a constitution is?[79]

In a sense, this is the inevitable result of having put aside the requirement of derivation down from the historically first constitution. One could say that the

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76. *Ibid* at 107.

77. See the discussion of NE Simmonds, "Practice and Validity" (1979) 38:2 Cambridge LJ 361 at 369-70. See also Jacques Derrida, who provides an elegant demonstration that declarations of independence are necessarily *both* descriptive and prescriptive, both fact and law: Jacques Derrida, *Otobiographies : l'enseignement de Nietzsche et la politique du nom propre* (Paris: Galilée, 1984) at 27.

78. John W. Salmond is often quoted to justify statements of that type: "Before there can be any talk of legal sources, there must be already in existence some law which establishes them and gives them their authority. The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a municipal council; the rule that these by-laws have the force of law has its source in an Act of Parliament. But whence comes the rule that Acts of Parliament have the force of law? This is legally ultimate; its source is historical only, not legal. The historians of the constitution know its origin, but lawyers must accept it as self-existent. *It is the law because it is the law, and for no other reason that it is possible for the law itself to take notice of*" (Sir John W Salmond, *Jurisprudence*, 7th ed (London: Sweet & Maxwell, 1924) at para 48 [emphasis added]). This reflects Salmond's first formulation of this argument: "there must in every system of law be some one or more ultimate principles, the existence of which is not deduced from any other principle; rules which exist, but for the existence of which the law provides no reason" (John W Salmond, *The First Principles of Jurisprudence* (London: Steven & Haynes, 1893) at 222). He mentions three such rules: one for statutes, one for common law, and one for custom: *ibid* at 220-23.

79. Hart, *Concept*, *supra* note 3 at 152.

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unappealing quest for the historically first constitution was basically traded for a form of circularity in the explanation of law.[80] Hart was conscious of this and was of the opinion that the picture thus offered was an improvement. Answering his own question, laid down above, he writes:

> But the paradox vanishes if we remember that though every rule may be doubtful at some points, it is indeed a necessary condition of a legal system existing, that not every rule is open to doubt on all points. The possibility of courts having authority at any given time to decide these limiting questions concerning the ultimate criteria of validity, depends merely on the fact that, at that time, the application of those criteria to a vast area of the law, including the rules which confer that authority, raises no doubt, though their precise scope and ambit do.[81]

The picture here sketched is one that integrates circularity as a useful explanatory tool for law.[82] What is found, I would suggest, at the ultimate level—or in the *ensemble* of constitutional standards—is a number of interdependent standards that support and shape one another in a complex network of justification that is partly circular. Any one of those standards can be challenged in some of its elements on the basis of other accepted standards. This process being effected mostly through judicial decisions made on a case-by-case basis, each affecting a usually small element of the network, the circular movements of justification are but very rarely exposed.

This is not to say, however, that the system is closed. If it were, there could never be a change in the *ensemble* of constitutional standards; there could not be a change, for instance, in the ultimate rule of formal validation. And such changes do occur. At all levels, external elements are constantly being brought into the system.[83] Those elements may be provided by unrestricted moral reasoning in the community. The sense in which the legal system's claim to "closedness" must be understood is that any external element needs intra-systemic grounds to be received into the system. One may refer here to MacCormick's "toe-hold" criterion: a judicial decision is a legal decision insofar as grounds are found in the existing legal materials to justify it. It is the role which external elements are allowed to play in a legal system's evolution that keeps the acknowledged circular justificatory processes of that system from being "vicious".

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80. This is particularly obvious in Joseph Raz's jurisprudential criterion for a norm's membership in a legal system. The system is said to contain "only those norms which its primary organs are bound to apply" (Joseph Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999) at 142). The legal system is thus defined as containing only norms that are "binding" on "primary organs" of the system, where "binding" and "primary organs" are, more or less directly, defined by norms of the system, that is, norms binding on primary organs of the system. Raz provides a semi-formal representation of such a circle of justification: Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon Press, 1970) at 138-40.

81. Hart, *Concept*, *supra* note 3 at 152.

82. Michel van de Kerchove & François Ost, *Legal System between Order and Disorder*, translated by Iain Stewart (Oxford: Oxford University Press, 1994) at 65-72, 118-22. See also Neil MacCormick, *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press, 1978) at 54-55, 245-46.

83. Niklas Luhmann, "The Unity of the Legal System" in Gunther Teubner, ed, *Autopoietic Law: A New Approach to Law and Society* (Berlin: Walter de Gruyter, 1987) 12.

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6. Conclusion

The foregoing discussion of the modelling of constitutional change provides a survey of the various difficulties involved in the explanation of legal change at the fringe of a system. It should be useful at this point to sum up my findings.

Starting with Ross's puzzle, I showed that a logical representation of formal constitutional self-amendment would require tools not provided by the traditional system of first-order logic, which Ross was apparently using. It was suggested, further, that adopting the orthodox British notion of continuing parliamentary sovereignty on the basis of this limited system of logic was misconceived. Considering the real-world context in which constitutional change is understood and acted upon, however, it appeared that the time factor, which basic first-order logic cannot handle, was essential. The time factor is part of the unwritten data lawyers make use of when considering what standard is to be applied in a particular case. I noted that Finnis provided a convincing account of the rules of "pragmatics" surrounding legal change. Those rules, which Finnis fit under one general principle, make formal self-amendment intelligible in practice. The present validity of all formal norms adopted in the past—including those adopted under a rule of competence no longer in force, and whose continuing validity is not explained by Hart's model—can be said to rest on that principle.

I suggested that the type of principle we are here concerned with naturally lies in certain respects outside the formal structure of validation of the system. It defines what it means for a formal norm to be validly created; it regulates the life of the norm through time; it is a part of the matrix in which the whole formal structure of validation moves. Hart's model pointed to the importance of acceptance and emphasized that the structure has ultimately to rest on something that is not formal. And if one looks at that "something" from Hart's "internal point of view", one does not just see the factual aspect of context; one sees *reasons*; that is, one sees the *normative* aspect of the context in which the formal structure is embedded. The unity of the legal system, as well as the concomitant notion of all-or-nothing validity, ultimately depends on that normative context.

I emphasized, finally, that the explanation of a change in the ultimate constitutional standards, if it is to be provided in the terms of the system, necessarily involves a measure of circularity. Because the system is not completely self-sufficient as a structure, however, this circularity is only partial. Each one of the accepted constitutional standards, including the ultimate rule of competence, can be challenged or sustained on the basis of "other elements" of the system. Those "other elements" of the system provide the required toe-holds that make adjudication legal even where well-established legal standards are being changed on the basis of what really is, in some cases, unfettered practical reasoning.

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