HANDBOOK

OF

American Constitutional Law

BY

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CHAPTER I.

DEFINITIONS AND GENERAL PRINCIPLES.

CONSTITUTIONAL LAW DEFINED.

1. Constitutional law is that department of the science of law which treats of the nature of constitutions, their establishment, construction, and interpretation, and of the validity of legal enactments as tested by the

criterion of conformity to the fundamental law.

CONSTITUTION DEFINED.

2. The constitution of a state is the fundamental law, containing the principles on which the government is founded, regulating the division of the sovereign powers, and directing to what persons each of these powers is to be confided, and the manner in which it is to be exercised.[1]

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3. In American law, the constitution is the organic and fundamental act adopted by the people of the Union or of a particular state as the supreme and paramount law and the basis and regulating principle of the government.

In public law, a constitution is "the organic and fundamental law of a nation or state, which may be written or unwritten, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government, and regulating, distributing, and limiting the functions of its different departments, and prescribing the extent and manner of the exercise of sovereign powers"[2]

In American constitutional law, the word "constitution" is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or of any one of the states, as the absolute rule of action and decision for all departments and officers of the government, in respect to all the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even of the people themselves, will be altogether void. Any country which is not given over to anarchy may be said, in a sense, to possess a constitution, since there must be some fixed principle in accordance with which its government is established and administered. But usually the term "constitutional government" is applied only to those whose fundamental rules or maxims not only locate the sovereign power in individuals or bodies designated or chosen in some prescribed manner, but also define the limits of its exercise, so as to protect individual rights, and shield them against the assumption of arbitrary power.[3]

Synonyms.

In a certain sense, constitutions may be said to be laws. That is, they are rules of civil conduct prescribed by the supreme power in a state, and are as much

within the definition of "laws," in the widest signification of that term, as are the acts of a legislature. Thus, the constitution of the United States is declared to be the [Page 3] "supreme law of the land," no less than the acts of congress passed in pursuance of it. So, also, the same instrument forbids the several states to pass any law impairing the obligation of contracts, and declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. And it is held that these clauses do not relate solely to the acts of a state legislature, but that a state constitution or an amendment thereto is as much a "law," within their purview, as any statute. But in practice a distinction is made between those organic or fundamental laws which are called "constitutions" and such ordinary laws as are denominated "statutes." Both answer to the description of laws, but constitutions are seldom called "laws," and never called "statutes."

A constitution differs from a statute or act of a legislature in three important particulars:

(1) It is enacted by the whole people who are to be governed by it, instead of being enacted by their representatives sitting in a congress or legislature.

(2) A constitution can be abrogated, repealed, or modified only by the power which created it, namely, the people; whereas a statute may be repealed or changed by the legislature.

(3) The provisions of a constitution refer to the fundamental principles of government, or the establishment and guaranty of liberties, instead of being designed merely to regulate the conduct of individuals among themselves. But the tendency towards amplification, in modern constitutions, derogates from the precision of this last distinction.

MEANING OF "CONSTITUTIONAL" AND "UNCONSTITUTIONAL."

4. "Constitutional" means conforming to the constitution. A statute or ordinance which is inconsistent with the constitution, or in conflict with any of its provisions, is said to be "unconstitutional."

The term "constitutional" means consistent with the constitution; authorized by the constitution; not conflicting with any pro- [Page 4] vision of the constitution or fundamental law of the state. It also means dependent upon a constitution, or secured or regulated by a constitution; as a "constitutional monarchy," "constitutional rights." Hence, in American parlance, a constitutional law is one which is consonant to and agrees with the constitution; one which is not in violation of any provision of the constitution

of the United States or of the particular state. An unconstitutional law is one which is in violation of the constitution of the country or of the state. In those states where the same body which exercises the ordinary lawmaking power is also invested with the whole sovereignty of the nation, as is the case in Great Britain, an unconstitutional enactment is not necessarily void. There are many rules, precedents, and statutes, deemed a part of the British constitution, which are justly esteemed as valuable safeguards of liberty. But there is no one of them which parliament might not lawfully repeal. The Habeas Corpus Act, for example, might at any day be abrogated by act of parliament. Such a measure would be regarded as unconstitutional, because it would be in derogation of certain principles which are universally deemed a part of the constitution as it now stands. But it would not lack the sanction of legality. It would occupy precisely the position of an amendment to a written constitution, and would be no less the law of the land than had been the law which it destroyed. But in a country governed by a written constitution, which is of supreme authority over the lawmaking power, and to which all ordinary legislation must bend, an unconstitutional law is void and of no effect, and in fact is no law at all. Yet, so long as it stands on the statute book unrepealed, it will have the presumptive force of law, unless the proper courts have pronounced its invalidity. Until that time, any person may disregard it at his own peril, but officers are bound to give it force and effect. After it has been duly adjudged unconstitutional, the presumption is that no further attempt will be made to enforce it. But the protection of the individual rests on the probability that the courts will abide by their first decision in regard to the law. [Page 5]

WRITTEN AND UNWRITTEN CONSTITUTIONS.

5. Constitutions are classified as written and unwritten. All the American constitutions, national and state, belong to the class of written constitutions.

Among the various constitutional governments of the world, it is customary to make a distinction between those which possess a "written" constitution and those which are governed by an "unwritten" constitution. The distinction, however, is not very exact. It is difficult to conceive of a constitution which should be wholly unwritten. Practically, this term means no more than that a portion of what is considered to belong to the constitution of the country has never been cast in the form of a statute or charter, but rests in precedent or tradition. The so-called unwritten constitution of Great Britain consists, in large measure, of acts of parliament, royal grants and charters, declarations of rights, and decisions of the courts. It also comprises certain maxims, principles, or theories of government which, though not enacted with the force of law, have always been acquiesced in by the people and acted upon by the rulers, and thus, possessing historic continuity, may be said to enter into the

fundamental conception of the nature and system of the government. The differences between written and unwritten constitutions, as these terms are generally employed, are chiefly as follows: First. A written constitution sums up in one instrument the whole of what is considered to belong to the constitution of the state; whereas, in the case of an unwritten constitution, its various parts are to be sought in diverse connections, and are partly statutory and partly customary. Second. A written constitution is either granted by the ruler or ordained by the people at one and the same time; while an unwritten constitution is gradually developed, and is contributed to not only by the executive and legislative branches of government, but also by the courts, and by the recognition, by rulers and people, of usages and theories gradually acquiring the force of law. Third. A written constitution is a creation or product, while an unwritten constitution is a growth. The one may be influenced, in its essentials, by history, but is newly made and set forth. The other is not [Page 6] only defined by history, but, in a measure, is history. Fourth. A written constitution, in its letter, if not in its spirit, is incapable of further growth or expansion. It is fixed and final. An unwritten constitution, on the other hand, will expand and develop, of itself, to meet new exigencies or changing conditions of public opinion or political theory. Fifth. A written constitution, at least in a free country, is a supreme and paramount law, which all must obey, and to which all statutes, all institutions, and all governmental activities must bend, and which cannot be abrogated except by the people who created it. An unwritten constitution may be altered or abolished, at any time or in any of its details, by the lawmaking power.

In respect to the comparative merits of the two systems, their relative advantages may be gathered from the foregoing statement of the distinctions between them. Their respective faults are thus set forth by a writer of eminence and sound judgment: "The weakness of an unwritten constitution consists in this: that it is subject to perpetual change at the will of the lawmaking power, and there can be no security against such change except in the conservatism of the lawmaking authority, and its political responsibility to the people; or, if no such responsibility exists, then in the fear of resistance by force. * * * The weaknesses of a written constitution are that it establishes iron rules, which, when found inconvenient, are difficult of change; that it is often construed on technical principles of verbal criticism, rather than in the light of great principles; and that it is likely to invade the domain of ordinary legislation, instead of being restricted to fundamental rules, and thereby to invite demoralizing evasions. But, the written constitution being a necessity in America, the attendant evils are insignificant, as compared with the inestimable benefits."[4]

Contents of Written Constitutions.

As to the contents of a written constitution, the lines of definition are not very clear. It is by no means easy to say, as a matter of abstract theory, what such an

instrument must contain in order to be a complete constitution, or what kinds of provisions are essential to it, and what foreign or superfluous. So far as regards a consti- [Page 7] tution for one of the United States, if it established a representative government, republican in form, provided for the three necessary departments of government, fixed rules for the election and organization of the legislative department and the executive offices, defined and guarantied political rights, and secured the liberty of the individual in those particulars which are generally esteemed fundamental, it would probably be sufficient. On the other hand, there is practically no limit to the subjects or provisions which may be incorporated in the constitution. It might, for example, be made to include a code of civil or criminal procedure. The question in every case is how much the framers of the particular constitution are willing to leave to the legislative discretion, and what matters they desire to put beyond the reach of the legislature, in respect to their change or abolition. Whatever is enacted in the form of law by a legislature may be repealed by the same or a succeeding legislature. But what is incorporated in a constitution can be repealed only by the people. And the people, sitting in a constitutional convention, may put into their constitution any law, whether or not it has relation to the organization of the state, the limitation of governmental powers, or the freedom of the citizen, which they deem so important as to make it desirable that it should not be easily or hastily repealed. Of late years there is a very noticeable tendency towards longer and more elaborate constitutions, and towards the incorporation into them of many matters which properly have no relation to the idea of a fundamental organic act, but are intended as limitations upon legislative power. This disposition probably arises from a growing distrust of the wisdom and public spirit of the state legislatures, and also from a desire of the people to make their constitutions the means of bringing about reforms which a majority of them consider desirable, and are unwilling to trust to the slower and less certain action of the legislature.

CONSTITUTIONS NOT THE SOURCE OF RIGHTS.

6. The constitutions of the American states are grants of power to those charged with the government, but not grants of freedom to the people. They define and guaranty private rights, but do not create them.

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The state constitutions, in this country, grant and limit the powers of the several departments of government, but, except in regard to political rights, they are not to be considered as the origin of liberty or rights. A constitution "is not the beginning of a community, nor the origin of private rights; it is not

the fountain of law, nor the incipient state of government; it is not the cause, but the consequence, of personal and political freedom; it grants no rights to the people, but, is the creature of their power, -- the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it; it is all derived from a known source. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents, for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition."[5]

Sources of American Constitutional Law.

The system of government established by the constitution of the United States has no exact historical precedent. It was, in a sense, a creation and an experiment. But the framers of the constitution, though without a model for the whole structure, were guided, in respect to many details, by the experience and wisdom of other countries. To a very considerable degree, their action was determined by theories and ideas inherited from the mother country; and our constitution owes many of its provisions to that of Great Britain, as the latter then stood. Thus, the idea of a representative government, instead of a direct democracy, the principle of majority rule, the necessity of separating the three departments of government, the bicameral system in legislation, the doctrine of local self-government, and the balancing of centrifugal and [Page 9] centripetal forces, -- all these principles, and more, were incorporated into our constitution as a matter of course and because they were essential parts of the Anglo-American idea of government. Some further ideas were borrowed by the framers of the constitution from the constitutions then existing in several of the states, and some, it is probable, from ancient history. Many provisions of the constitution, as is well known, were no more than compromises, necessary to be made in order to secure a sufficient adherence to make its ratification by the states probable. The great principles which secure the natural, civil, and political rights of the citizen, and protect him against tyranny or oppression on the part of the government, were all derived from the British constitution, or suggested by its political history. Such rights were not created by the constitution, but were the lawful heritage of all Americans. Their original guaranties are found in those great monuments of English constitutional law, Magna Charta, the Petition of Right, the Habeas Corpus Act, the Bill of Rights, and in the common law.[6] The several states, in framing their

constitutions, have been guided and influenced by the same theories and doctrines, and by the prevalence of the same political ideas among the people, and also, and to a very considerable degree, by the constitution of the United States.

BILLS OF RIGHTS.

7. A bill of rights is a formal declaration, in a constitution, of the fundamental natural, civil, and political rights of the people which are to be secured and protected by the government.

A bill of rights is in the nature of a classified list of the rights and privileges of individuals, whether personal, civil, or political, which the constitution is designed to protect against govern- [Page 10] mental oppression, containing also the formal assurance or guaranty of these rights. It is a charter of liberties for the individual, and a limitation upon the power of the state. Such declarations are found in all the state constitutions. And the lack of a bill of rights was one of the objections to the federal constitution most strongly urged when it was before the people for their ratification. Very soon after the adoption of the constitution, this defect was remedied by the adoption of a series of amendments, of which the first eight may be said to constitute the federal bill of rights. These guaranties, however, as will more fully appear in another connection, were intended to operate only as a limitation upon the federal power, and not to impose any restrictions on the action of the several states. The idea, as well as the name, of a bill of rights, was undoubtedly suggested by certain great charters of liberty well known in English constitutional history, and particularly the "Bill of Rights" passed in the first year of the reign of William and Mary, A. D. 1689.

RIGHT OF REVOLUTION.

8. The right of revolution is the inherent right of a people to cast out their rulers, change their polity, or effect radical reforms in their system of government or institutions, by force or a general uprising, when the legal and constitutional methods of making such changes have proved inadequate, or are so obstructed as to be unavailable.

This right is a fundamental, natural right of the whole people, not existing in virtue of the constitution, but in spite of it. It belongs to the people as a necessary inference from the freedom and independence of the nation. But revolution is entirely outside the pale of law. "Inter armes silent leges." Circumstances alone can justify a resort to the extreme measure of a revolution. In general, this right may be said to exist when tyranny or a corrupt

and vicious government is intrenched in power, so that it cannot be dislodged by legal means; or when the system of government has become intolerable for other causes, and the [Page 11] evils to be expected from a revolutionary rising are not so great as those which must be endured under the existing order of things; when the attempt is reasonably certain to succeed; and when the new order proposed to be introduced will be more satisfactory to the people in general than that which is to be displaced. "Revolution is either a forcible breach of the established constitution or a violation of its principles. Thus, as a rule, revolutions are not matters of right, although they are mighty natural phenomena, which alter public law. Where the powers which are passionately stirred in the people are unchained, and produce a revolutionary eruption, the regular operation of constitutional law is disturbed. In the presence of revolution, law is impotent. It is, indeed, a great task of practical politics to bring back revolutionary movements as soon as possible into the regular channels of constitutional reform. There can be no right of revolution, unless exceptionally; it can only be justified by that necessity which compels a nation to save its existence or to secure its growth where the ways of reform are closed. The constitution is only the external organization of the people, and if, by means of it, the state itself is in danger of perishing, or if vital interests of the public weal are threatened, necessity knows no law."[7]

POLITICAL AND PERSONAL RESPONSIBILITY.

9. Generally speaking, the responsibility for political action is political only. That is, officers of the government, in either of its branches, are not liable at the suit of private parties for the consequences of acts done by them in the course of their public functions and in matters involving the exercise of judgment or discretion.

In order to the due administration of government, it is necessary that the officers who are charged with the various duties of making, interpreting, and administering the laws should enjoy a due measure of immunity from being called to account for their public acts at the instance of private parties. Misgovernment is to be [Page 12] remedied at the ballot box, not by suits at law. If the legislature attempts to violate or defy the constitution, it will be held in check by the judicial department. But for unwise or oppressive laws, not conflicting with the constitution or private rights, there is no redress save by the election of a new legislature. The motives, the policy, the good faith, of the legislators cannot be inquired into. And if individuals suffer detriment by reason of the laws enacted, they have no right of action against the members of the legislative body. Even the members of the governing bodies of municipalities may claim a like immunity in respect to their purely public

actions, unless they act corruptly, although they may be constrained by the courts to perform the duties specifically laid upon them, and may in some cases be personally amenable for violations of the rights of individuals.[8]

The judiciary are invested with a like privilege. Judges of inferior courts may be compelled, by appropriate process, to perform the duties laid upon them. But no judge can be held liable, at the suit of a private person, for any action taken or omitted by him, or decision rendered, in the exercise of his office of judge and of his judicial discretion, even though he acted with malice or corruptly, provided he kept within the bounds of his jurisdiction, which, in the case of superior courts, will be presumed.[9] A person who is indicted and tried for a felony, and is acquitted, cannot afterwards sue the grand jurors for conspiracy in finding the indictment against him.[10] So, also, the assessment of a tax is in the nature of a judicial act, and no action will lie against the assessors, for an erroneous determination, by one claiming to be exempt.[11] For gross abuses of power or malversations in office, on the part of the judiciary, the remedy is by impeachment.

A similar immunity protects the high officers of the executive [Page 13] department. They may be controlled in the performance of merely ministerial duties, involving the ascertained rights of individuals, by the process of the courts. But actions do not lie against them for damages sustained by private persons in consequence of their political or public acts.[12] For instance, the postmaster general is not to be sued by a private individual for any failure or default in the service which his department undertakes to perform for the benefit of the public.[13] In the case of these officers, also, great misbehavior is ground for impeachment. The inferior officers charged with the administration of the laws stand upon a different footing. In regard to those who are intrusted with a measure of discretionary power, and the authority to judge of their rights and duties, the rule is that they are not responsible to private persons for the consequences of acts done by them in good faith, and in the exercise of their discretion, but that any abuse of their authority, in the direction of willful, malicious, or unjustifiable violation of the rights of others, or of breach of duty to particular persons, will render them liable.[14] Thus, a local postmaster who refuses to deliver a letter to the person to whom it is addressed is liable in damages for the wrong done;[15] and so is a customs officer who uses his official authority for purposes of oppression or extortion.[16] "This is the rule," says Judge Cooley, "which is applied to election officers who are found guilty of having wrongfully refused to register voters, or to receive their ballots."[17] But [Page 14] those inferior officers whose duties are merely ministerial, and do not involve the exercise of any judgment or discretion, and are plainly prescribed for them by the law, are not exempt from liability for any illegal action on their parts.[18]

AM.CONST.LAW-1

[1]. Cooley, Const. Lim. 2.
[2]. Black, Law Diet "Constitution."
[3]. Cooley, Const. Lim. 3.
[4]. Cooley, Const. Law, 24.
[5]. Hamilton v. St. Louis County Court, 15 Mo. 13.
[6]. "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." Van Ness v. Pacard, 2 Pet. 137.
[7]. Bluntschli, Theory of the State, 477.
[8]. Borough of Freeport v. Marks, 59 Pa. St. 253; Baker v. State, 27 Ind. 485.
[9]. Fray v. Blackburn, 3 Best & S. 576; Calder v. Halket, 3 Moore, P. C. 28; Barnardiston v. Soame, 6 How. St. Tr. 1063; Hamond v. Howell, 2 Mod. 218; Houlden v. Smith, 14 Q. B. 841; Scott v. Stansfield, L. R. 3 Exch. 220; Kemp v. Neville, 10 C. B. (N. S.) 523; Bradley v. Fisher, 13 Wall. 335; Shoemaker v. Nesbit, 2 Rawle, 201.
[10]. Floyd v. Barker, 12 Coke, 23.
[11]. Barhyte v. Shepherd, 35 N. Y. 238.
[12]. Mississippi v. Johnson, 4 Wall. 475; Marbury v. Madison, 1 Cranch, 137; Macbeath v. Haldimand, 1 Term R. 172; Gidley v. Lord Palmerston, 3 Brod. & B. 275; Grant v. Secretary of State, 2 C. P. Div. 445.
[13]. Lane v. Cotton, 12 Mod. 472; Smith v. Powdich, 1 Cowp. 182; Rowning v. Goodchild, 2 W. Bl. 906; Whitfield v. Lord Le Despencer, 2 Cowp. 754.
[14]. Burton v. Fulton, 49 Pa. St. 151; Billings v. Lafferty, 31 Ill. 318; Parmalee v. Baldwin, 1 Conn. 313; Mostyn v. Fabrigas, 1 Cowp. 161.
[15]. Dunlop v. Munroe, 7 Cranch, 242; Teal v. Felton, 12 How. 284.
[16]. Barry v. Arnaud, 10 Adol. & E. 646.
[17]. Cooley, Const. Law (2d Ed.) 162, citing Lincoln v. Hapgood, 11 Mass. 350; Jeffries v. Ankeny, 11 Ohio, 372; Bevard v. Roffman, 18 Md. 479; Goetcheus v. Matthewson, 61 N. Y. 420; Weckerly v. Geyer, 11 Serg. & R. 35; Miller v. Rucker, 1 Bush, 135; Carter v. Harrison, 5 Blackf. 138; Gordon v. Farrar, 2 Doug. (Mich.) 411; Dwight v. Rice, 5 La. Ann. 580; State v. Porter, 4 Har. (Del.) 556; Wheeler v. Patterson, 1 N. H. 88; Fausler v. Parsons, 6 W. Va. 486; Peavey v. Robbins, 3 Jones (N. C.) 339; Rail v. Potts, 8 Humph. 225. And see Ashby v. White, 2 Ld. Raym. 938.
[18]. Stockdale v. Hansard, 9 Adol. & E. 1; Milligan v. Hovey, 3 Biss. 13, Fed. Cas. No. 9,605.

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CHAPTER XVIII.

CIVIL RIGHTS AND THEIR PROTECTI0N BY THE CONSTITUTIONS.

RIGHTS IN GENERAL.

139. With respect to the constitution of civil society, and in the sense in which the term is used in public law, "rights" are powers of free action. They are classed as natural, civil, and political.

Some rights are created by law, but others exist antecedently and independently of law. The latter class includes such rights as belong to a man merely in virtue of his personality. His existence as an individual human being, clothed with certain attributes, invested with certain capacities, adapted to a certain kind of life, and possessing a certain moral and physical nature, entitles him, without the aid of law, to such rights as are necessary to enable him to continue his existence, develop his faculties, pursue and [Page 386] achieve his destiny. But some other rights are the offspring of law. They imply not only an individual but a state. They are not grounded alone in personality, but

in an organized society with certain juristic notions. Still others add to these pre-requisites the idea of a participation in government or in the making of laws. We perceive, therefore, that for the purposes of constitutional law, rights are of three kinds. They may be classified as natural, civil, and political rights.

Natural Rights.

It was formerly the custom to use this term as designating certain rights which were supposed to belong to man by the "law of nature" or "in a state of nature." But clearer modern thought has shown that the "state of nature" assumed by the older writers is historically unverifiable and inadequate to account for the origin of rights. Even in savagery there is a rudimentary state. The law of physical nature recognizes no equality of rights; its rule is the survival of the fittest. In a state of nature, such as was once supposed, there could be no right but might, no liberty but the superiority of force and cunning. In reality, the only true state of nature is a civil state, or at least a social state. But it is permissible to use the phrase "natural rights" as descriptive of those rights which grow out of the nature of man and depend upon personality, as distinguished from such as are created by law and depend upon civilized society. An example of these natural rights is the right to life.

Civil Rights.

But since organized society is the natural state of man, and not an accident, it follows that natural rights must be taken under the protection of law, and although they owe to the law neither their existence nor their sacredness, yet they are effective only when recognized and sanctioned by law. Civil rights therefore will include natural rights, as the same are taken into the sphere of law. But there are also civil rights which are not natural rights. Thus, the right of trial by jury is not founded in the nature of man, nor does it depend upon personality. But it comes within the definition of civil rights, which are the rights secured by the constitution of any given state or country to all its citizens or to all its inhabitants, and not connected with the organization or administration of gov- [Page 387] ernment. Hence it appears that while the term "civil rights" is broader than "natural rights," and indeed includes it, there are important differences between those civil rights which are properly described as "natural" and those which are not. Natural rights are the same all the world over, though they may not be given the fullest recognition under all governments. Civil rights which are not natural rights will vary in different states or countries.

Political Rights.

Political rights are such rights as have relation to the participation of the individual, direct or indirect, in the establishment or administration of government. For example, the right of citizenship, that of suffrage, the right to petition government for a redress of grievances, the right of free criticism of public officers and government measures, are political rights. They are not natural rights in any sense, since they owe their existence entirely to law. They are civil rights in a qualified sense, since they concern the citizen in his relations with other citizens, but only in respect to the administration of the state. But they are best considered as a separate class. Political rights vary in different countries even more widely than civil rights. Under a despotism they scarcely exist. In our own country they have reached their maximum.

OF LIBERTY.

140. Liberty, whether natural, civil, or political, is the lawful power in the individual to exercise his corresponding rights. It is greatly favored in law. But it is restrained by the rights of the state and by the equal rights of all other individuals living under the same government.

As rights are powers of free action, it follows that liberty must be the power in the possessor of rights to make them available and effective, without extraneous hindrance or control except such as may be imposed by lawful measures. And as rights are divided into natural, civil, and political, the different kinds of liberty must be subject to the same classification. Natural liberty is not correctly described as that which might pertain to man in a state of complete isolation from his fellows. But it is the liberty to enjoy and protect [Page 388] those rights which appertain to his nature as a human being living in society with his kind. Civil liberty is the power to make available and to defend (under the sanctions of law) those rights which concern the relations of citizen with citizen and which are recognized and secured by the fundamental law of the state. Political liberty embraces the right to participate in the making and administration of the laws.

"In favor of life, liberty, and innocence," says the maxim, "all presumptions are to be indulged." According to Bracton, "liberty does not admit of estimation," that is, it cannot be valued or priced; it is invaluable. Such also were the doctrines of the Roman law. "Libertas inestimabilis res est," we read in the Digest. And again, "Libertas omnibus rebus favorabilior."

But although liberty is thus the foundation of rightful government, and is under the special favor and protection of law, it does not follow that it is unregulated by law. In an organized civic society, living under the dominion of law, liberty

is something very different from mere license. The state has the right to take measures essential to its own health and preservation, and to enact regulations for the dealings of citizen with citizen. And rights must be exercised in accordance with these laws. By them liberty is not so much restricted as defined. Liberty is marked out, on the one side, by the reciprocal duties of government and subject, and on the other side, by the co-existence in all of equal rights. The state has a right to maintain its own existence. And for that reason it is not within the rightful freedom of any individual to subvert the government, and treason may be punished by law. For the same reason, the private right of property is subject to the condition that all persons shall contribute of their property to the support of the state. The state exists on condition that it shall assure to each the undisturbed enjoyment of his rights. Hence the legality of criminal justice. The government also is bound to protect the public health, safety, and morals against the aggressions of individuals. And thus the freedom of all may be limited by proper police regulations. Moreover, if the public good requires the appropriation of private property to public use, it may be taken under the power of eminent domain. Secondly, it is the necessary condition to the union of men in a jural society that each shall respect the rights of others. [Page 389]

Indeed, a large school of political economists define the law of liberty as granting to each person the freedom to do all that he wills, provided he does not infringe upon the equal freedom of any other person. Whenever, therefore, a man's unrestrained choice as to his acts or conduct would lead him into collision with the equal rights of others, at that point his liberty stops. This principle is expressed in the common law maxim, sic utere tuo ut alienum non laedas. Not only is this rule a lawful limitation upon individual freedom, but without it liberty could not exist. But for the recognition and enforcement of such a rule, freedom would be the prerogative of the strong and slavery the heritage of the weak.

It is the purpose of the present chapter to exhibit the great guaranties of natural and civil liberty imbedded in our constitutions, and at the same time to direct attention to their proper limitations.

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PERSONAL LIBERTY.

142. Personal liberty consists in the power of locomotion, of changing

situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint unless by due course of law.[21] This right is amply secured by guaranties in both the federal and the state constitutions. No one can be deprived of it except by due process of law. But it is limited, in accordance with law, in so far as may be necessary for the preservation of the state and the due discharge of its functions, and so far as may be required for the securing of the rights of each member of the community against the others, and so far as is needful for the due regulation of the domestic relations.

Guaranties.

The fourteenth amendment to the federal constitution provides that no state shall deprive any person of life, liberty, or property [Page 398] without due process of law. And similar provisions are found in most of the state constitutions. Beside these specific guaranties, there are many which are designed to guard the right of personal liberty in particular aspects of it, or in particular relations, or against particular forms of aggression. For instance, the abolition of slavery and involuntary servitude is a provision which makes for personal liberty. So also is the prohibition against the passage of bills of attainder and that against ex post facto laws. Of the same nature is the humane provision of the constitutions admitting accused persons to bail in proper cases, and requiring that bail, when exacted, shall not be excessive. The same remark is true, though less directly, of those regulations of the mode of trial in criminal cases which give to the accused the benefit of the presumption of innocence and the right to be presented or indicted by a grand jury and to be tried by a petit jury of the vicinage. And the great safeguard of the right of personal liberty is the privilege of the writ of habeas corpus. All these guaranties are considered at large in other parts of this work.

Limitations.

The limitations upon the right of personal liberty to be first considered are those having relation to the duties and needs of the state and the obligations of the citizen to the government and to other citizens. And first, the citizen may be restrained of his liberty by being put under arrest, in a lawful manner and by a person duly authorized, in order to prevent the commission of a public offense, or in order to bring him to trial for a crime with which he is charged. But the law requires as an almost invariable rule that the arrest shall be made upon a warrant duly issued by a lawful magistrate, and that it shall be served by an officer of the law. Any person found in the act of committing a felony or

a breach of the peace with force may be arrested by any citizen without a warrant. An officer of the law may, without a warrant, arrest a person violating municipal ordinances in his presence, or on reasonable grounds of suspicion of felony.[22] But ar- [Page 399] rests without warrant are not by any means favored in the law, and any person making an arrest under such circumstances must at once take the person arrested before some magistrate or court of competent jurisdiction to inquire into the alleged offense, and must also show that the actual state of the case was such as to justify his action.

In the next place, a man may be restrained of his liberty as a consequence of crime committed by him. But the principle of protection to personal liberty demands that imprisonment shall be decreed only after a fair and impartial trial, conducted according to the regular forms of judicial procedure, and a proper conviction. And even then the terms of the sentence must be strictly observed. Any detention of the prisoner after the expiration of the term for which he was sentenced, whether for breaches of prison discipline or other cause, is illegal.[23] Under this head we must also include imprisonment or detention as a punishment for contempts of court or of legislative bodies, or for contumacy defeating the operation of their lawful powers and jurisdiction.

In the next place, certain classes of persons may be restrained of their liberty, by due process of law, whose power to go at large, without restraint, would threaten the peace, security, or health of the community. These include maniacs and dangerous lunatics, persons affected with dangerous infectious diseases, vagabonds, and possibly some other classes. But these, no less than others, are protected by the requirement of due process of law. For example, it is held that a person supposed to be insane may not lawfully be committed to an asylum, at the instance of public authorities, against his will, without some sort of judicial investigation into the question of his sanity.[24] Vagabonds and paupers may be committed, by those duly authorized, to public work-houses, infirmaries, and other similar institutions. Due process of law in such cases does not always require a trial by jury. But in [Page 400] some form due process of law must be employed, or such commitments are illegal.[25] Another ground of limitation upon the right of personal freedom is that which is described as being necessary to enforce the duty which citizens owe in defense of the state. This power of the state can have but few applications in practice, but those are highly important. The most conspicuous is the right to compel citizens, by draft or conscription, to serve in its armies in time of war. [26]

The second class of limitations upon the right of personal liberty includes such as are rendered necessary by the helpless, dependent, or immature condition of those persons to whom they apply. These limitations are not imposed by the state, but are recognized and allowed by its laws. They depend, as a rule, on

the constitution of the family, or on relations analogous thereto. This class includes the lawful control of a parent over the liberty of his children, of a guardian over that of his ward, of a master over his apprentice, of a teacher over his pupil. In this category belongs also the common law power of a husband over his wife. But as this has been reduced, by the progress of enlightened opinion and the gradual emancipation of women, to a minimum, it scarcely requires mention in this connection. There are some few anomalous conditions in which one person has the right to put restraint upon the liberty of another, which belong in this class of limitations, but do not depend on the domestic relations. Thus, parties who have become bail for another in legal proceedings are regarded in law as his friendly jailers, and they have a legal right to have the custody of him, for the purpose of delivering him up to the officers of justice in due time. Creditors had the power to put restraint upon the liberty of their debtors so long as laws authorizing imprisonment for debt remained upon our statute books. But these laws have been now almost universally abolished, and except in a few states, in cases of fraud, no such deprivation of personal liberty can be used as a means of collecting a mere civil debt.

[19]. Thurston v. Whitney, 2 Cush. 104.
[20]. Stim. Am. St. Law, p. 54, § 223.
[21]. 1 Bl. Comm. 134.
[22]. 1 East, P. C. 298; Holley v. Mix, 3 Wend. 350; Wade v. Chaffee, 8 R. I. 224; State v. Underwood, 75 Mo. 230; Mitchell v. Lemon, 34 Md. 176; Griffin v. Coleman, 4 Hurl. & N. 265. A peace officer may arrest for a breach of the peace committed against himself as well as for those committed against others. Davis v. Burgess, 54 Mich. 514, 20 N. W. 540.
[23]. Gross v. Rice, 71 Me. 241; Knox v. State, 9 Baxt. 202.
[24]. State v. Billings (Minn.) 57 N. W. 794; Van Deusen v. Newcomer, 40 Mich. 90.
[25]. Portland v. Bangor, 65 Me. 120.
[26]. See Cooley, Const. Lim. 339.

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RIGHT TO BEAR ARMS.

144. The second amendment to the federal constitution, as well as the constitutions of many of the states, guaranty to the people the right to bear arms.

[SAF Note: This is very similar to the following quote:

> The constitutions of most of our States assert, that all power is inherent in the people; ... that it is their right and duty to be at all times armed;

Thomas Jefferson in a letter to **Justice John Cartwright, June 5, 1824**. see more Founders' Quotes **HERE**]

This is a natural right, not created or granted by the constitutions. The second amendment means no more than that it shall not be denied or infringed by congress or the other departments of the national government. The amendment is no restriction upon the power of the several states.[33] Hence, unless restrained by their own constitutions, the state legislatures may enact laws to control and regulate all military organizations, and the drilling and parading of military bodies and associations, except those which are authorized by the militia laws or the laws of the United States.[34] The "arms" here meant are those of a soldier. They do not include dirks, bowie knives, and such other weapons as are used in brawls, fights, and riots. The citizen has at all times the right to keep arms of modern warfare, if without danger to others, and for purposes of training and efficiency in their use, but not such weapons as are only intended to be the instruments of private feuds or vengeance.[35] And a statute providing that a homicide which would ordinarily be manslaughter shall be deemed murder if committed with a bowie knife or a dagger, is valid. It does not tend to restrict the right of the citizen to bear arms for lawful purposes, but only punishes a particular abuse of that right.[36] This right is not infringed by a state law prohibiting the [Page 404] carrying of concealed deadly weapons. Such a law is a police regulation, and is justified by the fact that the practice forbidden endangers the peace of society and the safety of individuals.[37] But a law which should prohibit the wearing of military weapons openly upon the person, would be unconstitutional.[38]
[33]. U. S. v. Cruikshank, 92 U. S. 542; Andrews v. State, 3 Heisk. 165.
[34]. Presser v. Illinois, 116 U. S. 252, 6 Sup. Ct. 580.
[35]. English v. State, 35 Tex. 473.
[36]. Cockrum v. State, 24 Tex. 394.
[37]. State v. Wilforth. 74 Mo. 528; Haile v. State, 38 Ark. 564; Wright v. Com., 77 Pa. St. 470; State v. Speller, 86 N. C. 697.
[38]. Nunn v. State, 1 Kelly (Ga.) 243.

THE PURSUIT OF HAPPINESS.

145. All men are invested with a natural, inherent, and inalienable right to the pursuit of happiness.
This principle is formally declared in the constitutions of many of the states.

And moreover the framers of the Declaration of Independence announced that they "held these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." This latter expression is one of a general nature, and the right thus secured is not capable of specific definition or limitation, but is really the aggregate of many particular rights, some of which are enumerated in the constitutions, and others included in the general guaranty of "liberty." The happiness of men may consist in many things or depend on many circumstances. But in so far as it is likely to be acted upon by the operations of government, it is clear that it must comprise personal freedom, exemption from oppression or invidious discrimination, the right to follow one’s individual preference in the choice of an occupation and the application of his energies, liberty of conscience, and the right to enjoy the domestic relations and the privileges of the family and the home. The search for happiness is the mainspring of human activity. And a guarantied constitutional right to pursue happiness can mean no less than the right to devote the mental and physical powers to the attainment of this end, without restriction or obstruction, in respect to any of the particulars just mentioned, except in so far as may be necessary to secure the equal rights of others. Thus it appears that this guaranty, though one of the most [Page 405] indefinite, is also one of the most comprehensive to be found in the constitutions.