A BASIC DEFECT IN THE ILLINOIS CONSTITUTION

LYNFORD A. LARDNER
Northwestern University, Evanston

The government of the State of Illinois is today functioning under a constitution adopted in 1870. In spite of eight amendments, the last of which was adopted in 1908, there has been an increasing amount of dissatisfaction with our State Constitution. The recognition of the need for far-reaching and numerous changes had become so widespread that in 1920 a constitutional convention was called. The fact that the results of that convention were not approved by a majority of the voters at a special election called in 1922 does not mean that the need for change has diminished. On the contrary, the inadequacies of the present Constitution have become increasingly apparent as the years have passed.

It is not my intention here to make any item by item analysis of the present Constitution, nor to propose specific changes in the various articles. Many analyses have already been made of specific aspects of that Constitution, pointing to defects in such matters as the amending procedure, the judicial organization of the State, the revenue system, the organization of the executive branch of the State government, and the provisions for local government. Rather than to repeat those analyses—a repetition which could only be superficial in a brief address—I wish to call your attention, in this paper, to what I consider to be a basic defect of the Illinois Constitution. The point I should like to make might be introduced by the question: Why should the present Constitution be so thoroughly criticized, so generally unsatisfactory in so many of its provisions, unless there be some basic defect?

Much that has been written and said on behalf of a need for constitutional revision in Illinois implies that the basic defect is the age of the present Constitution. It is easy to point to the fact that the Constitution was adopted seventy-seven long years ago, and that it was intended to operate in an agricultural state populated by a meager two and a half million instead of in an industrialized state with a population approaching eight million. And now we have the atom bomb to make the contrast even more striking. All of these points are true, but I think it is gross error to assume, without further inquiry, that a constitution is inadequate, out-dated, and defective merely because it was drafted and adopted with reference to economic, social, and political conditions which have since undergone fundamental changes.

Let us for a moment make some comparisons between the Illinois and United States Constitutions. If one is old, the other is much older. Seventy-seven years is young contrasted to the one hundred and fifty-eight year age of the Constitution of the United States. While the population increase during the life of the Illinois Constitution has been threefold, the population increase during the life of the Federal Constitution

has been almost fifty-fold, or from three to one hundred and forty million. And need I do more than to hint at the far greater economic, social and political changes that have taken place in the United States in the last 158 years than have developed in the state of Illinois in the past 77 years? In spite of these contrasts the Federal Constitution has been better adapted to modern problems than has the Illinois Constitution. One cannot justifiably say that this better adaptability is due to the character or greater number of amendments to the Federal Constitution. While it is true that there are technically twenty-one amendments to the Federal Constitution as against only eight to the Illinois Constitution, yet it must be realized that only a few of the twenty-one amendments have any significant bearing on the problem of adjusting the Federal Constitution to changing economic, social and political conditions. For our purposes here the first ten amendments may be disregarded because they were adopted in the early 1790's under circumstances which indicate that the people of those times considered them an integral part of the original Constitution. Of the remaining eleven amendments only five can be regarded as having been prompted or necessitated by economic or social changes. These five are the three civil war amendments, the 16th amendment which cleared away an obstacle to the adoption of an income tax by the Federal Government, and the 19th amendment which extended the suffrage to women. But the subjects of these amendments involve only a microscopic few of the many phases of American life which have undergone great change. It is safe to conclude that the amendments to the Federal Constitution have contributed only slightly to the great task of adapting that Constitution to modern conditions.

The comparison I have been making ought to demonstrate amply that the mere age of a constitution is not in and of itself a defect. The comparison hints, furthermore, at what I regard as a fundamental defect of the present Illinois Constitution. That defect is that the Constitution is too long and too rigid. The Illinois Constitution is not flexible and adaptable to changing conditions. In that respect it differs greatly from the Federal Constitution. It should be emphatically noted that a well drafted constitution will contain no more than the bare essentials, the fundamental features, with respect to the organization and powers of the government to be established. Further than the fundamentals it should not go. Therein lies a vital defect of the Illinois Constitution. It contains more than the bare essentials. It contains much that is properly of a legislative level, not of constitutional importance. It is not without significance that whereas the Federal Constitution as amended contains roughly 7,500 words, the Illinois Constitution requires approximately 25,000 words.

A few illustrations will demonstrate the defect I am describing. Article XIII, which deals with public warehouses, provides in section 2 that:

> The owner, lessee or manager of each and every public warehouse situated in any town or city of not less than 100,000 inhabitants, shall make weekly statements under oath, before some officer

to be designated by law, and keep the same posted in some conspicuous place in the office of such warehouse, and shall also file a copy for public examination in such place as shall be designated by law, which statement shall correctly set forth the amount and grade of each and every kind of grain in such warehouse, together with such other property as may be stored therein, and what warehouse receipts have been issued, and are, at the time of making such statement, outstanding therefor; and shall, on the copy posted in the warehouse, note daily such changes as may be made in the quantity and grade of grain in such warehouse; and the different grades of grain shipped in separate lots shall not be mixed with inferior or superior grades without the consent of the owner or consignee thereof.

Notice the unnecessary rigidity of this section. And subsequent sections of the same article contain provisions equally definitive. Such details have no place in a constitution. They are essentially legislative, not constitutional in character. It is not, I submit, basically essential for the effective and satisfactory functioning of government in Illinois that the provisions of this article apply only to cities with more than a 100,000 population; nor that statements under oath be made every seven days; nor that daily changes be noted. Such specific requirements in a constitution prevent the legislature from adjusting the operations of the government to meet the main purpose of the article. The objective was to prevent the issuance of false and fraudulent warehouse receipts and to protect producers and shippers from such falsification and fraud. Yet from the way in which the article was drafted with all its detail the legislature could not without constitutional amendment have extended like control to prevent fraud on the part of the operators of public warehouses in cities with a population under 100,000. Also, without further amendment the state legislature could not properly provide for quarterly instead of weekly statements from public warehouse operators even though it were realized that weekly statements were unduly burdensome on business and unnecessary for the purpose of the regulation. A person would seriously be considered a fit inmate for an insane asylum were he to propose that the Federal Constitution be amended so as to provide for a bi-weekly report to the Interstate Commerce Commission of the total volume of business done by all common carriers engaged in interstate commerce.

Criticism of a similar nature may be made of provisions in the Illinois Constitution on the subject of local government. Every county in the State is constitutionally required to elect a county judge, a county clerk, a sheriff, a treasurer, a coroner, and a clerk of the circuit court. In addition those counties which have not chosen to organize on a township basis are required to elect a board of three members to be known as the Board of County Commissioners, part of whose authority is defined in the constitution. In addition the management of the county affairs of Cook County are constitutionally vested in a board of fifteen, two-thirds of the board to come from within and one-third to come from without the city of Chicago. It should be obvious that provisions such as these prevent the legislature and the people of Illinois counties from taking full advantage of the experience and experiments of other

states in the matter of improved county organization. In New York City and some other jurisdictions, for example, it has been found that a Chief Medical Examiner who is appointed and under civil service is far more satisfactory than the ancient office of Coroner, which it has replaced. In order for an Illinois county to profit by that experience it would first be necessary to eliminate the elective office of the coroner by a constitutional amendment.

One further illustration of constitutional rigidity in Illinois may be noted in the constitutional requirement that in the executive branch of the State government the following officers must be elected: the Governor, the Lieutenant Governor, the Secretary of State, the Attorney General, the Treasurer, the Auditor of Public Accounts, and the Superintendent of Public Instruction. This election system means that these officers are in an autonomous position, they may feel themselves responsible to none but the electorate for the operation of their respective departments. This situation permits these officers to direct their departments with a high degree of independence of the Governor, and can even lead to their working at cross purposes with the Governor. Such a condition of non-coordination has existed at times in Illinois to the serious jeopardy of the effective functioning of the State government. Any attempt to remedy it requires a constitutional amendment. It is interesting, in this respect, to note that in 1917 the State of Illinois took the lead in the re-organization of its executive branch. This re-organization took the form of eliminating the autonomous position of many of the existing departments, boards and commissions by bringing them under the guiding and co-ordinating authority of the Governor. It was a governmental improvement that was long overdue in practically every state in the Union. However, the much needed coordination of the executive branch in Illinois had to stop short of the goal desired by some because the legislature was not free to alter the constitutional autonomy of the Attorney General, the Secretary of State, and the few others.

For those who wish to take the time to study the Constitution of Illinois other illustrations than those given above could be found which reveal the tendency of the Constitution to go too much into detail—the unhealthy tendency to clothe matters which properly belong to the level of legislative policy with the rigidity and sanctity of a constitutional status. The adaptability of the government to changing conditions is thus seriously jeopardized. No good executive, whether he be a business man or a public official, would delegate duties to a subordinate and specify in detail the manner in which those duties were to be carried out. He would content himself with outlining the general purpose of the authority he was delegating and leave it up to the subordinate to determine and alter, if necessary from time to time, the means by which that authority was to be implemented. One might legitimately wonder why we don't use the same principles when acting in our sovereign capacity as when acting as good business men.

Unless the present inflexibility of

the Illinois constitution is corrected many of its defective articles will not be satisfactorily remedied. A revised constitution as inflexible as the present one would provide only a temporary improvement. Defects in such a revised constitution would quickly develop as the need arose for changing details. The benefits of a brief and flexible constitution can nowhere be found better revealed than in our own Federal Constitution. The contrast between the Federal and Illinois constitutions in the manner in which many important matters are handled is striking. Whereas the Illinois Constitution in Article VI devotes many hundreds of words to a description of a court system for the state, the Federal Constitution dismisses the subject of the structure of the Federal court system with the following brevity:

> The judicial power of the United States shall be vested in one Supreme Court and such inferior courts as Congress shall from time to time ordain and establish.

If the subject matter of Article XIII of the Illinois Constitution had been handled in the manner used in the Federal Constitution for granting legislative power it would have been condensed to some wording such as this:

> In order to prevent the issue of false and fraudulent warehouse receipts and to protect producers and shippers the Legislature shall have the authority to pass all laws necessary for the regulation of elevators or storehouses where grain or other property is stored for a compensation.

If the powers of Congress over such subjects as interstate commerce, of bankruptcy and coinage of money had been as carefully and thoroughly described as was the power of the state legislature over warehouses the Federal Constitution would have necessitated endless amendments beginning within a few decades of its adoption. In the Federal Constitution the only executive officers named are the President and the Vice President. The departments of the executive branch of our national government have been allowed to develop as the times required. At least in their development Congress has not been hampered by the notions which the framers of the Constitution had in 1787 as regards the number and duties of these departments.

The remarks I have been making on the matter of the essential nature of a constitution and the necessity for conforming to it were well summarized by John Marshall, one of the great Chief Justices of the United States Supreme Court, when he wrote in the important case of McCulloch v. Maryland:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefor, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language.....We must never forget that it is a constitution we are expounding.[1]

And several pages later, in the same opinion, he observed that the American Constitution was

> intended to endure for ages to come, and, consequently, to be adapted to the vari-

[1] 4 Wheaton, 407.

ous crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur.[2]

I sincerely believe that all efforts in Illinois for much needed constitutional improvement will be in vain unless the goal of the ideal constitution—a flexible constitution—is kept constantly in mind. But I would be guilty of leaving you with a gross misunderstanding were I to give you the impression that the task of casting constitutional provisions in broad and general terms while leaving it up to the legislature to fill in the details is an easy one. It is not. There are many opponents to constitutional revision. Their reasons for opposition are important and cannot be ignored. Broadly speaking these opponents fall into two groups. The first group is made up of those who have a personal interest in the preservation of one or more of the rigid provisions in the present Constitution. All people with high incomes and small real property holdings are in a personally advantageous position due to inability of the legislature under the present Constitution to levy a state income tax. They would certainly stand to lose if that position were disturbed. Coroners, whose office is now safeguarded by the Constitution, might well object to a revision which placed the very existence of their office at the hands of future legislatures. I do not wish to imply that all people who might conceivably fall within this first group will be swayed by an imagined personal interest, but there are a great many who will be. And unless this opposition is taken into account it may prove disastrous to reform.

The second group of opponents consists of those who fear that unless grants of power to our government are carefully defined and circumscribed our democratic institutions will be in serious danger at the hands of irresponsible officials who might not properly cherish our institutions. This group of citizens is undoubtedly motivated by a genuine desire to preserve democracy. No one has that desire more than I. But many people in this group are misguided as to how one best preserves democracy. It cannot be done by placing detailed checks on every grant of power. To do that is to defeat the very objective in establishing a government, for it leads to inactive government rather than democratic government. Democratic government cannot exist unless it is a competent government, and that means that grants of power must be ample and not too constricted. The fear of this is, of course, that broad grants of power may lead to abuse. But this is true of any grant of power. The only true protection against the abuse of power by our government lies in the selection of competent officials by an alert and intelligent electorate. In our desire to preserve democracy we must never overlook the fact that in spite of constitutional provisions the great principles of democracy will be maintained only as long as the people have faith in those principles and properly assume their responsibility at the ballot box.

[2] 4 Wheaton, 416.