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LOGIC, LIBERALISM AND THE CONVENTION OF 1938: PHILIP HALPERN'S ROLE

IN the summer of 1938 when Philip Halpern sat as a delegate from Erie County at the last New York Constitutional Convention, he was 35 years old. He was then a professor at the Buffalo Law School and a member of the law firm of Halpern and Friedman; but to a majority of the delegates who came together for the first time in April of that year, he was quite unknown.

The high reputation in law and in public affairs which he was to carve out for himself lay in the years ahead. A significant part of that reputation, however, was made in the Convention in the five months it sat from April to August of 1938.

To see in perspective the work of the 1938 Convention as a whole and the contribution of any individual delegate to that work, it is useful to look for a moment at its membership and its period.

There was a feeling within the Convention itself, shared by the press and by the public, that nothing it did would be acceptable to the people and no constitutional change would emerge from its deliberations. In part this feeling was based on the rejection in its entirety of the work of the last previous Convention in 1915 by the people in the election of that year. To everyone's surprise, not least to the delegates themselves, the main body of the work of the 1938 Convention was adopted at the general election (1,521,036 to 1,301,797) although some separately submitted changes, notably a proposed judiciary article were rejected.

Thus, for the first time since the revision of 1894, there was a general overhauling of the Constitution and there has been none since. Although the delegates looked at it differently as they attended its sessions, it must, in historical perspective, be regarded as one of the three effective New York Constitutional Conventions since the 1821 Constitution.[1]

It sat in time of profound change and disturbance in the world, repercussions of which were felt within the Convention itself. There was then in progress in Europe the rapid extension of the totalitarian oppressive power of Hitler with complete deprivation of rights of individuals and the loss of all constitutional rights; there was on the other hand in this country an expanding concept of welfare and new views about the areas in which democratic government owed affirmative obligation to the underprivileged and disabled citizen.

Hitler in 1938 had annexed Austria to the German Reich; the outbreak of World War II was to occur the following year; the Spanish Civil War was still in the balance; Franklin D. Roosevelt had been President for a little over five years; a counter-swing of articulate opinion against a greatly expanded governmental role, implicit in Roosevelt's program of economic recovery, was manifest in many fields. There were resulting sharp divisions of strongly held

1. 1847, 1894, 1938.

opinion on the philosophy of a welfare program which reflected themselves in the Convention.

There was, it is fair to say, deeply-seated apprehensions both about the future of individual freedom and the future of free enterprise. The same concern, however, was in general not shared by the same groups. At several points in the proceedings of the Convention at which issue was joined on these large questions, Halpern, whose views were certainly then clearly thought out and firmly espoused, was to play a significant part.

A study in considerable detail was made of the constitutency and work of the Convention for the Johns Hopkins University Studies in Historical and Political Science five years after it adjourned.[2] A majority of the delegates elected in the Fall of 1937 were Republicans (90 to 70), and the Convention was organized by the majority on a traditional legislative basis in the election of the President and officers and the appointment of Convention membership in the approximate ratio of the party representation in the body.[3]

But except in very rare instances where important party policy was involved the Convention consistently refused to follow regular party leadership. It voted according to its views on economic, social and legal issues, and repeatedly disregarded the suggestions of the Convention leaders of both parties, and the division most characteristic of its proceedings was between liberals and conservatives. On the whole, the conservatives were in the majority when feeling on sensitive issues was strong enough to cause their components in both parties to coalesce.

But a fair amount of the work of the Convention was quite liberal. It enacted a public housing article, for example. Halpern was in the forefront of liberal thought and action in the Convention and made himself one of the conspicuous figures in this group. His outstanding contribution to the work of the Convention—one that left its impress in the memory of the delegates and is reflected repeatedly in the record of proceedings—was to bring to bear on its work a carefully trained and thoroughly disciplined legal mind.

He was, *par excellence*, the fully-rounded lawyer of the Convention. Again and again in debate on legal questions, and most debates turned on legal issues, he employed to the full the techniques of the lawyer upon argument; the balance, the reference to historical development, the citation of authority, the steps taken by law in the past and its path in the future. All this was guided by a keen insight into the legal values involved.

It is remarkable that he was able to win a full and contemporaneous recognition of this ability in a Convention so heavily weighted, as this one was, with judges and lawyers. "You know more about this than I do", remarked Henry

2. O'Rourke & Campbell, Constitution-Making in a Democracy, Theory and Practice in New York State (1943).

3. For a comprehensive analysis of the political background of the delegates, see O'Rourke & Campbell, *op. cit. supra* note 1, ch. 111.

Hirschberg one day, addressing Halpern.[4] It was typical of a viewpoint toward him. The particular question was on a proposal to prevent the suspension of the power of grand juries to inquire into misconduct in public office. Hirschberg was district attorney of Orange County and surely one of the most articulate lawyers in the Convention. To this compliment Halpern returned a typical disavowal.

The impression Halpern made on the delegates by sheer lawyer-capacity is especially significant when it is recalled that at least two-thirds of the members of the Convention were lawyers and twenty-six delegates were then judges—two from the Court of Appeals, including Chief Judge Frederick E. Crane, who was elected Convention president, four Appellate Division justices, including three of the four presiding justices,[5] seven Supreme Court trial justices, and nine judges from other courts. Many of the lawyer members were of high professional standing with long and successful records at the bar.

An issue rather typical of the spirit and tone of the Convention arose over a restriction sought to be imposed on a proposed search and seizure provision of the Bill of Rights of the Constitution (Article I). The basic proposal was to authorize wire tapping by court order on showing probable cause which became section 12 of Article I. The debated issue was whether there should be a proviso, as proposed by an amendment by Mr. Dunnigan, that "evidence obtained in violation of this section shall not be received in any hearing, trial or proceeding."[6]

For over 150 pages of the printed record this was debated. Its opponents suggested that it would become a refuge and protection for criminals; that a mere "rule of evidence" did not belong in the Constitution; that it would accomplish a radical undoing of a settled rule of law in New York that even if evidence were unlawfully obtained this would not affect its admissibility.

The debate was impassioned on both sides and at times heavily surcharged with emotion. Halpern spoke toward the end of the discussion in favor of the restriction on admissibility; and although the proposal of restriction was in the end defeated, his address marks one of the high points of legal synthesis and logic in the proceedings of the Convention. It placed in close legal perspective what had been over several days a discursive and tumultous argument.

He opened with an explanation that he was leaving his own political colleagues in supporting the restriction on admissibility: "I owe it to my many colleagues whom I am leaving on this occasion . . . to give a word of explanation for my support of this proposal . . . I speak on this subject with all sincerity that I can command, because I hope to persuade a few of my colleagues to vote as I intend to vote in favor of the Dunnigan proposal."[7]

4. Revised Record of the Constitutional Convention of the State of New York, pp. 2572-73 (1938) [hereinafter cited as "Record"].
5. O'Rourke & Campbell, *op. cit. supra* note 1, at 83.
6. Record, pp. 406-07.
7. *Id.* at 546.

He plunged at once into the "rule of evidence" argument that had been made against the proposal:

> . . . The argument is made that this proposal should not go into the Constitution because it is a rule of evidence.
> . . . I think when this provision is analyzed it will be found that it is not a rule of evidence at all. It is unfortunate that the word "evidence" was used in the language of the bill, but it could be stated just as easily without any reference to the rules of evidence at all. Would those who oppose the bill like it any better if instead of saying the rule of evidence shall be thus and so the bill said that no governmental agency shall use the fruits of its own crime? Would they like it any better if it said, "No violator of a constitutional guarantee shall profit by his violation"? That is not a rule of evidence, that is a rule of substantive law. It goes back to the principles of equity embodied in those maxims with which all lawyers are familiar: "No one shall come into court with unclean hands," "no man shall profit from his own crime." And it goes back beyond the rules of equity to basic principles of morality and ethics. It is summarized in the statement accepted by civilized society everywhere that the end does not justify the means. Is that a rule of evidence?[8]

He then dealt with the judicial history of the rule of New York allowing the receipt of evidence wrongfully obtained and turned to the adequacy of the sanction proposed by the amendment before the Convention:

> . . . and I think . . . that this is the only effective sanction, and that if this sanction is not adopted, the guarantee against illegal search and seizure and the guarantee against wire-tapping without judicial supervision are ineffective. . . .
>
> Now, recognizing that this is the only effective sanction, why isn't it the proper sanction? Mr. Bruce tells us it is not the proper sanction for this reason: that if two persons are involved in private litigation, and one of them is guilty of some violation, the proper sanction is to penalize him, and not to confer a benefit upon the other. As a proposition of civil law, I might have something to say in criticism of that, . . .
>
> The fact is that we are not dealing with civil litigation between man and man, we are dealing with the problem of the power of the government against one man, we are dealing with the problem of the majesty of the State of New York against a single defendant, and we are dealing with a guarantee which is directed against the State of New York in all its majesty.[9]

In precise detail he examined the whole problem in its historical development. He ended with a plea of high eloquence resting on a view of long-term statesmanship. Recognizing the perils to freedom that the 1930's had uncovered, he begged the Convention "to go with me to a hill top and take a long-range view of this question."[10] He continued:

8. *Id.* at 546-47.
9. *Id.* at 549.
10. *Id.* at 553.

> We are writing a Constitution for a generation, it is for my generation, it is for the generation of many of us, it is for the generation of the children of many of you. And I say to you that this generation is in a much worse position than any generation in the history of our country. This is a generation that is caught in a mad whirl, that is destroying the basic decencies that make up civilization. And I care not on how narrow an issue the conflict may arise, the issue is before us. We, the pioneer State of this country, have a glorious opportunity to vote, not on this narrow issue, but to vote on its implications, to vote for the basic philosophy that stands for the other side. The two philosophies can be very simply stated. There is one which would facilitate the growth of governmental power—that is the one which puts first governmental convenience, which would even take care of lazy, stupid, incompetent prosecutors and police. . . . And on the other side, there is the philosophy that erects around every citizen and around the home of every citizen an invisible barrier against which even the majesty of the law is forbidden to trespass without proper judicial supervision.
>
> And I appeal to you, ladies and gentlemen of the Convention, to stand with me and to choose the philosophy that will mark New York State as a forward-looking State, not as a State willing to go back, back to the days of the King and the King's power to invade the home, but a State which is going forward, foward to a new birth of freedom.[11]

It is noteworthy to see how accurately this argument looked a quarter of a century ahead to embrace the view of the 1960's that basic constitutional rights need the full sanction of judicial interdiction against violation if they are to be truly effective and forecast the growth of this interdiction.

Again on the issue of the rights of an accused and again anticipating a far greater pre-occupation with this problem in the 1960's than had been known in the 1930's Halpern offered a proposal on the floor of the Convention which would have thrown heavy protection around a person accused of crime against confessions made while under arrest. He would have provided "that any statement or confession made by a defendant while under arrest should not be admitted into evidence unless the statement were made in open court or before a grand jury or unless the protection afforded by the section was waived in writing attested by counsel for the defendant."[12]

As "a substitute for the use of the private inquisition" he also proposed that a person accused of crime could be brought before a magistrate and compelled to submit to an examination after reasonable cause to believe him to be guilty of a crime had been established. His refusal to answer could be used against him. These two amendments were treated by him as "integrated proposal."[13]

A powerful and compact argument was advanced. As to the first he argued:

> As Judge Sears has indicated, one of the real problems in the

11. *Id.* at 553-54.
12. *Id.* at 1785.
13. *Ibid.*

> modern administration of criminal law is the problem which has come to be known commonly as "The Third Degree." It is an interesting historical fact that the privilege against self-incrimination which we regard as so fundamental in our law, under the decisions in this and in other states, protects the defendant only when he is in open court in the presence of his friends and in the presence of his counsel. And when the accused person really needs protection against the unsupervised inquisition privately carried on by prosecuting officials, it is held in all the courts that the privilege against self-incrimination does not protect him. And if he is induced to make any incriminating statement, it can be used against him upon the trial. . . . It seems to me if we are to make the privilege against self-incrimination really effective it ought to apply to the defendant before he is brought into the courtroom, as well as thereafter.[14]

As to the second part, compelling an examination before a magistrate, he argued for the proposal that:

> . . . It undertook to take the profit out of the third degree, by removing one of its motives, one of the motives of the third degree being the obtaining of a confession which can be introduced in evidence against a defendant. Under the existing law, in every case, there has to be a contest as to whether the confession was obtained by the use of force or was truly voluntary in character. If we are really to protect the defendant there should not be any question at all. The defendant is under arrest; his counsel isn't present. He ought to be taken before a Magistrate and asked to make a statement in open court, if he really wants to make a voluntary statement, and if he does not want to make one really voluntarily, then the statement under the law ought to be considered for all purposes as involuntarily made, and therefore excluded.[15]

Perhaps his most eloquent plea before the Convention and certainly the one which suggested the most thorough research and the most lawyer-like summing up, was against the proposal to add to the Judiciary Article as it had been reported by the Judiciary Committee an amendment which would authorize the courts to review judicial and quasi-judicial determinations of administrative agencies on the facts as well as the law and when found by the court to be "contrary to the evidence or not supported by the facts" to direct reconsideration.[16]

This apparently innocuous provision split the Convention assunder. It really represented the deep fear of the conservatives of the ever-enlarging scope of power vested in administrative agencies and the concern that the "welfare state" of large governmental bureaus would seriously impair traditional property rights. Their hope of refuge was in the courts.

But the courts had been very wary about meddling with administrative

14. *Ibid.*
15. *Ibid.*
16. Record, p. 3432.

decisions—they had looked to see if they were supported by substantial evidence and that was as far as they would go.

The liberal view in the Convention was that this proposal would emasculate administrative agencies, turn back the hand of time, and in effect turn over to the judges the vast and complicated task of handling administration of government for which the judges were ill-prepared. The proposal was carried in the Convention and became a part of the Judiciary Article submitted to the people. But in the election of 1938 both political parties opposed the adoption of the whole Judiciary Article because of this enlarged judicial review and the article was defeated.

Halpern's opening words were characteristic of his stature in the Convention and of the strength and courage of his personal convictions: "I want to appeal to my Republican brethren to think of this in terms of a problem of government. . . . We ought not to rush it through tonight without giving it the consideration it deserves."[17]

In a few words he laid down the general problem created by the proposal. "The government of the State of New York has been built up over a period of over 50 years upon the basis of boards and officers and tribunals which have combined within them functions which are partly judicial, partly legislative and partly executive. . . . This proposal means, in the form that Mr. Whalen has now presented it, that the government of the State of New York will be transferred from the executive and legislative departments into the courts; that the courts will undertake to administer the government of the State of New York."[18]

Then, the habitual method of the carefully trained lawyer coming to bear, he turned to the word "quasi-judicial" used in the amendment. He said:

> And to go back for just a moment to the word "quasi-judicial," we get some idea what this proposal means.
>
> A half dozen definitions have been introduced tonight of quasi-judicial. The fact that the word "quasi" at this time cannot be defined by anybody to anybody else's satisfaction indicates the nature of the problem. You have all kinds of quasi-things, quasi-judicial, quasi-legislative, quasi-executive. These various boards, officers and tribunals, combine within them all these different functions; you cannot tear them apart. You cannot say to the Insurance Department, we are going to tear out all of the functions of your department that are judicial. You cannot say to the Banking Department that whenever you have to make a decision on evidence at a hearing we will tear that out; that must go into court. You cannot say to the Conservation Department and Agriculture and Markets and all the departments that they may not pass on anything which involves a question to be determined upon evidence.[19]

17. *Id.* at 2092.
18. *Id.* at 2097, 2094.
19. *Id.* at 2094.

Then, turning from narrow and tight legal construction to the broader avenues of public policy, he pursued his argument:

> Now, if I have spoken with some heat about this matter, it is because I have lived with it in the Convention for three or four months; but not only that, I have lived with this problem for the many years that I have been studying it, and I want to say to the lawyers and judges who are members of this Convention please do not think of this problem as a lawsuit, because it is not a lawsuit, and it is not a question of the grievance of a particular client who did not like a decision by a particular administrative body. It is a question of whether we here in this Convention on the basis of three hour discussion are going to tear apart the whole structure of the government of this State.[20]

Eloquently he gave the warning that if this proposal were adopted it would be rejected by the people and the whole work of the Convention lost:

> Let me point out . . . if this proposal goes into the Constitution, which I think means goes out of the window, because when the people of this State are made aware of what we are doing in one night's session, undermining the system of the government that we have had for so many years in this State, not only this provision, but all of the Constitution that goes with it will be lost.[21]

In all this serious discussion, and Halpern took active part in many exchanges and debates on these areas of constitutional law which engaged his interest, there were occassional flashes of the rapid Halpern wit and good humor. At one point he was opposing a proposal that if Congress incorporated a Federal agency and freed it from taxation New York could not tax a similar State agency, with the suggestion that the State should not "hobble" its own Legislature. Chief Judge Crane, as president, had called time on his discussion and another delegate (Mr. Pitcher) had yielded him five minutes of his time.[22] Finally there were several interruptions, at which the Chief Judge directed "Sit down; sit down."[23] Halpern, apparently thinking that this direction included him, sat down before his time was up. As he tried to continue, he was cut off by the Chief Judge with the remark: "I think you sat down voluntarily before your time was up. I was just going to compliment you on it." To this came the rapid reply: "I took what your Honor intended for a smile for a frown."[24]

One of the significant proposals by Halpern before the Convention which became part of the Judiciary Article as proposed and was adopted was the paragraph in Article I, section 6, that "The power of grand juries to inquire into the willful misconduct in office of public officers and to find indictments

20. *Id.* at 2095.
21. *Id.* at 2095-96.
22. *Id.* at 2454.
23. *Id.* at 2456.
24. *Id.* at 2570.

or to direct the filing of informations in connection with such inquiries shall never be suspended or impaired by law."

He explained this succinctly:

> . . . The grand jury under statutes of this State is authorized to inquire into the misconduct of public officials within the county in which the grand jury sits, and there is a guarantee in the Constitution against prosecution of any person for a felony without the indictment of grand jury. However, there is no guarantee in the Constitution of the right of a grand jury and of the power of a grand jury to investigate the misconduct of public officials. . . .
>
> The function of grand juries in the investigation of the misconduct of public officials is one of the most important functions served by the grand jury system today. The existence of an independent agency drawn from the citizenry at large for that purpose is one of the most estimable features of the American system of government. It has served well. Recent experience has demonstrated that although it has been with us for over a century and a half, and before that, in a modified form, as part of the English system, it is not beyond the reach of legislative interference. And the purpose of this amendment is to protect, at least, that function of the grand jury against legislative interference.[25]

These references embrace a mere sample of a truly remarkable total contribution by Philip Halpern to the work of the Convention. His restless energy and wide and responsive interests covered the broadest possible range of constitutional problems. He made a significant contribution to the work of the Convention. He brought to bear at once a lawyer's skill of the highest order and a far-sighted view of the public welfare in the highest tradition of the State.

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25. *Id.* at 2570-71.