CONstitutional CONcepts

Number 9

A series of condensations of the scholars' research papers prepared by the Illinois Constitutional Research Committee which was appointed by Governor Richard B. Ogilvie to furnish background material for delegates to the Constitutional Convention.

THE STATE BILL OF RIGHTS

Frank P. Grad

With a national bill of rights in the federal Constitution, why should the Illinois Constitution have a separate bill of rights?

Does the current court interpretation of the federal 14th Amendment eliminate the need of the State Bill of Rights?

Should our Illinois Constitution contain a guarantee to labor of the right to organize? What about a right to work?

These and other questions are answered in the paper "The State Bill of Rights" written by Frank P. Grad, Professor of Law, at the Columbia University Law School. This paper will be one of the background materials for the Constitutional Convention delegates.

The following is an abbreviated summary of the original, and does not purport to contain all the detail of the original. (See the back page for further information.)

Every one of the fifty state constitutions includes a bill of rights or a declaration of rights placed in one of the first articles of the constitution, an indication of the great importance which has been attributed to it throughout state constitutional history. Unlike the Constitution of the United States, which added the Bill of Rights by way of the first ten amendments—in order to make the new constitution acceptable to the people of the original thirteen states—the several state constitutions, from earliest times on, have included the protection of individual liberties as a primary part of the constitutional document itself.

The Place of the Bill of Rights in the State Constitution

The inclusion of a bill of rights in the state constitution might, logically, be viewed as unnecessary. State governments, in their origin and nature, are sovereign governments having all the powers government can have, except insofar as some of these powers have been delegated to the United States in the Federal Constitution. The state government is wholly responsible to the people, and in theory, at least, the people ought to be capable of controlling their government so as to prevent it from riding

roughshod over the rights of individuals or minority groups.

In fact, we know from our experience—just as the Founding Fathers knew from theirs—that government may become oppressive and arbitrary, that minorities may sometimes need protection against the tyranny of the majority, that the dissenter, the critic of government of the existing order, and the social theorist need to be protected against abuses of the power of government, as well as against the imposition of any official or orthodox view of government, for a democratic society needs constant reexamination and criticism for its growth and for its sound development. Moreover, the citizen in his ordinary pursuits needs to be protected against bureaucratic and administrative excesses, whether resulting from overzealousness or negligence, and whether done in the name of the public interest or from less pure motives.

The need for the protection of the individual or the group is clear. Yet such protection could be provided—and most of it indeed is—through the method of ordinary legislation. Why, then, are certain protections given this special constitutional status? The answer must be sought in the nature of the state constitution itself.

The Constitution of the United States is a document of grant: the Federal government has only those powers granted or delegated to it by the states, and in spite of its enormous powers, the Federal government cannot exercise any function which cannot be derived from one of the powers expressly delegated to it. State constitutions, on the other hand, are documents of limitation. The state government, as has been noted, has all the powers a sovereign government can have *except as limited by the state constitution.*

To react flexibly and effectively to current needs, state constitutions ought to be simply and briefly written, and ought to contain few limits, for the inclusion of any provision within the constitution generally puts the matter outside the range of legislative consideration and action. The inclusion of certain personal rights and liberties in the constitution's bill of rights thus puts them beyond the reach of the legislature, and any laws passed by the legislature (or any action taken by other branches of the government) in violation or derogation of these rights are unconstitutional and subject to invalidation. Thus, the inclusion of certain rights in the bill of rights elevates them to the highest order in the hierarchy of our laws.

Relationship with Federal Bill of Rights

The present Illinois Bill of Rights, similar to other state bills of rights, duplicates many of the most important provisions of its Federal counterpart. There was an excellent reason for this initially, for the courts had held that the first ten Amendments protected the people only against legislation and action of the government of the United States. To protect themselves against denial of these rights by their own state governments, the people needed to have protection in their own state constitutions.

Through the 14th ("due process") Amendment, the Federal government for the first time undertook to protect the rights of its citizens against encroachments by their own states. A gradual incorporation by United States Supreme Court interpretation has construed the 14th Amendment so that today, in October 1969, most—but not all—of the rights guaranteed in the Illinois and other state bills of rights duplicate provisions of the Federal Bill of Rights.

There is a clear continuing justification for state bills of rights. First, the state may grant greater and more far-reaching protection to its citizens than Federal decisions require. For instance, the Illinois Bill of Rights does provide greater protection in the case of damages for property taken or "damaged" for public use by eminent domain.

Another continuing reason for state bills of rights is based on a view of the relationship of the people to their state governments. State government has long exercised powers that affect the people most directly in their family relations, education, property arrangements, occupational requirements, environmental controls, and in many other aspects of their daily lives. When a person's rights are abridged by his state government, he should be able to seek protection close to home—in his own state courts, subject to his own state constitution.

Bills of rights appear to be viewed with even more awe than the constitution as a whole, and consequently there is great political reluctance to change the language of a bill of rights. Thus, the question whether archaic language should be removed from state constitutional bills of rights should be carefully weighed against the popular apprehensions which may be caused by mere verbal changes.

The Illinois Bill of Rights: Derivation and Contents

Of the 20 provisions of the present Illinois Bill of Rights adopted as part of the Constitution of 1870, 18 are all derived from the first Illinois Constitution of 1818. There have been no amendments of the present Illinois Bill of Rights since its adoption almost one hundred years ago. They largely parallel the provisions of the first eight Amendments of the Federal Bill of Rights, and of such other Federal constitutional provisions as prohibit the suspension of the writ of habeas corpus or bills of attainder and *ex post facto* laws (U.S. Const., Art. I, Sec. 9). Section 12 prohibiting imprisonment for debt and Section 13 requiring just compensation for private property taken or damaged by eminent domain, have their counterparts in most other state constitutions. Section 1, on inherent and inalienable rights, Section 19, on rights to remedy and justice, and Section 20, which admonishes a "frequent recurrence to the fundamental principles of government," merely state principles of government rather than define areas of protection.

A noteworthy and significant omission from the Illinois Bill of Rights is the lack of an express guarantee of the equal protection of the laws. An adequate clause guaranteeing the equal protection of the laws, enhanced, possibly by an express protection of civil rights regardless of race, creed, color or sex, ought to be considered for inclusion in the Bill of Rights so as to give expression to what is already the law of the land as well as the aspiration of its people.

Protection of the Right to Organize and "Right to Work" Amendment

It is likely that the forthcoming constitutional convention will be urged by union and labor groups to include an express statement of the right of workers to organize and bargain collectively. It is also to be expected that some employer groups will urge upon the convention the adoption of provisions that would prohibit closed shop agreements through a so-called "right-to-work" amendment.

At present, five states (Florida, Hawaii, Missouri, New Jersey and New York) give constitutional recognition to the right to organize and bargain collectively. Seven states (Arizona, Arkansas, Florida, Kansas, Mississippi, Nebraska and South Dakota) prohibit the closed shop by a right-to-work amendment.

Regardless of political sympathies, the inclusion of either one of these provisions appears to be unwarranted. The right to organize is recognized in all fifty states and it would be difficult to argue that the mention of that right in five state constitutions protects workers more fully than they have been protected in the other forty-five. The only workers who might benefit from the guarantee of the right to organize and bargain collectively are employees of state or local governments or of charitable, religious or other institutions who have not been granted that right heretofore. In those instances, the salient issue is generally not the right to organize or bargain collectively, but the right to engage in concerted action, such as strike action, to support their collective bargaining efforts.

This subject is one which is more effectively dealt with by legislation which can provide procedural and substantive safeguards. In the Hawaii and New Jersey Constitutions, which expressly grant the right to organize to public employees, this grant is promptly cut back by limiting concerted action to making known their grievances through representatives of their own choice. In practice, the presence or absence of constitutional or other legal barriers to concerted action by public employees has neither deterred nor prevented such action, nor has the presence of constitutional provisions that broadly grant the right to organize and bargain collectively to all employees significantly enhanced their organizing efforts.

The right-to-work provision, which is a constitutional ban on the closed shop, is also of dubious constitutional importance. The Federal law regulates the use of the closed shop device in establishments in interstate commerce. Some states that do not have a right-to-work amendment have accomplished results similar to that of the Federal law by state legislation. The question is whether the ban on the closed shop is of such preeminent importance as to warrant its inclusion as a protected right in the state constitution. Another question is whether the right-to-work laws protect the worker's right to choose a job, or whether they protect the employer against having to accept the closed shop after negotiations with a strong union. Right-to-work amendments are not generally supported by workers whose rights the amendment purports to protect. It is perhaps noteworthy that the *Model State Constitution* contains neither a guarantee of the right to organize and bargain collectively nor of the so-called right to work.

Social and Economic Rights

Bills of rights have traditionally focused on protections of a procedural nature against governmental interference with life, liberty and property. It has been repeatedly proposed that bills of rights should reflect not only the people's right to be left alone by their government, but also the people's right to make claims upon their government for the rendition of social and economic services. In spite of these repeated proposals, none of the recent state constitutions contain an enumeration of social or economic rights.

The right to be free from hunger and want, the right to medical care and dignified support during old age, the right to adequate food, clothing and shelter, the right to useful and creative work—all of these have been formulated and reformulated since the days of the New Deal. Should constitutional conventions of the future view the bill of rights as a mere depository of general aspirations and contemporary pieties, they will find it easy to include the new rights. If, on the other hand, they view the bill of rights as a meaningful document in which every guarantee of a right carries with it the assurance of an effective remedy, then they will first attend to finding the remedy before articulating the right.

A guarantee of adequate food, clothing, shelter and medical care in a state constitution, or a guarantee of security during old age is meaningless unless provision is made elsewhere in the constitution to make good on that guarantee. Otherwise, the statement of new rights is about as useful as the present provision of the Illinois Constitution that a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty.

Unless a method to fulfill the promise of social and economic rights is provided, their inclusion in the state constitution will at most provide a slogan or a rallying point for political action by the disadvantaged groups who, instead of new rights will discover new disappointments.

UNION LEAGUE CLUB OF CHICAGO

WHY these DIGESTS?

Preparing for a constitutional convention requires advance background and research. Accordingly, Governor Richard B. Ogilvie called upon a group of scholars to prepare research papers for the use of delegates and appointed Dr. Samuel K. Gove, director of the Institute of Government and Public Affairs of the University of Illinois as project director. Sixteen papers on various aspects of state government are being assembled. These will be issued in condensed form in continuing issues of Constitutional Concepts. A sincere attempt has been made to retain the concepts and ideas of the writers whose papers run from up to 80 pages or more. Any errors which result from the condensations clearly are not those of the scholars originating the research.

As no public funds were available to the Constitution Research Group, the Union League Club of Chicago made an initial grant of $10,000 to the group so the work might proceed. The Club took no part in the selection of the scholars nor the topics to be researched; made no effort to influence either research or conclusion; and did not, in any manner, direct the group. Nor does the Club necessarily endorse any suggestions, proposals or ideas expressed by the scholars.

This is one of a series of condensed research papers, prepared and published as a public service by the Public Affairs Committee of the Union League Club of Chicago.

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