

THOUGHTS ON CONSTITUTION-MAKING SUGGESTED BY THE EXPERIENCE OF ILLINOIS.

In 1922 an earnest effort, extending over approximately five years, to give Illinois a new constitution, came to complete failure. On the surface there were important elements of success. First, everybody agreed that the old constitution was not suited to the needs of the state. It compelled the retention of the discredited general property tax under which personal property almost altogether escaped, and an undue share of the expense of government fell upon real estate; the home-owner and the farmer both suffered. It provided for minority representation in the lower house of the legislature. Theoretically both parties in every legislative district were given equitable representation. Practically the normal political complexion of each district and the majority and minority parties were soon established. By custom the majority party nominated two candidates, the minority party one candidate for the three representatives to be elected from the district (the decision of the number of candidates to be nominated being made by the party committees), and the voters were deprived of any choice in the election. Under the old constitution the cities of the state, including Chicago, were limited to the powers specifically granted by the legislature, and an inflexible debt limit presented a serious and all but insurmountable obstacle to the acquisition of public utilities. Finally, the old constitution fettered the power of amendment, particularly by providing that only one article should be amended at a time. The effect of this was that at session after session of the legislature, friends of different amendments battled for the right of way. They almost invariably deadlocked one another and thus helped to establish the need for an entirely new document.

When in 1918 the question was submitted to the voters whether a constitutional convention should be called, it carried in the affirmative by a majority of almost 400,000, and this was a second element for success. A third was the high ability and character of the delegates. Among its members the convention numbered some of the ablest men in Illinois. Particularly the

leaders of the bar, both in Chicago and downstate, were well represented. Moreover, the delegates on the whole were animated by a real aim of public service. They were men who would eschew any ordinary political office but who undertook this task at pecuniary sacrifice in order to render to the state what they conceived as a service of pre-eminent importance.

A fourth element for the success of the new constitution was the many undoubtedly meritorious provisions which it embodied. Aside from some which are subjects of controversy, it abolished minority representation in the legislature and provided for a real instead of a sham contest for each one of the one hundred and fifty-three representatives of the lower house. It granted large powers of home rule to the city of Chicago, and specifically authorized indebtedness above the limit for general purposes, for financing municipal transportation and water systems. It provided for the unification of the courts of Cook County (which contains Chicago). It specifically authorized zoning regulations and thus removed any doubt, as far as the state constitution was concerned, as to the legality of zoning ordinances which cities all over the state are seeking in order to stabilize the use and value of urban property.

But with all these elements in its favor, the new constitution failed, and failed miserably, when it was put to a vote last December. In fact, the outcome was the most overwhelming defeat of any proposition or candidate seriously offered for popular suffrage that the writer has ever known. In the city of Chicago the vote was approximately thirteen to one against the new constitution, and in the entire state the vote was a little over 100,000 for and about 900,000 against, an adverse majority of approximately 800,000.

Now, if this were only a local occurrence in Illinois it would not deserve any particular comment outside. Let Illinois bury its own dead. But as a matter of fact there are many states where constitutional progress is desirable, and where somewhat similar conditions to those that exist in Illinois have to be taken into account, namely, metropolitan cities and geographically extensive but relatively thinly populated rural sections, more or less

distrust between the inhabitants of the two, large masses of not very well-informed and easily influenced voters, and an aggressive and widely circulated press. Therefore, the experience of Illinois may have some lessons for the proponents of constitutional reform generally.

With all deference to the high purpose of the delegates to the convention, it seems to the writer that the attitude and point of view of the delegates rendered success difficult. The typical attitude was that they had been selected to exercise their judgment as to the kind of constitution that Illinois required, and that they proposed to do it, popular expressions to the contrary on any point notwithstanding. Being for much the greater part conservative, they conceived it their duty to protect the state against excessive exercise of the power of taxation, and in particular to prevent exploitation of the propertied classes by taxes which might bear with undue severity upon them. Thus they found themselves out of harmony with that large section of the voters who believe that instead of the rich needing protection against the poor, the contrary is the case.

By no means all of the members of the convention were oblivious to considerations of policy, and toward the end of their deliberations in particular, public opinion was very intelligently conciliated in a number of matters. But by the large it is true that the delegates were self-centered and paid little or no attention to the popular point of view. One reason, of course, that they could do this, was that they were not regularly in politics and did not aspire to any other public office. Their only concern was to exercise their independent and conscientious judgment in this one task with which they had been entrusted. From an abstract standpoint this was meritorious and fine. But the very virtue of independence of political considerations became a defect from the standpoint of proposing a constitution which would be adopted.

The disregard of public opinion by the convention was conspicuously shown in its treatment of the initiative and referendum. On a number of occasions when the question had been presented to the voters of the state, whether the referendum

should be adopted, it had carried in the affirmative by a large majority. The legislature had never acted on these expressions of opinion, which were only advisory, but regularly for several sessions the advocates of the initiative and referendum had been urging a constitutional amendment to carry them into effect. The principle was popular with organized labor, it had no inconsiderable newspaper support, and the hope of getting it adopted undoubtedly influenced a large number of persons to vote for holding a constitutional convention.

But the convention gave no recognition whatever to any phase of either the initiative or referendum. In fact, not content with rejecting it, the convention metaphorically stamped on it by adopting an entirely new provision that "the republican form of government of this state shall never be abandoned, modified, or impaired." This last provision would probably have been of no practical consequence because what judicial authority there is on the point, is to the effect that the existence of the initiative and referendum supplementary to the usual method of legislation by a representative body, is not incompatible with a republican form of government (*Kadderly v. Portland*, 44 Ore. 120, 74 Pac. 710, 75 Pac. 222), and, moreover, if it were, a constitutional amendment establishing the initiative and referendum (and they could not be otherwise established) would necessarily as the later enactment, amend by implication to any extent necessary the provision for a republican form of government. But this futile provision added insult to injury to the advocates of the initiative and referendum.

There is no doubt that the members of the convention acted conscientiously in this matter. They regarded the proposals as incompatible with representative government. So far as the initiative is concerned, there seems ground for their belief. Anyone who is at all familiar with the process of legislation, realizes the value of the modification of measures which occurs in the course of their progress through the legislative mill, as the result of discussion revealing weaknesses, and corrective amendments. Any system which would permit the enactment of a law by the people *en masse* without opportunity for the modification by

criticism or anything but a vote up or down, is open to grave objection.

But the referendum is different. The referendum does not subtract from the usual legislative process; it merely gives an added check. We are accustomed to it in many of our cities and states where bond issues are involved. The constitution itself must be submitted to referendum. Why should we shrink from permitting a legislative referendum under reasonable safeguards to insure that it will not be invoked unless there is a real demand for it? The convention apparently gave no serious consideration to a compromise of this nature, and yet there is good reason to believe that it would have won the support of the advocates of the initiative and referendum, as giving them a substantial part of what they sought. At any rate, it would seem wise to have tried what could be done in this direction.

Again it is conceded that many of the delegates to the convention would have regarded even this with misgiving. But, which would have been worse: for Illinois to provide for a safeguarded legislative referendum, or to remain bound as it now is to the inequitable general property tax, to be deprived by the system of so-called "minority representation" of any adequate voice in the election of the House of Representatives, and to deny to Chicago the power requisite to deal with the pressing problems of metropolitan development? The convention does not seem to have weighed this choice: it proceeded as if it were framing a constitution for an abstract Utopia of its own creation, instead of the state of Illinois with living people and rather concrete and readily ascertainable political opinions.

The same tendency appeared in other parts of the convention's work. In one direction it made a marked improvement in the revenue article of the present constitution: it permitted the substitution of an income tax for the present tax on intangible personal property by valuation, and it permitted in addition a general income tax. But the advantage of these provisions was largely nullified by restrictions with which they were coupled. The income tax on intangible property had to be at a flat rate. From the general income tax the exemption for a single person

could be only \$500, and for the head of a family only \$1000, and the highest rate could be only three times the lowest.

In establishing these limitations, the convention was undoubtedly influenced by the apprehension that unless prevented, the mass of the people possessed of small means, as the majority always are, would commit the state to extravagant expenditures and meet them by confiscatory taxes upon the rich. They probably had in mind one plank in the platform of a then strong and all but dominant faction in the Republican party of Illinois, that income taxes should be levied only upon incomes of more than \$5000. The convention apparently did not realize that if it hobbled the power of taxation so that under no contingency could it be used oppressively it could never be used efficiently. If the constitution had been adopted it seems unlikely that any legislature would ever have been bold enough to attempt a general income tax when it would have had to begin with wage-earners, drawing only \$500 a year. There are few if any precedents for this in ordinary statutory legislation, and yet the convention wrote it into the constitution. In so doing it indicated a distrust of the people which was rather characteristic. It could not venture to give to the legislature the power possessed by Congress and by other states like New York, Massachusetts, and Wisconsin, which have income taxes, to establish reasonable exemptions and to prescribe rates in its discretion.

Obviously the provision which was adopted was as impolitic as anything which could well have been conceived. The event was what might have been expected. In the campaign the prospect of abolition of the odious personal property tax and the relief of the home owner, renter and farmer through a lightening of the burden on real estate, were lost sight of in the seeming imminence of an income tax taking toll of subsistence incomes. That this was the primary cause of the defeat of the constitution is shown by the fact that the vote was adverse throughout the state. The legislative article permanently limited Cook County to one-third of the membership of the Senate, although it will soon have more than a majority of the population; and attack was made on this ground in Chicago. But the nega-

tive vote in the rural sections of the state was only less sweeping. The revenue article was the one common and decisive factor.

Many more instances of the aloofness of the convention from the voters might be cited. But one further, the decision to submit the new constitution as a whole instead of in parts, will suffice. The indications of experience were clear. In New York, a constitution formulated like that of Illinois by delegates of outstanding ability had failed of ratification when submitted as a whole. In Massachusetts and Ohio, which present the most successful examples of constitutional revision in recent years, the work of the conventions had been submitted in parts.

The delegates to the Illinois convention were well aware of this. But two considerations certainly and possibly others led them to a different course. First, many delegates were especially interested in some one or two features which they had had adopted. These it was insisted should be tied up to the whole instrument so that no part of the constitution could be ratified without carrying with it these special provisions. Second, from long thought upon the document as it was evolved, the delegates came to set such store by it that they could not bring themselves to divide it for submission into separate proposals. It was to them a whole which could not be broken up without destroying its unity, or changing its essential character.

Here again, excessive devotion to a particular feature or the zeal for perfection in the abstract prevailed over sound political judgment. It may be granted that ideally a constitution should be regarded as a single document, each part dependent on the rest. But practically it is possible to submit separately the principal controversial issues, and so adjust the various provisions as to provide for the contingency of approval of some and rejection of others. Had some such plan been followed, it is at least possible that some of the articles which were generally admitted to be improvements and which were comparatively immune from attack, like the grant of powers of home rule to Chicago, and the abolition of minority representation in the legislature, might have been saved from the wreck. As it was nothing remained.

From the experience of Illinois certain conclusions seem warranted: first, that constitutional revision in modern times is a task of very great difficulty at the best; second, that the method of amendment of existing constitutions, or in any event the submission of separate proposals, is much more promising than the submission of a new instrument *in toto*; and third, that much more definite effort should be made than in the past to bring the revision into harmony with prevailing public opinion and to educate the electorate as to the issues involved contemporaneously with the work of the convention.

The large number of voters who must pass upon a constitution today and the difficulty of conveying to them any intelligent comprehension of it, are a serious obstacle to ratification. Under the method of submission to conventions which prevailed at the time of the campaign for the federal constitution, it was considerably easier to secure a decision on the merits. In debate in convention fallacious objections could be exposed and refuted, considerations of advantage and disadvantage could be more accurately weighed, and the total effect better determined. Under such conditions the agitator was at a discount as compared with the statesman.

The historian, McMaster, speaking of Patrick Henry in the Virginia convention which passed upon the federal constitution, illustrates this. He says:

"No one spoke so well or reasoned so badly as Henry. He was to the end of his days an orator and an actor, and nothing more. Had he, indeed, gone upon the stage, he would have rivaled Garrick. . . . But a statesman he certainly was not. Whatever could be done by eloquence he could do. He could deliver a Fourth of July oration, move a jury, conduct a canvass, or entertain the legislature with tirades on liberty and the rights of man in a way that would have excited the envy of Pitt and Burke. When, however, the end sought was to be gained, not by good speaking, but by good reasoning, he was unable to cope with men whose limited vocabulary, whose mouthing and stammering and monotonous tones it was painful to hear.

"In the convention, therefore, though he came up as the leader of the Anti-federalists, he was much less formidable than

during the canvass. Rants on the iniquity of shutting up the Mississippi, on the dangers of allowing the Indiana claim, on established churches and monarchies, might impose on the men of the Ohio valley, but they were lost on men long accustomed to weigh evidence carefully, who had sat in Congress, who were familiar with the secret history of the Spanish negotiations, and had taken a part in framing the constitution. No arguments that Henry could bring forward could refute the close reasoning of Madison and the careful statements of Randolph and Marshall."

Where a constitution is submitted to the mass of the voters, necessarily only the smallest percentage can have any first-hand knowledge of its provisions. Most of the voters form their impressions from what they read in the newspapers or gather from associates who are no less ignorant. The newspapers take sides and give little or no space to contrary arguments. In Illinois arguments utterly baseless were advanced and had weight because it was not physically possible to reach the voters in whom they had lodged, with the truth. Prejudice and misrepresentation ran riot. In this there was no difference from 1788 when Henry and others inveighed against the federal constitution on spurious grounds. The difference is that under the former system it was possible to meet them, whereas we have not yet found a method of educating an electorate as a whole concerning an entire constitution.

The obvious policy then would seem to be, to proceed by the method of amendments, not too many at one time, or even if a constitution requires thorough-going revision, by separate proposals, not so numerous as to scatter too much the voter's attention. If in this way a limited number of single issues are presented, it may be possible through the discussion of the definite problem that naturally occurs in the legislature or convention, and later before the people, to bring about something approaching a fair understanding by the body of electors of that particular matter. In any event one provision, or a few which prove to be unacceptable (and might be relatively unimportant), need not defeat the rest and block any progress whatever.

Finally, in addition to the presentation of separate issues separately, public opinion should be taken into account, and a much more definite effort made to bring public opinion and the constitutional proposals of the legislature or convention into correspondence than has been done heretofore. This does not mean that every idea which may be temporarily popular should be unreasoningly accepted. But it does mean that we should recognize that the people are the ultimate constitution-makers, and take care to ascertain their wishes and acquaint them with the proposed changes in the constitution as the work progresses.

If public opinion is wrong on any point, it is by no means hopeless to change it by sound argument if sufficient time is allowed and the subject-matter in issue is not too large and complicated. Hence the advantage of the submission of separate constitutional proposals limiting the points in controversy, and the cultivation of contact with all organs of public expression, like civic, commercial, industrial, and labor associations, while the constitutional provisions are being formulated, and not merely after they are determined by the proposing body. Then it may be too late.

In short, public opinion should both influence and be influenced in the making of constitutional changes. Because of the very difficulty of making an entire electorate intelligent on the subject, unusual pains should be taken to that end. Large as the task is, ways and means should be found of explaining to the voters in their various communities throughout the state, the purpose, nature, and probable effect of the constitutional changes, and doing it in time to permit a period of incubation before the popular vote is taken.

In the course of this process the members of the legislature or convention will come to sense the temper of the public, and so much the better. If there is a preponderant and stable public sentiment on a vital matter, it must either be recognized or there is no use in proceeding. There may be times when, under such circumstances, the representative body will deem the price for accomplishment too high. But it seems reasonable to believe

that in the great majority of cases this mutual action and reaction will bring the people and their representatives into a state of accord under which substantial progress will be possible.

At any rate the experience of Illinois points to the necessity of some such policy. The great increase in the number of electors and the difficulty of leadership, render the old methods of seeking constitutional changes ineffectual. There is no need to despair and give up the effort for constitutional advance as hopeless. But there is need to adopt new methods fitted to the new conditions, chief among which is the dominance of public opinion.

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