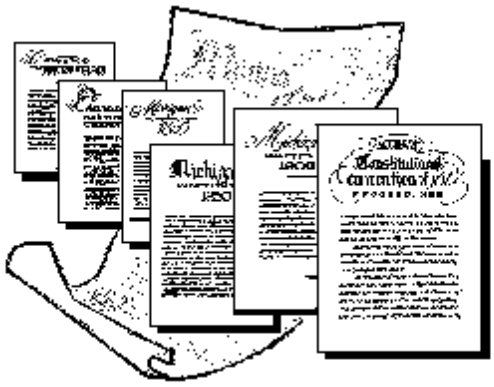
A Comparative Analysis of the Michigan Constitution

Volumes I & II

Articles I – XVII



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Report Number 208

October 1961

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CHAPTER II DECLARATION OF RIGHTS

(over)

Section Detail

II DECLARATION OF RIGHTS

1. Political Power

by
Clark, Klein, Winter, Parsons and Prewitt of Detroit
Under the Supervision of Robert C. Winter

Article II: Section 1. All political power is inherent in the people. Government is instituted for their equal benefit, security and protection.

Constitutions of 1835 and 1850

The Michigan constitution, 1835, Article I, Bill of Rights, Sections 1, 2, and 3 provided:

> Section 1. All political power is inherent in the people.
>
> Section 2. Government is instituted for the protection, security, and benefit of the people; and they have the right at all times to alter or reform the same, and to abolish one form of government and establish another, whenever the public good requires it.
>
> Section 3. No man or set of men are entitled to exclusive or separate privileges.

The Michigan constitution, 1850, contained no comparable provisions.

Constitution of 1908

The proceedings and debates of the constitutional convention, Official Report, 1907, contain a full text of the general revision of the constitution with explanations of the then proposed changes and the reasons therefore. The comment pertaining to Article II, Section 1 was: “This section is new.” However, although there was no comparable provision in the 1850 constitution, the present provision is, in effect, a restatement of a similar provision in the 1835 constitution.

Article II, Section 1, has not been amended since the adoption of the present constitution.

A statement of general philosophy with regard to the bill of rights is contained in the official address to the people of the state of Michigan submitting the proposed revision of the present constitution. It was there stated:

> "In the revised constitution the old framework of government is most carefully preserved. No structural changes are proposed. The historic safeguards of life, liberty, and property remain, with here and there a word or line to make those guaranties more ample and certain." (emphasis supplied)

This general statement is, of course, applicable to other sections of the bill of rights, discussed below.

Judicial Interpretation

Object of bill of rights:

The bills of rights in the U.S. constitution have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation; they are conservatory, rather than reformatory. Weimer v. Bunbury, 30 Mich. 201.

Political power in people:

Under this section of the constitution "all political power is inherent in the people," and remains there except as delegated by constitution or statute. Public Schools of Battle Creek v Kennedy, 245 Mich. 585.

While the legislature obtains legislative power and the courts receive judicial power by grant in the state constitution, the whole of such power reposing in the sovereignty is granted to those bodies except as it may be restricted in the same instrument. Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673.

Section as guaranty of equal protection:

The fourteenth amendment of the United States constitution and this section of the Michigan constitution give the same right of equal protection of the laws. Naudzius v. Lahr, 253 Mich. 216; Cook Coffee Co. v. Village of Flushing, 267 Mich. 131.

Equal protection of laws does not prevent reasonable classification by legislative enactment and ultimate decision as to wisdom of such laws rests with legislature. Tribbett v. Village of Marcellus, 294 Mich. 607; Rood v. City of Lapeer, 294 Mich. 621.

The guaranty of equal protection of the law is not one of equality of operation or application to all citizens of the state or nation but rather one of equality of operation or applicability within the particular class affected, which classification must, of course, be reasonable. Tomlinson v. Tomlinson, 338 Mich. 274.

Classification in General:

The fundamental rule of classification for the purposes of legislation is that it shall not be arbitrary, must be based on substantial distinctions, and be germane to the purposes of the law. Kelley v. Judge of Detroit Court of Recorder, 239 Mich. 204.

Classification of subjects for legislation is sufficient if practical and reasonable, and is not reviewable unless palpably arbitrary and unreasonable. Straus v. Elless Co., 245 Mich. 558.

Burden of establishing inequality:

One who assails the classification in a police law has the burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. Naudzius v. Lahr, 253 Mich. 216.

One who would strike down statute as unconstitutional must bring himself, by proper averments and showing, within class as to whom act thus attacked is unconstitutional. General Motors Corp. Attorney General, 294 Mich. 558.

Distinguishing between corporations and others:

Public Acts 1927, No. 335, providing that "no corporation shall interpose the defense of usury to any cause of action hereafter arising" is reasonable and valid because the classification embraces all corporations and is supported by practical considerations of public policy. Wm. S. & John H. Thomas, Inc. v. Union Trust Co., 215 Mich. 279.

Other State Constitutions

The Model State Constitution, Section 102 provides in part

> "No person shall be... denied the equal protection of the laws...."

The U.S. constitution, Amendments, Article IX, provides:

> The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The U.S. constitution, Amendments, Article X, provides

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The U.S. constitution, Article XIV, provides in part:

> ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor to any person within its jurisdiction the equal protection of the laws. (emphasis supplied)

Forty-seven states, including Michigan, provide that political power is in the people. The Alaska constitution, Article I, Section 1 provides:

> All persons /are/ equal and entitled to equal rights, opportunities and protection under law; all persons have corresponding obligations to people and state.

The Hawaii constitution, Article I, Section 4; New Mexico constitution, Article II, Section 18; South Carolina Constitution, Article I, Section 5 provide: "No person shall be denied equal protection of law."

Comment

The present provision is a statement of political theory, enumerating fundamental principles on which democratic government is based; e.g. popular sovereignty, equality of man, and consent of the governed.

Article II, Section 1, contains no explicit recognition of the obligations or duties owed by the people to the state and to each other. In a bill of rights the emphasis is naturally upon rights; however, in such a statement of rights it would not be inappropriate to qualify the statement by recognizing correlative duties, as has been done in the Alaska constitution.

Although the 14th amendment to the U.S. constitution affords the same equal protection against arbitrary state action as Article II, Section 1, Michigan constitution, a specific statement of this principle in a state constitution is not superfluous, but affords additional safeguards.

Bibliography

Index Digest of State Constitutions (1960); Michigan Statutes Annotated, Vol. I, The Constitution; Model State Constitution (1948); and, Proceedings and Debates of The 1907-1908 Convention.

2. Right of Assembly and Petition

by
Clark, Klein, Winter, Parsons and Prewitt of Detroit
Under the Supervision of Robert C. Winter

Article II: Section 2. The people have the right peaceably to assemble, to consult for the common good, to instruct their representatives and to petition the legislature for redress of grievances.

Constitutions of 1835 and 1850

The Michigan constitution of 1835, Article I, Section 20, provided:

> The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.

The Michigan constitution, 1850, Article XVIII, Section 10, provided:

> The people have the right peaceably to assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances.

Constitution of 1908

The explanatory comment referring to Article II, Section 2 in the revised text contained in the official report of the 1907 Proceedings was: “No change from Sec. 10, Art. XVIII of the present Constitution.”

Article II, Section 2, has not been amended since adoption.

Judicial Interpretation

Criminal syndicalism:

To make it a crime for one, in sympathy with and on his own volition to join in an assemblage of persons formed to teach or advocate crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform does not contravene the right of the people to peaceably assemble as guaranteed by the constitution of the state or of the United States. People v. Ruthenberg, 229 Mich. 315.

Assembly for election:

The constitution of 1850, Article XVIII, Section 10, providing that the people have the right to assemble together for the common good and to instruct their represen-

tatives, was held to afford justification, if such was needed, for the enactment of a law providing for the nomination of candidates for United States senator, governor and lieutenant governor by direct vote, but it had no bearing on how the law submitting such a question to the people should be enacted. Kelly v. Secretary of State, 149 Mich. 343.

Opinions of the Attorney General

An ordinance which bars public employees from becoming actively interested in a political campaign for any public office violates this provision. Op. Atty Gen., June 16, 1958, No. 3302.

Other State Constitutions

The Model State Constitution, Section 101 provides in part:

> No law shall be enacted respecting ... the right of the people peaceably to assemble and to petition the government for a redress of grievance.

The U.S. constitution, Amendments, Article I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievance.

All 50 states make provision for freedom of assembly and petition. The Tennessee constitution, Article I, Section 23 provides:

> Citizens have the right, in peaceable manner, to assemble for common good, to instruct their representatives, and apply to those invested with powers of government for redress of grievances, or other proper purposes, by addresses or remonstrance.

The New York constitution, Article I, Section 9 provides:

> No law /is/ to be passed abridging right of people peaceably to assemble and petition government, or any department thereof.

The North Carolina constitution, Article I, Section 25 provides:

> Secret political societies are dangerous to liberties of a free people, and should not be tolerated.

Comment

The general language of the present provision would appear to include the protection afforded by the more specific sanctions in other state constitutions; e.g., the

guarantee against abridgment by legislative action and the right to present views to all departments of government. Specific inclusion of such guarantees would, however, remove any doubt.

Bibliography

Index Digest of State Constitutions (1960); Michigan Statutes Annotated, Vol. I, The Constitution; Model State Constitution (1948); and, Proceedings and Debates of The 1907-1908 Convention.

3. Freedom of Worship

by
Clark, Klein, Winter, Parsons and Prewitt of Detroit
Under the Supervision of Robert C. Winter

Article II: Section 3. Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

Constitutions of 1835 and 1850

The Michigan constitution, 1835, Article I, Sections 4, 5 and 6 provided:

> Section 4. Every person has a right to worship Almighty God according to the dictates of his conscience; and no person can of right be compelled to attend, erect, or support, against his will, any place of religious worship, or pay any tithes, taxes or other rates, for the support of any minister of the gospel or teacher of religion.
>
> Section 5. No money shall be drawn from the treasury for the benefit of religious societies, or theological or religious seminaries.
>
> Section 6. The civil and religious rights, privileges and capacities of no individual shall be diminished or enlarged on account of his (sic) opinions or belief concerning matters of religion.

The Michigan constitution, 1850, Article IV, Sections 39, 40 and 41 provided:

> Section 39. The legislature shall pass no law to prevent any person from worshiping Almighty God according to the dictates of his own conscience, or to compell any person to attend, erect or support any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion.
>
> Section 40. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary, nor shall property belonging to the state be appropriated for any such purposes.
>
> Section 41. The legislature shall not diminish or enlarge the civil or political rights, privileges and capacities of any person on account of his opinion or belief concerning matters of religion.

Constitution of 1908

The explanatory comment referring to Article II, Section 3 in the revised text contained in the official report of the 1907 Proceedings was:

> "No change from Sections 39, 40, 41, Art. IV of the present Constitution except for the purpose of improving the phraseology."

Article II, Section 3, has not been amended since adoption.

Judicial Interpretation

Religious liberty defined:

Religious liberty does not cover purposes or methods that are unlawful in themselves, or that interfere with another's liberty of action or violate peace and good order. In re Case of Frazee, 63 Mich. 396.

However Jehovah's Witnesses may conceive them, public highways have not become their religious property merely by their assertion, and there is no denial of equal protection in excluding their children from doing there what no other children may do. People v. Ciocarlan, 317 Mich. 349.

Religious texts in schools:

The action of a board of education in permitting the use of a book in the public schools known as "Readings from the Bible," made up of moral precepts enforcing the Ten Commandments, no instruction being given from the said book, and no note

or comment by teachers being allowed, is not in violation of this provision. Pfeiffer v. Board of Education of Detroit, 118 Mich. 560.

Church property:

Where the purpose of a church congregation as originally organized was to teach and promulgate the doctrines of the Syrian Greek Orthodox Church those who organized the society, acquired property for such purposes and thereafter adhered to the declaration of faith are entitled to the property as against those who seek to divert its use and control to a Holy Russian Synod or Patriarch. Hanna v. Malick, 223 Mich. 100.

Opinions of the Attorney General

In view of this provision a township has no power to vote a donation or provide for the levy of a tax for the benefit of a church or of all the churches in the township. Op. Atty. Gen. April 12, 1935.

Other State Constitutions

The Model State Constitution, Section 1.01 provides in part:

> No law shall be enacted respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

The U.S. constitution, Amendments, Article I provides:

> Congress shall make no law respecting an establishment of religion, or prohibit the free exercise thereof

Other state constitutions contain comparable provisions, enumerating in detail, as in the present Michigan provision, guaranties of religious freedom.

Comment

The present provision sets out in detail the scope of religious freedom guaranteed. A change to a more concise statement of religious freedom would have the disadvantage that the change might be treated as an abridgment of that right.

Bibliography

Index Digest of State Constitutions (1960); Michigan Statutes Annotated, Vol. I, The Constitution; Model State Constitution (1948); and, Proceedings and Debates of The 1907-1908 Convention.

4. Liberty of Speech and of the Press

by
Clark, Klein, Winter, Parsons and Prewitt of Detroit
Under the Supervision of Robert C. Winter

Article II: Section 4. Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

Constitutions of 1835 and 1850

The Michigan constitution, 1835, Article I, Section 7, provided:

> Every person may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all, prosecutions or indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

The Michigan constitution, 1850, Article IV, Section 43, provided:

> No law shall ever be passed to restrain or abridge the liberty of speech or of the press; but every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right.

Constitution of 1908

The explanatory comment referring to Article II, Section 4 in the revised text contained in the 1907 Proceedings was:

> "No change from Sec. 42, Art. IV of the present Constitution except for the purpose of improving the phraseology."

Article II, Section 4, has not been amended since adoption

Judicial Interpretation

Liberty defined:

Liberty is something more than the mere freedom from personal restraint; it includes the right to do as one pleases when not inconsistent with others' legal rights. Kuhn v. Common Council of Detroit, 70 Mich. 534

Section as limited to natural persons:

Public Acts 1913, No. 109, Section 14, forbidding contributions for nomination and election expenses by corporations, is not violation of this section, since the section applies only to natural persons. People v. Gansley, 191 Mich. 357.

Advocating violence sedition overthrow of government or the like:

A statute making it a crime for one in sympathy with and on his own volition to join in an assemblage of persons formed to teach or advocate crime, sabotage, violence or other unlawful methods of terrorism as a means of accomplishing industrial or political reform does not unconstitutionally restrain or abridge liberty of speech. People v. Ruthenberg, 229 Mich. 315.

The right of free speech is not an absolute one, and the state, in the exercise of its police power, may punish the abuse of such freedom by utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. People v. Immonen, 271 Mich. 384.

Injunctions:

Under this provision it is said, in Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, that no one can be enjoined from publishing a libel, but held that equity may nevertheless enjoin picketing and the distribution of a boycott circular which not only libels but also seeks to intimidate, threaten and coerce the public from trading with an employer. Pratt Food Co. v. Bird, 148 Mich. 631.

A court of equity as a general rule will not restrain the publication of a libel, but relief by injunction will be granted to restrain the state dairy and food commissioner from placing in the hands of every dealer in the state a bulletin which in effect threatens them 'with prosecution in case they make use of the complainant's products in the form in which they are lawfully sold to them because the effect would be to absolutely exclude complainant's business from the state.

Publication of matter suppressed by court:

Where papers in certain injunction case were suppressed by order of court and sealed in envelope with public access thereto prevented, and reporters and newspapers secured information and had same published, held not guilty of contempt since power of court cannot be extended to curtailment of free speech or of the press. In re Times Publishing Co., 276 Mich. 349.

Freedom of speech and press as personal right:

Liberty of speech and press secured from federal abridgment by first amendment to federal constitution has been carried over and made part of fundamental personal rights and liberties secured from state abridgment by fourteenth amendment and such liberties are also secured by state constitution. Book Tower Garage, Inc. v. Local No. 415, International Union, U.A.W.A. (C.I.O.), 295 Mich. 580.

Distributing pamphlets in sheets:

On appeal from conviction of parents who permitted their children, between ages six and twelve years, to distribute religious literature and advertise religious meetings, held that such activity was within prohibitions of city's ordinance which provided that no male under twelve years of age and no female under 18 years of age should engage in any street trade, and that ordinance violated no constitutional right of freedom of speech or of the press. People v. Ciocarlan, 317 Mich. 349.

Criticism of courts:

As criticism of courts within proper limits is proper exercise of right of free speech, courts should not be overly sensitive, and should not subject critic to penalty for contempt unless criticism tends to impede or disturb administration of justice. In re Gilliland, 284 Mich. 604.

Picketing:

In action by employer to enjoin picketing trial court properly modified temporarily injunction so as to permit peaceful picketing to make known facts of labor dispute since such rights are guaranteed by state and federal constitutions securing rights of free speech and press. Book Tower Garage Inc. v. Local No. 415. International Union U.A.W.A. (C.I.0.), 295 Mich. 580.

Opinions of the Attorney General

Advocacy of communism is subversive and not protected by this provision Op. Atty. Gen. 1930-32, p. 544.

Senate Bill No. 292 /Act No. 168/ of 1935, making it a felony to urge overthrow of government does not violate right of free speech. Op. Atty. Gen., April 18, 1935.

It is within police power of state to prohibit publication of betting odds either before or after occurrence of event. Op. Atty. Gen. 1923-24, p. 100.

An ordinance which bars public employees from becoming actively interested in a political campaign for any public office violates this provision. Op. Atty. Gen., June 16, 1958, No., 3302.

Other State Constitutions

The Model State Constitution, Section 1.01 provides:

> No law shall be enacted…abridging the freedom of speech or of the press....

The U.S. constitution, Amendments, Article I provides:

> Congress shall make no law...abridging the freedom of speech, or of the press….

All 50 states have provisions on freedom of speech and of the press.

The Utah constitution, Article 1, Section 1 provides:

> Men have right to communicate freely their thoughts, and opinions, being responsible for abuse of that right.

The Indiana constitution, Article I, Section 9 provides: "No law shall be passed to restrain free interchange of thought and opinion."

The California constitution, Article I, Section 9; Connecticut constitution, Article I, Section 5; Nevada constitution, Article I, Section 9; New York constitution, Article I, Section 8; Ohio constitution, Article I, Section 11; Pennsylvania constitution, Article I, Section 7; Tennessee constitution, Article I, Section 19; Virginia constitution, Article I, Section 12 provide: "Every citizen may freely speak on all subjects, being responsible for abuse of that right."

The Missouri constitution, Article I, Section 8 provides: "No law shall be passed to impair freedom of speech, no matter by what means communicated."

The Pennsylvania constitution, Article I, Section 7; Tennessee constitution, Article I, Section 19 provide: "Every citizen may freely write and print on any subject, being responsible for abuse of that liberty."

The Indiana constitution, Article I, Section 9; Oregon constitution, Article I, Section 8 provide: "No law shall be passed to restrict right to write or print freely on any subject; but for abuse of that right every person to be responsible."

The West Virginia constitution, Article III, Section 7 provides: "Legislature may restrain publication or sale of obscene books, papers, or pictures, and provide for criminal prosecution and civil actions for libel or defamation of character."

Comment

The present provision contains no specific protection of the freedom of speech, writing, and publication against abridgment by executive action, although there is a specific sanction forbidding legislative abridgment of that right.

The present provision does not include the procedural rights with reference to the law of libel included in the 1835 constitution (see Section 18), but is confined to a broad statement of the substantive right of freedom of speech, writing and publication, as was the course taken in the 1850 constitution.

Bibliography

Index Digest of State Constitutions (1960); Michigan Statutes Annotated, Vol. I, The Constitution; Model State Constitution (1948); and, Proceedings and Debates of The 1907-1908 Convention.

5. Right to Bear Arms

by
Varnum, Riddering, Wierengo and Christenson of Grand Rapids
Under the Supervision of Laurent K. Varnum

Article II: Section 5. Every person has a right to bear arms for the defense of himself and the state.

Constitutions of 1835 and 1850

The provisions of the 1835 constitution (Article I, Section 13) and the 1850 constitution (Article XVIII, Section 7) are identical to that found in the 1908 constitution.

Constitution of 1908

Section 5 has not been amended since the adoption of the present constitution.

Judicial Interpretation

The meaning of this section has not been entirely clear, as there have been some cases construing it. Basically, it has been held to mean that any person, whether a citizen or not, may own a weapon for the defense of himself and his property. This does not curtail, however, the legislature's police power in regulating the carrying of firearms, and does not justify the carrying of concealed weapons. The meaning of the word "arms" seems to be limited to firearms, as a blackjack was held not to be included within this provision.

Other State Constitutions

Many of the various state constitutions include provisions on the right to bear arms, some specifically applying the right to all people, not just citizens. There is some variety in the purpose for which arms may be borne, as some allow it for defense of

self, some for the common defense, some for home and some for property. A few of the constitutions refer to the right to "keep" arms, not just to "bear" them. Eleven of the constitutions provide that the legislature may regulate the way in which arms may be worn or carried, with five also specifying that the right to carry concealed weapons is not included.

There is no direct provision in the Model State Constitution pertaining to the right to bear arms. The United States constitution (second amendment) provides that the people have the right to keep and bear arms.

Comment

Although many states have included provisions on the right to bear arms for many years, the necessity for including such a provision is not clear. Since the United States constitution does include such provisions, the provision in a state constitution may merely duplicate the effect of that amendment. The absence of a specific provision on the right to bear arms in the Model State Constitution may indicate that this right is included within; broader statement of the rights of individuals.

6. Civil Power Supreme

by
Varnum, Riddering, Wierengo and Christenson of Grand Rapids
Under the Supervision of Laurent K. Varnum

Article II: Section 6. The military shall in all cases and at all times be in strict subordination to the civil power.

Constitutions of 1835 and 1850

The identical provision was found in the 1835 constitution (Article I, Section 14) and the 1850 constitution (Article XVIII, Section 8).

Constitution of 1908

Section 6 has not been amended since the adoption of the constitution in 1908. The meaning of this provision is relatively clear, as the only litigation on this section in Michigan deals with the liability of military officers for injury done to private property. Decisions in other jurisdictions, with similar provisions, have indicated that merely calling out the militia for the preservation of the peace does not suspend the civil authority.

Other State Constitutions

Forty of the states have provisions similar to Michigan's providing that the military is to be subordinate to the civil power. Seven of the states, including Michigan, provide that it is in "strict subordination." Apparently, New York is the only state with no provision on this point.

There is no explicit provision for this in the Model State Constitution, nor in the United States constitution.

Comment

The widespread inclusion of such a provision within the state constitutions, may indicate the importance of making this specific. The main reason for including this type of section, would seem to be the necessity of indicating who is responsible when the militia is called out to preserve the peace, so perhaps it should specify that the civil authorities remain in charge and are responsible for the acts of the militia.

7. Quartering of Soldiers

by
Varnum. Riddering. Wierengo and Christenson of Grand Rapids
Under the Supervision of Laurent K. Varnum

Article II: Section 7. No soldier shall in time of peace, be quartered in any house without the consent of the owner or occupant, nor in time of war, except in a manner prescribed by law.

Constitutions of 1835 and 1850

The provision in the constitution of 1835 (Article I, Section 15) is basically the same as those found in the two succeeding constitutions. Aside from a slight change in phraseology, the only material change of the 1850 constitution from the 1835 constitution is the inclusion of the necessity of the consent of the occupant of the house as well as of the owner. The 1908 constitutional provision is identical to that of the constitution of 1850 (Article XVIII, Section 9).

Constitution of 1908

Section 7 has not been amended since the adoption of the present constitution. There has been no litigation on the meaning of this provision.

Other State Constitutions

Most of the states presently have some provision regarding the quartering of soldiers, most of which are very similar. Three states besides Michigan have a provision allowing the consent by the occupant of the house as well as the owner.

The United States constitution (third amendment) is nearly identical to the provision in the 1908 constitution. There is no similar provision in the Model State Constitution.

Comment

Because of the provision in the United States constitution, the necessity for this provision within the state constitution is questionable.

8. Slavery Prohibited

by
Varnum, Riddering, Wierengo and Christenson of Grand Rapids
Under the Supervision of Laurent K. Varnum

Article II: Section 8. Neither slavery nor involuntary servitude, unless for the punishment of crime, shall ever be tolerated in this state.

Constitutions of 1835 and 1850

The constitution of 1835 contained no provision on this subject. The subject was first dealt with in the 1850 constitution (Article XVIII, Section 11) with the identical section carried over to the 1908 constitution.

Constitution of 1908

Section 8 has not been amended since the adoption of the present constitution. The effect of this provision has apparently been clear as no litigation has arisen under it.

Other State Constitutions

Twenty-two states have provisions on slavery similar to that found in Michigan. A few others have provisions different in form, but with the same effect.

There is no specific provision in the Model State Constitution dealing with slavery. The statement in the United States constitution (thirteenth amendment) is quite broad, prohibiting slavery in any form. It also grants power to Congress to enforce this by appropriate legislation.

Comment

The necessity of a provision which merely duplicates the effect of the provision in the United States constitution is questionable.

9. Attainder; Ex Post Facto Laws; Impairment of Contracts

by
Warner, Norcross and Judd of Grand Rapids
Under the Supervision of David A. Warner

Article II: Section 9. No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

Constitutions of 1835 and 1850

The 1835 constitution (Article I, Section 17) contained this exact provision and an almost identical provision appeared in the 1850 constitution (Article IV, Section 43).

Constitution of 1908

Section 9 has not been amended since the present constitution. The provision is clear and definite since the legal meaning of the terms has become clarified through much litigation. A bill of attainder may be defined as a legislative act which inflicts punishment without a judicial trial, while an ex post facto law is one which makes something criminal which was not so at the time that the action was performed, or which increases the punishment or which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage.[1] Most of the litigation in connection with this provision has been concerned with the meaning of impairment of contracts as applied to particular situations.

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[1] 11 AM. JUR., Constitutional Law, Section 348, p. 1171, People v. Chapman, 301 Mich. 584 (1942).

[2] Index Digest, p. 35

Other State Constitutions

Twenty-four states, including Michigan, have constitutional provisions prohibiting bills of attainder. Eleven others prohibit a person from being attainted of treason or felony, or both, by the legislature.[2]

Forty-four states besides Michigan have provisions prohibiting ex post facto laws.[3]

Forty-one states besides Michigan have provisions prohibiting laws impairing the obligation of contract.[4]

Article I, Section 10, of the United States constitution forbids a state from passing "any Bill of Attainder, ex post facto law or law impairing the Obligation of Contracts." The Model State Constitution does not have a provision of this type.

Comment

Since the United States constitution guarantees against state action in this area, this provision would appear unnecessary and its elimination would avoid the present duplication.

10. Searches and Seizures

by
McKone, Badgley, Domke and Kline of Jackson
Under the Supervision of Maxwell F. Badgley

Article II: Section 10. The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation: Provided, however, That the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any narcotic drug or drugs, any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slungshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state.

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[3] Index Digest, p. 470.

[4] Index Digest, p. 108

Constitutions of 1835 and 1850

The Michigan constitutions of 1835 (Article I, Section 8) and 1850 (Article VI, Section 26) carried the same provision relative to search and seizure as the first two sentences up to the "Provided, however," of the constitution of 1908.

Constitution of 1908

The constitution of 1908, as originally adopted, provided:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation.

The provisions of the Michigan constitution of 1908 relating to search and seizure have been twice amended. In 1936 the following provision was added:

> Provided, however, That the provisions of this section shall not be construed to bar from evidence in any court of criminal jurisdiction, or in any criminal proceeding held before any magistrate or justice of the peace, any firearm, rifle, pistol, revolver, automatic pistol, machine gun, bomb, bomb shell, explosive, blackjack, slungshot, billy, metallic knuckles, gas-ejecting device, or any other dangerous weapon or thing, seized by any peace officer outside the curtilage of any dwelling house in this state.

Then in 1952 "any narcotic drug or drugs" was added to the list of things which should not be excluded as evidence if seized outside of a dwelling house.

Judicial Interpretation

The provisions of the Michigan constitution prohibiting unreasonable searches and seizures have been subject to much interpretation by the courts. The questions have generally involved: (1) What is an unreasonable search and seizure, and, (2) assuming there has been an unreasonable search and seizure, what are the consequences of such search and seizure?

As to the second question relating to the consequences of an illegal search and seizure, this has been quite definitely answered in Michigan. Almost the whole import and impact of this section of the constitution is found in criminal cases wherein evidence is sought to be introduced in court against an accused where that evidence is claimed to have been obtained by an unreasonable search and seizure.

The Michigan courts have made it the law in Michigan that if an objection is made to the introduction of such evidence, the evidence was in fact obtained by an unreasonable search and seizure, the evidence is not admissible in court

It is interesting to note that although all of the states and the federal government recognize the prohibition against unreasonable searches and seizures, only about one-half of the states recognize that the consequences of such an unreasonable search and seizure shall be the inadmissibility of evidence thus obtained.[5]

The reason for holding such evidence inadmissible is generally the feeling that if the evidence is allowed to be admitted the constitutional rights of privacy are, as a practical matter, unenforceable. In this area the courts are not so much concerned with protecting the individual who stands accused as they are with protecting the rest of the people. By holding such evidence inadmissible they, in effect, say to the police that if the police violate this constitutional guarantee and commit an unreasonable search and seizure, the evidence thus obtained will not be able to be used in court to gain criminal conviction; and thus the courts seek to deter and discourage the police from committing unreasonable searches and seizures.

The opposing view that such evidence should be admissible is generally sustained along the lines that the method of obtaining the evidence does not generally effect its substantiality or relevancy. That is, the murder weapon found in the accused's basement or the policy or numbers slips found in the trunk of his car are clear signs pointing towards his guilt, and the fact that the home or car was entered in violation of the accused's constitutional rights does not change this, and the conviction of criminals should not be made difficult or impossible by excluding such evidence.

The further argument is made that there are methods other than the exclusion of evidence for protecting this constitutional right, although the opposing arguments hotly contest this.

Here the courts are forced to strike a balance between the protecting of society against crime on the one hand and the protection of the individual against violation of his constitutional rights on the other hand. Judges both great and small have argued this matter over the years.[6] However, as will be shown later, it may be that the U.S. Supreme Court has now settled the argument.

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[5] 50 American Law Reports, 2d, 535.

[6] For good discussion of the pros and cons of the questions relating to admissibility see People v. Cahan, 44 California 2d, 434,282 Pacific 2d, 905, 50 American Law Reports, 2d, 513.

The Michigan constitutional provision was quite significantly modified in 1936 when the search and seizure article was amended to provide that certain things (dangerous weapons) seized in certain places (anywhere outside of a dwelling house) even though unlawfully obtained should be admissible as evidence.

The list of certain things was further broadened in 1952 to include "any narcotic drug or drugs."

These amendments to the Michigan constitution are unique. That is, no other state has by specific constitutional amendment so modified its provision on searches and seizures.

However, it is very important here to note that on June 21, 1961, the U.S. Supreme Court handed down a decision which seems to hold that it is a violation of the United States constitution and the guarantees provided thereunder, for any state to admit into evidence in its state courts in any criminal proceeding any evidence illegally obtained by an unreasonable search and seizure.[7]

Since the provisions of the United States constitution as interpreted by the U.S. Supreme Court are generally supreme over conflicting provisions of state constitutions, it is questionable at this writing whether those states which allow admission of illegally procured evidence can lawfully do so in the future, and it is further questionable whether the 1936 and 1952 amendments to the Michigan constitution can stand as valid in face of the U.S. Supreme Court's interpretation of the United States constitution.

The amendments, although today they may be of historical significance only, at the time they were enacted put Michigan in a status of compromise to some degree between the two opposing views on the questions of admissibility. They reflect the concern of the legislators and the people over the fact that persons involved in more serious crimes, that is those crimes which involve use of dangerous weapons and narcotics, may escape punishment because of the rules against admissibility, and at the same time they reflect a desire to hold the line in protecting the basic rights of privacy traditionally afforded persons in their homes or "dwelling houses." In addition these amendments reflect the concern of the people and the police authorities over the fact that many crimes involve the use of modern means of transport, particularly automobiles, in situations where search warrants are not always immediately obtainable. However, as will be seen later, the fact that a police officer is not in possession of a search warrant does not necessarily prevent him from making a search and seizure.

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[7] Mapp v. Ohio, Decision No. 236 October term, 1960, Supreme Court of U.S.

This brings us back to the first question—what is an "unreasonable" search and seizure? This perhaps can be answered best by indicating what is not an unreasonable search and seizure.

It is clear from a reading of the provisions of the constitution that a search and seizure made pursuant to a search "warrant" describing the person or place to be searched, which warrant was properly obtained, is not an unreasonable search and seizure. Of course judges must issue warrants and the right judge, that is the judge having jurisdiction, must issue the warrant.

The feeling behind this provision of the constitution is that judges are better equipped to determine coolly and calmly when search warrants should be issued and to know whether there is "proper cause" for the issuance of the warrant, especially if the person requesting the warrant is forced to appear before the judge and swear to certain facts.[8]

A search and seizure made pursuant to a lawful arrest is generally not unreasonable. The search of the place where a lawful arrest is made, or a search of the person lawfully arrested is allowed when that search is designed to reach (1) the fruits of the crime, or (2) the means by which it was committed, or (3) instruments calculated to effect escape from custody.[9] So there is great doubt whether a police officer stopping a car for a traffic violation and making an arrest, has the right to search the car.[10]

An arrest is lawful if made by a police officer with a valid warrant for arrest, or made by a police officer when any crime has been committed in his presence, or when made by a police officer when that police officer has reasonable grounds to believe that a felony has been or is about to be committed by the person arrested. Whether or not the grounds for believing a felony had been committed were reasonable is normally reviewable by a jury or a judge whom the police officer must be prepared to convince, if he is to get the evidence he seized admitted in court.

Lastly, a search is reasonable if the person with a right to object to the search waived that right; that is, if the person searched consents to the search or if the

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[8] Even when signed and issued by a judge, a warrant is not necessarily valid, and warrants have been held to be defective in this state which were not supported by someone's affidavit in writing stating facts instead of conclusions (People v. Hertz, 223 Mich. 170) which were issued without the person who swore out the affidavit appearing before the judge (People v. Fons, 223 Mich. 603); and which were supported by affidavit not stating enough facts to show proper cause to believe that a crime was being, had been, or was about to be committed (People v. Warner, 221 Mich. 657).

[9] Michigan State Journal, April, 1961, p. 30 – article by Justice George Edwards.

[10] People v. Gonzales, 356 Mich. 254.

owner or person entitled to control over the premises gives permission for the search.

It is clear under our constitutional provision that there is no right to search and seize pursuant to a mere investigation without a lawful arrest, or a warrant, or a consent to the search.

Other State Constitutions

The basic provisions of the search and seizure article of the Michigan constitution, less the 1936 and 1952 amendments, are further found almost verbatim, in the federal constitution, in the Model State Constitution and in 48 of the 50 state constitutions. The states of Virginia and North Carolina, which do not have these constitutional provisions, recognize the right to freedom from search and seizure as part of the basic fabric of their law, nevertheless.[11]

The Model State Constitution provides in addition that:

> (b) The right of the people to be secure against unreasonable interception of telephone, telegraph and other electric or electronic means of communication shall not be violated, and no orders or warrants for such interceptions shall issue but upon probable cause supported by oath or affirmation that evidence of crime may be thus obtained, and particularly identifying the means of communication, and the person or persons whose communications are to be intercepted.
>
> (c) Evidence obtained in violation of this section shall not be admissible in any court against any person.

Comment

The advisability of including in any new state constitution the 1936 and 1952 amendments to this article might be reviewed; and the question of the legal validity of any such provisions if they were to be included in the new constitution is certainly present in view of the recent U.S. Supreme Court decision.

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[11] Index Digest, p. 921; Model State Constitution, Article 1, Section 1.03; U.S. constitution, 4th amendment.

As a matter of fact, the real necessity for any search and seizure provision at all in the new constitution is also questionable in view of the interpretation placed upon the United States constitution in the recent Supreme Court decision, although the people of this state might well expect Michigan "to go on record" as clearly in support of these principles.

11. Habeas Corpus

by
Warner, Norcross and Judd of Grand Rapids
Under the Supervision of David A. Warner

Article II: Section 11. The privilege of the writ of habeas corpus shall not be suspended unless in case of rebellion or invasion the public safety may require it.

Constitutions of 1835 and 1850

Both the 1835 constitution (Article II, Section 12) and the 1850 constitution (Article IV, Section 44) contained substantially identical provisions.

Constitution of 1908

Section 11 has not been amended since the present constitution was adopted.

There has been only a limited amount of litigation with respect to this provision. It has been supplemented by procedural statutes (M.S.A. Sec. 27.2244 et seq.).

Other State Constitutions

All 50 state constitutions contain habeas corpus provisions. Twenty-nine states have provisions similar to Section 11. Ten states provide that the privilege shall not be suspended and make no exceptions. Seven states provide for the granting of the writ rather than the non-suspension. The constitutions of six states are similar to Section 11 except that they go on to expressly provide that only the legislature may suspend the privilege of the writ. In Massachusetts the privilege may never be suspended beyond twelve months and in New Hampshire beyond three months.[12]

The United States constitution contains a practically identical provision which, however, does not always protect individuals being detained by state officers.

The Model State Constitution contains an identical provision.

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[12] Index Digest, pp. 517-518.

Comment

Since the United States constitution does not require states to grant the privilege of the habeas corpus writ, a provision similar to Section 11 should be included in Michigan's constitution if the protection of the writ is deemed desirable.

12. Appearance in Person or by Counsel

by Warner, Norcross and Judd of Grand Rapids
Under the Supervision of David A. Warner

Article II: Section 12. Any suitor in any court of this state shall have the right to prosecute or defend his suit, either in his own proper person or by an attorney or agent of his choice.

Constitutions of 1835 and 1850

This provision first appeared in identical form in the constitution of 1850 (Article VI, Section 24).

Constitution of 1908

Section 12 has not been amended since the adoption of the present constitution.

The word "agent" in this provision has been judicially held to be synonymous with attorney.[13] With this interpretation, the provision is now clear and definite. Since Article II, Section 19 of the present constitution gives the accused in every criminal prosecution the right to have the assistance of counsel, Section 12 will be important only in civil cases. There has been very little litigation involving this section.

Other State Constitutions

Only six other states (Alabama, Georgia, Mississippi, Utah, Wisconsin and Maine) have constitutional provisions similar to Section 12, and these do not contain the word "agent" as found in the Michigan provision, but grant the right to be repre-

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[13] Cobb v. Grand Rapids Superior Court Judge, 43 Mich. 289 (1880).

[14] Index Digest, pp. 206, 578.

sented by counsel only. Four of these provisions specifically apply only to civil cases.[14]

Neither the Model State Constitution nor the United States constitution have provisions of this type, though both have provisions similar to that in Article II, Section 19, giving the accused in criminal prosecutions the right to have the assistance of counsel.

Comment

In view of the judicial interpretation of the word "agent," it would appear that it should either be deleted from the provision to avoid confusion and duplication, or be expanded so as to clarify the meaning of the word.

13. Jury Trial

by
Warner, Norcross and Judd of Grand Rapids
Under the Supervision of David A. Warner

Article II: Section 13. The right of trial by jury shall remain, but shall be deemed to be waived in all civil cases unless demanded by one of the parties in such manner as shall be prescribed by law.

Constitutions of 1835 and 1850

The constitution of 1835 contained a similar provision (Article I, Section 9) and the constitution of 1850 contained this exact provision (Article VI, Section 27).

Constitution of 1908

Section 13 has not been amended since the adoption of the present constitution. By its terms, the provision requires statutory implementation. Through judicial interpretation, the provision has become clear. "The right to trial by jury shall remain" means the right as it existed in the state at the time of the adoption of the constitution. The jury weighs evidence and determines fact while the court reviews law matters. There can be no trial by jury in equity cases.[15] The number of jurors need

[15] Guardian D. Corp. v. Darmstaetter, 290 Mich. 445 (1939). Conservation Dept. v. Brown, 335 Mich. 343 (1952).

not be twelve (Article V, Section 27). Since Article II, Section 19 of the present constitution gives the accused in every criminal prosecution the right to a jury trial, Section 13 will be important only in civil cases.

Other State Constitutions

Forty states, including Michigan, have general provisions regarding the right to jury trial. Nine others have provisions applying specifically to civil cases while almost all states have provisions applying to criminal cases. Fourteen states have provisions for waiver of jury in civil cases.[16]

The U.S. constitution guarantees the right to jury trial in federal suits at common law where the value in controversy exceeds $20.00. The U.S. constitution also provides for a jury trial in federal prosecutions. The Model State Constitution does not have a provision of this type.

Comment

If a provision of this type is to remain, consideration might be given to combining it with Article V, Section 27 which provides:

> "The legislature may authorize a trial by a jury of a less number than twelve men."

14. Former Jeopardy; Bailable Offenses

by
Warner, Norcross and Judd of Grand Rapids
Under the Supervision of David A. Warner

Article II: Section 14. No person, after acquittal upon the merits, shall be tried for the same offense. All persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great

Constitutions of 1835 and 1850

The constitution of 1835 contained a similar provision (Article II Section 12) and the constitution of 1850 contained this exact provision (Article VI, Section 29).

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[16] Index Digest, p. 578.

[17] People v. Schepps, 231 Mich. 260 (1925).

Constitution of 1908

Section 14 has not been amended since the present constitution.

The portion of the provision concerning bail is clear and unambiguous. The portion dealing with double jeopardy has been construed by the Michigan supreme court as being the same law as under the United States constitution. An accused is in jeopardy when his trial has been entered upon and progressed through selection and swearing of a jury.[17] The dismissal of a prosecution following disagreement of the jury is not a bar to a new prosecution.[18] Also, the limitation applies only when the defendant is placed in jeopardy twice for the same offense.

Other State Constitutions

Forty-seven of the states have constitutional provisions dealing with double jeopardy. Though there are slight differences in the language of these provisions, their substantive effect is no doubt practically (or exactly) the same.[19]

Forty-one states have constitutional provisions dealing with the right to bail. The basic differences lie in the exceptions. Michigan and three other states appear to be the only states with the exceptions limited to murder and treason. In thirty-four states, all capital offenses, where proof evident or presumption great, are non-bailable. One state (Rhode Island) excepts offenses punishable by death or imprisonment for life. In another (Texas), persons accused of non-capital felonies, if twice previously convicted of felonies, may be denied bail. One state (Louisiana) grants the right to bail after conviction, and pending appeal, where there was a sentence of less than five years hard labor actually imposed. In Virginia, the constitution grants the legislature the right to provide by whom and how applications for bail will be heard and determined.[20]

The United States constitution contains a similar provision in connection with double jeopardy. While the United States constitution prohibits excessive bail, it does not guarantee the right to bail as does the Michigan constitution. However, the right to bail is recognized under the Federal Rules of Criminal Procedure except for capital crimes.

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[18] In re Weir, 342 Mich. 96 (1955).

[19] Index Digest, p. 576.

[20] Index Digest, p. 48.

The Model State Constitution has a provision similar to Michigan's, but instead of "murder and treason," specifies "capital offenses or offenses punishable by life imprisonment."

Comment

In view of the language found in other constitutions, some consideration might appropriately be given to changing the words "murder and treason" to "capital offenses and offenses punishable by life imprisonment."

15. Excessive Bail, Fines and Punishments

by
McKone, Badgley, Domke and Kline of Jackson
Under the Supervision of Maxwell F. Badgley

Article II: Section 15. Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.

Constitution of 1835 and 1850

The Michigan constitutions of 1835 (Article I, Section 18) and 1850 (Article VI, Section 31) contain the same provision here as does the constitution of 1908, except that the constitution of 1835 did not contain the provision relative to unreasonable detention of witnesses.

Constitution of 1908

This article of the 1908 constitution has not been amended.

The Michigan supreme court has interpreted the prohibition against cruel and unusual punishments to mean that "inhuman and barbarous" punishments such as "torture and the like" should not be inflicted as punishment for the commission of crimes;[21] and has specifically held that ordering a convicted criminal to leave the state was in violation of this article[22] and that laws permitting the sterilization of mentally defectives were not in violation of this article since such laws were not meant as punishment for crimes.[23]

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[21] In re Ward, 295 Mich. 742.

[22] People v. Baum, 251 Mich. 187.

[23] Smith v. Wayne Probate Judge, 231 Mich. 409.

The questions of what might be "unreasonable" detention of a witness have not been specifically answered in relation to this article, nor have questions of what might be "excessive" bail or fines. Certainly the courts are allowed wide discretion in these matters within the limitations imposed by legislatively enacted statutes.

Other State Constitutions

Imposition of excessive fines and excessive bail is specifically prohibited by at least 49 state constitutions, the United States constitution and the Model State Constitution. The Model State Constitution provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted."

Cruel and unusual punishments are prohibited in at least 47 state constitutions and by the United States constitution. It is interesting to note that the Montana constitution provides that laws for punishment are to be founded on principles of reformation and prevention (Article III, Section 24); that the Alaska constitution provides that penal administration is to be based on principles of reformation and upon the need for protecting the public (Article I, Section 12); that the Wyoming constitution provides that the penal code is to be framed on humane principles of reformation and prevention (Article I, Section 15); and that the New Hampshire and Oregon constitutions provide that punishments are to be founded on principles of reformation, not vindictive justice (Article I, Section 18, and Article I, Section 15, respectively); and that the Indiana constitution provides that the penal code is to be founded on principles of reformation, not vindictive justice, (Article I, Section 18).

As to unreasonable detention of witnesses, the constitutions of at least 14 other states have provisions similar to or the same as Michigan. California, North Dakota and Wyoming constitutions provide that witnesses are not to be confined in rooms where criminals are actually imprisoned.[24]

Comment

It is questionable whether the provisions of the bill of rights of the United States constitution (which are exactly the same as those in our constitution of 1908 minus the part about the detention of witnesses) necessarily impose limitations on acts of this state (Smith v. Wayne Probate Judge, 231 Mich. 409). Therefore, the inclusion of this article in any new constitution might well be determined desirable from a legal standpoint.

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[24] Index Digest, p. 1128.

16. Self-incrimination; Due Process of Law

by
Gault, Davison and Bowers of Flint
Under the Supervision of Harry G. Gault

Article II: Section 16. No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.

Constitutions of 1835 and 1850

This provision contains language identical with that appearing in Section 32 of Article VI of the 1850 constitution. The 1835 constitution did not contain a similar section.

Constitution of 1908

Section 16 has not been amended since the adoption of the present constitution. While the language of this section is clear and definite, there has been substantial litigation involving the determination of what constitutes being a witness against oneself in a criminal case and involving the determination of what constitutes due process. The United States constitution and amendments thereto, particularly the fifth and fourteenth Amendments have a direct bearing on the questions of self-incrimination and due process. This section has been implemented to a certain extent by Section 617.59 of the 1948 Compiled Laws (Section 27.908, Mich. Statutes Annotated).

Other State Constitutions

Section 10 of Article II of the Illinois constitution of 1870 is substantially similar with respect to self-incrimination and Section 2 of Article II of the same constitution is identical as to due process. Section 6 of Article I of the New York constitution is substantially similar.

The Model State Constitution contains a provision on self-incrimination and in Section 1.02 of Article I has a guaranty of due process.

Comment

In view of the fact that this provision is one of long standing and has been thoroughly interpreted by numerous court decisions, no material change would appear to be necessary.

17. Competency of Witnesses

by
Gault, Davison and Bowers of Flint
Under the Supervision of Harry G. Gault

Article II: Section 17. No person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief.

Constitutions of 1835 and 1850

This provision contains language identical with that appearing in Section 34 of Article VI of the 1850 constitution. The 1835 constitution did not have a similar section.

Constitution of 1908

Section 17 has not been amended since the adoption of the present constitution. This section is clear and definite, but notwithstanding, it has been substantially repeated in and implemented by Section 617.82 of the 1948 Compiled Laws (Section 27.931, Mich. Statutes Annotated). There has been very little litigation with respect to this provision and the implementing statute.

Other State Constitutions

A similar provision is found in Section 3 of Article I of the New York constitution. The Model State Constitution does not contain a similar provision, although, Section 1.01 of Article I does guarantee freedom of religion.

Comment

It would appear that there is no necessity for making any change in connection with this matter.

18. Libels; Truth as Defense

by
Gault, Davison and Bowers of Flint
Under the Supervision of Harry G. Gault

Article II: Section 18. In all prosecutions, for libels the truth may be given in evidence to the jury; and, if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the accused shall be acquitted.

Constitutions of 1835 and 1850

This provision contains language almost identical with the first sentence of Section 25 of Article VI of the 1850 constitution. However, the second sentence of Section 25 of Article VI of the 1850 constitution was omitted. Its language was as follows: "The jury shall have the right to determine the law and the fact." Section 7 of Article I of the 1835 constitution contained language substantially identical with that appearing in Section 25 of Article VI of the 1850 constitution.

Constitution of 1908

Section 18 has not been amended since the adoption of the present constitution.

This provision is clear and definite and hardly needs statutory implementation. There has been practically no litigation relating thereto.

Other State Constitutions

Section 4 of Article II of the Illinois 1870 constitution and Section 8 of Article I of the New York constitution are substantially similar. The Model State Constitution does not contain a similar provision.

Comments

Probably no change is necessary, although, there are good reasons for eliminating the requirement that the jury must find that the truth was published "with good motives and for justifiable ends" before acquitting the accused. The question is "why require a more burdensome defense in a criminal libel case than in a civil libel case?"

19. Rights of Accused

by
McKone, Badgley, Domke and Kline of Jackson
Under the Supervision of Maxwell F. Badgley

Article II: Section 19. In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 men in all courts not of record; to be informed of the nature of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defense; and in courts of record, when the trial court shall so order, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Constitutions of 1835 and 1850

The Michigan constitution of 1835 provided at Section 10, Article I:

> In all criminal prosecutions, the accused shall have the right to a speedy and public trial by an impartial jury of the vicinage; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to have the assistance of counsel for his defense; and in all civil cases, in which personal liberty may be involved, the trial by jury shall not be refused.

The 1850 constitution is the same as the constitution of 1908 except that it made no mention of the right of reasonable assistance in appealing criminal cases. The reason for the addition of this provision in 1908 has been said to be the desire of those drafting the constitution to "confirm the existing power of the trial court, in its discretion, to order the expense of an appeal from a judgment of conviction to be borne by the county."[25]

Constitution of 1908

This section of the 1908 constitution has not been amended since its enactment.

Judicial Interpretation

The Michigan supreme court has, to some degree, passed upon the provisions of this article. It has held that the trial courts have a great latitude of discretion in the matter of the speed at which the trial shall be brought on and progress, and has indicated that if the defendant is "out on bond" or has not formally requested immediate trial, such defendant has little grounds to complain that his trial was not speedy enough.[26]

The court has held trials to be "public" although some people were not allowed admittance to an overcrowded courtroom, although certain witnesses were excluded and although spectators were searched for dangerous weapons.[27] It has held a trial

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[25] Proceedings and Debates of the 1907-08 convention, p. 1417.

[26] Hicks v. Judge of Detroit Court of Recorder, 236 Mich. 689; People v. Shufelt, 61 Mich. 237; People v. Foster, 261 Mich. 247.

[27] People v. Greeson, 230 Mich. 124; People v. Martin, 210 Mich. 139; People v. Mangiapane, 219 Mich. 62.

[28] People v. Yeager, 113 Mich. 228: People v. Micalizzi, 223 Mich. 580.

[29] People v. Mol, 137 Mich. 692.

[30] People v. Brown, 299 Mich. 1.

not to be "public" where the public was excluded from an uncrowded courtroom wherein evidence of licentious or peculiarly immoral acts was to be presented and has held a trial not to be "public" where the courtroom door was locked during the charge to the jury and the defendant's attorney was among those excluded thereby.[28]

The court has held a jury was not "impartial" where in a prior case the same jury had heard evidence based on the same conspiracy, from the same witnesses, who gave the same testimony; although the accused in the second case was different.[29]

The right of the accused to be informed of the charges against him has been vigorously protected by the courts as it is felt that such knowledge is essential for the accused in preparation for trial and also affords him protection of record from being placed twice in jeopardy for the same offense.[30]

The rights of the accused to confront, to question and to cross-examine witnesses against him has also been vigorously protected by the courts and there are numerous rules of evidence and cases dealing with questions in this area.

The right to compulsory process for obtaining witnesses involves the right to force witnesses to the stand by subpoena and the right to force them to testify on behalf of the accused, except where such witnesses can validly object to being forced to testify on the grounds that they would incriminate themselves.

Normally the right to counsel does not include the right to have the state or county pay for that counsel,[31] although an attorney will normally be appointed and paid for by the county in felony cases where the accused requests it and is unable himself to pay. Further in this area, an order by a judge to the sheriff to prevent a person who had pled guilty and was in jail awaiting sentence from consulting with a lawyer was held to be in violation of this article.[32]

Other State Constitution

The article relating to rights of the accused in the Michigan constitution is almost exactly the same as the sixth amendment to the United States constitution, except that the United States constitution mentions nothing about reasonable right to counsel in perfecting an appeal.

The Model State Constitution provides at Section 106 as follows

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[31] People v. DeNeerleer, 313 Mich. 548.

[32] People v. Posoni, 233 Mich. 462.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. In prosecutions for felony, the accused shall also enjoy the right of trial by an impartial jury of the county (or other appropriate political subdivision of the state) wherein the crime shall have been committed, or of another county, if a change of venue has been granted, and he shall have the right to have counsel appointed for him.

At least 42 state constitutions specifically require a "speedy" trial, at least 41 state constitutions specifically provide for "public" trial, and at least 45 state constitutions specifically provide that all serious or felony offenses shall be tried by a jury. Twenty-six state constitutions specifically mention that the jury shall be "impartial", at least 46 state constitutions provide that the accused must be informed of the nature of the accusation, and 45 state constitutions specifically provide that he shall have the right to confront witnesses. Forty-three state constitutions specifically provide that the accused shall have compulsory process for obtaining witnesses in his favor and 49 state constitutions specifically provide that he shall have assistance of counsel. Michigan is apparently the only state that specifically mentions anything about counsel for appeals.[33]

Comment

The people of the state will probably expect the state constitution to go on record in favor of the rights of the accused as set forth in the previous state constitutions. Even should these rights be not specifically enumerated in our constitution, however, it is probable that they are included in the concept of due process of law which is part of the basic fabric of the common law of this state and which is provided for in the United States constitution.

20. Imprisonment for Debt or Military Fine

by
Gault, Davison and Bowers of Flint
Under the Supervision of Harry G. Gault

> Article II: Section 20. No person shall be imprisoned for debt arising out of, or founded on a contract) express or implied, except in cases of fraud or breach of trust, or of moneys collected by public officers or in any profes-

[33] Index Digest, pp. 326, 348, 349, 579 and 581.

sional employment. No person shall be imprisoned for military fine in time of peace.

Constitutions of 1835 and 1850

This provision contains language identical with that appearing in Section 33 of Article VI of the 1850 constitution, except for the omission of the word "a" which appeared before the word "military" in the second sentence. The 1835 constitution did not contain a similar section.

Constitution of 1908

Section 20 has not been amended since the adoption of the present constitution. There has been a substantial amount of litigation involving this section which has been implemented by Sections 613.11-613.21, 623.3, 623.10, and 623.23-623.32 of the 1948 Compiled Laws (Sections 27.741-27.751, 27.1503, 27.1510, and 27.1523-27.1532, Mich. Statutes Annotated).

Other State Constitutions

Section 16 of Article I of the Wisconsin constitution is identical save as to the exceptions and as to military fines.

Comment

In view of the fact that this provision is one of long standing and that it and the implementing statutes have been thoroughly construed by numerous court decisions, no material change would appear to be necessary.

21. Treason

by
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Under the Supervision of Laurent K. Varnum

Article II: Section 21. Treason against the state shall consist only in levying war against it or in adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason unless upon the testimony of 2 witnesses to the same overt act, or on confession in open court.

Constitutions of 1835 and 1850

The provisions in the 1835 constitution (Article I, Section 16) and in the 1850 constitution (Article VI, Section 30) are almost identical with that found in the 1908 constitution. The only changes have been in phraseology.

Constitution of 1908

Section 21 has not been amended since the adoption of the present constitution. There has been no litigation with respect to this provision. The statutory provisions regarding treason are Sections 28.812 and 28.813, M.S.A.

Other State Constitutions

Thirty-eight states define treason exactly as Michigan does. Thirty-seven states require, as does Michigan, the testimony of two witnesses to the same overt act or a confession in open court for conviction. Utah has no provision for a confession in open court. Four states indicate that conviction for treason is not to have any affect on the rights of the descendants of the convicted.

There is no specific provision in the Model State Constitution concerning treason. The provision in the United States constitution (Article III, Section 3) includes treason against an individual state.

Comment

In view of the fact that the provision in the United States constitution seems to include acts of treason against the state, the necessity for including such a provision in the state constitution is questionable. It is a little difficult to conceive of treasonous conduct against a state which would not also be treasonous as to the United States.

22. Subversion

by
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Article II: Section 22. Subversion shall consist of any act, or advocacy of any act, intended to overthrow the form of government of the United States or the form of government of this state, as established by this constitution and as guaranteed by section 4 of article 4 of the constitution of the United States of America, by force or violence or by any unlawful means.

Subversion is declared to be a crime against the state, punishable by any penalty provided by law.

Subversion shall constitute an abuse of the rights secured by section 4 of this article, and the rights secured thereby shall not be valid as a defense in any trial for subversion.

Constitutions of 1835 and 1850

There is no provision dealing with subversion in either the 1835 or 1850 constitutions.

Constitution of 1908

Section 22 did not appear in the original draft of the 1908 constitution. It was added in 1950 as a result of a proposal by a joint resolution of 1950 during the extra session of the legislature, and it was adopted at the general election of November 7, 1950. There is apparently no litigation with respect to this provision.

Other State Constitutions

Michigan is the only state having a constitutional provision of this type making subversion a crime. Five states have provisions in their constitutions making persons who are subversive unqualified for various public offices, generally defining subversive people as those who "advocate" the violent overthrow of the government or membership in organizations which advocate it.

California's constitution has a provision which denies state tax exemptions to persons or organizations which advocate the violent overthrow of the government.

Neither the Model State Constitution nor the United States constitution have specific provisions dealing with subversion.

Comment

Neither the effect of this provision nor the necessity for its inclusion is completely clear. The effect of the last sentence of this section is especially questionable. Since the presence or absence of subversive activity is the question to be determined at such a trial, it is difficult to understand the justification for disregarding the liberty of speech and press (Article II, Section 4) during the course of such a trial. If these freedoms can be disregarded, it would have to be justified by the subversive conduct, the existence of which has not yet been proved at the trial. Some clarification of this problem seems to be necessary. The entire section may be in conflict with the first amendment to the United States constitution through the effect of the fourteenth amendment as it applies to the states.[34]

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[34] See generally, 11 American Jurisprudence, "Constitutional Law," §§ 319 and 320.