Constituent Authority and the Canadian Provinces

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I. The Regulation by Law of Canadian Lawmaking Processes

Sir Ivor Jennings has perhaps epitomized the modern view of the English law about 'parliamentary sovereignty' and the regulation by law of the lawmaking process, in his phrase, 'The law is that Parliament may make any law in the manner and form provided by the law.'[1] Where Dicey[2] saw 'parliamentary sovereignty' as much in terms of a limitation on the competence of the courts as in terms of the unlimited legislative competence of the (United Kingdom) Parliament, most modern authorities emphasize the latter, insisting that the courts must in general enforce the laws prescribing the lawmaking processes as they would any other laws, and that Parliament (or other competent lawmaking authority, if we are not specifically speaking of the United Kingdom) may by law alter those processes. These principles are indeed implicit in the duty of the courts to notice and apply the law to matters before them: purported enactments made by those who do not by law enjoy the power to make them, do not form part of the law, and cannot be noticed or applied as part of the law. This is no assertion of a special power to quash; to annul; to set aside; to expunge; this is no claim of a special jurisdiction. It is merely a denial that there is some special exception whereby claims to power must be treated as lawful powers; usurped authority as authority; illegal acts as legal; revolutionary acts as acts of the existing legal order attacked by them; and legal discontinuity as continuity. To treat even a simpler legislative process (like the United Kingdom Parliament), not as a complex legal structure involving hundreds of persons and existing only *in abstracto,* but rather as an omnipotent human person who cannot stop himself from changing his mind or bind himself in fetters, is, at best, to become ensnared in one's own crude metaphors, and, at worst, to indulge in metaphysical claptrap. Problems, no doubt, exist. When is the appropriate sanction absolute nullity, or an injunction, or a penalty, or something else? What rules are to be considered constitutive of a legislative body, and which merely of a lesser character? When will things be presumed to have been properly done, and how strong will that presumption be? (Were a maniac to force the Clerk of the Parliaments to certify, at gunpoint, a purported act vesting the maniac with supreme powers, there are many who would re-examine the doctrine

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[1] W. Ivor Jennings, *The Law and the Constitution,* 3rd ed., (London, 1943), p. 144.

[2] A. V. Dicey, *Introduetion to the Study of the Law of the Constitution,* now in 10th edition, (London, 1959).

that the Parliament roll is conclusive as being the record of a court, and who, disinclined to the view that United Kingdom law obliges obedience in the circumstances, would find hitherto unsuspected resources in the plea *nul tiel record.)* But whatever problems there be, the author is convinced, as he has suggested elsewhere,[3] that the principles above stated are the only ones logically consistent with the body of English law and that of the British Commonwealth in general; and that they are indeed merely corollaries or applications of "the rule of law". Historical instances of successful revolutions do not prove that they were not revolutions; even if judges, happily or reluctantly, went along with the revolutions. Legal discontinuities are not legal continuities because judges refrain from broaching the subject. Nor are political calculations as to the likely malleable behaviour of judges in a revolutionary situation any indication of — and still less conclusive of — what is or can be prescribed by *law* under the *present* legal order as being necessary for lawmaking.[4] There *is* law which governs the lawmaking processes; it *is* applied and enforced; it *is* from time to time altered; when it is altered the new law displaces the old. In England, the *Parliament Act,* 1911, provided for legislation, on certain conditions, by Crown and Commons; which latter legislative process was so far considered to produce fully-fledged Acts of Parliament that the process was used to enact the *Parliament Act,* 1949, which removed in part the conditions imposed by the Act of 1911 — something unthinkable for a mere delegate.

The scope of this essay dictates that, as a starting point, it be taken for granted that in Canada law may be made according to law, and not otherwise; a proposition for which, if authority be required, it will be found in the greatly preponderant weight of decided cases and learned authors, to the bulk of which references may be found in the works already cited. The proposition will, of course, find, for obvious reasons, more ready acceptance with regard to a federal system, even though there is no logical connection between the two as such.

The author is here concerned to probe the impact of changes in the lawmaking processes of the Canadian provinces upon the constitutional structure of Canada as a whole. It is perhaps worth

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[3] (1966) 44 *Can. Bar Rev.* 366-372.

[4] Compare H. W. R. Wade, 'The Basis of Legal Sovereignty', [1955] *Camb. L. J.* 172, with Jennings, *op. cit.,* 5th ed. (London, 1959) p. 137 ff. and especially p. 318 ff., and Marshall, *Parliamentary Sovereignty and the Commonwealth* (Oxford, 1957), especially at pp. 43-46.

bearing in mind that though the most obvious changes in lawmaking processes are thought of as a special class called "constitutional amendments", this is more or less a matter of degree, for *all* changes in the law will have an impact, more or less obvious or obscure, proximate or remote, on the lawmaking process; the impact of an Elections Act being more obvious, that of a Bills of Exchange Act (on the solvency of members of Parliament and therefore on their qualifications) less so. It is in this respect that the Kelsenian hierarchy of laws or norms seems seriously oversimplified, failing as it does to take account of the essential circularity, or wholeness, or "seamlessness" of the law.

Since the *British North America* (No. 2) *Act*, 1949,[5] the Parliament of Canada has apparently[6] enjoyed the power to recast the structure of the Dominion lawmaking power into forms other than those prescribed by sections 17 and following of the *B.N.A. Act*, 1867, since these sections do not seem to fall within the exceptions made to the power conferred by s. 91(1) of the B.N.A. Act, introduced in 1949. Nor does the attribution of Dominion lawmaking power to the "Queen, by and with the Advice and Consent of the Senate and House of Commons" seem to fall within the exceptions made to s. 91(1). If such be the case, it would seem open to the Parliament of Canada to complicate the lawmaking processes with all manner of referenda, special majorities, or other 'entrenchments', whether with a view to to safeguarding civil liberties, or for other reasons. Compliance with these complications could be made essential to valid lawmaking. Probably section 6 of the *Fulton-Favreau Formula* of 1964 would have closed the door to much of this type of action at the federal level, except such as could be accomplished by changing the constitution of the houses individually.

But it is in the provinces, however, rather than at the federal level, that experiments of this sort are more likely, as history has shown, and as the Premier of Quebec has lately suggested history may again show. Such experiments are of course in themselves interesting legally and politically, but their full importance can only be appreciated once it is realized that, to the extent that the provincial legislatures may reconstruct themselves, they may very possibly also be able to complicate any ultimate general constitutional amendment

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[5] 13 Geo. VI, c. 81 (*U.K.*).

[6] The argument *contra* would be that the new legislative process must remain a "Parliament" (whatever essential characteristics that may be held to involve) if it is to wield the powers *inter alia* conferred by s. 91. But even so, the relations between the two houses, and their respective constitutions, could be enormously altered — and even special majorities or a third house introduced.

procedure for Canada which speaks, as the *Fulton-Favreau Formula* uniformly does, of action by the *legislatures* of the provinces.

It is with the object of giving at least such indication as the authorities permit, of the extent of the provincial constitutional amendment power, that I engage in the following minute examination of the few decided cases, in an effort to distill their precise authority. What they decided is not so obvious as may at first reading be thought.

II. Recasting the Lawmaking Process by Provincial Enactment

1) *The Obstacles to Provincial Constitutional Change*

Western Canadian experiments with the "initiative" and "referendum" have given rise to the litigation which has produced at once the best illustration of the problems of, and the most authoritative judicial pronouncements upon the limits of, the change, by provincial enactment, of the lawmaking procedures of the Canadian provinces.

The B.N.A. Act injects two specific arguable obstacles to the recasting by the provincial legislatures of the law prescribing the processes of lawmaking.[7] Two, but with this reservation: that these "two" obstacles appear to overlap at one point at least; but, subject to this, they may be divided into the two following:

First, is the qualification that the provincial legislature shall have power with respect to, s. 92(1) "The Amendment from time to time (notwithstanding anything in this Act) of the Constitution of the Province *except as regards the office of Lieutenant-Governor.*" [Emphasis added]. This seems clearly to preclude any provincial enactment interfering with the participation of the Crown — or such participation at least as is prescribed expressly or impliedly in the B.N.A Acts — in the legislative process: in particular, the royal assent to, and reservation of, bills, and (perhaps for partly different reasons) the disallowance of Acts.

Second, are the words of the B.N.A. Act granting to the provincial legislatures their powers: "In each province the *Legislature* may *exclusively* make laws in relation to" & c. [Emphasis added]. It is

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[7] As to s. 92(1) generally, reference may be made to *Rex ex rel. Tolfree* v. *Clark* [1943] O.R. 319; [1943] 2 D.L.R. 554 (Hope J.); [1943] O.R. 501; [1943] 3 D.L.R. 684 (C.A.: Riddell, Fischer, Henderson, Gillanders and Laidlaw JJ. A.). Leave to appeal refused: [1944] S.C.R. 69; [1944] 1 D.L.R. 495. See also *R. ex rel. Brooks* v. *Ulmer* [1923] 1 W.W.R. 1; 19 Alta. L.R. 12; 38 C.C.C. 207; [1923] 1 D.L.R. 304; *A.-G. for Sask.* v. *C.P.R.* [1953] A.C. 594; *North Cypress* v. *C.P.R.* (1904) 35 S.C.R. 550; (1903) 14 Man. R. 382.

possible, by a restrictive [8] construction of these words, to incorporate by reference into the term "Legislature" any such array of qualifications as would require, in greater or lesser measure, conformity with some perhaps elaborate judicially-expounded meaning of "legislature"; more especially, conformity with some postulated standards, of one sort or another, of parliamentary government. In particular, it is possible to confine the exercise of provincial legislative power to the Crown acting in conjunction with representative bodies of one sort or other.

2) *Scope of the Manitoba "Initiative and Referendum Act"*

Both obstacles were considered in the leading decision on the subject, *In re The Initiative and Referendum Act*,[9] arising from "An Act to enable Electors to Initiate Laws, and relating to the Submission to the Electors of Acts of the Legislative Assembly", being 6 Geo. V. c. 59 of the *Statutes of Manitoba*, which received royal assent on March 10th, 1916, with the short title "The Initiative and Referendum Act".

The Act provided for direct participation of the electors in the legislative process, electors being defined by s. 2 to mean persons whose names appeared on the electoral lists which would be used at the relevant time for elections to the Assembly. The long title of the Act, quoted above, gives some indication of the two forms which the electors' direct participation was to take: (1) to "initiate" laws — in short, to propose them and bring them to the statute book unless the representative Legislature did so first — and (2) "Submission to the Electors of Acts of the Legislative Assembly" — roughly, the exercise of a negative voice against enactments of the Lieutenant-Governor and Assembly, during a period of their suspended operation or afterwards; to which may be added a submission of laws enacted by the new procedure (1).

3) *The Referendum as an Element of Legislation: (i) Sufficient for legislation: (ii) Necessary to legislation*

Though the minds of the judges did not ever seem clearly directed to it, the difference is obvious between a referendum (i) exercising

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[8] Restrictive because on such an interpretation not everything would, simply by being designated as the lawmaking power, be a "Legislature" within the B.N.A. Act.

[9] The decision in the Court of Appeal for Manitoba is reported at (1916) 27 Man. R. 1; in the Privy Council, [1919] A.C. 935. Reference of the Act was made under R.S.M. 1913 c. 38 to the Court of King's Bench (Mathers C.J.K.B.) where "by consent there was no argument": [1919] A.C. 935 at p. 938; the learned Chief Justice giving a formal judgment in favour of the validity of the Act, from which appeal was taken.

a positive power of legislation in itself [or, if need be, in conjunction with the Crown, a situation which may conveniently be assimilated thereto]; and, on the other hand, a referendum (ii) exercising a negative voice on legislation.

In the *former* case, instantiated by the Manitoba "Initiative", the electors become a sufficient condition for legislation [if need be, acting in conjunction with the Crown: a point in which the Manitoba legislature was held to have sinned], for the electors are able to pass the legislation themselves [if need be with, — and there is need of, — royal assent].

In the *latter* case, on the contrary, — instantiated by the Manitoba "Submission" — the electors are not a *sufficient*, but a *necessary*, condition to legislation. To state the obvious, they obtain a negative voice only, as in Britain do Queen, Lords and Commons each; in Canada, Queen, Senate, and Commons; in most provinces, Queen and Assembly.

What is important is that these two kinds of direct popular participation are not only analytically and legally distinct: in addition to this, different considerations of policy apply. Thus, of two common objections to direct democracy which spring to mind immediately, one[10] is to the effect that "bills" passed by voters have no opportunity of being debated, considered and amended during their passage: it is clear that this has force rather against enactment of measures by the voters *alone*, than against referral to the voters only *after* the bill has been fully debated, considered, amended if necessary, and approved, by the representative bodies; with the result in the latter case that the voters may only *then* pass on it (whether because it must meet a requirement of prior affirmative consent or because it stands subject to their expression of disapproval.)

The other policy objection, too, — danger of ill-advised measures being brought in either on sudden passions or through popular ignorance of the issues or difficulties involved — makes sense equally rather as an objection to the electors being a *sufficient* legislature, than to their consent being *necessary*. So much is this true that the referendum is found in constitutions frequently as a condition for the change of certain classes of laws; and this is quite obviously done as a technique of *conservatism* — of "entrenchment" — to protect constitutional provisions of one sort or other from being too readily changed, especially freedoms thought fundamental. For,

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[10] *Per* Richards J.A., (1916) 27 Man. R. 1 at p. 15; *per* Perdue J. A. at p. 23. Both thought that this weighed as showing that the *Initiative* could not have been within the contemplation of the B.N.A. Act.

when a referendum is added, change is made more *difficult*, not easier; the popular voice being required *in addition to, not in lieu of*, other requirements.

4) *Requisites for Legislation: Distinguishing Necessary from Sufficient Conditions*

Thus, in understanding the problems in the regulation by law of the lawmaking processes, the first step is to make the obvious distinction between a condition established as *sufficient for* legislation, and one established as *necessary* to legislation. In the language of the logician, the legislative process may be described in terms of the conjunctions and disjunctions of necessary and sufficient conditions for legislation. Thus, the necessary and sufficient condition for an act of the Parliament of Canada is (neglecting their order, and without a further breakdown to see what is required for valid action by each) the conjunction of the concurrences of Crown, Senate and House of Commons; each being necessary; no one or two being sufficient. In Manitoba, the concurrence of Crown and Assembly would theretofore have been necessary and sufficient for legislation. But under the *Initiative and Referendum Act*, another sufficient mode of legislation — that by referendum — was created, called the "Initiative". As the terms of the said Act were intepreted by the Courts, that Act purported to dispense with the Crown as part of the "Initiative" procedure; and this defect was held fatal to the initiative.[11] In other words, the Act was held to have tried to introduce a new and alternative mode of legislation, — not Crown-and-electors, but electors. Had the Act made it clear that "proposed laws" once passed by the voters had still to be presented for royal assent, the Courts would have had to face squarely the referendum problems, instead, as we shall see, of turning the matter on interference with the office of Lieutenant-Governor. Specific safeguarding of the royal prerogative would have eliminated this ultimately crucial ground of *ultra vires*. But it is clear that, however interpreted, the Act meant to set up a new and alternative referendal legislative process intended to operate side by side with the representative one.[12] That much admitted of no doubt; the only obscurity was whether it had been intended to include the Crown.

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[11] As the "referendum" (on submission to the electors of Acts passed by the Assembly) was treated as simply repealing lawmaking, it, too, was held bad for dispensing with the Crown: [1919] A.C. at p. 944.

[12] The Legislature, in Lord Haldane's words, [1919] A.C. at p. 945, had tried to 'create and endow *with its own capacity* a new legislative power'. [Emphasis added]. Judgment was reserved on whether this was possible.

5) *Concurrent Processes of Legislation*

Prima facie, at any rate, the *Initiative and Referendum Act* appeared to leave the representative legislative process fully intact and competent to make laws on every subject as fully as before: though now, of course, it would not be the sole legislative power.

This, of course, is, potentially, a highly interesting situation: for, two equally competent legislative processes, each independent of the other, may act disharmoniously, each undoing the work of the other (the last to speak laying down, in principle, the governing law) — or even engage in a race to the statute book to alter the constitution of the other, restrict its power, or even abolish it outright.

Likelihood of disharmony is of course reduced in the measure that, like Siamese twins, the two processes share one or more common organs: as, the Crown — but nevertheless, of two concurrent legislative powers, there is no *prima facie* reason to suppose either to be immune from interference by the other. Thus, in principle, legislation passed by the "representative" process might abolish or restrict or reform the "referendal" process (as, if the Legislature of Manitoba, having once enacted the *Initiative and Referendum Act,* repented and proceeded to repeal it); or, equally, the "referendal" process might enact a law to reform, restrict, or even abolish, the "representative" legislature.[13]

6) *Entrenchment as a Solution to Instability of Alternative Processes*

The obvious instability of situations of this type — especially where the alternative processes are wholly independent one of the other [as was the case here once the courts interpreted the Manitoba statute as leaving the Crown as a participant *only* in conjunction with the Assembly, *not* with the electors] — is easily overcome

[13] It is precisely the full equality of the new legislative power with the old one that made the Courts refuse to consider the situation as merely one of delegation. And exactly the same reasoning applies to show that legislation under the *Parliament Acts,* 1911 and 1949, is not delegated authority but fully primary authority: with deference to Professor H.W.R. Wade, [1955] *Camb. L. J.* 172 at p. 193; *Administrative Law* (1961) p. 9; and to Dr. Yardley, *Source Book of English Administrative Law* (1963) p. 3. Considered as subdelegation, the passage, under the 1911 Act, of the *Parliament Act,* 1949 would be considered as going far beyond permissible bounds, for it flouts the terms of the "delegation". Considered as the alteration by a delegate in the terms of the delegation, its illegality would be indisputable. If the *Parliament Act,* 1949 is valid, then the *Parliament Act,* 1911 was not a delegation but a change in the lawmaking process.

by a rule excluding from the competence of one of the legislative processes whatever subject-matter it is desired to leave free and clear to the other. And one of the processes can without much difficulty be given a reasonable protection by excluding from the competence of the other, the alteration of the constitution of the first-mentioned process, as well as the alteration of this rule itself.

7) *The Right to Entrench*

Dicey's rule against parliament "binding" itself, or "binding" its successors, can be given a meaning, consistent with the unquestionable power of Parliament to recast the lawmaking process, if understood as a rule against the creation of vacuums. In such form it could be formulated as providing that "Parliament cannot validly legislate to provide that there exist during some finite time some rule of law, actual or formulable, for which there exists no legislative process by which it can be enacted as law". This may reasonably be urged to be the common law; but any rule against "binding" which goes beyond this, and which yet allows for permissible reconstitution and redefinition of the lawmaking processes, cannot, it is submitted, be meaningfully formulated. At most it can be said that Parliament cannot create a legislative vacuum. Even the introduction of a referendum into the U. K. lawmaking process would require no more than taking the road pointed out by Walter Bagehot in *The English Constitution* (1872): namely, creating every man and woman in the U. K. a peer; though elections to the House of Commons might become difficult unless peers were given the vote as well. In principle the same power to recast the provincial lawmaking process must rest with the provincial legislatures of Canada, saving interference with the office of Lieutenant-Governor, subject to a restrictive construction of the word "Legislature" in s. 92 of the *B.N.A. Act*. There have been suggestions of a restrictive construction of the word "amendment" in s. 92; thus, *per* Perdue J.A.:[14]

> 'The amendment contemplated by No. 1 of section 92 was not the substitution of a new constitution or of one founded on new principles. It was intended, I think, merely to give the provinces power to alter certain details of structure or machinery deemed necessary for the efficient operation of the constitution, the essential design and purpose being preserved.'

And powers of federal remedial legislation under the peace, order and good government power could be developed. But it is not easy to see why any of these would make it illicit to use any of the usual techniques of entrenchment; and even a referendum as a necessary condition of legislation would, [even apart from the *Colonial Laws*

[14] (1916) 27 Man. R. 1 at p. 23.

Validity Act, 1865, a largely declaratory statute] seem permissible under *A.-G. N.S.W.* v. *Trethowan*.[15]

Entrenchments at the provincial level are envisaged by the *B.N.A. Act, 1867*, in that s. 80 creates one. That section requires in substance the consent of a majority of the members of the Assembly coming from constituencies listed in the *Second Schedule* as a prerequisite to passage by the Legislature of a bill to alter the constituency boundaries. Unless their concurrence is obtained on second and third readings "it shall not be lawful to present to the Lieutenant Governor of Quebec for Assent" the bill. Does that make assent void when the bill has wrongfully been presented, or merely create a punishable or restrainable wrong in the presenting? "Assent shall not be given to such Bill unless an Address has been presented by the Legislative Assembly to the Lieutenant Governor stating that it has been so passed". Here the condition is merely an address reciting passage. If there is no address, is assent null? Even if concurrence had in fact been obtained? Can section 80 be repealed in the ordinary manner? The *Statute of Westminster, 1931*, is of little assistance; though it removes nullity for repugnancy to Imperial Statutes, it excepts the British North America Acts; so the provincial legislature could not do so after 1931 if it could not do so before. Could it do so before then? A good deal could be said on the subject, and a good body of authority invoked; but these questions cannot be enlarged upon here.

And whatever view be taken of *Re Initiative and Referendum Act*, it should be remembered that in that case, the decision, whatever it may be taken to have said about referenda, or about creating new legislative powers in which the Crown had no share, left a very great deal of room for creating or replacing Houses, and providing for special majorities, or for making use of other techniques of entrenchment. Viscount Haldane indicated that he would have sustained so much of s. 12 of the statute under consideration as postponed the operation of statutes for certain periods: when we read s. 12 we see a special two-thirds majority requirement to bring a statute into earlier operation.

The provincial Legislatures would seem left with a great freedom to prescribe by law the lawmaking processes; and the laws by which they do so are of full force and effect, and must be respected.

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[15] [1932] A.C. 526; on appeal from (1931) 44 C.L.R. 394.

III. The Initiative and Referendum Case and the Provincial Constitntions

1) *The Statute and the Issues Arising from It*

It will now be convenient to examine closely the legislation in question, and the decisions thereon, to find their precise authority and meaning, not only for evaluation and criticism, but in order to set out as far as possible the exact state of the law on a matter whose great implications on constitutional amendment in Canada have been suggested earlier.

The crucial portions of the *Initiative and Referendum Act* [16] are the Initiative provision of section 7, giving the electors a power of making laws:

> "7. A proposed law so referred to the electors and approved of by a majority of the votes polled thereon shall, unless a later date is specified therein, take effect and become law, subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly, on a date to be fixed by proclamation to be made by the Lieutenant-Governor-in-Council, which date shall not be later than thirty days after the clerk of the Executive Council shall have published in *The Manitoba Gazette* a statement of the result of the vote on said law in accordance with section 35 hereof."

and the "submission" or (in Cameron J.A.'s terminology [17]) "referendum" provision of section 11 in conjunction with s. 9(1), respecting laws submitted to the electors for their censure:

> "9. (1) Upon petition in writing of any electors, not less in number than five per cent. of the total votes polled at the general Provincial election last held previous to the date of the petition herein referred to, whose names appear on the lists of electors last made and revised under "The Manitoba Election Act" previous to the date of the petition herein referred to, addressed the Lieutenant-Governor-in-Council, and filed in the office of the clerk of the Executive Council, requesting that any Act of the Legislative Assembly or part or parts thereof, whether now or hereafter in force, or not yet in effect by reason of section 12 hereof, or any law enacted under the provisions of sections 3 to 7 of this Act, be referred to the electors, the Lieutenant-Governor-in-Council shall, in the manner hereinafter provided, subject, however, to the provisions of subsections (2), (3) and (4) hereof, submit such Act or law, or part or parts thereof, to a vote of the electors of the Province to be taken at the next general

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[16] 6 Geo. V, c. 59 (*Stat. Man.*, 1916).

[17] *Per* Cameron J.A. (1916) 27 Man. R. 1 at p. 32, 'The Act purports to do two different things, which are indicated in its title as above...' At p. 34 he speaks of 'what may be called "the Referendum" as distinguished from "the Initiative"'. See also p. 43.

provincial election, unless a special referendum vote is asked for in the petition;..."

"11. In the event of such Act or law or parts thereof not being approved of by a majority of the votes polled at such referendum, such Act or law, or part or parts thereof so disapproved, shall, at the end of thirty days after the clerk of the Executive Council shall have published in *The Manitoba Gazette* a statement of the result of the vote on such Act or law, or part or parts thereof, become and be deemed repealed."

The Act contains thirty-nine sections and occupies twelve pages of the statute book; and as a summary is useful, it is as well to give that offered in the judgment of Lord Haldane for the Privy Council:[18]

'The validity of the Initiative and Referendum Act, a statute of a type which is not unknown in parts of the world with constitutions different from that of Canada, of course depends on whether the Constitution of Canada as defined by the British North America Act of 1867 permitted a Provincial Legislature to pass it into law for the Province. The first step in the consideration of the matter is therefore to ascertain the exact character of the legislation proposed. In substance it is this. The Legislative Assembly seeks to provide that laws for the Province may be *made and repealed* [emphasis added] by the direct vote of the electors, instead of only by the Legislative Assembly whose members they elect. The machinery created for the accomplishment of this end is that first of all a number of the electors, being not less than eight per cent. of the number of votes polled at the last election, may by petition submit a proposed law to the Legislative Assembly. In the next place, the proposed law, unless enacted without substantial change by the Assembly in the session in which it is submitted, must be submitted by the Lieutenant-Governor in Council to a vote of the electors, to be taken at the next general Provincial election, unless a special referendum vote has been asked for in the petition. Provision is made for time being available in which to obtain the opinion of the Attorney-General, and if necessary of the Court, as to whether the proposed law is intra vires. If not it cannot be submitted. If a special referendum vote has been asked for it is usually to be taken within six months from the presentation of the petition. In the third place, if a proposed law has been submitted to the electors, and approved by a majority of the votes polled, it is to take effect, "subject, however, to the same powers of veto and disallowance as are provided in the British North America Act or as exist in law with respect to any Act of the Legislative Assembly, as though such law were an Act of the said Assembly", on a date to be proclaimed by the Lieutenant-Governor, and to be not later than thirty days after the official announcement of the result of the vote.'

'The proposed law further provides that a number of electors, equivalent in this case to not less than five per cent. of the number of votes polled at the last election, may petition for the *repeal* [emphasis added] of any Act of the Assembly or of any law enacted by the new method, the validity of which is now in question, and provisions, not differing in material respects from those already referred to, are made

[18] [1919] A.C. 935 at p. 939.

for the repeal of such act or law. There are in the Initiative and Referendum Act other provisions which may be mentioned briefly. No Act of the Legislative Assembly is to take effect until three months after the end of the session in which it was passed, unless in a preamble voted for by two-thirds of the members voting, the Act has been declared to be an emergency measure, but this is not to apply to a Supply Bill or Appropriation Act, except as to items for capital expenditure exceeding $100,000. When a vote is to be taken under the Act the Lieutenant-Governor is to order the issue of writs in His Majesty's name for taking such vote, and he is also to provide for the public dissemination of information and arguments on the matters referred, not exceeding twelve hundred words for each side.'

Did this enactment, whose substance has just been summarized, infringe the B.N.A. Act in interfering unlawfully with the office of Lieutenant-Governor? Alternatively, was there infringement consisting in an attempt to vest the authority in question in a body or process other than a "Legislature" within the meaning of the B.N.A. Act?

2) *Interference with Office of Lieutenant-Governor*

The judgment of the Privy Council construed widely the exception, contained in s. 92(1) of the *B.N.A. Act*, to the provincial legislative power of constitutional amendment. In the words of Viscount Haldane:[19]

'The analogy of the British Constitution is that on which the entire scheme is founded, and that analogy points to the impropriety, in the absence of clear and unmistakable language, of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person who directly represents it.'

Of course, even on a narrower construction of the exception, the power of royal assent to bills must obviously still have fallen squarely within it, clearly being as it is the essence of the position of the Crown, represented by the Lieutenant-Governor, as part of the Legislature of the province. In any event, his Lordship continued:[20]

'when the Lieutenant-Governor gives to or withholds his assent from a Bill passed by the Legislature of the province, it is in contemplation of law the Sovereign that so gives or withholds assent. Moreover, in accordance with the analogy of the British Constitution which the Act of 1867 adopts, the Lieutenant-Governor who represents the Sovereign is a part of the Legislature. This is in terms so enacted in such sections as s. 69, the principle of which has been applied to Manitoba by s. 2 of the Dominion Statute of 1870, which formed the new Province... It follows that if the Initiative and Referendum Act has purported to alter the position of the Lieutenant-Governor in these respects, the Act was in so far ultra vires.'

Upon the question of the construction of the *Initiative and Refer-*

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[19] [1919] A.C. 935, 943.

[20] *Ibid.*, at p. 943.

endum Act, the Privy Council held that, properly interpreted, the Act had intended to dispense with the concurrence of the Lieutenant-Governor, as well for legislation by Initiative (s.7) :[21]

> 'if the Act is valid it compels him to submit a proposed law to a body of voters wholly distinct from the Legislature of which he is the constitutional head, and renders him powerless to prevent it from becoming an actual law if approved by a majority of these voters. It was argued that the words already referred to, which appear in s. 7, preserve his powers of veto and disallowance. Their Lordships are unable to assent to this contention. The only powers preserved are those which relate to Acts of the Legislative Assembly, as distinguished from Bills, and the powers of veto and disallowance referred to can only be those of the Governor-General under s. 90 of the Act of 1867, and not the powers of the Lieutenant-Governor, which are at an end when the Bill has become an Act.'

as for the effect of a referendum, taken on "submission" to approve or disapprove Acts made by the old or new methods, under s. 11:

> 'Sect. 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a proposal for *repeal* [emphasis added] of some law has been approved by the majority of the electors voting, that law is automatically to be deemed repealed at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote.'

Their Lordships, in sum, held that:[22]

> 'Thus the Lieutenant-Governor appears to be wholly excluded from the new legislative authority.'

And in so construing s. 7 and s. 11 as dispensing with the Lieutenant-Governor's concurrence, their Lordships affirmed the Court below.[23]

3) *The Voters' "Negative" ("Submission", "Referendum") as an Interference with the Lieutenant-Governor*

This finding — that the Act intended to create a legislative power in which the Crown should have no part — can scarcely

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21 [1919] A.C. 935 at p. 944.

22 [1919] A.C. 935 at p. 944.

23 Howell C.J.M. (1916) 27 Man. R. at p. 8. *Per* Richards J.A. at p. 16. *Per* Perdue J.A. at p. 27 and p. 29. (His Lordship indicates at p. 29 that he thinks of the voters' 'negative' — the submission to referendum — as a repealing statute: 'If there are any doubts that this is the effect under section 7 the intention of the Act to dispense with the assent of the Lieutenant-Governor is most clearly shown by section 11. That deals with the *repeal* of an existing law.' [Emphasis added].) Cameron J.A. speaks of interference with the Lieutenant-Governor's functions as to money bills (p. 42) and as to legislation (p. 43), concluding 'These essentials are ignored, and I am satisfied that they were intended to be ignored.' At p. 44 he discusses the meaning of the term 'veto', and at p. 45 funds a constitutionally invalid material addition to the office of Lieutenant-Governor. Haggart J.A. merely expressed concurrence.

occasion much surprise. What must, however, create some difficulty is the excessive facility with which the *negative* voice given to the electorate (to disapprove laws which they might require by petition to have submitted to them), was assimilated to the *positive* voice (initiative) given to them to enact legislation. Emphasis has been added to certain portions of the passages quoted above in the text and notes, wherein it becomes clear that the electorate's 'negative' voice (submission) was being assimilated to the 'positive' (initiative) by treating the negative simply as if it were a repealing enactment: that is, as simply a particular kind of legislation; or, to put it another way, simply a particular instance of a more general rule (section 11) providing for referendal legislation in disregard of the rights of the Crown.

If the electorate's negative voice is here being assumed to be as much a legislative enactment as its positive voice, the Manitoba legislature can scarcely complain that the courts reached such a conclusion uninvited: for the very terms of the *Initiative and Referendum Act:*

> '11. In the event of such Act or law or part or parts thereof not being approved by a majority of the votes polled... such Act or law, or part or parts thereof so disapproved, shall... become and be deemed repealed.'

called the electorate's disapproval a 'repeal'. Still, if we are to concern ourselves with the substance of the enactment — i.e., with *what was enacted* — and not only with the form of words used (which could easily be changed), it is by no means clear that there was here a power given to the electorate to enact a repealing law. One can, almost as readily, read the *Initiative and Referendum Act* as merely subjecting the legislation of the province to one more condition in addition to Crown and Assembly: a condition of voters' approval; and, more particularly, a *condition subsequent* (if not a condition precedent) of voters' approval.[24]

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[24] At this point, argument can become rather fine. As by the terms of s. 9(1) of the Act the voters can compel submission to them *not only of* (a) laws thereafter enacted by Crown and Assembly, but whose operation has been suspended by s. 12; and (b) laws thereafter enacted by Crown and Assembly, and in immediate operation; and (c) laws enacted by the Initiative under s. 3 to 7 of the Act; *but even of* (d) laws enacted by Crown and Assembly *even before the coming into force* of the *Initiative and Referendum Act,* it is consequently likely to be responded that it is unreasonable to speak of the Legislature as having enacted laws of category (d) subject to *any* condition of *any* kind. It will be argued in consequence that in *this* case, at least, the voters' negative must be treated as a repealing statute. To this the reply may be made that this argument is good only as to class (d). Moreover, there is a two-fold reply to the argument. One can choose to say that the *Initiative*

Disallowance, too, operates much as would a repealing enactment;[25] yet no one thinks of disallowance as a new, repealing, statute.[26]

There is, in short, very strong reason for regarding a voters' negative as being not necessarily or in every case a power of *enacting repealing legislation* by a procedure which dispenses with royal assent and which therefore infringes the B.N.A. Acts. One may see it instead as (1) the exercise of a statutory power to whose operation the provincial legislature has subjected its statutes; or (2) as a condition subsequent subject to which a statute has been enacted. *And whatever the true nature of the Manitoba legislation, properly framed legislation could easily cast a voters' negative as a condition subsequent.*

What is of the greatest importance in applying this case is to bear in mind that the Privy Council *did not have occasion* to consider

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and Referendum Act was itself the conditional repealing legislation; did itself subject all earlier statutes to this condition. Or one can say that the voters' negative is of the nature of disallowance: and disallowance is not considered a repealing enactment, though it has much the same force as one.

Notice, incidentally, that s. 9 (1) gives the voters a censure or negative power over a seemingly exhaustive enumeration of types of laws; but does not mention s. 9(1) and s. 11 themselves. If action under s. 9(1) and s. 11 is to be considered a repealing law, why not include it, like other forms of laws, as being capable of being negatived under those sections? Merely because new legislation could be passed by other procedures instead of repealing a repealing law?

[25] That is to say, *secundum quid;* not *simpliciter;* the disallowed enactment is ineffective for the future but good as to the past. *Wilson* v. *Esquimalt and Nanaimo Railway* [1922] 1 A.C. 202; Duff J. for the Privy Council at p. 209: '... The point under examination turns... upon the effect to be ascribed to the words "shall annul the Act from and after the day of such signification." ... Their Lordships think that the language itself discloses with sufficient clearness an intention that, at all events as to private rights completely constituted, and founded upon transactions entirely past and closed, the *disallowance* of a Provincial statute shall be inoperative.'

[26] A power of disallowance probably exists to the extent that the constitutional provisions creating it are in force at the time that this power is exercised. If it is the time of exercise that is material, disallowance would be exercisable against a statute passed before a disallowance power existed. Conversely, were it removed from the *B.N.A. Act,* it could not be exercised at all, even as to statutes enacted before its disappearance. Applying this analogy of a royal negative to a voters' negative, we may conclude that it is no more true to say of the one than of the other that it must be looked upon as a repealing law merely because the disapproval power came into existence only after some or all of the laws against which it might be exercised. If this be so, my analogy between disallowance and voters' negative — neither being necessarily the enactment of a law — remains good even as to laws in force before the *Initiative and Referendum Act.*

the imposition of a referendum as a condition *PRECEDENT* to some or all classes of legislation. It did not therefore give a ruling about referenda simply. What its attitude might have been to the imposition of a referendum as a condition precedent to some or all classes of legislation, must be a matter for conjecture but in face of *A.-G. N.S.W.* v. *Trethowan*[27] it is not easy to see what objection could be raised. Certainly it would be most difficult to find any infringement of the Crown's authority; the Crown would participate as usual. Yet, unless a *condition-precedent* referendum would offend in this regard, it is hard to see why a *condition-subsequent* referendum should in any way be distinguishable. Must we then conclude that in Canada (unlike Australia), the Privy Council having seemingly rejected the latter at the provincial level, has also impliedly rejected the former as well? The answer, surely, is that their Lordships were not considering conditions of any kind, whether precedent *or* subsequent.

In all probability, the Privy Council, seeing the Manitoba referendum appear in the guise of "repealing" legislation, took the statute at its word and did not think to analyse further. *It is strongly arguable therefore, that when the question comes to be put, a "negative" referendum or referendum imposing voters' consent as a condition to enactment would be valid at the provincial level, even when cast in the form of a condition subsequent. When cast as a condition precedent, the validity would have strong support from the Trethowan case.*[28]

That case does not truly turn upon the *Colonial Laws Validity Act, 1865*, of which section 5 requires that legislation be enacted in accordance with manner and form required by law, and of which section 1 defines "Legislature" to include lawmaking authorities generally. Dixon J., in the Australian High Court, gave reasons covering the Imperial Parliament itself,[29] and, as has been said above, this position is gaining the overwhelming support of judicial authority and learned opinion. Even the objection to applying this view to the Canadian provinces, on the ground that they would then not have "Legislatures" within the meaning of s. 92(1), has in considerable measure been repudiated in Australia, where raised by McTiernan J. dissenting in *Trethowan's Case*.[30]

In any case, the matter seems, at very least, open in Canada. Taking *In re the Initiative and Referendum Act* as settled law, when

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[27] [1932] A.C. 526.
[28] *Ibid.* In the High Court of Australia (1931) 44 C.L.R. 394.
[29] (1931) 44 C.L.R. 394 at p. 426-7.
[30] *Ibid.* 442, 448-9.

must we, upon its authority, hold the imposition of a negative upon legislation — in particular a referendal negative — to infringe the rights of the Crown? Taking a wide view, one might say that, on the authority of this case, a referendum as condition subsequent is always bad, but that the question is at least open whether a condition precedent is good (because it does not dispense with the Crown and because the Privy Council reserved judgment on other objections). Yet the distinction between conditions precedent and subsequent seems pointless, especially since, in one form at least, conditions subsequent are good beyond question (i.e. the bringing of laws into force on proclamation, to say nothing of other conditions) by universal acceptance. We must, it would seem, look for a narrower *ratio decidendi*, and one is readily apparent: the "negative" is bad when it is cast as the enactment of repealing legislation.[31] Thus, their Lordships said:[32]

> 'Section 11 of the Initiative and Referendum Act is not less difficult to reconcile with the rights of the Lieutenant-Governor. It provides that when a *proposal for repeal* of some law has been approved by the majority of the electors voting, that law is automatically to be *deemed repealed* at the end of thirty days after the clerk of the Executive Council shall have published in the Manitoba Gazette a statement of the result of the vote. Thus the Lieutenant-Governor appears to be *wholly excluded* from the *new legislative authority*.' [Emphasis added.]

Likewise in the Court of Appeal, Howell C.J.M. said:[33]

> 'I do not think that the portion of the proposed Act which is known as the Initiative, including the *procedure for repealing* statutes, is within the power of the Province to enact.' [Emphasis added.]

and similarly *per* Perdue J.A.:[34]

> 'If there are any doubts that this is the effect under section 7 the intention of the Act to dispense with the assent of the Lieutenant-Governor is most clearly shown by section 11. That deals with the *repeal of an existing law.*

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[31] Even the characterization by the courts of s. 11 as providing for repealing legislation is open to question, *inter alia* because s. 11, though it uses the term "repeal" itself, has the following interesting feature. An Act submitted to the voters is by s. 11 considered rejected by "not being approved of by a majority of the votes polled", meaning, apparently, that the Act *FAILS on equal division*, which can be contrasted with the requirement of s. 7 that positive legislation requires to be "approved of by a majority of the votes". This makes the voters' negative look more like *failure of a condition subsequent of voter approval* than like a *repealing law enacted by voters*. One expects a law — even a repealing law — to require a majority if it is to pass; while a law fails on equal division in an assembly whose consent is needed by way of a condition of passage.

[32] [1919] A.C. at p. 944.

[33] (1916) 27 Man. R. 1 at p. 8.

[34] *Ibid.*, p. 29. Emphasis added.

> If such law is not approved by a majority vote, at the end of thirty days after publication of the vote, it shall "become and be deemed *repealed*". Nothing could be clearer than the intention of *this section to do away with the assent* of the Lieutenant-Governor.'

It is indeed telling that so far did the Privy Council think in terms of s. 11 as a repealing procedure that their Lordships apparently misread the section itself, and, in the passage just quoted, said that a law is repealed "when a proposal for repeal of some law has been approved by the majority of electors voting". That is obviously what one assumes when one is thinking in terms of carrying a repeal; but that is not what the section appears to say, and Perdue J.A., in the passage just quoted, reads it as negativing the law "if such law is not approved by a majority". On equal division an Act of the Legislature brought before the voters fails. That is not what is normally understood by repeal, but the Privy Council had the idea of repeal firmly in mind, and so altered the terms of the statute in its reading of it.

What, then, do the Privy Council and Appeal Court decisions say about a voters' negative, or a requirement of voter concurrence? Only that *when framed as a power in the voters to repeal statutes*, it is a legislative power which infringes the rights of the Crown when the latter is not added as a participant. But the rights of the Crown are fully respected when the referendum is added merely as an extra condition, be it precedent or even subsequent: so that referenda of these varieties, if they are to be condemned at all, must be condemned on grounds upon which the Privy Council *reserved judgment*, which we shall next consider.[35]

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[35] An examination of the remarks of Viscount Haldane [1919] A.C. 935, at p. 945 about section 12, which he seemed inclined to sustain apart from its last sentence, may seem to cast doubt on the foregoing. His Lordship was in effect suggesting that the Legislature might require that the operation of its statutes be delayed for a time save where two-thirds of the Assembly voted for immediate operation. And his Lordship was suggesting that the last sentence was bad, i.e., that the operation of the statute could not be made conditional upon voter approval. Does this mean that no statute may be made conditional on voter approval; or, at least, that the province cannot impose a referendum as a requisite to some or all legislation, i.e., cannot entrench by referendum? Viscount Haldane, having expressed his view, seems to reserve it in the next breath as 'unnecessary to decide'. In any event, that passage, if governed by the context of the judgment, is obviously made on the basis that the last sentence of s. 12 has to do with a referendal *repealing* process in which the Crown is ignored.

4) *The Positive Referendum (Initiative) and the Lieutenant-Governor's Powers*

Far more obvious are the grounds on which the Initiative — the voice of the electors enacting laws themselves — the positive power of legislation by referendum — can be thought to infringe the Lieutenant-Governor's powers. For here, the Initiative allows a law to be brought to the statute books without his consent. That, of course, is the *gravamen* of the charge that the *Initiative and Referendum Act* interfered with his powers. Yet, even to this charge, an answer may be offered in support of the validity of the scheme: and that argument is that the referendal legislation here in question was merely such a delegation as could be made in accordance with *Hodge* v. *The Queen* to a body of which the Lieutenant-Governor formed no part. If delegation could be made out, it would obviously serve as a rather forceful answer to both the charges brought against the *Initiative and Referendum Act;* namely, (1) that the Crown, represented by the Lieutenant-Governor, had been wrongfully excluded from participation in the lawmaking process; and (2) that lawmaking powers exercisable under s. 92 ff. of the *B.N.A. Act*, by the "Legislature" exclusively, had been invested in a body other than a "Legislature" within the meaning of that Act.

Delegation is, of course, as relevant an answer to (1) as to (2). If municipal councillors or municipal voters can act in exercise of delegated legislative powers without constitutional necessity for royal assent, so too, one would think, could the voters of the province; and if so, any objection to a delegation to the voters will have to be founded on grounds other than (1). Curiously, discussion in the judgments seem to proceed as if delegation were offered in answer only to objection (2).

Does this mean that, as the Privy Council reserved judgment on objection (2), they therefore reserved judgment on the preliminary question whether the powers given to the electorate could be sustained as a *delegation*? Clearly not. It is clear that most of the discussion about delegation was in both courts addressed to objection (2). Yet the passages quoted above from the Privy Council opinion make it clear that in their view the lawmaking powers conferred upon the electors were of quite another order than those which *Hodge* v. *The Queen* had held could be placed in a body which, in that case, was independent of any requirement of royal assent to its acts. Rejection of the 'delegation' argument is implicit in the Privy Council's judgment; because its acceptance would have involved sustaining the *Initiative and Referendum Act.* But rejection is more than implicit: it is explicit. It is explicit in the distinction

drawn by their Lordships [36] between a provincial legislature which 'while preserving its own capacity intact, seek[s] the assistance of subordinate agencies' and one which tries to 'create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence'. The Privy Council may be leaving open the constitutional legitimacy of the latter as regards circumstances where the Crown's rights are respected; but they do not doubt that it is the latter that is being attempted. And in the Court of Appeal, as we shall see, even Cameron J. who, unlike his brethren, would have sustained the latter type of experiment — provided the Crown were respected — entertained no doubt that this was what was being done.[37] The remaining judges of the Court of Appeal who delivered judgments made it equally clear that they did not consider the matter one of delegation.[38]

The distinction between delegating legislative power to a subordinate and investing it in a new legislative power may not be a clear one; and the criteria for the distinction may be hard to find or unsatisfactory, but it is, it would seem, necessarily implied in the Privy Council decision here, that there is a line to be drawn.[39] On one side powers may be given in whose exercise the Crown plays no part: *Hodge* v. *The Queen.* On the other side of the line the assent of the Crown must be provided for: *In re Initiative and Referendum Act.* Of course, what amounted to a scheme to derogate from the Lieutenant-Governor's authority as representing the Queen who is the supreme executive government of the province, might be *ultra vires;* or to the extent that it was *intra vires,* it might be the subject of remedial legislation by Parliament in relation to the office of Lieutenant-Governor, a subject excluded from the provincial legislative authority.

It is submitted accordingly, that the Courts rejected the *Initiative and Referendum Act,* not because the general body of voters was less capable than anyone else of taking a delegation of powers; nor because, on taking a delegation of powers, they would be more bound than any other delegate to have the assent of the Lieutenant-Governor as part of their procedure; but precisely because, in the view taken by the Courts, the Act purported to vest *such equal and coordinate legislative power* in the body of electors as *could not be regarded as a mere delegation to a subordinate* — just as the *Par-*

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[36] [1919] A.C. 935 at p. 945.

[37] (1916) 27 Man. R. 1 at p. 35.

[38] See below in connection with objection (2) — infringement of the implied requirements of a "Legislature."

[39] See above I(5) and I(6) and below III(6).

liament Acts, 1911 and 1949, in the United Kingdom, cannot be regarded as a process for the passage of anything less than a fully-fledged Act of Parliament. It followed, then, once a new legislative power was assumed to have been created, that the Lieutenant-Governor's exclusion therefrom was an interference with his powers, rendering the *Initiative and Referendum Act ultra vires*,[40] apart any other ground.

5) *Referendal Legislation and the Requirements of a "Legislature"*

The second principal ground of objection to the *Initiative and Referendum Act* was, of course, that the new legislative power was not a 'Legislature' within the meaning of the *British North America Act*, the term being taken to import impliedly some few or many characteristics, actual or ideal, of English parliamentary government.

Upon this point, the Privy Council expressly reserved judgment; but appeared nevertheless favourably disposed to it:[41]

> 'Having said so much, their Lordships, following their usual practice of not deciding more than is strictly necessary, will not deal finally with another difficulty which those who contend for the validity of this Act have to meet. But they think it right, as the point has been raised in the Court below, to advert to it. Sect. 92 of the Act of 1867 entrusts the legislative power in a Province to its Legislature, and to that Legislature only. No doubt a body, with a power of legislation on the subjects entrusted to it as ample as that enjoyed by a Provincial Legislature in Canada, could, while preserving its own capacity intact, seek the assistance of subordinate agencies, as had been done when in *Hodge* v. *The Queen*, the

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[40] Perdue J.A. (1916) 27 Man. R. at p. 31 would have gone so far as to find that even had a requirement of royal assent been included, there would still have been an illegal interference with the office of Lieutenant-Governor: 'Even if it could be shown that section 7 did imply that the assent of the Lieutenant-Governor should be obtained, or if the Act were amended so as to make it clear that such assent was required under both sections 7 and 11, the Act would still remain unconstitutional, because, as I have pointed out, the Lieutenant-Governor can only assent to an Act that has been passed by the Legislative Assembly.' This would seem for example to doubt the generally-accepted right of the provincial legislatures to invest in the Lieutenant-Governor powers germane to the office: *A.-G. Can.* v. *A.-G. Ont.* (1891) 20 O.R. 222 at 247; and see (1893) 19 O.A.R. 31; (1894) 23 S.C.R. 458. *Shannon* v. *Lower Mainland Dairy Products Board* [1938] A.C. 708, at p. 722. It is interesting to compare Manson J.'s attempt [1937] 2 W.W.R. 401, esp. 416-421 to extend *In re Initiative and Referendum Act*. C.f. *Credit Foncier* v. *Ross* (1937) 2 W.W.R. 353, 357-8. See also *Re Land Registry Act and City of Vancouver* (1956) 5 D.L.R. (2d) 512; *A.-G. N.S.* v. *A.-G. Can. and Lord Nelson Hotel Co.* [1951] S.C.R. 31.

[41] [1919] A.C. 935 at p. 945.

> Legislature of Ontario was held entitled to entrust to a Board of Commissioners authority to enact regulations relating to taverns; but it does not follow that it can create and endow with its own capacity a new legislative power not created by the Act to which it owes its own existence. Their Lordships do no more than call attention to the gravity of the constitutional questions which thus arise.'

The judges of the Manitoba Court of Appeal were not, as we shall see, so reticent; and, with the exception of Cameron J.A., all the judges who rendered opinions found this another ground of *ultra vires*.

For obvious reasons, discussion circled around the proper application of *Hodge* v. *The Queen*,[42] which their Lordships gave the most anxious consideration. Could the delegation in that case cover a situation like the present, and, if not, could the remarks about provincial legislative sovereignty justify an extension of the principle there laid down, or influence the court in its interpretation of the breadth of the provincial constitutional amendment power? The judges obviously felt bound to approach the *Hodge* decision virtually as revealed truth, weighing every dictum found in it as if it were a provision in an Act of Parliament, and offering explanations in tones most cautious and deferential.[43]

It is clear from the judgments in the Court of Appeal that all those who delivered opinions considered — and in this they were in accord with the Privy Council — that the *Initiative and Referendum Act* did not purport so much to effect a *delegation* to a *subordinate* as to effect a *vesting of equal legislative power* in a *co-ordinate authority*.[44]

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[42] (1883-4) 9 App. Cas. 117.

[43] See Howell C.J.M. (1916) 27 Man. R. 1 at p. 2 ff.; at p. 8; and Richards J.A. at p. 10 ff.

[44] *Per* Howell C.J.M. (1916) 27 Man. R. 1 at p. 6: 'If the proposed Act is within the powers of the Legislature, then all powers of legislation could be taken from the Legislative Assembly and given to the democracy...'

Richards J.A. distinguished the power to delegate (at p. 10): 'In Canada we have cases, such as *Hodge* v. *The Queen*, which declare that Provincial Legislatures may, as to minor details, delegate limited powers of legislation to bodies created by, or by authority of, those Legislatures, or may permit localities to decide whether or not certain Acts, such as those regulating the sale of intoxicating liquors, shall be in force in such localities.

'Those powers so given, are, however, merely in the nature of policing regulations. They do not interfere with or purport to cause others to take the place of, or perform the functions of, the legislature.'

He characterized the referendal processes thus, by contrast: (p. 13) 'What is the limit of the power of amendment so [s. 92(1)] given? If it permits the passing of the Act in question it must go so far as to allow the

But, unlike the Privy Council, they were not so reticent in pronouncing upon the constitutional validity of such a scheme. Thus, Howell C.J.M.[45] accepted this ground of *ultra vires:*

Legislature to create a completely new constitution based not on the sovereignty of Parliament but on that of the people, and which *can control and render nugatory* the acts of the Legislature itself.' [Emphasis added.]

Or, again, (at p. 14), he said: '...the amendments that may be made under s.-s. (1) must necessarily be such that they do not purport to destroy or take away or *give to others the lawmaking* powers of the Legislature.' [Emphasis added.]

The above-mentioned viewpoint emerges very clearly from the remarks of Perdue J.A., (at. p. 23): 'The procedure for enacting laws provided by the new Act would, where it was invoked, *override or have equal force with* the system of legislation provided by the constitution.' [Emphasis added.]

Again, distinguishing *Hodge* v. *The Queen* (at p. 24): 'It is obvious that the power of delegation referred to in the above is very different in principle from that claimed in the present case. The proposed Act has for its object the creation of a new legislative power which will initiate and pass legislation which hitherto the Legislature alone could enact. This is *not a delegation* of authority for the purpose of making by-laws or *rules to aid in carrying an enactment into effective operation.* It is an effort to *endow another body* with the *same power* of making laws that the Legislature *itself possesses.* [Emphasis added.]

Also, (at p. 25), 'I cannot believe that No. 1 [of s. 92] was intended to give to the Legislature the power of abolishing itself, or conferring on another body its power of enacting laws, or the power of abolishing the Legislative Assembly so that only the Lieutenant-Governor would be left.'

Again (at p. 26); 'It cannot, in the guise of an amendment to the constitution, completely abolish the representative chamber in the Legislature or suspend its law-making functions or delegate them to another body of its own creation.'

Again, (at p. 26) 'There are many authorities showing that an Act may legally provide that the time and manner of its taking effect may depend upon a vote of electors, or a proclamation of the government... This is not a delegation of the powers of legislation. By the Act now in question, even where the Legislature should act on the petition under section 4 and itself pass the proposed law, it would be bound to do so without any change that would alter the meaning of such proposed law. In this way the Legislature would tie its own hands in respect of any matter which the electors, or the designated percentage of them, appropriated as a subject for legislation. This, it appears to me, would be an abdication by the Legislature of its legislative powers, rather than a mere delegation of them.'

And Cameron J.A., though not finding it objectionable on that account, characterized it similarly (at p. 35): 'Can the Legislature create within the Province a new Legislature or law enacting body not already created or authorized by the British North America Act? That is no doubt the intention of the Act before us. In certain matters it is intended that *laws* should be enacted not by the Legislature but by the general body of the electors. It does not purport to abolish the Legislature. But it does purport to create a *method of enacting laws* without the approval of the Legislature.' [Emphasis added.]

[45] (1916) 27 Man. R. 1 at p. 7.

'The law-making power, is by section 92, vested in the Legislature, and that is reiterated in section 91. The proposed Act provides that any person may draw a bill and get a petition signed by at least eight per cent. of the electors supporting it and may force that bill to an election and, if carried on a vote of the electors, it will become law, even against the will of the Legislative Assembly. I cannot think that such a proceeding is the Act of a Legislature within the meaning of section 92. I feel safe in stating that no person in the Imperial House, and none of the statesmen in Canada who advocated the legislation, ever intended that power should be given to Canada or the Provinces to enact laws otherwise than through or by a body of men who were in some way the representatives of the people, and with whom the representative of the Crown could meet and discuss matters requiring legislation and thus consider his assent thereto in the King's name.'

and so did Richards J.A. who said *inter alia*:[46]

'The section does not say that the Legislature or any body it may substitute for itself, whether such body substituted is or is not a Legislature, may make laws, & c. It says that "the Legislature may exclusively make laws", & c., for each of these 16 different classes of subjects.' ...'Our legislature consists of the Lieutenant-Governor and the Legislative Assembly. To substitute the popular vote for that of the Legislative Assembly would leave us without a Legislature.'

Perdue J.A. was of like opinion:[47]

'... [T]he Act sufficiently shows that the Legislature provided for each Province is the only provincial law-making authority to which legislative power has been assigned over the subjects mentioned in section 92. I think one may safely assert that neither the framers of The British North America Act nor the Imperial Parliament that passed it ever contemplated the creation by the Legislature of a new legislative body such as that sought to be created by the "Initiative and Referendum Act", to which body the Legislature would delegate its powers of legislation, or with which it would share them.'

'From other portions of the Act dealing with the constitution of the provinces it is abundantly clear that the law making power in each province was entrusted to a Legislature which must consist of a Lieutenant-Governor and a Legislative Assembly at least, whether there is a Legislative Council or not.'

'But there must be a Legislature and the laws must be enacted by a Legislature. It cannot, in the guise of an amendment to the coustitution, completely abolish the representative chamber in the Legislature or suspend its law-making functions or delegate them to another body of its own creation.'

Cameron J.A., on the contrary, expressed the view[48] that:

'it would appear that the Legislature can do as it sees fit in delegating or transferring the law making power with the exception stated in the section [i.e., the office of the Lieutenant-Governor].'

because[49]

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[46] *Ibid.*, p. 14 and p. 15.
[47] *Ibid.*, at pp. 21, 23 and 26 respectively.
[48] *Ibid.*, p. 36.
[49] *Ibid.*, p. 37.

> 'The wording of sub-section one being apparently clear and explicit, why should it be assumed that the Provincial constitution, if and when and as amended by the Legislature, must still conform to the general constitutional provisions of the British North America Act, or to the general scheme of parliamentary or representative institutions existing in Great Britain at the time of its passage. I confess I see great difficulty in answering in favour of such assumption.'

but nevertheless at last reserved his opinion thereon, as [50]

> 'it does seem that they can be regarded as largely speculative and that the questions here submitted may be answered without reference to them'

and it sufficed to find interference with the office of Lieutenant-Governor.

6) *Primary and Delegated Legislative Power*

If it be *permissible* to provincial legislatures to vest lawmaking powers by "delegation" in a "subordinate", *even* on terms under which the Lieutenant-Governor's concurrence is *not required* for exercise of the delegated powers, and *even though* the delegate be in no sense more a "Legislature within the meaning of the *B.N.A. Act*" than are the electors, we are bound to ask ourselves what is the precise difference between a principal exercising primary power and a subordinate exercising delegated authority, for that is the distinction suggested by the Privy Council and made by a majority of the Court of Appeal for Manitoba. Unless we are to say that the body of electors are less capable of receiving a *delegation* than anyone else — a proposition for which there seems little to be said, especially if municipal electors can receive such delegations — the grounds on which the *Initiative and Referendum Act* must be impugned must be based on the sole ground that the electors had been given *primary* legislative power as principals rather than subordinate legislative power as delegates, thus raising the objections that they purported to be a Legislature-without-Lieutenant-Governor and a body-not-meeting-the-test-of-a-legislature-under-section-92.

The difference between primary and delegated legislative power is not at all an easy one. In a rough way, it may be said that a delegate may not alter the terms of his delegation, which may always be revoked. In some sense the analogy is one of private-law agency, and the metaphor one of hierarchy. Yet the unreality of the hierarchical notion becomes apparent on closer examination, when it is realized that *every* exercise of legislative power (not to mention other power) has constitutional consequences, which differ only in being more or less obvious or obscure, more or less proximate or remote. The merest

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[50] *Ibid.*, p. 37.

delegate, seemingly at the bottom of the heap, can, by his legislative — or indeed administrative or judicial — acts, produce consequences with legal force and effect, determining who may exercise lawmaking power, and the manner in which they may validly exercise it. What change in private law does not, directly or remotely, affect the solvency of members in a legislative assembly, and therefore their qualifications as such? More obviously, a board empowered to vary electoral boundaries by its acts strips of legislative power electors and representatives who otherwise would wield it, and it does so irrevocably, at latest, once by dissolution of the house or otherwise the opportunity to undo the Board's work is lost: for now only those who newly wield power can restore the old order. Who of those who march under the maxim that "Parliament cannot bind itself" can doubt that the great Reform Act irrevocably put the lawmaking power into new hands — redefined the lawmaking process?

A delegation would seem characterized by restricted scope of authority and restricted power to turn against the authority which made the delegation — to destroy the latter, to alter it, to take away its power to revoke. But a striking illustration that such differences are primarily quantitative rather than qualitative will be found in the fact that, in 1939, a member of the U.K. House of Commons, one Captain Ramsay, was placed in preventive detention by the Home Secretary,[51] exercising the authority conferred on him by Regulation 18B of the Defence (General) Regulations, made by the Queen in Council under the Emergency Powers (Defence) Act, 1939. Here a 'delegate' acted with the most drastic effect on the constitution of the 'principal', Parliament.

It is not therefore an easy matter to say at what point, or why, powers conferred by a provincial legislature transcend mere delegation, and become something which the Courts suggest is somehow of a different order altogether. Yet, unless the decision *In Re Initiative and Referendum Act* is simply a holding that electors cannot take a delegation, it turns on the distinction just considered; and the decision cannot be explained away on any such basis as inability of electors to take a delegation: *first*, because this was never suggested; *second*, precisely because the Courts denied that the situation was one of delegation at all, insisting instead that the scheme intended a true legislature, but without including the Crown, or without conforming to the B.N.A. Act, or both.

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[51] (1939-40) H.C. Pap. 164.

7) *The Holding in Re Initiative and Referendum Act* [52]

What, then, did the case decide?

(1.) It is submitted that it is authority, as well in the Privy Council as in the Manitoba Court of Appeal, for the proposition that a provincial legislature cannot vest *(primary)* powers of legislation in any authority, including the electors, *without providing for presentation to the Lieutenant-Governor for Royal Assent;* though, under *Hodge* v. *The Queen* [53] a body may, as *delegate,* be given the exercise (by itself and without need of Lieutenant-Governor's concurrence) of subordinate or delegated powers.

(2.) The same is true as regards vesting a power to enact *repealing laws;* but the case is *not* authority against the power of a provincial legislature to impose the consent of another body (whether another assembly or the body of electors) either as a condition precedent or as a condition subsequent to the enactment of some or all classes of laws. (Such a case, it would appear, is still governed by *A.-G. N.S.W.* v. *Trethowan*).[54]

(3.) There is the authority of the Manitoba Court of Appeal, by a majority, but not of the Privy Council, for the proposition that, *even if the position of the Lieutenant-Governor be respected,* a provincial legislature cannot vest in certain bodies, of which the electorate is an instance, primary powers of legislation, because such bodies will not be "Legislatures" within the meaning of the B.N.A. Act: the term "Legislature" is on this view not wide enough to embrace every manner of lawmaking authority, but such only as possess some as yet unsettled set of determining characteristics, actual or ideal, of English parliamentary government.

(4.) There is an *obiter dictum* of the Privy Council, not quite approving proposition (3), but declaring that the *contrary* does *not* flow from *Hodge* v. *The Queen.*

(5.) There seems to be no holding that the electors are less capable than anyone else of taking a true *delegation.*

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[52] [1919] A.C. 935; on appeal from (1916) 27 Man. R. 1.
[53] (1883-4) 9 App. Cas. 117.
[54] [1932] A.C. 526.

IV. The Consultative Referendum and the Provincial Constitutions

1) *The Direct Legislation Act of Alberta*

R. v. *Nat Bell Liquors Ltd.*[55] raised the question of the constitutional effect of "An Act to provide for the Initiative or Approval of Legislation by the Electors", which received Royal Assent in Alberta on March 25, 1913, with the short title "The Direct Legislation Act".[56] This statute did not empower the electors *of their own motion* to enact or nullify laws, but gave voters in more diluted form both a negative and positive voice. But the operation of statutes passed in the ordinary way might, under section 3, be postponed — if the Legislature so provided — until the ninetieth day after the close of the session; whereupon, by section 4, ten per cent of the electors satisfying certain conditions might pray for its reference to a vote of the electors; with the result that the operation of the statute would by s. 5 be further deferred to turn on the result of the vote, which, if favourable, would allow the statute to be proclaimed in force under s. 23. Section 6 provided a limited initiative, allowing twenty per cent of the electors meeting certain conditions to petition the Legislature to pass a proposed Act, which, if not enacted at the session to which it was presented, would be submitted under section 7 to the voters; and if approved by them, section 24 provided that:

> 'the said proposed statute shall be enacted by the Legislature at its next session without amendment, save such amendments as may be certified to by the Speaker as not constituting a substantial alteration therein, or as not changing the meaning, effect or intent thereof, and notwithstanding the provisions of section 3 hereof shall come into force upon receiving the royal assent...'

The Act thus envisaged that the Legislature might of its own volition when it saw fit subject the operation of particular statutes to the will of the electors, and provided the appropriate machinery for consultation. This aspect of the act did not come before the courts,

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[55] [1922] 2 A.C. 128; (1921) 16 Alta. L. R. 149.

[56] Stat. Alta. 1913, 1st sess., c. 3. Amended by *The Statute Law (Amendment) Act, 1913 (Second Session)*, S. A. 1913 (2) c. 2, s. 25 [October 25, 1913]. Further amended by *The Equal Suffrage Statutory Law Amendment Act*, S. A. 1916, c. 5, s. 2(7) [April 19, 1916]. As revised and amended, it appeared in R.S.A. 1922, c. 6. Amended by *An Act to amend The Direct Legislation Act*, S. A. 1923, c. 7 [April 21, 1923]. Amended by *The Direct Legislation Act Amendment*, 1931, S.A. 1931, c. 8 [March 28, 1931]. As revised and amended, appearing as R.S.A. 1942, c. 7. R.S.A. 1955, c. 84. Repealed by *An Act to repeal Certain Acts of the Legislature*, S. A. 1958, c. 72 [April 14, 1958].

but it would seem valid conditional legislation, and drew no adverse comment when the Privy Council discussed the Act.

The Alberta statute is obviously much weaker than the Manitoba legislation for, unlike the latter, the former (1.) leaves the Alberta Legislature free to decide in each case whether it will postpone the operation of a statute under section 3 to allow for consultation; and (2.), in particular, allows an act *repealing* the Direct Legislation Act to be immediately operative, without any opportunity for the voters to force *it* before them as, under the Manitoba statute, the voters could do unless two-thirds of the Assembly could be found to vote the urgency preamble which (under s. 12 of the Initiative and Referendum Act) would in Manitoba be necessary to bring into immediate force (*inter alia*) an Act to repeal the Initiative and Referendum Act.

Accordingly, conditional legislation of this sort, even combined with an opportunity to consult the voters, seems permissible [57] — and no less so even if it be thought impermissible to give the voters a negative entrenched by a negative on any attempt to take it away.

As regards an Initiative, the Alberta statute, though it did not empower the electors to bring their will to law directly, did by sections 6 and 7 allow a requisite number of voters to petition the Legislature to enact a law which they proposed, and, in the event of its failure to comply, have the matter put to the electorate. Approval by the electorate did not make the proposal law, but section 24 seemed to make it a matter of statutory duty for the "Legislature"[58] then to pass the measure without substantial alteration, which, on royal assent, would become law.

Whether such a statutory duty, if mandatory rather than directory merely, could be enforceable, and if so how — and, indeed, whether imposing such a legal duty, even if merely *in abstracto*, would not in fact amount to making the electors' will sufficient to legislation — was obviously not considered by the Board in the *Nat Bell* case; Viscount Sumner speaks as if there *were* a statutory duty. To find that the Direct Legislation Act imposes a statutory duty binding upon the Legislature, must immediately imperil the Act; for, the Lieutenant-

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[57] *Russell* v. *The Queen* (1882) 7 App. Cas. 829. In *R.* v. *Walsh* (1903) 5 O.L.R. 527, a Divisional Court of the King's Bench Division (Falconbridge C.J.K.B., Street and Britton JJ.) held *intra vires* the conditioning of the operation of *The Liquor Act, 1902*, 2 Edw. VII c. 33 *(Ont.)*, by s. 2 thereof, upon a province-wide referendum. Similarly *Rex* v. *Carlisle* (1903) 6 O.L.R. 718 (C.A.: Moss C.J.O., Osler, Maclennan, Garrow and Maclaren JJ. A.).

[58] Presumably meaning the "Assembly". The statutory duty obviously could not validly include the Lieutenant-Governor.

Governor being part of the Legislature, the Act would thus purport to deprive the Lieutenant-Governor of his right to grant or refuse assent. Avoiding this hazard, by restricting the construction or operation of the word "Legislature" to the Assembly alone, still, a statutory duty *even on the Assembly alone* would make the will of the voters sufficient, with the assent of the Crown. It would seem immaterial whether recourse to the Courts must be had to enforce performance, for the Legislature, it must be assumed, or the Assembly, would consider itself bound to follow its statutory duty. And, if the voters, with the concurrence of the Crown, are by the Direct Legislation Act purportedly empowered to bring a measure to law, even by agent, that, of course, raises exactly the question of validity reserved by the Privy Council, and decided — adversely — by the Manitoba Court of Appeal *In re the Initiative and Referendum Act.*

But looking at it as a whole, it seems absurd to take the Privy Council decision,[59] *sustaining certain liquor legislation passed* by the Alberta Legislature *in pursuance of* the popular will expressed under *The Direct Legislation Act,* as being a deliberate decision on the question earlier reserved by the Privy Council. There is no suggestion that their Lordships addressed their minds to the consideration of this last issue. Nor can we even say that the question — i.e., whether voters plus Crown could be a "Legislature" within the B.N.A. Act — was even implicity decided here, *sub silentio.* For the remarks of Lord Sumner, assuming though they did a statutory duty on the part of the Legislature to pass the impugned liquor act:[60]

> 'it is none the less a statute because it was the statutory duty of the Legislature to pass it,'

would be even *more* true were the supposed statutory duty nonexistent or unenforceable. The liquor legislation was attacked, said Lord Sumner, on the ground that it had not been made by the provincial Legislature which "exclusively" had power under the *B.N.A. Act,* because it had been made partly also by the people of Alberta. Indeed the part played in the matter by the Legislature was practically only formal.' His Lerdship continued:

> 'It was further argued that the Direct Legislation Act was itself ultra vires on the ground that it altered the scheme of legislation laid down for Canada by the British North America Act, a scheme which vests the Provincial legislative power in a Legislature, consisting of His Majesty, as represented by the Lieutenant Governor, and of two Houses, or in some Provinces one House, and introduced into it a further and dominant legislative power in the shape of a direct popular vote taken upon a Bill, which the statutory legislature must pass, whether it really assents to it or not.'

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[59] [1922] 2 A.C. 128.
[60] [1922] 2 A.C. 128 at p. 134.

His Lordship answered these contentions thus:

> 'On the first point it is clear that the word "exclusively" in s. 92 of the British North America Act means exclusively of any other Legislature, and not exclusively of any other volition than that of the Provincial Legislature itself. A law is made by the Provincial Legislature when it has been passed in accordance with the regular procedure of the House or Houses, and has received royal assent duly signified by the Lieutenant-Governor on hehalf of His Majesty. It is impossible to say that it was not the Act of the Legislature...'

adding, rather tartly,

> 'If the deference to the will of the people, which is involved in adopting without material alteration a measure of which the people has approved, were held to prevent it from being a competent Act, it would seem to follow that the Legislature would only be truly competent to legislate either in defiance of the popular will or on subjects upon which the people is either wholly ignorant or wholly indifferent. If the distinction lies in the fact that the will of the people has been ascertained under an Act which enables a simple project of law to be voted on in the form of a Bill, instead of under an Act which, by regulating general elections, enables numerous measures to be recommended simultaneously to the electors, it would appear that the Legislature is competent to vote as its members may be pledged to vote individually, and in accordance with what is called an electoral "mandate", but is incompetent to vote in accordance with the people's wishes expressed in any other form.'

It is precisely in such words as 'deference', and in the view expressed that the Direct Legislation Act did not formally interfere with the functioning of the Legislature, that it becomes plain that the Board was not proceeding on the basis that a statutory duty existed, or at least not a mandatory one; for a true statutory duty would in law constitute a formal interference with the operation of the Legislature, and wholly exclude the idea of mere 'deference':[61]

> 'Unless the Direct Legislation Act can be shown, as it has not been shown on this occasion, to interfere in some way formally with the discharge of the functions of the Legislature and its component parts, the Liquor Act, 1916, being in truth an Act duly passed by the Legislature of Alberta and no other, is one which must be enforced, unless its scope and provisions can themselves be shown to be *ultra vires*. As for the Direct Legislation Act, its competency is not directly raised in the present appeal. What was done in this case was done under the Liquor Act, and if that Act is sustained there is no utility in going behind it to decide the validity of another Act, which merely conditioned the occasion on which the Liquor Act was duly passed.'

2) *The Holding in the Nat Bell Case* [62]

At most the Privy Council decision here holds, it is submitted, that an Act passed by a provincial legislature is not invalid by reason

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[61] [1922] 2 A.C. 128 at p. 135.

of its 'deference' to the will of the electors in enacting, even in pursuance of statutory direction, a law approved by the electors on referendum: *provided* that there is no formal interference with the discharge of the functions of the Legislature or its component parts. The Privy Council even seems unsure as to whether it is ruling on the validity of the *Direct Legislation Act*, though such a ruling would indeed seem to be involved to the extent that they are holding that the *Direct Legislation Act* does not have such an operation as would vitiate the Liquor Act passed in pursuance of it. But that, of course, is perfectly consistent with the view that the *Direct Legislation Act* — for whatever reason — did not or could not validly make the Assembly the puppet of the voters in the juridical sense.

V. Problems Suggested by the American Experience and the Canadian and Australian Cases

Since judicial review of legislation in the United States is considered to have been definitively established on the basis of a case which is, if it is anything, a plea that the law must be made in

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[62] In the Privy Council: [1922] 2 A.C. 128. In the Appellate Division of the Supreme Court of Alberta (Harvey C.J., Stuart and Beck JJ.): (1921) 16 Alta. L.R. 149, 173 one of Beck J.'s grounds of decision against the validity of the *Liquor Act* was the operation of the *Direct Legislation Act*, passage in pursuance of which, he thought, tended to show that the Act in substance dealt with public morals and criminal law. Referring to his remarks in *Gold Seal Ltd.* v. *Dominion Express Co.* (1920) 15 Alta. L. R. 377, at 406-7, he said: 'It was not my intention to hold that *The Liquor Act* was *ultra vires* merely because it had been passed in pursuance of *The Direct Legislation Act*, 1913, ch. 3, which itself is, in my opinion, unconstitutional...' See the reasons of Hyndman J. who delivered the judgment *a quo*, and whose reasons were adopted by Harvey C.J., dissenting, on appeal: (1921) 16 Alta. L. R. at p. 158. The opinion of Hyndman J. [1921] I W.W.R. 136, cited on the material point at (1921) 16 Alta. L. R. at p. 158, disagreed with the contention that the law had not been made exclusively by the provincial legislature. Distinguishing the Manitoba decision, his Lordship said: 'It is clear that the *ratio decidendi* in that case was the interference by the local Legislature with the office of Lieutenant-Governor. The position in this province is entirely different. The functions of the Lieutenant-Governor are not in any way affected. Although a vote is taken ...in Alberta under the provisions of the Referendum Act it is, in my opinion, a plebiscite merely. Before such a proposed measure becomes law it must be presented and pass through the stages common to all other bills in the properly constituted Legislature and must finally receive the assent of the Lieutenant-Governor. This Act having passed through all these necessary stages and formalities I do not think it is open to show that the legislators bad abdicated their functions or to inquire into the reasons why they voted for the measure and the bill having received the Royal Assent, in my opinion, became validly enacted.'

accordance with the law, and not otherwise,[63] one may be forgiven for thinking somewhat schizophrenic judges who hold, in effect, that whilst the Constitution means what the Court says it means, it contains whatever the Congress says it contains.

The cases [64] dealing with the U.S. constitutional amendment process show considerable ambivalence towards the enforcement of legal

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[63] *Marbury* v. *Madison* (1803) 1 Cranch 137; 1 L. ed. 368.

[64] In *Hollingsworth* v. *Virginia* (1798) 3 Dall. 378; 1 L. ed. 644, a decision which one may observe preceded *Marbury* v. *Madison*, the validity of the Eleventh Amendment (restricting the judicial power of the United States) was challenged on the grounds that it had not been submitted to the President for his approval before ratification. The Supreme Court unanimously held the amendment "constitutionally adopted". There seems to have heen no suggestion that this question was not one perfectly proper to consider and determine like other questions of law.

Since this decision the Supreme Court has had occasion to consider a great variety of germane problems. In giving some of those most directly relevant, I have made no attempt at being exhaustive.

In *Ohio ex rel. Davis* v. *Hildebrant* (1915) 21 U.S. 565, 60 L. ed. 1172, it was held that where by the constitution of a state, legislative authority was vested not only in a general assembly, but in the people exercisable by referendum, popular action could validly constitute legislative action within Art. 1, sec. 4, of the Constitution of the U.S., under which U.S. congressional and senatorial elections are (subject to certain Congressional legislation) regulated "in each state by the legislature thereof".

In *Hawke* v. *Smith* (1919) 253 U.S. 221, 64 L. ed. 871, reversing 100 Ohio St. 385; 126 N.E. 400, the Supreme Court held that the provisions of a state constitution reserving to the people the exercise of the power to ratify Amendments to the United States constitution, conflicted with Article V of that Constitution, respecting Amendments, because popular legislation could not constitute a Legislature within the meaning of that Article.

This proposition was put without qualification even though, as the representative legislature *had* ratified *despite* the purported provision of the state constitution, and as the Eighteenth Amendment had been proclaimed with Ohio's ratification amongst the necessary number, the Supreme Court had only (if the question was the validity of proceedings connected with the Eighteenth Amendment) to consider whether the *representative* legislature's ratification was *valid*; not whether a *popular* ratification would have been *invalid*; especially in view of doctrines of Congressional recognition of state authorities and later doctrines of Congressional supervision of the amending process.

But the litigation had challenged the expenditure of public monies for a referendum. This expenditure was upheld below, and the judgment below was reversed by the Supreme Court. This goes therefore so far as to suggest perhaps that even consultative referenda are illegitimate. Compare *R.* v. *Nat Bell Liquors Ltd.* [1922] 2 A.C. 128 *Supra* p. 557 ff., especially the rather tart passage from Lord Sumner's remarks, quoted above p. 560.

In *Rhode Island* v. *Palmer* ("National Prohibition Cases") (1920) 253 U.S. 350, 64 L. ed. 946, the two-thirds vote of each House required to propose a constitutional amendment was construed by the Supreme Court to mean two-thirds of

continuity — of lawmaking according to law — which is, perhaps, attributable to (1) "federal" considerations extending to a right in the states to control their own legal orders or continuity, or breach or overthrow them [the problem is that the state legislatures produce in an infinity of ways juridical consequences not only in their own law but in the law *of the United States;* particularly, in the ratifica-

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those present, assuming however a quorum. Referendum provisions of state constitutions could not be applied in ratification or rejection of amendments.

In *Dillon* v. *Gloss* (1921) 256 U.S. 368; 65 L. ed. 994 the Court *per* Van Devanter J. held Article V of the Constitution to imply that amendments must be ratified within some reasonable time after their proposal; that Congress might in proposing an amendment fix a reasonable time; and that the seven years fixed by Congress in the resolution proposing the Eighteenth amendment was reasonable.

"First, proposal and ratification are not treated as unrelated acts, but as succeeding steps in a single endeavor, the natural inference being that they are not to be widely separated in time. Secondly, it is only when there is deemed to he a necessity therefor that amendments are to be proposed, the reasonable implication being that when proposed they are to be considered and disposed of presently. Thirdly, as ratification is but the expression of the approbation of the people and is to be effective when had in three fourths of the States, there is a fair implication that it must be sufficiently contemporaneous in that number of states to reflect the will of the people in all sections at relatively the same period, which, of course, ratification scattered through a long series of years would not do." 256 U.S. 368, 374.

Judicial notice would be taken of ratification, and an amendment had effect from the date of consummation of ratification, and not that of its proclamation [by the Secretary of State under the then rule] which latter date was immaterial.

In *Leser* v. *Garnett* (1922) 258 U.S. 130, 66 L. ed. 505, the Court held the function of ratification by state legislatures of amendments to the United States Constitution to be a federal function, transcending any limitations sought to be imposed hy a state, and the Nineteenth Amendment to be duly ratified and part of the Constitution. It had been contended that the ratifying resolutions of Tennessee and West Virginia were "inoperative, because adopted in violation of the rules of legislative procedure prevailing in the respective states ... As the legislatures of Tennessee and of West Virginia had power to adopt the resolutions of ratification, official notice to the Secretary, duly authenticated, that they had done so, was conclusive upon him, and, being certified to by his proclamation, is conclusive upon the courts."

It may be observed that the earlier decisions all presupposed that the requirements of Article V of the Constitution were subject to construction and enforcement by the courts. From the time of this judgment (delivered by Brandeis J.) a conflict between this view and a contrary trend, is discernible.

It is submitted that the decision begs the question as to the enforcement of rules constitutive of the state legislature, and determinative of whether action may be properly imputed to the state legislature in question. Insofar as the U.S. constitution invests the state legislatures with a federal function, it is vesting that function in complex legal structures, not in quasi-persons in respect

of whom all rules are "limitations". And the attribution of conclusive "identifying" or "certifying" power to a series of clerks or executive officers is not only subversive of the legal system, but still does not avoid the problems of determining the competence of the certifying authority. Public authorities are not identifiable by having natural marks on their brows.

Coleman v. *Miller* (1939) 307 U.S. 433; 83 L. ed. 1385; in the court below 146 Kan. 390; 71 P. (2d) 518, arose out of events in the Kansas Legislature in connection with the ratification of a constitutional amendment, proposed by Congress in 1924, known as the Child Labour Amendment. The Kansas Legislature had in 1925 adopted and communicated to the U.S. Secretary of State, a resolution of rejection. In 1937 another resolution of ratification was introduced into the Kansas Senate, which body being equally divided, the Lieutenant-Governor as presiding officer cast a favourable vote. The Kansas House of Representatives by majority later adopted the resolution.

The twenty senators opposed, joined by another and by three members of the House of Representatives, sought mandamus in the Supreme Court of Kansas to compel the Secretary of the Kansas Senate to change his endorsement on the resolution to indicate failure of passage, and to restrain the officers of both Houses from signing the resolution, and the Kansas Secretary of State from authenticating it and delivering it to the Governor.

The grounds taken were that (i) the Lieutenant-Governor had no casting vote; (ii) the earlier Kansas refusal to ratify precluded subsequent ratification; (iii) the proposed amendment was itself stale as not having been ratified within a reasonable time after its proposal.

The Kansas Supreme Court held that the legislators were entitled to its judgment upon their claims, but rejected them, and denied *mandamus*.

The U.S. Supreme Court (Hughes C.J., McReynolds, Butler, Stone, Roberts, Black, Reed, Frankfurter, and Douglas JJ.) upheld its jurisdiction to review on *certiorari* the decision of the Kansas Supreme Court, on the ground that the questions were federal, arising under Article V of the Constitution, and that the complaining Senators had a sufficient interest to maintain the proceedings, namely, their interest in the effectiveness of their votes. "This is not a mere intra-parliamentary controversy but the question relates to legislative action deriving its force solely from the provisions of the Federal Constitution, and the twenty senators were not only qualified to vote on the question of ratification, but their votes, if the Lieutenant-Governor were excluded as not being part of the legislature for that purpose, would have been decisive in defeating the ratifying resolution." 307 U.S. 433, 441. As the State court had entertained and decided these federal questions, the U.S. Supreme Court could review that decision on that interest.

In an opinion of Justice Frankfurter (in which Roberts, Black and Douglas JJ. joined), a minority denied that the petitioners had sufficient legal interest to have *locus standi* in the U.S. Supreme Court.

The objections listed as (ii) and (iii) above "... [in] no respect... relate to any secular interest that pertains to these Kansas legislators apart from interests that belong to the entire commonalty of Kansas. The fact that these legislators are part of the ratifying mechanism while the ordinary citizen of Kansas is not, is wholly irrelevant to this issue. On this aspect of the case the problem would be exactly the same if all but one legislator had voted for ratification." 307 U.S. 464; 83 L. ed. 1402.

"Indeed the claim that the Amendment was dead or that it was no longer open to Kansas to ratify, is not only not an interest which belongs uniquely to these Kansas legislators; it is not even an interest special to Kansas. For it is the common concern of every citizen of the United States whether the Amendment is still alive, or whether Kansas could be included amongst the necessary "three-fourths of the several States." 307 U.S. 465.

"We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokeman of a constitutional point of view cannot ask us to pass on it." 307 U.S. 467.

Nor, in the minority view, did the petitioners have *locus standi* upon (i), despite the analogy drawn to *Ashby* v. *White*, 2 Ld. Raym. 938; 92 E.R. 126; 3 Ld. Raym. 320; 92 E.R. 710, where an action in damages had been allowed upon the infringement of a franchise. "The reasoning of Ashby v. White and the practice which has followed it leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts. The procedures for voting in legislative assemblies — who are members, how and when they should vote, what is the requisite numbers of votes for different phases of legislative activity, what votes were cast and how they were counted — surely are matters that not merely concern political action but are of the very essence of political action..." 307 U.S. 469.

One may venture to observe that to allow the petitioners to found their claim on grounds (ii) and (iii) would indeed be to allow them to sue for determination rather of a question of law than of a legal right. If their contentions be correct upon grounds (ii) and (iii), the consequence ought in principle to be the nullity of the amendment if it depended on a Kansas ratification, or else the nullity of the amendment altogether in case (iii); which could be raised subsequently by persons whose rights might depend on the validity of the amendment if and when it was purportedly in force. That the Court might be reluctant to review the validity of a constitutional amendment even when the requisite pecuniary interest was present, is of course another matter.

As regards *locus standi* upon (i), one would have thought that the U.S. constitution, in incorporating the action of a state legislature as part of the constitutional amending process, would incorporate the whole of the state machinery. It is hard to see at what point one is to refuse to incorporate part of the machinery, or why. Whether the machinery under Kansas law be a sergeant-at-arms to expel members disobeying the rules, or the interference of the law courts, would seem to be all the same; the right of any person to specific performance of any physical act or thing on the floor of the Kansas legislature would seem to be in the first instance a matter of Kansas state law respecting the legislature. And it is difficult to see why, if the Kansas state legislature be incorporated as part of the legal machinery of the United States, specific performance of a proper record of legislative action enforced by the courts, should be any less incorporated than specific performance of orderly behaviour enforced by the sergeant-at-arms. And this, whether or not the sergeant or the Kansas Supreme Court be supposed to be exercising federal functions: even, indeed, if a state right to *mandamus*, become federal, were to be enforced in federal court.

The decision upon the merits was itself rather inconclusive.

Upon question (i) — the right of the Lieutenant-Governor to a casting vote — the Court said: "Whether this contention presents a justiciable contro-

versy, or a question which is political in its nature and hence not justiciable, is a question upon which the Court is equally divided and therefore the Court expresses no opinion upon that point." 307 U.S. 447; 83 L. ed. 1393.

As regards (ii) the Court said: "We think that in accordance with ... historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment." Accordingly, on the "precise question as now raised", the Court should not "restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action." 307 U.S. 450; 83 L. ed. 1394.

These remarks prompt the following observations.

(1) It is not easy to see how Congress's "control" is consistent with notice by the courts of the contents of the U.S. constitution, and with the courts' giving effect to it as it stands on any given day, and particularly so since the prevailing doctrine has been that the courts, and in particular the Supreme Court, will notice ratifications and give effect to an amendment on the date of the last ratification. Indeed, the very necessity of any proclamation is a matter of doubt, and it is difficult to suppose that the high function of supervision has been conferred upon an official called the Administrator of General Services, who has by 65 Stat. 710-11 s. 3; 1 U.S.C. 112, replaced the Secretary of State as proclaiming officer. And compare *Dillon* v. *Gloss*, *supra*.

(2) Assuming that only federal rights are involved, and the Supreme Court jurisdiction established, it seems somewhat unnatural to separate the question of the *locus standi* of petitioners from that of their right to the relief sought. It is not easy to see why there is more than one question: viz., the specific right, under the Constitution and laws of the United States or of the State, to the relief sought.

(3) The reasons given by the Supreme Court seem to extend well beyond merely holding that petitioners had no right to the relief claimed. Such a holding with respect to grounds (ii) and (iii) would indeed amount to no more than saying that a legislator has no right to restrain a purported ratification on the ground alone that the purported ratification would be void, whether void because of a previous rejection or void because the amendment itself was dead. This is perfectly plausible, and indeed legislators are not understood to have the right to apply to the courts in most jurisdictions, to restrain the purported enactment of invalid legislation.

The Court went much beyond this in suggesting that illegality of ratification is a ground of law which cannot be raised *even when* it is germane to an otherwise perfectly justiciable controversy before the courts. On ground (iii), "the Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications." 307 U.S. 456; 83 L. ed. 1397. The passage similarly disposing of ground (ii) has already been quoted above, on this page.

In short, not only is unlawful ratification not a *ground of suit*, it is not a ground of *law* that can be raised *in a suit*.

(4) Even if the historical instance offered by the Court proves anything, it is a trifle incongruous to see the Court offering that which Congress has done in proof of its legitimacy.

As regards the length of time for ratification, question (iii), the Court said that it could not agree that in the absence of the fixing by Congress of a limited time for ratification, the Court should fix one. "[T]he question of a reasonable time in many cases would involve, as in this case it does involve, an appraisal of a great variety of relevant conditions, political, social and economic, which can hardly be said to be within the appropriate range of evidence receivable in a court of justice and as to which it would be an extravagant extension of judicial authority to assert judicial notice as the basis of deciding a controversy with respect to the validity of an amendment actually ratified. On the other hand, these conditions are appropriate for the consideration of the political departments..." 307 U.S. 453; 83 L. ed. 1396.

One can fully agree with the Court that (at 307 U.S. 454; 83 L. ed. 1397) "In determining whether a question falls within that category [i.e. political and not justiciable questions] the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations" without coming to their conclusion that reasonableness is not here justiciable. The Court does not have to consider in every case what period is reasonable, but merely to hold that a given period is impliedly fixed by the constitution, even subject to Congressional variation. The common law, after all, fixed arbitrary time periods.

The concurring opinion of Black J., (for himself and Roberts, Frankfurter, and Douglas JJ.) was even more radical in tone. They said, 307 U.S. 458-9, 83 L. ed. 1398, "To the extent that the Court's opinion in the present case even impliedly assumes a power to make judicial interpretation of the exclusive constitutional authority of Congress over submission and ratification of amendments, we are unable to agree." Thus they insisted that it was to Congress to decide even whether ratification must be had within a reasonable time, and not only what a reasonable time was. There was no "ultimate control over the amending process in the courts". "Undivided control of that process has been given by the Article exclusively and completely to Congress. The process itself is "political" in its entirety, from submission until an amendment becomes part of the Constitution, and is not subject to judicial guidance, control or interference at any point." The Court should therefore express no views on the subject.

And as the legislative authority of the United States is exclusively confided to Congress, the same reasoning no doubt excludes the courts from judicial review of legislation !

Despite the need felt by four of the justices to express a separate concurrence, it is not easy to see precisely wherein consists the difference between their view and that of the Court. Both denied the justiciability of the question whether previous rejection precluded subsequent ratification. The following remarks are directed at both.

(1) It does not follow, even from the most unrestricted right of Congress to recognize or withdraw recognition from state governments, or to erect new ones, that the existing governments and laws are of anything less than full force and effect until so changed. Until so changed such governments and laws are recognized by the constitution of the United States, and by the Courts,

tion of U.S. Constitutional amendments]; (2) doctrines allowing the political organs of the U.S. to decide conclusively who are the lawful state governments — much as one government recognizes a foreign government — Congress being left, in sum, to decide just how much state illegality, discontinuity or revolution there is to be;[65] (3) inti-

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for an infinity of purposes, including constitutional purposes, such as vested rights, which will be protected *even against Congress itself*. The doctrines respecting recognition and reconstruction of state governments do not therefore preclude the Courts from recognizing those from time to time in existence, and from insisting upon proper ratification in accordance with the laws for the time being in force.

(2) A legislature is not a natural, but a juridical, phenomenon, a legal structure. It is defined and created by law. The rules respecting casting votes are as much a part of the structure of a legislature as are, for instance, the rules which, in consequence of bicameralism, make the consent of a single house insufficient.

(3) If one is going to apply in a fair and honest manner the test of "satisfactory criteria for judicial determination" as one of the conditions of justiciability, it becomes perfectly plain that there is not the slightest difference between the inherent suitability for judicial enforcement, of the ratification process (exhaustion of power by previous ratification or rejection; casting votes; reasonable times; and any other matters), and the legislative processes of municipalities on the other hand. The subject-matter of the two is the same, and review of the latter is long known to the law. And can anyone doubt that satisfactory criteria for the resolution of such disputes are a thousand times easier to find than answers to such questions as, what is due process? what is equal protection? what is just compensation? what is freedom of speech? Surely these last, if any, are the non-justiciable questions, those for which criteria are lacking, and which are inappropriate for judicial determination. Those justices who with great facility consider themselves able to determine what is justice, freedom, equality or reasonableness, but balk at the matter of the right to a casting vote, or exhaustion of power, would seem to have a somewhat distorted sense of justiciability.

The doctrine of the political question makes much sense in, say, foreign affairs; but, so far as the *'inherent suitability'* of the amending process for judicial review is concerned, the doctrine is a flimsy hoax. It boils down in the end to a view that the question is one where there is 'appropriateness of final determination by political authorities', or, in other words, that whatever persons may be in *de facto* occupation of the houses of Congress are the appropriate persons to determine finally what is the content of the United States Constitution.

But where, pray, have any such overwhelming reasons been offered as would justify the courts in giving less than its ostensible operation to Article V of the U.S. Constitution, namely, operation as a fully effective and enforceable part of the supreme law of the United States?

[65] *Luther* v. *Borden* (1849) 7 Howard 1; 12 L. ed. 581 dealt with a revolution in Rhode Island and conflicting claimants to governmental authority. The Supreme Court took the view that it was to Congress to recognize state governments, and, under its authority, the President, who had in the present instance made a choice which the Courts were bound to follow. Secondly, the

mations or recollections of a revolutionary ideal suggesting that it is not the business of the Courts to enforce compliance with the constitutional amendment procedures as a condition of constitutional change or in other words to uphold the existing legal order against its overthrow: how this squares with the oath may well be a matter of conjecture.

The American authorities must be approached with great caution, in view of their very lax attitude towards the enforcement of legal continuity, to be contrasted with the rigorous attitude generally prevailing in modern times in the British Commonwealth, and in the Dominions in particular.

In a number of respects, however, they suggest problems that must be dealt with in Canada, *under any Amendment Formula.*

(1) *The recognition of provincial authorities.* Our Courts ought not in principle to weaken in any respect their traditional attitude insisting upon rigorous enforcement of legal continuity. Nor in general can we think in terms of distinct federal and provincial legal orders: they would seem in principle all one under the B.N.A. Acts: so that there can in general be (it would seem) no question of a federal power to recognize or refuse to recognize provincial public authorities as if they were foreign states. This leaves open however a prerogative of the Crown to repair legal discontinuities, as for example to summon a new assembly where for some reason one had

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U.S. Courts were bound to follow the decisions of the State Courts on such matters.

One may observe that this latter proposition begs the question very likely to be in issue: who are the legitimate state courts? Moreover, the trouble with the first proposition is that, given the impact of state laws and acts on the composition of Congress and even on the Presidency, the composition of *those called upon to decide* the question *presupposes* in many cases a decision as to who are the public authorities of a state. The impact on the composition of the federal courts is likely to be much more remote and delayed.

The advent of the *Reapportionment Cases,* holding as they do that there are judicially-enforceable constitutional requirements for proper composition of state legislatures, necessarily attenuates the hitherto-unrestricted prerogative of the U.S. political authorities to recognize in whom they please the government of a state. The new doctrine is however consistent with an unrestricted *negative* on state authorities: Congress's curse may still be fatal though its blessing may not be the royal touch. But more than that, the Supreme Court not having held void everything done by irregularly-constituted legislatures, it follows that irregularly-constituted legislatures are considered legislatures none the less, albeit subject to a legally enforceable duty to reform or be reformed. Accordingly, Congress may still have an unrestricted power of recognition, whose exercise may however entail the consequence that the state authorities recognized may be liable to be reformed.

gone out of existence without there being otherwise valid machinery to summon a new one.[66] The Crown, as *fons et origo* of all public authority, and vested with all residuary power, could summon a new assembly as it could before one had ever existed in a given territory. Equally open is the impact of federal laws — for example, criminal laws, laws dealing with war, invasion or insurrection, or remedial laws dealing with the peace, order and good government of Canada generally — on the constitution of provincial public authorities.

(2) *Sufficiency of Provincial Consents.* It is possible that Parliament might be held to have power to rule upon the sufficiency of Provincial consents to constitutional amendments, the *Formula* as drafted being silent on the subject. It would seem that Parliament could at least empower the courts to give immediate and definitive rulings on the subject, whether in virtue of its power with respect to the Supreme Court as a general court of appeal for Canada, or in virtue of its power to create courts for the better administration of the laws of Canada, which latter class might comprehend the B.N.A. Acts themselves and would seem to comprehend Acts of Parliament effecting general constitutional amendments.

(3) *The force of Provincial Consents.* A problem arises as to the power of the provincial legislature, having given consent, to withdraw it;[67] or, having refused consent, to give it. Neglecting this last as not being of particular difficulty, the first remains however more serious, and the *Formula* makes no provision for it. Would the courts develop a contractual theory — offer and acceptance, with perhaps communication, constituting a binding consent, and precluding withdrawal? What rules would the courts develop as to the moment of the conclusion of the 'contract'?

(4) *The time for ratification.* The *Formula* as drawn appears to presuppose action by Parliament of Canada followed by consent of the Provincial legislatures. If, once given, a consent cannot be withdrawn; or if, once given and answered with an acceptance of some sort a consent cannot be withdrawn, a consent would seem indefinitely good, with the result that consents given at widely varying times might be accumulated over a considerable period.[67]

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[66] See *Simpson* v. *A.-G. N.Z.* [1955] N.Z.L.R. 271.

[67] The problems of withdrawal of ratification and of time limits were taken up by Mr. Logan in the N.B. Legislative Assembly, *Synoptic Debates*, 1965, I, p. 383 (March 16, 1965). Mr. Hatfield at p. 386 suggested: 'It would have been far better for the amending formula to provide that a resolution in the federal house should start the amending process. Then the necessary number of provinces could have enacted legislation regarding that resolution, and then the federal government would pass an Act changing the constitution...' His

Could a provincial statute giving a consent fix a time limit? Could Parliament in its proposal do so? Would any period be implied if it did not? Could Parliament withdraw its proposal before any consents had been given? After one had been given but not "accepted"? After one had been given and "accepted"? Before a sufficient number had been given? Before a sufficient number had been given and accepted?

(5) *The meaning of "provincial legislature"*. As it is likely that the provinces have, as we have seen, the power to complicate their legislative processes by referenda, special majorities, and so forth, either generally or for limited purposes, the impact of such experiments upon the general constitutional amendment processes established by the *Formula* or its successors — that is to say, processes requiring the participation of one or more provincial legislatures — would raise the greatest difficulties and the most serious problems. Even were we to adopt the American solution of an overriding power of ratification in the *representative* legislatures, there would remain the problem of special majorities, and so forth; our legal tradition would tend towards an insistence that the law on such matters be punctually respected.[68]

Under paragraph (1) above, we suggested that the Canadian legal order must be considered a single one, and drew appropriate conclusions as regards federal powers of 'recognizing' the public authorities of the provinces. This problem has another important aspect. Ought the laws of each province to be properly considered in every other province as matter of law rather than matter of fact? The present author's view is that they should, a view which draws some

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complaint was that as it stood the federal government 'loses control over whether or not that legislation will come into force'. See also Mr. Hatfield's doubts at p. 387; *inter alia*: '...there is no time limit for determining whether any amendment becomes law or is rejected. The situation could become very fluid, with the nation unsettled on a particular constitutional matter for years on end, simply because, under certain provisions affecting the provinces, the individual province could endorse or reverse its position at will over an undetermined period of time. In other words, Mr. Speaker, no time limit in which provinces must ratify amendments is specified.' (p. 399).

[68] See Mr. Sherwood, *N.B. Leg. Ass. Deb., Synoptic Reports*, 1965 (March 16), I, 399: 'No provision in the proposals prevents a province from frustrating the process of amending the constitution by altering the majority of legislative members required for expressing its consent to any constitutional amendment, i.e., raising the requirements above a simple majority.'

'Indeed, any of the 10 provinces could adopt such a procedure, thereby impeding future constitutional changes of vital national interest. Such action could place the whole nation in a constitutional strait jacket.'

support from sections three and five of the B.N.A. Act which create one dominion and divide it into provinces, but a thesis which, radical as it may be thought, the author is not concerned to enlarge upon here. The particular relevance of this question lies in the fact that a "general" constitutional amendment would be part of the law of all provinces; all Courts would have to notice and apply it; and whether a purported amendment exists as part of the body of the law, is a question of law. This question of law would turn upon the law of the particular provinces whose consent would be in issue. It is impossible that this should be treated as a matter of fact determinable differently from province to province and from court to court.

(6) *Comprehensiveness of the most 'difficult' procedure.* The most general constitutional amendment power ought, in principle, to be capable of doing anything whatsoever, on the basis that the greater includes the less. One would assume, though by no means with complete certainty, that whatever could under the *Formula* be done by Parliament alone, or by Parliament and one or more legislatures, or by a legislature alone, could also be done by Parliament and all the legislatures conjointly. Otherwise, there can be no security in choosing, in cases of doubt, the most 'difficult' procedure.

Such, in effect, was the view of the U.S. Supreme Court in the *"National Prohibition Cases"*[69] where the Eighteenth Amendment was unsuccessfully challenged *inter alia* on the grounds that it was legislation rather than constitutional amendment. One would think it clear, for instance, that the U.K. Parliament, which now retains by virtue of section 7(1) of the *Statute of Westminster, 1931,* unrestricted power to *dispose of* legislative power in Canada, *ipso facto* retains an unrestricted right to *exercise* that power.

But perhaps all such doubts and difficulties are unwarranted, having as we do the assurances of the former Deputy-Minister of Justice, Mr. Driedger, as draftsman, that the *Formula* is clear and unambiguous.

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[69] (1920) 253 U.S. 350; 64 L. ed. 946.