THE ESSENTIALS OF A WRITTEN CONSTITUTION. PRINTED FROM VOLUME IV. PP. 313 - 353

Published @ 2017 Trieste Publishing Pty Ltd

ISBN 9780649224449

The Essentials of a written constitution. Printed from Volume IV. pp. 313 - 353 by Harry Pratt Judson

Edited by Trieste Publishing Pty Ltd.
Cover @ 2017

www.triestepublishing.com

HARRY PRATT JUDSON

THE ESSENTIALS OF A WRITTEN CONSTITUTION. PRINTED FROM VOLUME IV. PP. 313 - 353

Trieste

THE UNIVERSITY OF CHICAGO
FOUNDED BY JOHN D. ROCKEFELLER

THE DECENNIAL PUBLICATIONS

THE ESSENTIALS OF A WRITTEN CONSTITUTION

BY
HARRY PRATT JUDSON
PROFESSOR OF COMPARATIVE POLITICS AND DIPLOMACY AND HEAD OF THE DEPARTMENT OF POLITICAL SCIENCE

PRINTED FROM VOLUME IV

CHICAGO
THE UNIVERSITY OF CHICAGO PRESS
1908

THE ESSENTIALS OF A WRITTEN CONSTITUTION

HARRY PRATT JUDSON

SINCE the year of the Declaration of Independence of the United States there have been created a long series of written constitutions. Each of the original thirteen states of the American Union set forth its fundamental law in statutory form during the Revolutionary War. In 1781 the confederated thirteen adopted a definite constitution—the Articles of Confederation—which soon proved most unsatisfactory. After only a half-dozen years under this frame of government the present constitution of the United States was formed. In the century since that time many new states have come into the Union, each with its written constitution, and nearly all the states have several times recast their constitutions entirely. Meanwhile the Latin American republics have come into existence and have framed an interminable list of such documents, all more or less based on that of the United States. In Europe, France began in 1791 with her first written constitution, and has followed that with no less than six others. With the gradual dominance of liberal ideas throughout the continent every other nation but Russia has adopted a similar policy, so that at the opening of the twentieth century the land of the tsar is the only civilized country on the globe which is not governed in accordance with the stipulations of a specific constitutional charter. To be sure, a material part of the British constitution is not reduced to statutory form, but much of it is, and the great British colonies, like Canada and Australia, have in the shape of parliamentary enactment each a quite definite organic law.

The political history of Christendom for the last century, then, has consisted largely in the evolution of constitutional government and the fixing of its principles in statutory documents. These documents have many things in common, and at the same time have many differences. Some constitutions include in detail important matters which others omit altogether. Some are elaborate and comprehensive; others are merely sketchy outlines. Some are well adapted to the social conditions and needs from which they have sprung. Others, adopted by imitation from other countries in which success has been evident, are more or less ill-suited to the people to which they are applied, and are in some cases obvious failures. Still, on the whole it is clear that the modern system of government involves a fundamental law—a constitution—which shall be quite full and precise, and which, therefore, is best reduced to the form of a definite statute.

The purpose of such fundamental statute—in other words, of a written constitution—is security against abuses on the part of those intrusted with political power—whether such abuses arise from design, from incompetence, or from inadvertence. Security is found in great part by specific and easily accessible knowledge as to just

what are the powers which officers of government are entitled to use, and particularly as to the powers forbidden. Of course, to insure protection there must also be provided a means of calling to account officers who may transgress their sphere of authority. Paper restrictions alone are little more than hortatory legislation, and as a rule one cannot rely on them to restrain average human nature.

The officers of government are merely the agents of a power higher than themselves. This power is found in the last analysis to consist in that portion of the community which has supreme political authority—in other words, whose will is law. In every civilized human community there is such supreme authority somewhere. Some portion of the community of necessity rules the whole, and this portion is the sovereign. Sovereignty—final political supremacy—may belong to a single person, in which case the community is a pure autocracy; to a small number of persons, in which case there is an aristocracy; or to a large number of persons, in which case the community is a political democracy. Autocracies are practically obsolete among civilized men today, that of Russia being the only one on a considerable scale, and even that having in practice no small number of limitations on the theoretical supreme power of the tsar.

Aristocracy and democracy, in the political sense, it will be noticed, are merely relative terms. There is no exact point at which a community ceases to be aristocratic and becomes democratic, and it is quite obvious that a community may be aristocratic as respects a second and at the same time democratic in relation to a third. France under the Orleans monarchy vested supreme political power in some 200,000 voters, while under the second empire there were 7,600,000. More than one of the states of our Union at the outset had suffrage laws so restrictive in character that they were decidedly aristocratic as compared with their present status, although undoubtedly democratic in comparison even with France under Louis Philippe.

An organized political community, independent of external control, is commonly called a state. There is, however, often a confusion of thought arising from the more or less unconscious use of the term "state" in two different senses. These two applications of the term should be sharply distinguished, and the distinction kept always in mind.

In the larger sense the state includes the whole community living in a given territory and subject to the political authority of its government. In the limited sense the state includes only that portion of the community which has political authority over the whole, and whose agent in the exercise of that authority is the government. The state in the larger sense we may, for convenience, call the social state. The other may be called the political state. The members of the social state are all subject to law. The political state creates law and enforces it. Political power belongs to the political state, to be sure, for the protection and welfare of the social state. But in the exercise of that power the political state has no legal superior. Its will is law for all.

In defining and restricting the powers of government the political state at the same time secures itself from the results of the abuse of such power, protects a minority

of its own membership from oppression by the majority, and also secures the defenseless non-political portion of the social state from like oppression. Political democracy implies that the political state is a relatively large portion of the social state. The steady extension of suffrage in the states of the American Union has gradually increased the proportional extent of the political state. It goes without saying, however, that even with the adoption of woman suffrage the members of the political state will in a normal society be considerably less than a half of the whole community.

It should be noted that subordinate political communities, in possession, however, of supreme authority over some subjects, are also commonly called *states*—as those of the American Union, those of the German empire, and those of the Commonwealth of Australia. No adequate scientific term has been suggested as a substitute in such cases. One must bear in mind always in which sense the term is employed—the French state meaning one thing, the state of Illinois quite another.

A constitution is adopted by the political state, but always with the aid of a delegated body (a "convention," it is called in this country), which has greater or less powers in the matter. These powers always include that of drafting a scheme of organic law, and may also include its final enactment. In the latter case the convention is given plenary power.

This latter method is pursued in France under the present constitutional laws. The convention is formed by the union of the two houses of the national legislature in joint session, and the action of this body is final. Thus the constitution of France is amended without the choice of a constituent body *ad hoc*, and without a popular vote on the amendments drafted.

In the states of the American Union a new constitution is uniformly drawn by a convention chosen for the purpose, but it is usual for enactment to be effected by a direct vote of the people.

A full constitution includes, besides the enacting clause and what may accompany it, usually called the "preamble," four distinct parts.

The first treats of the *social state;* the second covers a definition and scheme of organization of the *political state;* the third, by far the most extensive of all, treats of *government*, including its structure, the powers and duties of its branches and of its officers, restriction on the powers of government, and the sanctions by which government is controlled; the fourth includes a mode of changing the constitution—the *amending* process.

Some of these may be implied, or may be left to the action of the ordinary legislative authorities. Hence it appears that we may have to consider political provisions which are *express*, or *implied*—and others which are *constitutional* or *statutory*.

THE PREAMBLE

The only really essential part of a preamble is the enacting clause. This contains the statement by the sovereign authority that the document is made law: "We, the people of the United States . . . . do ordain and establish this Constitution."

Many preambles contain also other matter, especially such as indicate the purposes of the enactment, and in some cases such as express religious faith. In the preamble to the federal constitution of the United States the purposes are indicated: "In order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity." The preamble of the constitution of the state of Illinois, adopted in 1870, runs as follows: "We, the people of the State of Illinois, grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations in order to form a more perfect government, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the State of Illinois." Here we have, besides the enacting clause, both the expression of religion and the indication of purposes. The constitutions of Louisiana adopted in 1845, in 1852, and in 1864, had this preamble: "We, the people of the State of Louisiana, do ordain and establish this Constitution." This was the mere enacting clause.

THE SOCIAL STATE

The extent of the social state is seldom expressly defined in a constitution, as it is plainly enough to be understood from the attendant circumstances. The Illinois constitution has as its first article a definition of the state boundaries, by which is indicated the area covered by the authority of the state (*i. e.*, the political state) of Illinois. The people residing within this area form the social state. The Swiss constitution (Chap. I, Art. I) enumerates the twenty-two cantons of the republic — which in their totality form the confederated social state, as each by itself is the cantonal social state. The German imperial constitution (Art. I) enumerates in like manner the twenty-five states of the empire, and then proceeds (Art. II): "Within this territory the empire shall have the right of legislation according to the provisions of the constitution." Under the war- and treaty-making powers the limits of German jurisdiction have been extended to include Elsass-Lothringen and a number of colonies over sea, thus notably extending the German social state. The Prussian constitution (Art. I) reads: "All parts of the Monarchy in its present extent form the Prussian state territory."

International disputes as to boundaries of course relate to the relative extent of the social states in question, the disputed areas being subject to one or the other legal authority, as the case may be.

The area of the social state is usually divided into convenient portions for governmental purposes. These may be *states* (as in our own republic), *departments* (as in France), *cantons* (as in Switzerland), *crown lands* (as in Austria), *provinces* (as in Canada), or they may have still other designations. All are alike in being more practi-

cable governmental units than the entire nation. They differ only in so far as the organization of the political state differs under different constitutions. There is no common name known to political science by which these primary divisions of the social state may be called. Perhaps for convenience we may indicate them as *primary social groups*.

These primary groups are farther subdivided, also for governmental convenience, into what may we call *secondary groups—counties* (in all our states but Louisiana, where they are called *parishes*), *arrondissements—i. e.*, "districts"—(in France), and the like. In turn, secondary groups may be subdivided into what may be termed *minor social groups*. With us there are rural groups, *towns;* municipal groups, *cities* and *villages;* special groups, *school districts*, *sanitary districts*, and the like. In France the elementary minor social group is the *commune*, a cluster of which form the *canton*. Of course there are great varieties in the form and nomenclature of these minor groups.

THE POLITICAL STATE

The legal qualifications for suffrage mark out the limits of the political state. These qualifications may be embodied in the constitution, or may be left to the discretion of the ordinary law-making power; but in either case they form a most essential element of the organic law. It is the political state which has final authority; which creates and modifies the constitution itself; which directly or indirectly constitutes the personnel of government and enacts ordinary law. It is therefore of prime importance that the membership of this fundamental constituent body of the community should be determined wisely and beyond the possibility of doubt. It would seem, then, that so vital a feature in the commonwealth should be hedged about by every safeguard of the fundamental law. The structure of government itself is surely not more important than the basis on which all government rests.

The French constitution merely requires[1] that the members of the Chamber of Deputies shall be elected by universal suffrage, details being left to statute. The constitution does not define universal suffrage, but existing law (1874) sufficiently defined it as confined to male French citizens not less than twenty-one years of age. Of these in 1880 there were 9,948,000, out of a total population of 37,672,048. Thus in France at that time the political people were at the rate of about 264 to each 1,000 of population—in other words, the political state was 0.264 of the social state.

The German imperial constitution, like that of the French republic, requires that the members of the popular branch of the national legislature shall be elected by universal suffrage,[2] but leaves the definition to statute. In Germany the electoral law fixes the voting age at twenty-five, and limits the suffrage to the male sex. There were in the empire in 1880 9,124,000 qualified voters, out of a total population of 45,234,061. This made the political people of the empire about 202 to each 1,000 of total population—the political state was 0.202 of the social state.

[1] *Loi constitutionelle*, 25-8 février, 1875, Art. 1.

[2] *Verfassung des Deutschen Reichs*, Art. 20.

The federal constitution of the United States does not define the qualifications for suffrage in choosing the House of Representatives, but leaves the matter expressly to the several states.[3] It follows that the states are free to adopt such varying legislation as may seem to them most expedient, and the suffrage laws differ accordingly. Further, the states may embody these laws in their constitutions, as is the case with Illinois,[4] or may relegate power to the legislature by ordinary statutes. The former, however, is the method preferred. Universal male suffrage, the voting age being twenty-one, prevails in most states. Property or intelligence qualifications are required in a few, and in a small number the sex limitation is waived. On the whole, the political state is not far from a fifth part of the social state.

The organization of the political state is quite as essential as its definition.

In a pure democracy the organization is very simple. The voters gather in one place and need only such officials as may make it possible for the business of the assembly to be conducted in an orderly manner—a chairman, a clerk, and possibly a peace officer to maintain proper decorum. A still more important point of organization, however, is an agreement as to what proportion of the whole number shall, by the common action, be taken as speaking with authority for all. This is usually a majority, although in the Russian village commune unanimity has been required. In the New England town-meeting majority rule has uniformly prevailed.

Large areas and great numbers of people make representative government a necessity, and quite different methods have to be devised for ascertaining the popular will. The political people have to be divided into convenient voting groups and proper devices found for taking the votes and gathering the results. From this necessity have come by gradual evolution our complicated modern election laws, including the Australian ballot and the voting machine. Obviously the debate, which in a pure democracy immediately precedes the vote, must in this other system be disconnected from it, as public organization can hardly go farther than to ascertain the general will after the people have made up their minds. In elections, however, as in democratic assemblies, it is essential that there be a definite agreement as to the proportion of the total vote which shall rule. This may be a plurality, or a majority, or a fraction larger than a mere majority. In most elections in the states of our republic a plurality suffices to elect a candidate to office. The law of Vermont, however, for instance, requires that if no candidate for governor has a popular majority then the legislature in joint session shall choose a governor from the highest three candidates on the list.[5] Rhode Island and New Hampshire have had similar provisions. In California certain questions, such as that of the public ownership of street traction lines in cities, are determined by a vote of the people in the locality concerned, and the proposition to be carried must have two-thirds of all the votes cast on the subject.

But the most vital question relating to the organization of the political state goes

[3] United States Constitution, Art. I, sec. 2, § 1.
[4] Constitution of 1870, Art. VII.
[5] Constitution of Vermont, Amendments, Art. IX.