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# Comparative Constitutional Fundamentals

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# COMPARATIVE CONSTITUTIONAL FUNDAMENTALS

*by Richard S. Kay\**

## I

If by legal theory we mean considered reflection on the nature and sources of law, no field of law more insistently engages questions of legal theory than constitutional law. Constitutional law regularly involves the application of rules that are fundamental in the sense that they control and authorize other law but are, themselves, neither controlled nor authorized by any other law. The interpretation and elaboration of those rules necessarily requires attention to the very basis of a legal system, to the stuff that makes law law.

This aspect of a legal system is evident from the familiar regression which legal theorists make in seeking the ultimate validating source of any rule of law. We can trace a chain of validity only so far. In most systems once we get to the constitution we have run out of law. When we ask what makes the constitution law we have left the universe of positive law. Whatever makes law at this level must itself be something other than law. This pre-legal source consists of behavior and beliefs of human beings in the society in which the relevant legal system functions.

An informed description of any legal system requires an account of this social origin. H.L.A. Hart posits the existence of an ultimate "rule of recognition" that provides criteria for identifying valid law in a legal system. This rule has a dual nature. From a point of view internal to the legal system the rule of recognition appears as a rule of positive law. But, since it is not validated by any other rule of law, we can understand how it achieved its status only by considering it from a

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viewpoint external to the legal system. From that perspective we see that it is a product of some kind of social acceptance.<sup>1</sup> "It is," noted H.W.R. Wade in what is still one of the most compelling expositions of this question, "simply a political fact."<sup>2</sup>

Usually actors in a legal system can ignore the pre-legal aspect of the rule of recognition. The internal point of view, according to which it appears merely as another, although superior, rule of law is adequate to deal with most of the issues that concern legal decision-makers. Lord Bryce thought it was possible and desirable to separate entirely the question of the basis of legal authority from those of the identification and application of that authority.

The question, Who is legal Sovereign? stands quite apart from the questions, Why is he Sovereign? And Who made him sovereign? The historical facts which have vested power in any given Sovereign, as well as the moral grounds on which he is entitled to obedience, lie outside the questions with which law is concerned; and belong to history, or to political philosophy, or to ethics; and nothing but confusion is caused by intruding them into the purely legal questions of the determination of the Sovereign and the definition of his powers.<sup>3</sup>

This is true enough in normal times.<sup>4</sup> But there are occasions when such a separation is impossible. At certain times the character of the rule of recognition itself comes into contest and a more explicit consideration of the pre-legal facts supporting it are forced to the surface. When such a consideration is undertaken by officials of the legal system it is likely to occur in the context of constitutional adjudication.

I intend here to survey a number of such instances. They are drawn from various legal systems at various times (the United King-

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1. See H. HART, *THE CONCEPT OF LAW* 111-13 (1960).

2. Wade, *The Basis of Legal Sovereignty*, [1955] C.L.J. 172, 189. See also Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981). This ultimate fact or rule of recognition is sometimes misleadingly called a rule of common law. See e.g. W. J. JENNINGS, *THE LAW AND THE CONSTITUTION* 156-63 (5th ed. 1959); Dixon, *The Common Law as an Ultimate Constitutional Foundation*, 31 AUSTRAL. L.J. 240 (1957); Slatery, *The Independence of Canada*, 5 SUP. CT. L. REV. 369, 379-81 (1983). Wade has shown that, if it is, it is unique since it is unalterable by any action of the law-makers whose authority it created. See Wade, *supra* at 187-88; C. MUNRO, *STUDIES IN CONSTITUTIONAL LAW* 103-04 (1987). A similar notion is that of the Basic Norm propounded by Hans Kelsen. See H. KELSEN, *THE PURE THEORY OF LAW* 46-48, 194-200 (1967).

3. K. WHEARE, *THE CONSTITUTIONAL STRUCTURE OF THE COMMONWEALTH* 109 (1960 reprinted 1982) (quoting 2 BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE*).

4. But see *infra* note 104.

dom, Ireland, the United States, Hong Kong, the Philippines, Rhodesia (now Zimbabwe) and Canada) although all share a link to the common law system of England. The presence of such cases in such a variety of times and places reinforces the inference that the problems occasioning such judgments are general. They all arise from an ineluctable common central fact — social and political change. The pre-legal sources on which law is built will, like any social phenomena, change over time. These changes will make themselves felt in the interpretation and application of rules of positive law.

It is an understandable instinct in judges to dress their consideration of such questions in the attire of ordinary law.<sup>5</sup> When the changes at issue are moderate and gradual this will be a plausible approach. On the other hand, when political and social change is drastic and abrupt, we can expect judicial inquiry to be more overt. But subtle or dramatic, hidden or revealed, every judgment of constitutional law — indeed every judgment of law — rests on an explicit or implicit finding on the source of legal authority.

## II

The association of constitutional law adjudication with an examination of constitutional fundamentals requires a consideration of what we mean by the term “constitutional law.” Similarly, our definition of “constitutional law” requires a prior definition of “constitution.” At this point we run into a difficulty: the term “constitution” does not mean the same thing in every legal system. In most legal systems it refers to a single, entrenched, written set of constitutional rules. A significant exception, however, is the legal system of the United Kingdom where no such document exists.<sup>6</sup> In the United Kingdom the word “constitution” refers, more generally, to “the body of rules and arrangements concerning the government of the country.”<sup>7</sup> Those “rules

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5. See Dias, *Legal Politics: Norms Behind the Grundnorm*, 26 CAMBRIDGE L.J. 233, 233 (1968).

6. The United Kingdom is now almost unique in this regard. The New Zealand Parliament achieved full and unrestrained law-making power in this century. See Joseph, *Foundations of the Constitution*, 4 CANT. L. REV. 58 (1989). It is sometimes said that Israel has no written constitution but it does have some Basic Laws that are unchangeable by ordinary legislative action. BASIC LAW: KNESSET, ss. 44,45 reproduced in 8 A. BLAUSTEIN & G. FLANZ, CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 18 (1988).

7. C. MUNRO, *supra* note 2, at 1. See also J. ALDER, CONSTITUTIONAL AND ADMINISTRATIVE LAW 3 (1989) (The constitution is “the basic framework of rules about the government of [the] country and about its fundamental values.”).

and arrangements" have many sources and appear in many forms. They include rules of law embodied in charters and statutes, as well as in court decisions. They also include non-legal traditions and understandings that vary in specificity and venerability.<sup>8</sup>

These two different meanings of "constitution" lead to two different definitions of "constitutional law." In the United States, and in other countries with similar constitutions, constitutional law is the law of the constitution. It consists of the application of the rules of the constitution in the operation of the agencies of public power as well in the adjudication of disputes about the proper use of that power. It includes, therefore, not merely the written rules but also the elaboration of those rules by public officials, most significantly by the judges, in the decision of cases.

In the British tradition, on the other hand, the nature of the "constitution" precludes such a straightforward definition. There is no single constitutional text to serve as the sole source of constitutional law. The constitution is created in many ways, occupies various levels in the hierarchy of law, and is applied or interpreted by different actors on different occasions. Constitutional law is defined then not by its source but by its subject. It is that law "which regulate[s] the structure of the principal organs of government and their relationship to each other and to the citizen and determine[s] their main functions."<sup>9</sup> In this sense, it is a category like family law or agricultural law. This also accounts for the affinity, almost amounting to identity, of British constitutional law and administrative law,<sup>10</sup> two subjects more clearly, if still imperfectly distinguished in American law.<sup>11</sup>

Once we have identified these two different conceptions of constitutional law it may be appropriate to ask whether the association of constitutional law with questions of constitutional fundamentals holds in the United Kingdom, as well as in countries with a single entrenched constitution. The controversies that raise these inquiries will be those that challenge the propriety of the actions of the state. These cases will take the form of issues of constitutional law in the British system as

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8. See E. WADE & A. BRADLEY, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 12-24 (1985). It should be noted that certain American legal realists also preferred to use the term "constitution" in this "British" sense. See Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1 (1934).

9. E. WADE & A. BRADLEY, *supra*, note 8, at 9.

10. See *id.* at 10. See also J. ALDER, *supra* note 7, at 6 ("Administrative law is an aspect of constitutional law.")

11. See B. SCHWARTZ, *ADMINISTRATIVE LAW* 3 (1984).

well as in the more typical regime where they are premised on the written constitution. Put more generally, the availability of the legal system as a forum for the determination of disputes over public power will sometimes require an investigation of the extent to which the state is governed by law. But since the legal system is itself a product of the state, such an investigation will tend towards a consideration of the nature of legal authority.

### III

In fact, from one perspective, these theoretical questions might emerge more readily under the British model of constitution and constitutional law. That is because there has been no attempt in that system to reduce the understanding of fundamental legal authority to rules of positive law. Under a written constitution the extent of state power can, in the first instance, be ascertained by the ordinary judicial process of construction of a legal enactment. The response to a challenge to government action in the United Kingdom, on the other hand, more quickly runs out of positive law to consult. Justification of state power, then, requires the consideration of, or at least citation of, the political postulates that underlie official authority. Thus English judges have responded to challenges to the validity of acts of Parliament not by citing some legal authority for the rule of parliamentary supremacy, but by putting it forward as an axiom of the legal system:

What the statute itself enacts cannot be unlawful, because what the statute says is itself the law, and the highest form of law that is known to this country. It is the law which prevails over every other form of law, and it is not for the court to say that a parliamentary enactment, the highest law in this country, is illegal.<sup>12</sup>

This language faithfully reflects the doctrine of parliamentary supremacy which has been, for more than two hundred years, dogma in British law. Dicey called this "the dominant characteristic of [British] political institutions" and said it means that Parliament has "the right to make or unmake any law whatever and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."<sup>13</sup> What this comes down to

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12. *Cheney v. Conn*, [1968] 1 All E.R. 779, 782 (Ct. App. Ch. Div.).

13. A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 3-4 (8th ed. 1915, reprinted 1982).

is a social and political understanding that final legal authority is properly vested in a joint decision-maker consisting of the monarch, House of Lords and House of Commons, and that such authority is subject to no legal restraint of any kind.<sup>14</sup> This allocation of legal power is usually thought to have emerged from the political settlement following the Glorious Revolution of 1688.<sup>15</sup>

We can note, however, two arguments that have caused British courts to examine more critically this underlying political judgment. The first, based on the Acts of Union of 1707, relies on the claimed existence of a positive law restraint on parliamentary discretion. It thus directs judges to a different and subsequent historic moment when the legal system's character is supposed to have been defined. The second, based on the United Kingdom's membership in the European Community, assumes the appearance of a new rule of recognition at a third and even later date.

In the Acts of Union of 1707 the Parliaments of England and Scotland effected the political union of those countries and the creation of the United Kingdom.<sup>16</sup> At the same time, they created the Parliament of the United Kingdom and expressly prohibited that body from passing certain legislation. Both litigants and academic commentators have argued that these provisions constitute legal limits on Parliament's law-making power. Strictly as a matter of positive law reasoning this argument is irresistible.<sup>17</sup> Yet, although claims of this kind have been brought on several occasions to Scottish courts and sometimes received sympathetically,<sup>18</sup> they have never sufficed to decide a case.

It was impossible for courts to reject these arguments without making implicit judgments on the pre-legal source of legal authority in the United Kingdom. To be sure, the judgments did not address the matter in these terms. Rather the judges tended to narrow the issue so as to focus on the powers of the judiciary. In particular, they sometimes doubted the right of courts to examine the existence of a conflict between legislation and the terms of the Union. (In addition, the Scot-

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14. See Allan, *The Limits of Parliamentary Sovereignty*, [1985] PUB. LAW 614, 615. It has been suggested that this assumption entails a political preference for "some irreducible, minimum concept of the democratic principle." *Id.* at 620.

15. See J. ALDER, *supra* note 7, at 10-12.

16. Union with Scotland Act, 1706, 6 Ann. c. 11; Union with England Act, 1706, A.P.S. XI, c. 7.

17. See e.g. Upton, *Marriage Vows of the Elephant: The Constitution of 1707*, 105 LAW QUARTERLY REV. 79 (1989).

18. *MacCormick v. Lord Advocate*, 1953 Sess. Cas. 396 (First Division).



tish courts considering such questions have always offered their opinion that no conflict existed).<sup>19</sup> More to the point, they have averred that even in the face of a presumed conflict the judiciary has no authority to treat a statute as ineffective.<sup>20</sup>

Whatever the form of the judgments, to the extent they enforced legislation at odds with the Union, these courts had to found the authority of Parliament on something other than the conventional understanding of the facts of its creation in 1707. Perhaps the lawmaking power of Parliament is instead based on some pre-existing right in the *English* Parliament and it is that Parliament that survived the union or that passed its powers on to the new Parliament.<sup>21</sup> Perhaps political events and attitudes subsequent to the union vested unlimited law-making authority in the Westminster Parliament.<sup>22</sup> We cannot be sure from the opinions expressed exactly what these judges believed was the legitimating source of parliamentary authority. But we can know they rejected one entirely plausible possibility.

A very similar kind of question arises with respect to the effect of the membership of the United Kingdom in the European Communities. This is a matter that is receiving active scholarly attention and has begun to percolate its way through the British courts. The issue, simply put, is whether Parliament may legislate in a way that conflicts with properly promulgated European Community law. The United Kingdom acceded to the treaties creating the European Communities in 1973.<sup>23</sup> Those treaties, as interpreted by the European Court of Justice, require that Community law prevail over any inconsistent national law.<sup>24</sup> The 1972 British implementing legislation, moreover, provides that "any enactment passed or to be passed . . . shall be construed and shall have

19. See *Fraser v. MacCorquodale*, 1990 Inner House Cas. (Court of Session, Inner House 24 July 1990)(challenging levy of "poll tax" in Scotland); *Murray v. Community Charges Registration Officer*, 1990 Inner House Cas. (Court of Session, Inner House 24 July 1990)(same); *Gibson v. Lord Advocate* 1975 Sess. Cas. 136 (Outer House) (challenging legislation enabling membership in European Communities); *MacCormick v. Lord Advocate*, 1953 Sess. Cas. 255 (First Division) (challenging use of numeral "II" in royal title of Queen Elizabeth).

20. See cases cited *supra* note 19. Two judges reserved judgment as to the justiciability of challenges to legislation which would abolish the Church of Scotland or the Court of Session. See *Gibson v. Lord Advocate*, 1975 Sess. Cas. 136 (Lord Keith); *MacCormick v. Lord Advocate*, 1953 Sess. Cas. 396 (Lord President Cooper).

21. See 5 STAIR MEMORIAL ENCYCLOPEDIA: THE LAW OF SCOTLAND 153-54, *Constitutional Law*, ¶1351 (T. Smith ed. 1987).

22. See *id.* at 153.

23. See M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 217 (1988).

24. See *id.* at 227-28 (discussing *Costa v. Ente Nazionale per L'Energia Elettrica*, 1964 Common Market L. Rep. 425).

effect subject to" the law of the Communities.<sup>25</sup> Based solely on these legal authorities, it would appear that no legislation that conflicted with Community rights or obligations could, to that extent, "have effect."

That is indeed the position to which the courts of the United Kingdom appear, quietly and obliquely, to have come. The problem in reaching this conclusion was not acute insofar as it concerned legislation enacted before the effective date of the 1972 act. That act could be seen as impliedly repealing or amending any prior legislation insofar as it was inconsistent with the European law adopted by the statute.<sup>26</sup> Such a result is perfectly consistent with the orthodox view of parliamentary sovereignty.

Conflicting legislation enacted after 1972 poses a much more serious issue. To the extent a court would hold such a statute ineffective it could do so for one of two reasons. First, it may be that by virtue of the provisions I have cited of the European Communities Act, 1972, enactments "to be passed" are subject to European law. But that is to say that the Parliament of 1972 may limit the legislative authority of subsequent Parliaments. That would be to abandon a basic corollary of the doctrine of parliamentary sovereignty, that no Parliament may bind its successors.<sup>27</sup> Second, it may be that upon the United Kingdom joining the European Communities it introduced into its legal system a new and superior organ of law-making power to which the old law-giver was subordinate. Either of these rationales, therefore, would mark recognition of a new definition of the source of legal authority in the United Kingdom.<sup>28</sup>

The initial and natural approach of the British courts to this difficulty was to avoid it. Whenever and however possible, they attempted to construe the domestic law as consistent with the relevant European law.<sup>29</sup> This required a relaxation of those English rules of statutory interpretation whereby a court was confined to the plain words of legislation without consideration of the underlying purpose of Parliament (which was, in these cases, presumed to be to act consistently with the

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25. European Communities Act, 1972, § 2(4).

26. See C. MUNRO, *supra* note 2, at 129.

27. A. DICEY, *supra* note 13, at 21-25.

28. The constitutional difficulties associated with Britain's membership in the European Communities are discussed in Bradley, *The Sovereignty of Parliament - in Perpetuity?* in *THE CHANGING CONSTITUTION* 25, 37-43 (J. Jowell and D. Oliver eds. 1989).

29. The ability of the British courts to construe European law so as to avoid conflicts was much more limited. The European Communities Act, 1972 s.3(1) made the interpretation of such law by the European Court conclusive in United Kingdom law.

treaties.)<sup>30</sup> This effort required greater and greater judicial liberality with the domestic statutes. In a much cited dictum Lord Diplock suggested the possibility that nothing

short of an express positive statement in an Act of Parliament passed after January 1, 1973, that a particular provision is intended to be made in breach of an obligation assumed by the United Kingdom under a Community treaty would justify an English court in construing the provision in a manner inconsistent with a community treaty obligation of the United Kingdom, however wide a departure from the *prima facie* meaning of the statute might be needed in order to achieve consistency.<sup>31</sup>

In a recent judgment unanimously agreed to in the House of Lords, Lord Bridge restated this rule of "interpretation" in even more extreme terms. He stated that the 1972 Act "had precisely the same effect as if a section were incorporated in [every subsequent statute] which in terms enacted that [its provisions] were to be without prejudice to the directly enforceable Community rights of nationals of any member state."<sup>32</sup> If this language still refers to a rule of interpretation we have reached a "point [where 'interpretation'] becomes fictitious and political reality is better represented by obeying the Community rule and admitting that the English rule is inconsistent."<sup>33</sup> Indeed in his reasons for judgment in a subsequent phase of the same litigation Lord Bridge stated his view more bluntly:

Under the terms of the Act of 1972 it has always been clear that it was the duty of a United Kingdom court, when delivering a final judgment, to override any rule of national law

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30. See *e.g.* *Pickstone v. Freemans plc*, [1989] 1 A.C. 66.

31. *Garland v. British Rail Engineering Ltd.*, [1983] 2 A.C. 751, 771. It is important to note, however, that Lord Diplock offered this supposition only after stating that this was a question which "the instant appeal does not present an appropriate occasion to consider." *Id.*

32. *Factortame Ltd. v. Secretary of State for Transport*, [1989] 2 All E.R. 692, 701. See Editorial, *Interim Relief Against the Crown*, 15 EUR. L. REV. 281, 282 (1990) ("The House of Lords...acknowledged that it had the power and duty to give priority to provisions of community law over conflicting national legislation.")

33. J. ALDER, *supra* note 7, at 97. On the relation of interpretation to substantive limitation, see Allan, *supra* note 13, at 616-18. It is possible that by means of such devices as purposive interpretation or restrained discretion, a divergence between the formal positive rules and the actual substantive decision-making power can be maintained for a substantial length of time. Occasionally, however, circumstances force a confrontation in which the incongruity must be dealt with. See *infra* text, at notes 79-101.

found to be in conflict with any directly enforceable rule of Community law.<sup>34</sup>

The language of this dictum is especially telling. "Overriding" is exactly what Dicey said "no person or body" had the right to do to an act of Parliament.<sup>35</sup>

Whether we have a rule calling for overt invalidation or an explicit canon requiring that we invariably construe laws as consistent with those of the European Community, the result is the same. In some cases, at least, Parliament is, as a matter of law, no longer free to legislate exactly as it chooses; in some cases the courts are to disregard the best, the most honest, estimate of the will of Parliament.<sup>36</sup> Parliament in such a regime, is no longer the supreme law maker.<sup>37</sup>

I am not here concerned so much with the results of either line of cases I have discussed, as with the kinds of questions the courts were posed. When, as in these cases, constitutional law adjudication calls on the courts to determine the extent to which Parliament may or may not legislate contrary to the acts of Union or to European Community law, it necessarily demands that they make judgments as to the pre-legal facts that determine what makes valid law. "When we ask what Parliament can or cannot do, we are going to the very root of the legal sys-

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34. *R. v. Secretary of State for Transport ex parte Factortame Ltd.* (1990) 3 W.L.R. 818, (1990) Common Market L. Rep. 375 (11 October, 1990). To be perfectly precise, it must be pointed out that the subject of both of these judgments was the availability of interim relief, pending a reference to the European Court, to parties who challenged the operation of a 1988 statute as inconsistent with Community rights. The quoted statement of Lord Bridge in the 1989 judgment referred to the relation of Community law to the underlying statute. His referent in the 1990 judgment is more general but *might* be understood as confined to the effect of European law on the English law concerning interim relief against the Crown and *that* law might be understood as pre-dating the 1972 Act.

35. *See supra* text, at note 13.

36. It has been suggested that these new limitations do not go so far as to prevent Parliament from either repealing the 1972 Act in its entirety or from making an express statement that the relevant legislation is to operate in contravention of European law. Even such a restriction on the mere form of legislation, however, represents an encroachment on the total sovereignty of Parliament (at least as it has often been understood) and opens the door for far more sweeping "manner and form" restrictions. *See* C. MUNRO, *supra* note 2, at 97-102. Numerous commentators have noted that the development of a rule of the supremacy of European law would involve the emergence of a new basic norm or rule of recognition. *See, e.g.* de Smith, *The Constitution and the Common Market: A Tentative Appraisal* 34 MOD. L. REV. 597, 613-14 (1972); Winterton, *The British Grundnorm: Parliamentary Supremacy Re-examined* 92 L. Q. REV. 591, 613-17 (1976).

37. *Cf.* Allan, note 14, at 618-19. I refer here to a situation in which an otherwise informal rule of interpretation has been adopted as an explicit rule of law. In such a case we can say that *legal* as well as political sovereignty has been transformed. *See* A. DICEY, *supra* note 13, at 27-35.

tem, and in that proximity legal theory depends on political fact."<sup>38</sup> Conversely, if we are interested in the underlying political premises of the British legal system, we can look no place else than to these kinds of decisions of constitutional law.

#### IV

Such more or less immediate recourse to the fundamentals of the legal system might seem to arise less naturally in the more common case where there is an identifiable written positive law constitution. In such a case the nature of legal authority is presumably set out in the discrete constitutional document which is itself a legal enactment and is to be construed in the same way as any other such enactment.<sup>39</sup> But the fact of a written positive law constitution cannot eliminate the need for recourse to constitutional fundamentals. Rather, such a fact merely takes the inquiry back one step. In interpreting and applying the written constitution it will, on occasion, be necessary to consider *what the constitution is*, or, put another way, what makes it law.

A good example of this kind of investigation by judges is presented by a disagreement in the 1930's over the nature of the constitution of the Irish Free State. The existence of that state was the immediate product of a period of armed rebellion in Ireland in the years 1919-21. The Irish nationalists had established a governmental structure for an independent Irish republic, including an elected legislature, the Dail Eireann. Negotiations between representatives of that government and those of the United Kingdom resulted in the Anglo-Irish Treaty of 1921 providing for extensive self-government for the southern part of Ireland. The agreement specified that the new Irish regime would have status and powers similar to those of other self-governing dominions in the British Commonwealth such as Canada and Australia. The Dail Eireann thereupon declared itself a "constituent assembly" and enacted a Constituent Act giving force of law to a constitution scheduled to the act. That constitution conformed to the requirements of the Treaty. The United Kingdom Parliament then enacted the Irish Free State Constitution Act, 1922 declaring the same constitution effective as the

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38. C. MUNRO, *supra* note 2, at 71. The common questions involved in the Union and the joining of the European Communities are noted and discussed in Mitchell, *What Happened to the Constitution on 1st January 1973*, 11 CAMBRIAN L.J. 69 (1980).

39. Subject, of course, to possible special rules of construction appropriate to the general and long term nature of such enactments. See, e.g. *Edwards v. Attorney-General (Can.)*, [1930] A.C. 124, 136 (P.C.); *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406-07 (1819).

constitution of the Irish Free State.<sup>40</sup>

An interpretation of these events was called for in two cases decided in 1934 and 1935 in the Irish Supreme Court and in the Judicial Committee of the Privy Council.<sup>41</sup> The particular issue was whether the Irish Free State Parliament, the Oireachtas, could amend the Free State constitution so as to contravene the terms of the Anglo-Irish Treaty of 1921.

In *Moore v. Attorney-General*<sup>42</sup> the Judicial Committee decided that it could. Its reasoning was as follows: Article 50 of the constitution providing for constitutional amendments limited such revisions to those "within the terms of the Scheduled Treaty." In 1933, however, the Oireachtas, enacted, in proper form, an amendment to the constitution — Act No. 6, The Constitution (Removal of Oath) Act — deleting the quoted language from Article 50 thus opening the door to amendments of any kind. The 1933 amendment was itself permissible because in 1931 the United Kingdom Parliament had enacted the Statute of Westminster granting to "Dominions" the right to legislate in ways that contravened acts of the Parliament of the United Kingdom. Article 50 of the constitution had the force of law only because of the enactment by the Parliament at Westminster of the Irish Free State Constitution Act 1922, ratifying the action of the Dail in promulgating the constitution. Thus, as a result of the Statute of Westminster, the Oireachtas was not constrained by the 1922 Imperial act nor by Article 50, which was merely derivative of that act.

The courts of the Irish Free State never passed on the validity of Act. No. 6 of 1933, removing the treaty-based limits on the amending power. But, in dicta in a case decided about six months before the *Moore* case dealing with the validity of another amendment of the constitution, Justice FitzGibbon of the Irish Supreme Court declared that "an amendment of Article 50 by the deletion of the words 'within the terms of the Scheduled Treaty' would be totally ineffective."<sup>43</sup> Justice FitzGibbon's reasoning differed from the Judicial Committee's in one

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40. See J. CASEY, CONSTITUTIONAL LAW IN IRELAND 4-10 (1987).

41. This question and these cases are discussed in K. WHEARE, *supra* note 3, at 89-94.

42. [1935] A.C. 484, (1935) I.R. 472.

43. The State (Ryan) v. Lennon, [1935] I.R. 170, 227. Justice FitzGibbon's statement although not necessary to the decision of the case under review was by no means hypothetical since Act No. 6 of 1933 which attempted to do exactly this had been enacted 18 months before. While the dissenting judgment of Chief Justice Kennedy and the concurring judgment of Justice Murnaghan do not speak directly to the point, each is consistent with a similar conclusion. See *id.* at 209-14 (opinion of Kennedy, C.J.); See *id.* at 241 (opinion of Murnaghan, J.).

crucial respect. For him the force of Article 50 (and its limitation on the power of amendment) did not depend in any way on some enactment of the Parliament of the United Kingdom. It was, therefore, immune to any revising power created by the Statute of Westminster. Article 50, like the whole constitution, depended for its authority solely on the Constituent Act, the only legislation of Dáil Éireann sitting as a constituent assembly, "represent[ing] the inhabitants of Saorstát Éireann" acting "in accordance with the doctrines of popular sovereignty."<sup>44</sup> That being the case, no authority that did not equally represent the sovereign people could dispense with the limitations the people put on the amending power, certainly not the Parliament of the United Kingdom.

On the surface these two judicial expressions present something of a paradox. It is the British court that holds that the Irish legislature is free to adjust its constitutional arrangements as it sees fit.<sup>45</sup> The indigenous Irish court appears prepared to limit the powers of the Oireachtas. But these different conclusions are the result of two profoundly different conceptions of the nature of Irish law, each based on a different view of who has the power to make law in Ireland. The Privy Council founded the unrestricted amending power of the Oireachtas on the Statute of Westminster. Since that statute was an enactment of the Imperial parliament, the sweeping power it conferred was a consequence of the will of a foreign authority. Not surprisingly, that Court saw all Irish law as emanating from the power granted by the United Kingdom Parliament. The underlying source of law for it was the illimitable power of the King-in-Parliament. This conception of the basis of Irish law was naturally unacceptable to the Irish courts. The Statute of Westminster was, for them, an irrelevancy. For these judges there was no law higher than the constitution, and the constitution included Article 50 with its limitations. Therefore no mere legal agency could change it. The constitution's status as supreme law was established by an autochthonous legal process, one that rested on Irish will alone.<sup>46</sup>

This difference over the essential character of the Free State constitution was possible because of the parallel forms of enactment. Strictly as a matter of positive law argument, either result was perfectly defensible. It was, in part, this possibility that inspired the particular form of constitutional change adopted in Ireland in 1937. The

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44. *Id.* at 224-27.

45. See J. KELLY, *THE IRISH CONSTITUTION* 2 (2d. ed. 1984).

46. See K. WHEARE, *supra* note 3, at 92-93.

government of the day expressly refused to promulgate the new constitution by enactment of the Dail (the only surviving house of the Oireachtas). Rather, in carefully chosen words, the Dail merely "approved" a draft of the constitution; only in a popular referendum was it "enacted."<sup>47</sup> This was an intentional and explicit break with the law-making authority of the 1922 constitution and, as such, it was necessarily also a break with the authorization of that constitution at Westminster. Article 1 of the 1937 Constitution states that "[t]he Irish nation hereby affirm its inalienable, indefeasible and sovereign right to choose its own form of government. . . ."<sup>48</sup> The forms of law were intentionally designed to mirror the prevailing view as to the source of law-making authority.

The confusion engendered by the presence of two antecedent legal enactments creates an initial obstacle to officials or other observers who wish to understand the fundamental assumptions that support a legal system. In the case of Ireland in 1934 and 1935 the availability of the two legal explanations of the constitution, in a way, forced the courts beyond the positive law artifacts to consider and to articulate the source of the pre-legal constituent authority. This example shows that it is not enough merely to identify what H.L.A. Hart called a "relationship of validating purport" between two rules of law. Such a relationship may mask the actual social processes that legitimate a law-making authority.<sup>49</sup>

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47. See *id.* at 94-95; J. KELLY, *supra* note 45, at 3-4.

48. *Id.* at 8 (quoting IRISH CONST. OF 1937, art 1).

Of course it would have been possible for the United Kingdom Parliament to re-enact the 1937 Constitution thus reproducing the original problem. This is, after all, what it did in 1922 after the Third Dail Eireann had passed the Constituent Act expressly declaring that it was "sitting as a Constituent Assembly . . . and in the exercise of undoubted right." Quoted in K. WHEARE, *supra* note 3, at 90. In fact the British law did not respond to the new Irish constitutional situation until 1949. Irish legislation in 1948 explicitly abolished any role for the monarch in the Irish state. With this development the British authorities felt Ireland could no longer remain part of the Commonwealth (although this has not been an insuperable problem for the membership of subsequent republics). The Westminster Parliament then enacted the Ireland Act of 1949 explicitly stating that the King's authority no longer extended to Ireland. See *id.* at 152-56. In contrast to its actions in 1922 this may be seen as a decision to allow the legal forms to follow political realities. Of course, that act might itself be treated as some kind of authorization for Irish law making. See *infra* text, at notes 71-72 concerning the Hong Kong Act, 1985.

A similar "unauthorized" procedure for establishing an autochthonous constitution has been suggested for Australia. See Moshinsky, *Re-enacting the Constitution in an Australian Act*, 18 FED. L. REV. 134, 149 (1989).

49. See H. HART, *Kelsen's Doctrine of the Unity of Law* in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 309, 318-21 (1983). To take an extreme case, it was only 1964 that the United Kingdom Parliament repealed the American Colonies Act, 1766 (Declaratory Act) asserting the



## V

The same kind of issue, therefore, is bound to arise even when there is an uncontested hierarchy of positive law rules as in the constitutional system of the United States. This is especially likely in the period when a constitutional-political regime is settling into place. The easy assumptions judges and other officials may make about the political principles underlying a legal system will, at such times, be less obvious. Indeed several examples of adjudication early in American constitutional history show a willingness to consider the fundamental character of the new legal dispensation. Naturally these examinations arose in the course of construing the Constitution itself. But the words of the document alone could not resolve the questions put before the courts by litigators. To understand the meaning of the Constitution it was necessary to take account of the political convictions that had succeeded when the legal system governed by the Constitution had been created.

Most prominent in this regard is the case of *Marbury v. Madison*<sup>50</sup> which first applied the authority of the courts to declare legislation invalid if it conflicted with the Constitution. Chief Justice Marshall's argument for judicial review is well known: The courts must decide cases according to the law. When confronted with two applicable but conflicting laws, they must choose the superior law over the inferior. Consequently, the rule of the Constitution must be honored and that of a conflicting statute ignored.<sup>51</sup>

The argument depends, however, on the assumption that the Constitution is the same kind of law that is ordinarily applied by the courts — that it is, in fact, the supreme rule of, and in, the legal system. But that conclusion is not inevitable. It is not illogical to conceive of a written constitution that is not itself enforceable in the courts of law.<sup>52</sup> That is indeed the case in a number of countries including, for example, the Netherlands and Switzerland.<sup>53</sup> Moreover this view could not,

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sovereign legislative authority of the United Kingdom over the territory that now constitutes the United States. See S. DE SMITH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 77, note 8 (5th ed. H. Street & R. Brazier eds. 1981). If we just consider the relationship of validating purport we could conclude that the legal authority of American law since 1964 is a consequence of that parliamentary action.

50. 5 U.S. (1 Cranch) 137 (1803).

51. *Id.* at 177-78.

52. See Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 17-20, 25.

53. See K. WHEARE, *MODERN CONSTITUTIONS* 101, 103-04 (2d ed. 1966). In Switzerland the federal courts may review the constitutionality of cantonal but not federal legislation. *Id.* at 101.

logically, be derived from the Constitution itself, as Marshall tried to do, since it was the very nature of that document's authority that was in question. The result in *Marbury* must, therefore, rest on a controversial assumption about the nature of the legal system established by the creators of the Constitution. In fact, Marshall's decision makes this plain. He asserts that judicial review follows from a "theory . . . essentially attached to a written constitution . . . [and] one of the fundamental principles of our society."<sup>54</sup> That theory expresses a preference for a state limited in advance by abstract rules applied by the courts. "The fundamental principles of [a] society," of course, are not the products of the law. They determine what the law is.

A similar recourse to the fundamental characteristics of the legal system was necessary when the Supreme Court first had to elaborate on the nature of the federal system created by the Constitution. In two critical early cases the relative powers of the state and federal governments were put into issue. While, in form, these issues merely concerned the proper construction of the constitutional text, they really turned on a judgment as to the kind of thing the Constitution was, and on an assumption as to what made the Constitution law.

*Martin v. Hunter's Lessee*<sup>55</sup> was the first case in which the United States Supreme Court explicitly upheld its own appellate jurisdiction over the courts of the various states. Justice Story's opinion for the court was, for the most part, a straightforward interpretation of Article III of the Constitution, insofar as that provision defines the jurisdiction of the federal courts in general, and the Supreme Court in particular. But the nub of the argument of Virginia in resisting the authority of the national judiciary was premised on a far more basic point: It simply was not in the nature of the government established by the Constitution that the states, themselves, could be subject to direct national authority. This immunity of the states, one advocate argued, was apparent from "[t]he whole scheme of the constitution." The court could exercise no power "inconsistent with the whole genius, spirit and tenor of the constitution."<sup>56</sup> Another lawyer for the same side made plain that he saw the court necessarily straying into the most sensitive questions of constitutional politics: "The taper of judicial discord may become the torch of civil war, and though the breath of a judge can extinguish

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54. 5 U.S. (1 Cranch) at 177.

55. 14 U.S. (1 Wheat.) 304 (1816).

56. *Id.* at 316 (argument of Tucker).

the first, the wisdom of a statesman may not quench the latter.”<sup>57</sup>

The judgment of the Supreme Court in no way avoided this dimension of the issue. Justice Story saw fit, before offering his more familiar legal analysis, to “dispose of some preliminary considerations.” He thought it important to deal with the idea that the states were in some way the creators of the Constitution and they were, therefore, somehow immune from any control or correction by their creature, the federal government. He cited the preamble to the Constitution to affirm that the Constitution was not the handiwork of the states but of the “people of the United States.” The people in making the Constitution could treat the powers of the states as they chose, subordinating them to their more general objectives in creating the national government. “The constitution was not, therefore, necessarily carved out of existing state sovereignties, nor a surrender of powers already existing in state institutions . . . .”<sup>58</sup>

The same issue was raised three years later in the great case of *M'Culloch v. Maryland*.<sup>59</sup> The precise question was the vulnerability of the Bank of the United States, a creation of the national Congress, to taxation by the states. Once again the litigants and the Court saw the issue as turning, in part, on the correct characterization of the association of states and national government created by the constitution. The argument of the Bank that it was immune from state taxation required two significant implications from the Constitution: first that the Congress possessed a wide discretion in choosing the means for executing the limited number of express powers granted to it and; second, that the states were disabled from exercising their governmental powers in ways that interfered with the activities of the federal government.

Chief Justice Marshall plainly understood that the issue was whether or not the Constitution was the empowerment of a strong national government independent of the states. The alternative was that it would be a mere delegate of the separate sovereignties of the states. The text of the Constitution was far from conclusive on these questions. What were needed were some presumptions as to how to read its grants and prohibitions. To deduce these it was necessary to inquire as to what, in a broad political sense, the enactment of the Constitution had done.

To a very significant extent, issue was joined on exactly this ques-

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57. *Id.* at 320 (argument of Dexter).

58. *Id.* at 325.

59. 17 U.S. (4 Wheat.) 316 (1819).

tion. Walter Jones, arguing for the state, "insisted that the constitution was formed and adopted, not by the people of the United States at large, but by the people of the respective States . . . . It is, therefore, a compact between the States, and all the powers which are not expressly relinquished by it are reserved to the States."<sup>60</sup> The contrary position was put just as directly. In his argument for the Bank, William Pinkney claimed that the Constitution:

springs from the people . . . . The state sovereignties are not the authors of the constitution of the United States. They are preceding in point of time, to the national sovereignty, but they are postponed to it in point of supremacy, by the will of the people. The means of giving efficacy to the sovereign authorities vested by the people in the national government, are those adapted to the end . . . . They must be supreme, or they would be nothing.<sup>61</sup>

Before considering the specific issues in contest, Chief Justice Marshall, in his unanimous opinion of the Court, responded to the controversy as to the basic nature of the Constitution:

[C]ounsel for the State of Maryland have deemed it of some importance, in the construction of the constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the general government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.<sup>62</sup>

This view of the constituent process, he firmly rejected. He emphasized that the Constitution was ratified not by state governments but by special conventions. Therefore

[t]he government proceeds directly from the people . . . . To the formation of a league, such as was the confederation, the State sovereignties were certainly competent. But when, "in

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60. *Id.* at 363.

61. *Id.* at 377-78.

62. *Id.* at 402. Marshall here overstated the position of counsel who envisioned limited sovereignty in each level of government with resolution of conflicts left to restraint and accommodation. *See id.* at 370-71. His characterization, however, is true to the political outcome such a position entailed.

order to form a more perfect union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.<sup>63</sup>

Since the powers of the national government do not derive from the states but from the people, those powers are to be interpreted in a way liberal enough to accomplish the people's objects in conferring them. The people declared the laws enacted in pursuance of those objects to be supreme. "Consequently, the people of a single State cannot confer a sovereignty which will extend over [such laws]."<sup>64</sup>

It is worth noting that this exegesis did not succeed in settling the question of the nature of the Constitution's federal system. For almost another fifty years the contention that the Constitution was a mere compact of states and that the states retained the ultimate authority to determine the extent of federal power, was a vital, persistent and gnawing strain in American political discourse.<sup>65</sup> It took its most extreme form in the attempted secession of the Southern states, acts which were defended, at least in part, by reference to principles of state sovereignty which were still claimed to underlie the very constitution to be dissolved.<sup>66</sup> The unacceptability of this interpretation was determined, at the end, not by legal decision but by civil war. Even then, however, we may find the coda to that dispute in a judicial opinion concerning the legitimacy of acts of one of the rebellious governments. The Constitution, the Supreme Court declared, created "an indestructible Union, composed of indestructible States."<sup>67</sup>

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63. *Id.* at 403-04.

64. *Id.* at 429. *See also id.* at 432.

65. *See* H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875*, 211-14 (1982).

66. *See id.* at 210-15.

67. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868). Even after the Civil War the idea that the states retained some irreducible power to determine for themselves the nature of the national constitutional arrangements remained a significant although increasingly marginal theme in American political discourse.

As recently as 1981 President Reagan in his first inaugural address claimed that "[a]ll of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government." Ronald Reagan's Inaugural Address, *PUB. PAPERS* (January 20, 1981).

The right of state officials to differ from and resist the constitutional interpretations of the Supreme Court was definitively rejected in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

## VI

It is impossible to discuss these kinds of questions in this symposium without noting, at least in general and tentative terms, their possible application to the future constitutional status of Hong Kong. If events proceed as is now most likely, twenty or thirty years from now Hong Kong will be a Special Administrative Region of the People's Republic of China. It will be governed immediately by the terms of the Basic Law of the Hong Kong Special Administrative Region. The meaning of the terms of that Basic Law are already the subject of considerable discussion especially with respect to the right authoritatively to interpret its provisions.<sup>68</sup> If such issues become matters of judicial controversy their resolution will call for the same kind of investigation as the cases we have examined. The proper construction of the Basic Law depends on what kind of an instrument it is thought to be. For that it will be necessary to know on what prelegal basis the Basic Law rests — what makes the Basic Law law.

As in some of those other cases, however, we cannot specify a single regression through a series of validating acts of positive law which will unfailingly lead to the basis of the Hong Kong legal system. There are a number of possibilities. One simple analysis would proceed as follows: The Basic Law is an act of the National People's Congress. The power of the Congress to enact that law is provided in Article 31 of the 1982 Chinese constitution.<sup>69</sup> That constitution sets forth in Article 1 that it is the product of a political resolve to establish "a socialist state under the people's democratic dictatorship led by the working class and based on the alliance of workers and peasants."<sup>70</sup> Another

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68. See Basic Law of the Hong Kong Special Administrative Region arts. 2, 11, 82, 158; M. DAVIS, CONSTITUTIONAL CONFRONTATION IN HONG KONG: ISSUES AND IMPLICATIONS OF THE BASIC LAW 16-22, 42-46 (1990); Special Report: 'Basic Law' for Governance of Hong Kong Seen as Crucial To Role As Commercial Power, 7 INTERNATIONAL TRADE REPORTER 1716 (1990); Ho, *Autonomy*, in THE BASIC LAW AND HONG KONG'S FUTURE 296-98 (P. Wesley-Smith & A. Chen eds. 1988); Jones, *A Leg to Stand On? Post-1997 Hong Kong Courts as a Constraint on PRC Abridgment of Individual Rights and Local Autonomy*, in LAW IN THE PEOPLE'S REPUBLIC OF CHINA 918, 922-23 (R. Folsom & J. Minan eds. 1989).

69. See Ho, *supra* note 68, at 294-95.

70. CONSTITUTION OF THE PEOPLE'S REPUBLIC OF CHINA art.1. See also LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 68, at 22 ("The Preamble to the 1982 Constitution identifies the four principles on which the People's Republic of China is based. They are socialism, the people's democratic dictatorship, Marxism-Leninism and Mao Zedong thought, and the leadership of the Communist Party of China. . . ."). Commentators have argued that the very idea of a "constitution" in China is profoundly different from the Western conception, reflecting not long-term principles but transitory policies. See M. DAVIS, *supra* note 68, at 18-22; Jones, *The Constitution of the People's Republic of China* in LAW IN THE PEOPLE'S REPUBLIC OF CHINA, *supra*

plausible explanation would be as follows: The Basic Law is law because the authority to legislate for Hong Kong after July 1, 1997 was ceded by the United Kingdom Parliament in the Hong Kong Act, 1985.<sup>71</sup> That legislative cession was possible because of the plenary authority of Parliament "to make or unmake any law whatever."<sup>72</sup> The social and political universes out of which these two possible sources of authority emerged are certainly very different and depending on which is selected we can expect the Basic Law to be read very differently.<sup>73</sup>

It is plain that there is no way to choose between these alternatives simply as a matter of positive law analysis. Each exhibits a "relationship of validating purport"<sup>74</sup> and the choice will turn on the pre-legal factors that support the legal system as a whole. For the same reason, these two explanations need not exhaust the possibilities. The Basic Law might come to be understood as legitimated by neither Chinese nor British law but by the Joint Declaration of 1984 in which both China and the United Kingdom agreed on the 1997 transition and provided that Hong Kong would enjoy a "high degree of autonomy" and that its "social and economic system" and "life-style" should remain unchanged for 50 years.<sup>75</sup> Looked at this way the authority of the Basic Law would be founded in the international law of treaties and its interpretation would be influenced by that tradition.<sup>76</sup> Or, perhaps over an extended period of time and with a satisfactory course of adjudication, the Basic Law might come to be accepted in Hong Kong (and China generally) as authoritative in its own right, simply because it is so regarded. It would then be an autochthonous constitution, one that has struck a local root.<sup>77</sup>

There are sure to be other possibilities and the prospects are complicated by the interaction of at least three legal systems. It is simply impossible to say *now* what the underlying justifications for the existing constitutional order will be *then*. These questions are necessarily temporal. They can be answered only with reference to attitudes and values

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note 68, at 39, 49.

71. Hong Kong Act, 1985, § 1(1).

72. A. DICEY, *supra* note 13, at 3.

73. See M. DAVIS, *supra* note 68, at 18-22; Kuan, *Chinese Constitutional Practice*, in *THE BASIC LAW AND HONG KONG'S FUTURE* 55 (P. Wesley-Smith & A. Chen eds. 1980).

74. Hart, *supra* note 49, at 318-21.

75. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, para. 3 (2), (5).

76. See M. JANIS, *supra* note 23, at 23-34.

77. See K. WHEARE, *supra* note 3, at 89.

at a given point in time. The fact of change is central to any consideration of constitutional fundamentals. The very same positive law rules may be supported by different pre-legal considerations at different times.<sup>78</sup> Our judgments as to the future understanding of the Basic Law can be only speculation. The constitutional law of Hong Kong, however, like every constitutional law, will sooner or later have to come face to face with its own fundamental character and history.

## VII

Since it is the inevitability of change in the prevailing political values of a society that occasions the need for reconsideration of the basis of law, we can expect these reexaminations to occur, in their most explicit form, at moments of crisis. It is by no means accidental that so many of the cases I have discussed occurred in the course of fundamental political transitions in the states involved. In normal times the fundamental positive laws of a legal system suffice to decide almost any matter that comes before the courts. The presuppositions which give those rules force are taken for granted and they shape the understanding and application of the constitutional rules silently and invisibly. In contrast are those unusual periods when, for whatever reasons, there is widespread and openly expressed doubt about the essential nature and powers of the state and legal system. In such circumstances a misalignment may develop between the emerging political principles and the positive law that concerns the reach of state power — that is, constitutional law. Courts asked to apply the rules of positive law at such times will find themselves looking at the familiar constitutional rules in a more critical and self-conscious way. That is exactly what happened in many of the cases mentioned.

There are a number of different ways a court might respond on such occasions. It might, of course, simply insist on applying the old rules in the old way, that is, as if the former presuppositions on which the law was based still were effective.<sup>79</sup> That is a straight road to irrele-

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78. For example, the British North America Act, 1867, Canada's constitution may have been law in 1875 by virtue of attitudes about the authority of the Imperial Parliament. It was still regarded as binding law in 1982 but certainly for different reasons. See Slattery, *supra* note 2, at 398-99. It has been suggested that the same phenomenon has occurred in Australia. See Moshinsky, *supra* note 48, at 134, 136 (1989). See generally K. OLIVECRONA, LAW AS FACT 103 (2d ed. 1971).

79. An alternative not discussed in text is resignation. This was the course followed by some Rhodesian judges. See Dias, *supra* note 5, at 233. Similarly, a majority of the judges in Fiji resigned after a military coup. See Moshinsky, *supra* note 48, at 149 n.74. This is more the



vancy at best, and, at worst, to mortal danger. While the relationship of influence between law and the political consensus is not all one-way, in the long run, as I have noted, it is political beliefs that make law.<sup>80</sup> Therefore it will fall to a court (if it is to survive as a court) to bring the law into conformity with the political reality.

Sometimes a change in the foundations of the legal system is particularly clear and dramatic. On such occasions the judicial system, if it is permitted to continue in its old form, need do little more than recognize the transformation of the constitutional regime. Furthermore, given the obviousness and the apparent irreversibility of the change, there is little reason for a court to fail to acknowledge, as well, its extra-legal character. This was the case following the "people power" revolution in the Republic of the Philippines in February, 1986. On February 14 the National Assembly had certified President Ferdinand Marcos to be the winner of a presidential election held on February 7. That result was generally believed to be fraudulent, the true winner having been Marcos' principal opponent, Corazon Aquino. On February 25, following massive public demonstrations and a military revolt, Marcos left the country and Aquino took office as "President." Clearly she did not take that position as it was defined and regulated in existing law. On March 25 President Aquino put into effect, by proclamation, a provisional constitution which, *inter alia*, abolished the National Assembly.<sup>81</sup> An appointed constitutional commission prepared a draft of a proposed new permanent constitution that was approved in a plebiscite on February 2, 1987 and became effective on that date.<sup>82</sup>

The Supreme Court of the Philippines (All Marcos appointees had resigned at the request of President Aquino on March 13, 1986<sup>83</sup>) was soon confronted with cases questioning the authority of the Aquino government. Its response was perfectly direct. It appeared in a judgment delivered in October, 1986 in an action that sought a declaration as to the meaning of a provision of the proposed new constitution refer-

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decision of an individual than the response of a court.

80. This is not to say that legal rules and decisions do not themselves influence political beliefs. See Kay, *Moral Knowledge and Constitutional Adjudication*, 63 TUL. L. REV. 1501, 1511 (1989); Weisbrod, *On the Expressive Functions of Family Law*, 22 U. CAL. DAVIS L. REV. 991 (1989). The circumstances discussed in text are assumed, by hypothesis, to involve a significant divergence between the relevant political consensus, however formed, and the positive rules of constitutional law.

81. See Flanz, "Philippine Supplement, 1984-86" in 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 3-10 (A. Blaustein & G. Flanz eds. 1986).

82. *DeLeon v. Esguerra*, 153 S.C.R.A. 602 (1987).

83. See Flanz, *supra* note 81, at 5.

ring to the "term of the incumbent President and Vice-President elected in the February 7, 1986 election." Did this provision, the petitioner asked, mean Aquino or Marcos? The Court made no bones about the legitimacy, if not the legality, of the new system:

In previous cases, the legitimacy of the government of President Corazon C. Aquino was likewise sought to be questioned with the claim that it was not established pursuant to the 1973 Constitution. The said cases were dismissed outright by this court which held that:

'Petitioners have no personality to sue and their petitions state no cause of action. For the legitimacy of the Aquino government is not a justiciable matter. It belongs to the realm of politics where only the people of the Philippines are the judge. And the people have made the judgment; they have accepted the government of President Corazon C. Aquino which is in effective control of the entire country so that it is not merely a *de facto* government but in fact and law a *de jure* government. Moreover the community of nations has recognized the legitimacy of the present government. All the eleven members of this court, as reorganized, have sworn to uphold the fundamental law of the Republic under her government.'<sup>84</sup>

In other situations, however, things may not be so clear. Two other cases illustrate some of the difficulties and dangers. In the first, occurring in Canada in 1980-82, the change in constitutional fundamentals was unaccompanied by any breach of positive law. In the second, in Rhodesia in 1965-68, an obvious attempt had been made to break with existing law but the efficacy of the new legal system was more doubtful. In both these cases, moreover, the courts were called on to make far more complicated and, therefore, far riskier estimates of the nature of the underlying political change.

The Canadian adjudication arose in connection with a legal dispute surrounding the adoption of the Constitution Act 1982. Before that event the power to amend the Canadian constitution had, in significant measure, rested in the Westminster Parliament acting, by conven-

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84. In Re: Saturnino v. Bermudez, 145 S.C.R.A. 160, 163 (1986) (citing Joint Resolution of May 22, 1986 in G.R. No. 73748 [Lawyers League for a Better Philippines, etc. v. President Corazon C. Aquino, et al.]; G.R. No. 73972 [People's Crusade for the Supremacy of the Constitution, etc. v. Mrs. Cory Aquino, et al.]; and G.R. 73990 [Councilor Clifton U. Ganay v. Corazon C. Aquino, et al.]).

tion, on the advice of Canadian officials. In 1980 the Canadian federal government announced its plan to request such an amendment for the purpose of securing a domestic amending procedure and also creating a constitutionally entrenched charter of rights. Significantly, it planned to take this action without the consent of the provincial governments whose unanimous consent had, in the past, been secured before amendments of this kind were initiated. Eight provinces objected to this course of action.<sup>85</sup>

The federal-provincial dispute took, in part, the form of a lawsuit, a reference to the Supreme Court of Canada. The critical part of the Court's judgment responded to the provinces' claim that the power to seek a constitutional amendment of this kind was governed by a constitutional convention. Such a convention imposes a politically, but not legally, binding standard of behavior on public officials.<sup>86</sup> A majority of the Supreme Court held there was such a convention and it inhibited a federal request for an amendment affecting the relative powers of the federal and provincial governments without some, unquantified, measure of provincial assent.<sup>87</sup> In a subsequent reference it clarified the convention, holding that the minimum provincial assent did not, of necessity, have to include that of the government of Quebec.<sup>88</sup> While the finding of such a convention was, by definition, of no legal effect, as a practical matter it forced the federal government to come to a new agreement with nine of the ten provinces (excluding Quebec).<sup>89</sup>

The Court's decision, while in the form of a mere inquiry into the existence of a constitutional convention, really consisted of an examination of the pre-legal understandings that constituted the final law-making authority in the Canadian polity. The "convention" elaborated was about the right to create and to change the constitution, the law that controlled every other rule of positive law in the legal system. This investigation was made necessary by the fact that the fundamental political assumptions about authority in society had changed but those changes had not been reflected in the positive constitutional rules of the legal system. At Canada's creation in 1867 the ultimate source of law was the Imperial Parliament. By 1980 it was evident that the final legal

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85. See Kay, *Constitution-Making In Canada*, 24 *WORLDVIEW* 21 (1981).

86. See e.g., C. MUNRO, *supra* note 2, at 35-60.

87. Re: Resolution to Amend the Constitution (Patriation Reference), [1981] 1 S.C.R. 753, 875, 910.

88. Re: Objection By Quebec To A Resolution to Amend the Constitution (Quebec Veto Reference) [1982] 2 S.C.R. 793. See text at note 102 *infra*.

89. See N. WARD, *DAWSON'S GOVERNMENT OF CANADA* 300-02 (1987).

authority was Canadian and that it resided in some combination of provincial and federal elected officials. But this transition had never been crystallized into a definition. The constitutional program of the federal government forced an explicit examination of that question.<sup>90</sup> The Court's judgment focused overtly on the history and traditions of Canada as an independent state. Since the new political assumptions articulated by the Court only affected the way in which official actors should exercise admitted legal power, those officials were able to give effect to these fundamental changes without a breach of the positive rules of law.<sup>91</sup>

Such a peaceful and law-clad revolution, of course, is not always possible. In Canada it was viable because the positive law rules were broad enough to permit the kind of governmental power that the political imperatives required. Moreover, the governmental actors, the federal government and the United Kingdom government, were willing to restrict the exercise of the powers afforded them by positive law in order to conform with the now recognized political limitations. When, as the Philippines case illustrates, either of these elements is missing, the tension between the pre-legal understandings and the positive law rules may become unsustainable. In such a case a revolutionary breach of law becomes inevitable. Successful judicial accommodation to the fact of change will then ordinarily require a recognition of both the new political assumptions and of the break in legal continuity.

Such change occurred in what was then called Southern Rhodesia following the Unilateral Declaration of Independence and proclamation of a new constitution by the Ian Smith regime in 1965. These actions were plainly in conflict with the existing positive constitutional rules that had been enacted by the Westminster Parliament in 1961. The continuing validity of British authority was confirmed by that Parliament in the Southern Rhodesia Act, 1965 and in the Privy Council's judgment in *Madzimbamuto v. Lardner-Burke* in 1968.<sup>92</sup> There were, therefore, two competing sets of assumptions about what made legitimate law in Southern Rhodesia. One was premised on the final authority of the United Kingdom Queen in Parliament and the other on the

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90. See generally Kay, *Courts as Constitution-makers in Canada and the United States*, 4 SUP. CT. L. REV. 23 (1982).

91. "[L]egal rules create wide powers, discretions and rights which conventions prescribe should be exercised only in a certain limited manner, if at all." Re: Resolution to Amend the Constitution, (Patriation Reference) [1981] 1 S.C.R. 753, 881.

92. [1969] 1 A.C. 645. See generally E. WADE & A. BRADLEY, *supra* note 8, at 430-32.

will of the white minority population of Rhodesia as reflected in the actions of their elected representatives in the Smith government. These two views of political authority had yielded two different and conflicting regimes of positive law. Officials of each regime were intentionally acting in ways that prevented the operation of the other. It was, therefore, impossible to reconcile the authority of the Smith government with British colonial authority by reformulating either the contesting rules of law or the political principles.

Since the effective government in Rhodesia had left in place the judicial institutions of the old system, it was inevitable that the judges should come to confront questions about the legality of the actions of the new order.<sup>93</sup> This occurred in a number of cases<sup>94</sup> culminating in *R. v. Ndhlovu*<sup>95</sup> decided in the Appellate Division of the Rhodesian High Court in 1968. The collision of regimes was direct. The appellants had been indicted for violation of a public order measure enacted by the Rhodesian Legislative Assembly in 1967. By an Order in Council issued pursuant to the Southern Rhodesia Act, 1965 the United Kingdom authorities had expressly declared that legislature had no power to make law. The appellants challenged the validity of the indictments.

Unlike the situation in the Philippines where the efficacy of the political change was unmistakable, the refusal of British authorities to acknowledge the new government, its continuing efforts to resume control, and significant internal opposition all made the nature of the political basis of the legal system in Rhodesia highly problematic. Nevertheless, the judges of the Appellate Division unanimously held that the local "usurping" government had acquired the status of a *de jure* government and that it was its laws and not those of the United Kingdom that the court would follow.

As in the Philippine and Canadian judgments, the Rhodesian judges' inquiries were explicitly empirical. Whether revolutionary institutions in a society had achieved the right to make law depended on the "efficacy of the change." I have referred to the complex of pre-legal attitudes that create the law-making authority. This court implicitly found such attitudes to support the legitimacy of the local government

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93. On the judicial responses to the Rhodesian crisis see generally Dias, *supra* note 5; Palley, *Comment*, 1968 PUBLIC LAW 293; Eekelaar, Rhodesia, *The Abdication of Constitutionalism*, 32 MOD. L. REV. 19 (1969).

94. *Madzimbamuto v. Lardner-Burke* [1968] 2 S.A. 284, *rev'd* [1969] 1 A.C. 645; *Dhlamini v. Carter* [1968] 2 S.A. 464.

95. [1968] 4 S.A. 515.

by finding that it was effectively in control and likely to remain so. Chief Justice Beadle finally placed most of his emphasis on the ineffectiveness of the economic sanctions that Britain was employing in an effort to bring the Smith government down. "The real question," he asserted, is "[w]hat effect will sanctions have on the political temper of the people?" He examined export figures, tax revenues, the results of parliamentary by-elections, and the routine character of government operations and concluded that the government is "more firmly in the saddle than ever before."<sup>96</sup> The polemical judgment of Macdonald, J.A. drew a distinction between "constitutional reality [and] abstract legal theory."<sup>97</sup> That reality was affected by what he termed the British government's "waging . . . economic war against its own subjects" in order to bring the Rhodesian people "to a state of revolt against their elected representatives."<sup>98</sup> But the result, he claimed, was the opposite. By its actions the United Kingdom "forfeit[ed] not only respect and authority but also all claim to allegiance."<sup>99</sup>

The Rhodesian people in consequence were left with a choice between two Governments: first a Rhodesian Government in Britain created by the enactments of 16th November, 1965 and making no attempt to govern but, on the contrary, waging economic war: secondly, an elected Rhodesian government the Cabinet of which had illegally declared independence and had been dismissed but which had continued in office and was continuing to govern. . . . Not surprisingly the Rhodesian people in the main continued to support the Government in Rhodesia and this Government has, in consequence, now attained full *de jure* status.<sup>100</sup>

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96. *Id.* at 531.

97. *Id.* at 552.

98. *Id.* at 547.

99. *Id.* at 549.

100. *Id.* at 553-54. It is obvious, of course, that this court's reference to the political attitudes of "the Rhodesian people" was an extremely narrow and artificial one. A legal system rests on the attitudes and beliefs of those human beings whose acquiescence can be translated into effective political power. At the time of these judgments that probably meant the white minority. Over the long run, as events disclosed, the convictions of the whole population became critical. See text at note 101 *infra*.

Two other much discussed cases in which courts decided the legal status of revolutionary governments are *Uganda v. Commissioner of Prisons*, [1966] E.A. 514 (Uganda) and *State v. Dosso*, [1958] 2 P.S.C.R. 180 (Pakistan). In *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) the United States Supreme Court refused to adjudicate the question of which of two contenders was the lawful government of Rhode Island, deferring to the judgment of the legislative and executive

The backgrounds against which the Philippine, Canadian and Rhodesian cases were decided were very different but they presented an important common element. The Canadian court dealt with what it presumed to be a stable and widely shared political consensus that had peacefully evolved over a long period of time without any breach of positive law. The Philippine and Rhodesian judges confronted a discrete shift in political authority effected by an explicitly unlawful act. But in each case the inquiry was essentially historical and sociological. It required a description of the actual, changed, pre-legal state of affairs that had developed in each society. From that finding it was possible to infer the character of the legal system that was viable there.

The Canadian and Rhodesian cases also illustrate another unavoidable aspect of the kind of adjudication under discussion. Since they do not involve a conclusive interpretation of accepted legal rules but are, instead, based on an estimate of social and political reality, they are necessarily temporal and tentative. The Philippine court could, by virtue of the strong national approval of the extra-legal changes, recognize the new system with some confidence in its efficacy and stability.

The underlying facts in Canada and Rhodesia were substantially more complicated. This is evident from subsequent events in each country. The hard facts of world disapproval and civil war made the independent Rhodesian legal system untenable. Although the transition to an independent legal system in Zimbabwe was dressed up with formal accoutrements of enactment in the United Kingdom,<sup>101</sup> the authority of that system was in no substantive way based on the law-making authority of the Westminster Parliament. Rather it was founded on a workable political consensus in the territory which it governed. The story in Canada is not yet complete but the Supreme Court's judgment that final constituent authority existed in the federal government and some number of provincial governments that might not include Quebec is, at least, in serious doubt. The constitutional settlement that followed the court's decision was opposed by the government of Quebec. The "Meech Lake Accord" in which that province's concerns were to be met by a series of constitutional amendments failed passage at the eleventh hour. Very serious questions are now being expressed about the viability of the Canadian confederation. The movement for an indepen-

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branches of the national government. This does not mean the American courts have never looked to the pre-legal fundamentals of the legal system. See text at notes 50-67 *supra*.

101. See E. WADE & A. BRADLEY, *supra* note 8, at 430-33.

dent Quebec state is developing a possibly irreversible momentum.<sup>102</sup> Should new and different countries and legal systems emerge from this process, we will have another case of social and political realities outstripping the artifacts of positive constitutional law.

### VIII

The political change that is at the heart of the problem I have been examining might well be referred to as revolutionary even if it involves no tumult or bloodshed. That is because it demands a new definition of legal authority. There is a presumptive antinomy between the notions of law and revolution. But as the judicial material I have canvassed illustrates, there is also a necessary affinity between these two concepts. In advanced societies we cannot imagine a political change so profound as to sweep away all law. Even in the very course of revolution, the great bulk of everyday transactions continue based on the presumed continuity of some legal rules and the availability of institutions and procedures to vindicate legal rights. It is perhaps pathetic, but also telling, that before announcing his judgment on the legality of the very regime of which his court was a part, Chief Justice Beadle in the *Ndhlovu* case complained that the question of law in that case had been reserved "in terms of sec. 37 of the High Court Act, 22 of 1964" but it "should more properly have been reserved under sec. 36."<sup>103</sup>

The momentous questions we have seen courts address needed to be asked because the ultimate bases of those continuing legal proceedings and institutions were, at those times, matters of active doubt. But even in more normal times all law must trace its authority to some social facts. As I have noted, the connection between constitutional law, however defined, and those basic facts is especially close. The political consensus that supports the law at any given moment is, moreover, like

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102. See, e.g. *Quebec Premier Under Pressure as Referendum Calls Grow*, Reuters, March 29, 1991 (LEXIS, Nexis Library, Currnt File); *Quebec Struggles to Find New Role*, N.Y. Times, July 3, 1990, at A6, col.1; *Mulroney Seeks Debate on Future of Canada*, Wash. Post, Nov. 2, 1990 at A29.

The apparent failure of the Supreme Court's intervention in 1981 has not dulled some Canadians' preference for judicial resolution of the country's constitutional fundamentals. For example, it has been urged that a new constitution be instituted by some combination of constituent assembly and referendum. Since neither device is allowable under the existing constitutional amendment procedure, it has been suggested that the Supreme Court be asked to certify that such popular approval could override the positive constitutional law. See *How Will Nation Negotiate Future Role of Quebec?*, Toronto Star, Feb. 3, 1991 at A2.

103. [1968] 4 S.A. at 516.



any social phenomenon traceable to some beginning, either to some "founding" historical events or to some less explicit turn in the prevailing political climate.<sup>104</sup> In either case such a beginning might properly be called a revolution. Consequently every legal event is, in that sense, an extension of revolution.

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104. See Joseph, *supra* note 6, at 59-60 ("The mantle of legal continuity may be confounding, but it is no bar to a 'new' order transcending an 'old' . . .")

While it is impossible to address it completely, I should, at least, take note here of one rather basic objection to the analysis I have put forward. That is the contention that *all* instances of adjudication involve recourse to the social "pre-legal" factors I have mentioned. Social facts may well be determinative insofar as they provide the predicate for the application of accepted legal rules. Moreover, as mentioned in text, the pre-legal facts that support the legal system, may, in that sense, be said to influence every decision invoking that system's rules. But, I believe, relatively autonomous systems of law can, and do, exist, for extended periods of time and it is that relative autonomy, and the relative immunity from fundamental reconsideration of the law that it entails, that allows law to provide the stability and predictability that are its peculiar contribution to social well-being. I thus see the law as, most of the time, being analogous to what T.S. Kuhn called "normal science." See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTION* (1962). This should not be obscured by the inevitable and fascinating, but relatively unusual, moments of "paradigm shift" that are the focus of this paper.

