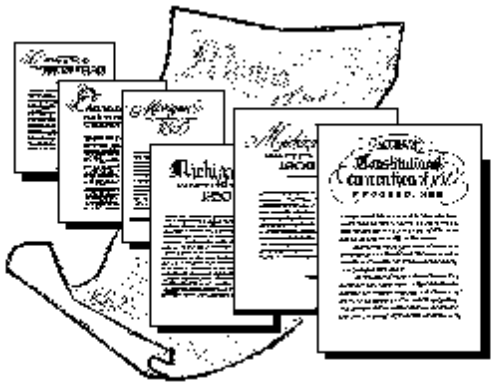
A Comparative Analysis of the Michigan Constitution

Volumes I & II

Articles I – XVII



Citizens Research Council of Michigan

1526 David Stott Building
Detroit, 26, Michigan

204 Bauch Building
Lansing 23, Michigan

Report Number 208

October 1961

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FOREWARD

The contributions of many persons and of many sources are involved in the production and publication of this document. The Citizens Research Council is exceedingly grateful for the cooperative efforts that are here represented.

Publication of this document was made possible by grants from W. K. Kellogg Foundation, The Kresge Foundation, McGregor Fund, and Relm Foundation.

Permission of the National Municipal League to use the 1961 draft version of the forthcoming edition of the Model State Constitution is gratefully acknowledged.

Heavy reliance for the provisions of other state constitutions has been placed on the Index Digest of State Constitutions, second edition, Columbia University, 1959, edited by Richard A. Edwards, and prepared under the auspices of the Legislative Drafting Research Fund of Columbia University, John M. Kernochan, director.

In preparing this document, the authors have placed extensive reliance on the Michigan Statutes Annotated, Volume 1. The sections on "Opinions of the Attorney General and Judicial Interpretation" have, for the most part, utilized the annotations written and published by Callaghan & Company in Volume 1 of Michigan Statutes Annotated. The Research Council is grateful to Callaghan & Company, publishers of Michigan Statutes Annotated, for permission to use their copyrighted material. Permission to reproduce any of the copyrighted material from Michigan Statutes Annotated must be obtained from Callaghan & Company.

The extensive contributions of individuals to this publication are revealed in the following series of sincere acknowledgements:

Article II, Declaration of Rights—Mr. Laurent K. Varnum, Varnum, Riddering, Wierengo & Christenson of Grand Rapids, organized the preparation of this Article. Sections 1, 2, 3 and 4 were prepared by the law firm of Clark, Klein, Winter, Parsons & Prewitt of Detroit, under the supervision of Mr. Robert C. Winter; Sections 5, 6, 7, 8, 21 and 22 were prepared by the law firm of Varnum, Riddering, Wierengo & Christenson of Grand Rapids, under the supervision of Mr. Laurent K. Varnum; Sections 9, 11, 12, 13 and 14 were prepared by the law firm of Warner, Norcross & Judd of Grand Rapids, under the supervision of Mr. David A. Warner; Sections 10,15 and 19 were prepared by the law firm of McKone, Badgley, Domke & Kline of Jackson, under the supervision of Mr. Maxwell F. Badgley; and Sections 16, 17, 18 and 20 were prepared by the law firm of Gault, Davison & Bowers of Flint, under the supervision of Mr. Harry G. Gault.

Article V, Legislative Department—Professor Charles W. Shull of Wayne State University (Part B, Legislative Apportionment); J. Edward Hutchinson, attorney at law, Fennville, Michigan (Part F, Legislative Procedure).

Article VII, Judicial Department—University of Michigan Law School, Allan F. Smith, Dean.

Article VIII, Local Government—Professor Louis H. Friedland of Wayne State University (Part B, Townships, Part C, Cities and Villages, and Part D, General Provisions).

Article X, Finance and Taxation—The law firm of Miller, Canfield, Paddock & Stone of Detroit. Messrs. John H. Nunneley, Stratton S. Brown, Robert E. Hammell, Fred M. Thrun (Sections 10, 11, 12, 21, 22, 27, and 28.)

Article XII, Corporations—The law firm of Dykema, Wheat, Spencer, Goodnow & Trigg of Detroit, Mr. John R. Dykema.

Article XIII, Eminent Domain—The Legal Division, Wayne County Road Commission, Messrs. Daniel J. Horgan, Jr., James N. Garber, John P. Cushman, and John C. Jacoby.

Article XIV, Exemptions—The Lawyers Title Insurance Corporation, Mr. John G. Heal.

Article VX, Militia—Brig. Gen. Philip C. Pack (Retired), Ann Arbor.

Article XVI, Miscellaneous Provisions—The Lawyers Title Insurance Corporation, Mr. John G. Heal (Sections 8 and 9).

Analyses of articles or parts of articles not listed above were prepared by the staff of the Citizens Research Council of Michigan. We are indebted to Mr. J. Edward Hutchinson, attorney at law, who reviewed a number of the chapters and offered helpful comments.

Citizens Research Council of Michigan
Robert E. Pickup, Executive Director

Detroit, Michigan
October, 1961

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INTRODUCTION

This two-volume analysis of the provisions of the Michigan constitution is the first of three major series of publications to be issued by the Citizens Research Council marking the occasion of the Michigan Constitutional Convention of 1961.

The publication at hand is designed to trace the history of the present state constitution and to compare its provisions with prior documents, with the constitutions of the other states, and with the Model State Constitution of the National Municipal League.

It is not the purpose of this publication to attempt to tell anyone how to change the present constitution. Rather, it is hoped that it will serve to indicate the evolution of the Michigan constitution, to delineate present meaning or interpretation of its provisions, and to draw attention to the significant alternative methods of handling particular subjects as included in constitutions of other states or as contemplated by recognized authorities in state constitutional law.

Suggestions, alternatives and critical or editorial statements have been included, where deemed proper, under the sections marked Comment. It has not been the purpose of the Research Council in publishing its own staff work and the contributed efforts of many other persons in these two volumes to take sides on any particular issue. The reader should, therefore, not confuse criticism with advocacy, nor allow his possible disagreement; with the views of others to obscure the fact that alternatives and differences do, in fact, exist.

An index prepared originally by the legislative service bureau for an official compilation of the constitution issued by the secretary of state has been used herein, in each volume, for the convenience of the reader. There will also be found a table of contents at the head of each chapter or separate article. Sections discussed out of context may be located in a cross-reference table following these individual tables of contents.

The other two series of the Council's constitutional convention publications will be issued shortly. The first of these will be a number of research papers discussing basic questions of constitutional import. Their purpose is to sum up for consideration of delegates to the convention the various views, attitudes, and possibilities regarding what has been, or could be done for the solution of particular major issues.

In contrast to this two-volume document, and to the research papers the Re-

search Council will also publish a series of “position papers” setting forth, in fact and argument, the findings of the Research Council regarding several constitutional issues.

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CHAPTER I BOUNDARIES AND SEAT OF GOVERNMENT

Section Detail

I BOUNDARIES AND SEAT OF GOVERNMENT

A. STATE BOUNDARIES

Article I: Section 1. The State of Michigan consists of and has jurisdiction over the territory embraced within the following boundaries, to wit: Commencing at a point on the eastern boundary line of the state of Indiana, where a direct line drawn from the southern extremity of Lake Michigan to the most northerly cape of Maumee Bay shall intersect the same—said point being the northwest point of the state of Ohio, as established by act of congress, entitled "An act to establish the northern boundary line of the state of Ohio, and to provide for the admission of the state of Michigan into the Union upon the conditions therein expressed," approved June fifteenth eighteen hundred thirty-six; thence with the said boundary line of the state of Ohio, until it intersects the boundary line between the United States and Canada in Lake Erie; thence with the said boundary line between the United States and Canada through the Detroit river, Lake Huron and Lake Superior to a point where the said line last touches Lake Superior; thence in a direct line through Lake Superior to the mouth of the Montreal river; thence through the middle of the main channel of the westerly branch of the Montreal river to Island Lake, the head waters thereof; thence in a direct line to the center of the channel between Middle and South Islands in the Lake of the Desert; thence in a direct line to the southern shore of Lake Brule; thence along said southern shore and down the River Brule to the main channel of the Menominee river; thence down the center of the main channel of the same to the center of the most usual ship channel of the Green Bay of Lake Michigan; thence through the center of the most usual ship channel of the said bay to the middle of Lake Michigan; thence through the middle of Lake Michigan to the northern boundary of the state of Indiana, as that line was established by the act of congress of the nineteenth of April, eighteen hundred sixteen; thence due east with the north boundary line of the said state of Indiana to the northeast corner thereof; and thence south with the eastern boundary line of Indiana to the place of beginning.

Constitutions of 1835 and 1850

Michigan had boundary problems even before its admission as a state. The 1835 constitution did not have a provision specifically defining the state boundaries, except indirectly by reference in the preamble to the 1805 Act of Congress which established the Michigan Territory.[1]

Errors in the Michigan-Wisconsin boundary as set forth in the enabling act were corrected through a survey made by the federal government in 1847. The 1850 constitution contained a boundary description which included this correction of the Michigan-Wisconsin boundary line.

Constitution of 1908

Part of the boundary description as set forth in the 1850 constitution was changed in the convention of 1907-08 in order to enhance a Michigan claim (based upon the vagueness and inaccuracy in the enabling act) to an area long administered by Wisconsin. Mr. Burton indicated in the convention of 1907-08 that the committee in charge of this matter would probably have omitted the boundaries provision if it had not been for the dispute then in progress with Wisconsin.[2]

Statutory Implementation

By legislative joint resolution (No. 6) of 1917, Michigan accepted a "joint relocation and permanent monumenting of the line between Ohio and Michigan.[3] By a statute of 1947 (Public Act No. 267), Michigan accepted an interstate compact with Wisconsin and Minnesota defining the lake boundaries of these states with one another.[4]

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[1] This act made the so-called "Toledo Strip" a part of the territory. However, Michigan's admission to the Union as a state was made conditional upon its relinquishing claim to the "Toledo Strip" by its assent (in convention) to the boundaries as described in the enabling act of June 15, 1836. Michigan, however, was given the upper peninsula (which was detached from the Wisconsin Territory) by this enabling act as compensation for the loss of the "Toledo Strip."

[2] Proceedings and Debates, pp. 766-767. The change in the wording to "the westerly branch of the Montreal river to Island Lake, the head waters thereof" was the change made from the 1850 provision— "the said River Montreal to the head waters thereof."

[3] M.S.A. 4.131.

[4] M.S.A. 4.144.

As defined by this compact, the lake boundaries with these two states are set forth at much greater length than the full boundary description in the constitution.[5]

Judicial Interpretation

The dispute over the boundary between Michigan and Wisconsin was finally settled by the supreme court of the United States in 1926.[6] Wisconsin was awarded the area in dispute (west of the upper peninsula) largely because Michigan had long acquiesced in Wisconsin's effective possession and administration of this area. The court was not impressed with the constitutional status given to the disputed area by Michigan and noted the obvious purpose of the changes made in the convention of 1907-08.

Other State Constitutions

Constitutional definition, or description, of state boundaries is common to only a slight majority of state constitutions. Most of these state constitutional boundary descriptions are briefer than the Michigan provision. Alaska and Hawaii define boundaries in their constitutions very briefly and simply by reference to what constituted their territorial boundaries.

Constitutional status for state boundary descriptions does not appear to give them any more authority than if they were not set forth as a constitutional provision. The U.S. Constitution and many state constitutions (including all of the 13 original states) do not define boundaries. No threat to their territorial integrity has developed as a result of this.[7]

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[5] In this compact, azimuths and geographical points (defined in terms of latitude and longitude) are carried out in degrees, minutes, and seconds.

[6] State of Michigan v. State of Wisconsin, 270 U.S. 295

[7] Index Digest, pp. 1065, 1116-1118; see also pertinent provisions in full. It was held judicially that the Indiana boundaries "were not fixed by the adoption of the state constitution, but by Congress and their recital in the constitution is merely a memorandum thereof." Watts v. Evansville Railroad Co., 123 N.E. 709. California and Arizona have provisions whereby the legislature may change or redefine the state boundaries in cooperation with an adjoining state. Since all states have, and many including Michigan have exercised, such inherent power in regard to state boundaries, this feature of the California and Arizona constitutions would seem to be unnecessary.

Comment

If a description of the boundaries of Michigan is to be retained in a revision of the constitution, this description should probably be extensively detailed and technically correct. It undoubtedly should be in accord with the most authoritative boundary determinations up to the present time and reflect the most recent geographical information.

There is good evidence that constitutional status for state boundary lines does not enhance their authority or effectiveness. It is probably advisable to omit a definition of state boundaries from a constitution even if they can be defined briefly and in general terms. Michigan's boundaries are extremely complicated and have already given rise to various problems. These boundaries are probably more difficult to set forth authoritatively in a constitutional provision than are those of any other state.[8]

B. STATE CAPITAL

Article I: Section 2. The seat of government shall be at Lansing, where it is now established.

Constitutions of 1835 and 1850

The 1835 constitution (Article XII, Section 9) provided that the seat of government "shall be at Detroit, or at such other place or places as may be prescribed by law," until 1847, "when it shall be permanently located by the legislature." Detroit remained the state capital, as it had been when Michigan was a territory, until 1847 despite the legislature's constitutional authority to move it elsewhere. In 1847, the state capital was permanently located at what was to become the City of Lansing.[9] In the 1850 constitution (Article II), the provision relating to the seat of government was the same as in the present constitution.

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[8] One possible alternative would be to omit the boundaries description, but to require in the constitution that the legislature provide by law that some state officer have custody of all material bearing upon the determination of the true boundaries of Michigan and to require this officer to keep such geographical boundary information current.

[9] Acts No. 60 and 65 of 1847, No. 237 of 1848.

Constitution of 1908

This provision was carried over from the 1850 constitution unchanged.

Other State Constitutions

Approximately 14 state constitutions (including Michigan) fix the state capital at a specific city within the state without provision for its being changed. An additional 18 state constitutions specify a city as the capital with provision that it may be moved by law with a referendum vote almost universally required, or allow the capital to be determined by statute in conjunction with a referendum vote. Three state constitutions require a two-thirds vote of the electorate in order to change the site of the capital, whether or not a site is specified. Fifteen states have no provision relating to the location of the capital in their constitutions.[10]

Comment

The present location of the state capital or "seat of government" at Lansing is mandatory. Since Lansing has long been the state capital and serious agitation for a different site has been lacking in recent years, it does not appear that the mandatory feature of this provision will cause controversy. The clause following the comma "where it is now established" may have had more pertinence in 1850 in view of the relative newness of the Lansing location at that time. One original purpose of this clause may have been to forestall a change in the site by statutory designation of another city as "Lansing." This effect could be maintained by providing that the seat of government "shall remain at Lansing." The provision as presently stated would not seem to stand in the way of the governor's authority under Article VI, Section 8 to convene the legislature "at some other place" when the capital "becomes dangerous from disease or a common enemy," but some reference to this or any other related provision of the revised constitution might be added for further clarification.

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[10] Index Digest, pp. 922-923.

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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

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

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.

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CHAPTER III ELECTIVE FRANCHISE

(over)

Section Detail

III ELECTIVE FRANCHISE

1. Qualifications

Article III: Section 1. In all elections every inhabitant of this state being a citizen of the United States; and every inhabitant of Indian descent, a native of the United States, shall be an elector and entitled to vote; but no one shall be an elector and entitled to vote at any election, unless be or she shall be above the age of 21 years and has resided in this state 6 months, and in the city or township in which he or she offers to vote 30 days next preceding such election: Provided, That a registered qualified elector who shall move into another city or township in this state within said 30 day period shall be entitled to vote in the city or township in which registered and from which he has last removed on filing a sworn affidavit to that effect with the election board of the city or township from which be bas last removed: Provided further, That no qualified elector in the actual military service of the United States or of this state or in the army or navy thereof, or any student while in attendance at any institution of learning, or any person engaged in teaching in the public schools of this state, or any regularly enrolled member of any citizens' military or naval training camp, held under the authority of the government of the United States or the state of Michigan; or any member of the legislature while in attendance at any session of the legislature, or said member's immediate family during such time, or commercial traveler, or any qualified elector employed upon or in the operation of railroad trains in this state, or any sailor engaged and employed on the great lakes or in coastwise trade, shall be deprived of a vote by reason of absence from the township, ward or state in which he or she resides; and the legislature shall provide by law the manner in which and the time and place at which such absent electors may vote and for the canvass and return of their votes: Provided further, That the legislature shall have power to pass laws covering qualified electors who may be necessarily absent from other causes than above specified: And provided further, That there shall be no denial of the elective franchise at any election on account of sex; And provided further, That the legislature may provide by law that the electors of a township may cast their ballots at a township polling place located within the

limits of a city which has been incorporated from territory formerly a part of the township.

Constitutions of 1835 and 1850

Both of the earlier Michigan constitutions contained a provision of this type. The 1835 provision (Article II, Section 1) defined an elector as a white male citizen over 21 years of age who had resided in the state six months prior to any election. Under the provision no individual was entitled to vote other than in the district, county or township in which he actually resided at the time of an election.

The 1850 provision (Article VII, Section l), amended three times, defined an elector as a male inhabitant of the state over 21 years of age and a citizen of the United States, or a foreign born inhabitant who resided in the state 25 years, or a civilized male inhabitant of Indian descent not a member of any tribe.

An elector was not entitled to vote unless he had resided in the state six months and in the township or ward where he intended to vote for 20 days prior to the election.

This section as amended also provided for absentee voting by qualified electors serving in the military services.

The 1850 provision was carried over into the 1908 constitution with no change except in the wording of the "absentee voting" clause to eliminate certain unnecessary words.

Constitution of 1908

Convention of 1907-08. In the constitutional convention of 1907-08 several proposals were considered which would have amended this section to extend suffrage to the women of the state. The section was not changed to extend the suffrage although a Section 4 was added to give women taxpayers the right to vote upon questions involving expenditures of public money.

A proposal to deny the right to vote to a person unable to read the constitution or write his name was not accepted by the convention, apparently because the delegates questioned the wisdom of placing in the election boards the power of determining a question of fact in the case of each potential voter.

Amendments. This section has been amended seven times since 1908. The amendments, for the most part, extended the suffrage and declared various persons entitled to vote under the residence provision. An amendment in 1914 provided for absentee voting for electors who were absent from their place of residence for cer-

tain causes specified in the amendment. In addition, the legislature was given the power to extend the privilege of absentee voting to electors absent for reasons other than those specified.

An amendment in 1918 extended the franchise to women. In 1932 the section was amended to require residence in a city instead of a ward. An amendment in 1950 removed former provisions entitling inhabitants of foreign birth to vote under certain conditions. The last amendment, adopted in 1954, added a clause which entitles an elector to vote under certain conditions in a city or township in which he is registered but from which he has moved.

Judicial Interpretation

In regard to the powers of the legislature the courts have held that where the constitution specifically provides for the qualifications of electors voting on certain questions, the qualifications cannot be changed by legislation.[1] In voting on ordinary school matters, the statutory provisions of the school code control, but when the question being voted on involves an increase in the tax limitation the constitutional provisions control with respect to voter qualifications.[2]

Other State Constitutions

Most other state constitutions contain a provision which establishes voter qualifications. The qualifications established by a majority of the states include considerations of age, citizenship and residence while considerations of property, education and tax payment also are frequently included.

Age. Forty-six state constitutions fix the minimum age requirement for voting at 21. In Alaska the minimum age requirement is 19, while Georgia and Kentucky recently lowered the minimum age qualification to 18 years. West Virginia provides that minors are not permitted to vote.[3]

Citizenship. Forty-five states require United States citizenship as a qualification for voting. California, Minnesota, New York and Utah provide, in addition, that a voter must have been a citizen for 90 days prior to an election. Seven states also require a voter to be a citizen of the state.[4]

Residence. A number of states provide that a voter must reside in the state, the county, the township and the election district a given period of time before an election. The length of time necessary to establish residence varies considerably. One

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[1] Kentschler v. Detroit Board of Education, 324 Mich. 603.

[2] Dearborn Township School District No. 7 v. Cahow, 289 Mich. 643.

[3] Index Digest, p. 437.

[4] Index Digest, p. 438.

state, Maine, requires three months residence in the state. Ten states, including Michigan, require six months residence in the state, while 35 states require residence in the state for one year. Alabama, Mississippi, Rhode Island, and South Carolina require two years.

Thirty-one states require residence in the county for periods varying from 30 days in Idaho and Nevada, to one year in Alabama, Louisiana (Parish) and South Carolina. Six states require 90 days residence in the county, while eight states require six months.

Residency requirements in cities varies from 30 days in Michigan and Washington, to six months in Rhode Island and Virginia. Mississippi requires one year's residence in a city, except a clergyman and his wife may vote after six months' residence in a city.[5]

The period of residence required in an election precinct also varies from a minimum of 30 days in eleven states, to a maximum of one year in Mississippi.

Absentee Voting. Twenty-five states, including Michigan, have provisions in their constitutions to permit absentee voting. In states other than Michigan, the provisions are usually short and either authorize or direct the legislature to provide for the matter by law. The following are a few examples.

> Qualified electors of the state who are absent, whether within or without the state, may be enabled by general law to vote at all elections by the people. (Missouri constitution, Article VIII, Section 7)
>
> . . .The legislature may, by general law, provide for the casting of votes by duly registered voters who expect to be absent from their respective precincts or unable to vote therein, by reason of physical disability, on the day on which any election is held. (California constitution, Article II, Section 1)
>
> Methods of voting, including absentee voting, shall be prescribed by law. ... (Alaska constitution, Article V, Section 3) The Hawaii constitution contains a similar provision.
>
> The U.S. constitution provides that electors choosing members of the house of representatives and the senate "shall have the qualifications requisite for electors of the most numerous branch of the State legislature."[6]

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[5] Index Digest, p. 448.

[6] U.S. constitution, Article I, Section 2 and Article XVII.

Under the fifteenth amendment the right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous conditions of servitude." The nineteenth amendment provides that the right of citizens to vote cannot be denied on the basis of sex.

Comment

The voter qualifications established in this section would appear to be comparable to those of most of the other 49 states.

In recent years, three states have lowered their minimum age requirement. A number of constitutional amendments have been proposed in the Michigan legislature to lower the voting age from 21. The most commonly suggested minimum was 18. This question will undoubtedly be raised in the forthcoming convention. The question is of national significance in that the U.S. constitution provides that any person having the qualifications requisite for electors of the most numerous branch of the state legislature is entitled to vote in national elections.

Some consideration might be given to simplifying the language of this section by leaving the matter of absentee voting to be prescribed by the legislature.

2. Residence

Article III: Section 2. No elector shall be deemed to have gained or lost a residence by reason of his being employed in the service of the United States or of this state, nor while engaged in the navigation or the waters of this state or of the United States or of the high seas, nor while a student at any institution of learning, nor while kept at any almshouse or other asylum at public expense, nor while confined in any public prison; except that honorably discharged soldiers, seamen and marines who have served in the military or naval forces of the United States or of this state and who reside in soldiers' homes established by this state may acquire a residence where such home is located.

Constitutions of 1835 and 1850

A similar section of the 1835 constitution provided for the retention of the voting privilege only for those persons leaving the state on public business. It did not bar people from obtaining residence who were temporarily in the state on public business. The 1835 constitution (Article II, Section 5) provided:

> No person shall be deemed to have lost his residence in this state, by reason of his absence on business of the United States, or of this state.

The language of the present provision originated in the 1850 constitution (Article VII, Section 5). The 1850 provision provided not only for the retention of the voting privilege for the Michigan resident while temporarily absent from the state, but also barred from voting persons who were present in the state for certain specified reasons. The 1850 provision was carried over into the 1908 constitution with only minor changes in phraseology. The word "seamen" was inserted in the last clause of the provision in the place of the word "sailor" which appeared in the 1850 provision to broaden the meaning of the former term as it applied to employment on the Great Lakes and to correspond with the same word in the first line of the next section (Article III, Section 3).[7]

An additional change to improve the phraseology of the section was made by inserting the words "at any institution of learning" in place of the words "of any seminary of learning."

This section has not been amended since the adoption of the present constitution.

Other State Constitutions

Most other state constitutions contain a provision of this type. Eighteen states, in addition to Michigan, combine into a single section provisions relative to the gain and loss of residence. Residence is not gained or lost while confined in a public prison in nine states, nor while an inmate of an almshouse or asylum in eleven states, nor while a student at an institution of learning in nineteen states. Seven other states provide only that residence is not lost by reason of absence on state business. Michigan's provision that allows soldiers, seamen and marines residing in soldiers' homes to acquire residence appears to be unique among the states.[8]

Neither the Model State Constitution nor the U.S. constitution contains provisions of this type.

Comment

In that a number of state constitutions, including the newer and recently revised constitutions of Alaska and New Jersey, contain no provisions of this type, some consideration might be given to eliminating this section and leaving the matter to be provided for by the legislature.

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[7] See Proceedings and Debates, p. 1284.

[8] Index Digest, pp. 447-448.

This section and the following section (Article III, Section 3) both bar from voting certain persons who migrate into the state. Should Section 2 be retained, consideration might be given to combining the subject matter of these two provisions to form a single section.

3. Residence - Not Obtained Because of Military Service in State

Article III: Section 3. No soldier, seaman or marine in the army or navy of the United States shall be deemed a resident of this state in consequence of being stationed in any military or naval place within the state.

Constitution of 1835 and 1850

The language of this provision originated in the constitution of 1835. it was carried over into the 1850 constitution unchanged.

Constitution of 1908

The 1850 provision was carried over into the present constitution with only one minor change. The word "state" at the end of the present section replaced the word "same" which appeared in the 1850 provision.

This section has not been amended since the adoption of the present constitution.

Opinions of the Attorney General

In 1956, the attorney general held that while members of the military services do not acquire residence merely by being stationed in a given community, nothing precludes their obtaining a new residence in a community off a federal post while in services.[9]

Other State Constitutions

Twenty-three states, in addition to Michigan, have a provision of this type. In a number of states the provision is combined with subject matter similar to that found in the previous section of Michigan's constitution (Article III, Section 2). For example, the Missouri constitution provides (Article VIII, Section 6):

> For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence

[9] Op. Attorney General, October 1, 1956, No. 2807.

while engaged in the civil or military service of this state or of the United State, or in the navigation of the high seas or the waters of the state or of the United States, or while a student of any institution of learning, or kept in a poor house or other asylum at public expense, or confined in public prison.

Comment

Those revising the constitution might consider eliminating this section and leaving the matter to be provided for by law.

Should the section be retained, consideration might be given to integrating the subject matter with that of Section 2 of Article III to combine in a single section of the revised constitution the intent of retaining or denying the voting privilege for persons who are temporarily absent or present in the state.

Section 4. Voting on direct Expenditures or Bond Issues

Article III Section 4. Whenever any question is submitted to a vote of the electors which involves the direct expenditure of public money or the issue of bonds, only such persons having the qualifications of electors who have property assessed for taxes in any part of the district or territory to be affected by the result of such election or the lawful husbands or wives of such persons shall be entitled to vote thereon.

Constitutions of 1835 and l850

This provision appeared in neither the constitution of 1835 nor the constitution of 1850.

Constitution of 1908

As originally written into the 1908 constitution this section was substantially different from its present form. It then read as follows:

> Whenever any question is submitted to a vote of the electors which involves the direct expenditure of public money or the issue of bonds, every woman having the qualifications of male electors who has property assessed for taxes in any part of the district or territory to be affected by the result of such election shall be entitled to vote thereon.

The address to the people stated that the purpose of this section (i.e., the extension of the elective franchise in certain elections to women property owners) was “in

keeping with the principle that no person's property should be directly affected without the consent of the owner thereof."

Amendment in 1932. The section as it emerged from the 1907-08 convention was amended in the general election of November, 1932. Whereas the purpose of the original provision was to extend the elective franchise (in certain elections) specifically to women property owners, the 1932 amendment limited the franchise in elections involving the direct expenditure of public money or the issue of bonds to property owners and their spouses. This served to exclude male non-property owners who formerly could vote in such elections.

Judicial Interpretation

A number of cases have defined more exactly the elections in which non-property owners mayor may not vote. The court decided that this provision's restriction of the electorate did not apply to a vote on the issuance of revenue bonds;[10] or on the issuance of self-liquidating bonds by the Huron-Clinton Metropolitan Authority.[11] In another case the court upheld the results of a special school bond election saying that:

> The section of the constitution in question contains no provision indicating that a failure to observe strictly the voting limitation renders the election void. It has been repeatedly held by this court that irregularities in the conducting of an election will not invalidate the action taken unless it appears that the result was, or may have been, affected thereby.[12]

Other State Constitutions

Four state constitutions specifically prohibit a property requirement for voting. Oregon and Alaska (for local bond issues) leave any such requirement to the discretion of the legislature. Six state constitutions include the requirement for both state and local governments (three of these relate only to votes on issuing debt). Three state constitutions limit the suffrage to taxpayers only in local elections. Finally, the remaining 36 state constitutions contain no property ownership requirement for voting. None of the states having recent conventions has included a property ownership requirement in the constitution. Neither the Model State Constitution nor the U.S. constitution contains a property requirement for voting.

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[10] Michigan Gas and Electric Co. v. City of Dowagiac, 278 Mich. 522.

[11] Huron-Clinton Metropolitan Authority v. Boards of Supervisors of Five Counties, 300 Mich. 1.

[12] Rosenbrock v. School District No.3, Fractional, 344 Mich. 335, 339.

Comment

The restriction of the franchise to property owners for certain purposes has a long history.[13] The restriction has been premised on the principle that no person's property should be directly affected without the consent of the owner. Historically, the property tax was the source of both state and local revenues and, therefore, the traditional assumption was that property owners paid for the "direct expenditure of public money or the issue of bonds," whether state or local.

The provisions of this section apply to the state as well as to local governments and the state no longer levies a general ad valorem property tax. Thus, voting on a state bond issue is limited to property owners even though property owners, as such, will not have to pay the principal and interest on the debt. A state bond issue would be financed through general state taxes, paid in part at least by all the citizens of the state.

In respect to local governments, which do rely on the property tax to finance general obligation bond issues and a large portion of their direct expenditures, this provision presents an interesting anomaly. Only property owners and their spouses can vote to issue bonds or make direct expenditures, but all electors, whether property owners or not can vote to increase the limitation on the amount of property taxes which can be levied by the local governing body. Thus, on a local bond issue on the ballot, only property owners and their spouses can vote, but on the question of increasing the property tax limitation to raise the funds to pay the debt service on the bonds, all qualified electors can vote.

As noted previously, the more recent state constitutions do not contain provisions of this type. If this section is to be continued, the convention may wish to consider the question of whether voting on millage increases should be similarly restricted.

5. Elector; Privilege from Arrest

Article III: Section 5. Every elector in all cases, except for treason, felony or breach of the peace, shall be privileged from arrest during his attendance at elections and in going to and returning from the same.

Constitutions of 1835 and 1850

Both the 1835 and 18j50 constitutions contained similar provisions.

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[13] As early as the sixth century, B.C., property was used in Athens as a basis for dividing the citizenry into four classes.

Constitution of 1908

Only a few grammatical changes were made in carrying this provision over from the 1850 constitution.

Other State Constitutions

Twenty-five state constitutions contain the same provision as is in the Michigan constitution. Ten other states have basically the same provision, but variously include as exceptions such things as larceny, violation of election laws and illegal voting, or arrest on civil process.[14] Only Missouri of the states having new constitutions includes a provision similar to that in the Michigan constitution. Neither the Model State Constitution nor the U.S. constitution includes any comparable provision.

Comment

See Comment under next section.

6. Elector; Militia Duty

Article III: Section 6. No elector shall be obliged to do militia duty on the day of election, except in time of war or public danger, or to attend court as a suitor or witness.

Constitutions of 1835 and 1850

The 1835 constitution (Article III, Section 4) excluded militia duty on "the days of election" and did not include the phrase "or attend court as a suitor or witness." Both these changes were made in the 1850 constitution (Article VII, Section 4).

Constitutions of 1908

No change was made in carrying this provision over from the 1850 constitution.

Other State Constitutions

Sixteen states, including Michigan, release electors from their obligation to perform military duty on an election day except in time of war or public danger. Three states, including Michigan, exclude electors from duty as a suitor or witness on election day; both Virginia and West Virginia also exclude duty as a juror, the latter

[14] Index Digest, p. 437.

state doing so only for the continuance of the election or the time needed for going to or returning from the election.[15] None of the newer constitutions or the Model State Constitution makes either type of exception.

Comment

Sections 5 and 6 are designed to guarantee the traditional right of Americans to cast their ballots on election day. The major question in connection with these two provisions is whether they should be continued in the constitution or in the subject matter provided by law.

7. Votes to be by Ballot

Article III: Section 7. All votes shall be given by ballot, except for such township officers as may be authorized by law to be otherwise chosen.

Constitutions of 1835 and 1850

This provision originated in the constitution of 1835 (Article II, Section 2); except for a minor change in word order it was carried over into the 1850 constitution (Article VII, Section 2).

Constitution of 1908

The provision was maintained exactly as it appeared in the 1850 constitution. There was no debate on the section during the convention.

Statutory Implementation

The legislature provided for the election of poundmasters and one overseer of highways for each township road district by a viva voce vote or in such other manner as the annual meeting might direct.[16] This provision was repealed in 1944.[17]

Judicial Decisions

This section has been held not to preclude the use of voting machines. The latter have specifically been interpreted as a type of ballot.[18] The important item seems to be that the voter be able to cast a secret vote.[19]

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[15] Index Digest, pp. 436-37.

[16] M.S.A., 5.10.

[17] Public Acts of 1944, No. 16.

[18] Henderson v. Board of Election Commissioners of Saginaw, 160 Mich. 36.

[19] Helme v. Board of Election Commissioners Lenawee County, 149 Mich. 390.

Other State Constitutions

Thirty-seven states require use of a ballot in elections.[20] Six states permit either a ballot or an alternate method prescribed by law; three of these states specifically require the retention of secrecy. Connecticut requires a ballot only in the elections of state officers and members of the legislature. Six states exclude some local elections from the general requirement. The provisions in the constitutions of Minnesota and Wisconsin are almost identical to that in the Michigan constitution. The constitutions of both Alaska and Hawaii leave the matter to the state legislature. The U.S. constitution leaves the "times, places and manner" of holding elections of senators and representatives to the state legislatures (Article 1, Section 4 (1)). The Model State Constitution gives to the legislature all controls over elections and includes no specific requirements itself.[21]

Comment

It would not appear necessary to include a provision specifically allowing the use of voting machines in elections as some states have done, since the courts have upheld the legality of the use of machines in lieu of written ballots. Since the legislature has repealed the laws excepting some township officers from the ballot requirement, that portion of the provision could probably be removed from the constitution. The convention may, however, want to consider a provision requiring all votes by the electorate to be by secret ballot or its equivalent, which would give the use of mechanical voting devices explicit constitutional sanction.

8. Purity of Elections; Recall of Officials

Article III: Section 8. Laws shall be passed to preserve the purity of elections and guard against abuses of the elective franchise, and to provide for the recall of all elective officers, except judges of courts of record and courts of like jurisdiction upon petition of twenty-five per centum of the number of electors who voted at the preceding election for the office of governor in their respective electoral districts.

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[20] Index Digest, p. 423.

[21] Article II, Section 202.

Constitutions of 1835 and 1850

The 1835 constitution did not have a provision of this type. The 1850 constitution (Article VII, Section 6) provided: "Laws may be... passed to preserve the purity of elections and guard against abuses of the elective franchise."

Constitution of 1908

The original form of Section 8 in the constitution of 1908 was the same as in the 1850 provision except for the substitution of "shall" for "may" which made the provision mandatory. An amendment, proposed by the legislature and approved at the April, 19l3, election, added the provision relative to recall.

Statutory Implementation

The Michigan election law of 1954 (Public Act 116 of 1954) contains detailed provisions relating to elections including those that are more specifically an implementation of Section 8.[22] Statutory provisions relating to recall are detailed and specify that every elective officer in the state, with the constitutional exception of most judges, may be recalled. This includes U.S. senators and members of congress as well as state legislators and state executive officers. A petition for recall cannot be circulated against any officer until he has performed the duties of office for 45 days in a legislative office or for three months in any other office. Any officer "sought to be recalled" shall continue to perform the duties of office until the result of the recall election is declared. Under certain conditions, if the petition has insufficient signatures, the sponsor or sponsors of the recall may file additional signatures within ten days. The statement of reasons for the recall and the officer's statement justifying his conduct must each appear on the ballot in 200 words or less.

In most cases, the election will take place within 35 days from the time it was called by the proper official. The election must be called within 30 days from the filing of the petition unless there is to be "any general, special or primary election" within 90 days at which time the recall election can be held. If a recall election fails to remove an incumbent, no further recall petition against him shall be filed during the term, unless "such further petitioners" pay into the pertinent public treasury the whole amount of the expenses for the preceding special recall election. If an officer is recalled in Michigan, he cannot be a candidate for the same office at the subsequent election to fill the vacancy.

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[22] M.S.A.,6.1001-6.2116. Statutory provisions dealing more specifically with purity of elections and safeguards against abuses of the elective franchise are in M.S.A., 6.1531-6.1943. Recall provisions are in M.S.A., 6.1951-6.1976.

Judicial Interpretation

Many court decisions relate to statutes which implement in whole or part the mandate of Section 8 concerning purity of elections and abuse of the elective franchise. The legislature has wide discretion in this area and pertinent judicial opinions are concerned largely with statutory interpretation related only indirectly to this provision of Section 8.[23]

Section 8 as it relates to recall of officers and statutes in pursuance of it have been interpreted somewhat frequently. The statement of reason or reasons required by statute in a petition for recall has been interpreted to mean that it must show some misfeasance, nonfeasance or malfeasance in office, but a recall petition need not be as specific concerning alleged acts as is required in procedure for removal of officers by the governor.[24]

Other State Constitutions

The constitutions of 13 states—Michigan, Alaska, Arizona, California, Colorado, Idaho, Kansas, Louisiana, Nevada, North Dakota, Oregon, Washington and Wisconsin—provide for the recall. Most of these have details that in Michigan, Alaska and Idaho are determined by statute. All of the state provisions for recall restrict its use to recall of elected public officers, except in Kansas where elective or appointed officers are subject to recall. In Michigan, Alaska, Idaho, Louisiana and Washington, all or most judges are not subject to recall.

Recall provisions in California and Colorado require that the recall election be combined with a vote for a successor, the successor to take office if the incumbent is recalled. Under the form of recall used in Arizona, Nevada, North Dakota and Wisconsin the recall takes the form of an election in which the incumbent runs against other candidates—in effect, the incumbent is forced to run for re-election.

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[23] The distinction between regulation of the right of franchise and action which might be destructive of it has been ruled upon in several cases; e.g., Attorney General v. Common Council of Detroit, 78 Mich. 545; Todd v. Board of Election Commissioners of Kalamazoo, 104 Mich. 474; Brown v. Board of Election Commissioners of Kent County, 174 Mich. 477; People v. O'Hara, 278 Mich. 281; Eliott v. Secretary of State, 295 Mich. 245. The Eliott case deals more specifically with problems of fairness to, or the rights of, those seeking elective office.

[24] People v. O'Hara, 246 Mich. 312; Eaton v. Baker, 334 Mich. 521; Amberg v. Welsh, 325 Mich. 285.

The number required to sign recall petitions varies from 10 per cent to 30 per cent with 25 per cent the most common requirement. Ten per cent is required in Kansas,[25] 12 per cent in California,[26] 25 per cent in Michigan, Arizona, Colorado, Nevada, Oregon, Wisconsin and Washington,[27] and 30 percent in North Dakota. In California, Colorado, Arizona and Washington, the percentage is computed on the basis of all votes for the office affected in the preceding election; in Nevada and Oregon all votes for justice of the highest court; in Michigan, Wisconsin and North Dakota all votes for governor. In Alaska and Idaho the number is determined by statute.[28]

Comment

The recall procedure in Michigan has not been used against state officers, legislators, United States senators or representatives in congress although it has been used against local elective officers.[29] The failure to use the recall process for state officers in Michigan may be explained by the rarity of manifest malfeasance by public officers or the existence of effective remedies for such problems. While recall procedure may be misused, the difficult 25 per cent requirement for petition signatures is generally considered an important and necessary safeguard against possible misuse of the device. The exception of most judicial officers from being subject to recall, is provided in five states while the eight other states having recall make judges subject to recall. Subjection of judges to recall is a controversial matter.[30] The present provision is brief and flexible although explicit and would seem not to need any added features to make it more self-executing. The statutes implementing it appear to be reasonable and comprehensive.

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[25] Ten per cent for state officers,15 per cent for those elected in a county.

[26] 20 per cent for state officers elected in a political subdivision.

[27] In Washington, 35 per cent for state legislators and some local officers.

[28] Index Digest, pp. 896-903; Manual on State Constitutional Provisions, pp. 125-127. In all 13 states having the constitutional recall, local officers are subject to it. In at least 16 other states there is statutory provision for recall of city officers or all local officers. W. B. Graves, American State Government (Fourth Edit., 1953), pp. 150-153.

[29] Recall for state officers and legislators, unlike recall for local officers) has been used very rarely among the states having provision for recall. Adverse factors in recall practice are discussed in H. R. Penniman, Sait's American Parties and Elections (Fifth Edit., 1952), pp. 504-507.

[30] President Taft strongly objected to judicial recall in Arizona in 1911 as destructive of judicial independence, and most authorities agree with his position in this matter. Recall of judicial decisions as a constitutional experiment in Colorado (1912) was considered a radical venture in popular control of government in that period.

9. Board of State Canvassers

Article III: Section 9. A board of state canvassers consisting of four members shall be established by law. No candidate for an office to be canvassed by the board shall be eligible to serve as a member of said board. A majority of the board shall not be composed of adherents of the same political party.

Constitutions of 1835 and 1850

The constitution of 1835 had no specific provision similar to this. However, in Article V, Section 4, the returns for every election for governor and lieutenant governor were required to be sealed and sent to the president of the senate "who shall open and publish them in the presence of the members of both houses." The 1850 constitution (Article VIII, Section 4) provided for three elective state officers to constitute a board of state auditors and a board of state canvassers.

Constitution of 1908

The constitution of 1908 (Article VI, Section 20) continued the 1850 provision and gave these three officers further duties as a board of escheats and a board of fund commissioners.[31] An amendment proposed by the legislature and ratified in April, 1955, by a vote of 456,986 to 297,250 removed that part of Article VI, Section 20 that required the three elective state officers to act as a board of state canvassers, and required a bipartisan board of state canvassers to be established by law. This amendment became a new section of the elective franchise article—Article III, Section 9.

In most instances the elective state officers of which the board of state canvassers was formerly constituted were adherents of the same political party. The potential for partisan advantage under that provision fostered the change to the bipartisan board required by Article III, Section 9.

Statutory Implementation

This provision was implemented by Public Act 239 of 1955. The act provides that the four members are to be appointed for a four-year term by the governor with the advice and consent of the senate. Two members are to be appointed from each of

[31] See discussion of Article VII, Section 20 in Chapter VI, pp. 80-82.

the two political parties "casting the greatest number of votes for secretary of state" in the November general elections. The state central committee of each party submits a list of three names from which the governor makes each appointment. Any three members constitute a quorum of the board, "but no action shall become effective unless one member from each major political party shall concur therein."[32]

Other State Constitutions

This provision of the Michigan constitution appears to be unique among state constitutions. A few states have constitutional boards of canvassers constituted in a manner similar to the former provision in Michigan. A few states assign duties in this area to courts or court officers. A few other state constitutions merely state that ballots are not to be counted or canvassed in secret. In most states there is no constitutional provision relating to the canvass of votes which is then at the discretion of the law-making process.[33]

Comment

Article III, Section 9 is the result of a recent amendment which changes the board of state canvassers from a membership likely to give one party an advantage to one having guarantees of equal representation of the two major political parties.

10. Determination by Board of State Canvassers of Contested Elections for Office Except Legislative

Article XVI: Section 4. In all cases of tie vote or contested election for any state office except a member of the legislature, any recount or other determination thereof may be conducted by the board of state canvassers under such laws as the legislature may prescribe.

Constitutions of 1835 and 1850

The constitution of 1835 did not have a provision of this type. The 1850 constitution (Article VIII, Section 5) provided:

> In case two or more persons have an equal and the highest number of votes for any office, as canvassed by the board of state canvassers, the legislature in joint convention shall choose one of said

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[32] M.S.A.,6.2111-6.2117. 'Statutory provisions relating to duties of the board of state canvassers are in M.S.A., 6.184l-6.1894.

[33] Index Digest, pp. 426, 429, 430.

persons to fill such office. When the determination of the board of state canvassers is contested, the legislature in joint convention shall decide which person is elected.

Constitution of 1908

This provision was carried over from the 1850 constitution unchanged. An amendment, proposed by the legislature and ratified in April, 1935, changed the provision to its present form whereby the board of state canvassers is permitted greater latitude in this area.

Statutory Implementation

Detailed statutory provisions relating to the subject matter of this provision are in the Michigan election law (Public Act 116 of 1954 as amended).[34]

Other State Constitutions

A number of state constitutions deal with the matter of tie votes. The Michigan provision is largely unique among state constitutions. With exceptions, a new election must be called by the governor in Maryland in the event of a tie vote. Four states provide for determination of tie votes by the legislature in joint vote.

Most state constitutions do not deal with the matter of contested elections, thereby leaving the matter to be determined by law. The constitutions of approximately 20 states deal with contested elections and most of them provide that the procedure for settling contested elections is largely to be determined by law or provision is made for judicial determination.[35]

Comment

Although the present form of Section 4 is fairly clear in its intent, the language does not make it mandatory. If this provision, or one of similar subject matter is retained, consideration might be given to making it a part of an elective franchise article.

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[34] On tie votes, recounts and other matters relating to contested elections, see M.S.A., 6.1846-6.1894. Judicial decisions in this area have been concerned mainly with statutory interpretation.

[35] Index Digest, pp. 457, 427.

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CHAPTER IV SEPARATION OF POWERS

Section Detail

IV SEPARATION OF POWERS

Article IV: Section 1. The powers of government are divided into three departments: The legislative, executive and judicial.

Section 2. No person belonging to one department shall exercise the powers properly belonging to another, except in the cases expressly provided in this constitution.

Constitutions of 1835 and 1850

The 1835 constitution (Article III, Section 1) provided that the powers of the government "shall be divided into three distinct departments," legislative, executive and judicial, "and one department shall never exercise the powers of another except in such cases as are expressly provided for in this constitution." This was similar in meaning to the 1850 provision (Article III, Sections 1 and 2) in which the present form originated.

Constitution of 1908

No change was made in this provision in carrying it over from the 1650 constitution.

Judicial Interpretation

Many judicial decisions in Michigan and other jurisdictions relate to the principle and practice of separation of powers. Historically, the doctrine of separation of powers and the related system of checks and balances is a basic feature of American government both state and federal.[1] Questions arising in relation to separation of powers have been decided over the years in a

[1] Although not American in origin, the principle became rooted in the American constitutional tradition largely as a result of Montesquieu's great influence on the framers of the early state constitutions and the federal constitution. Montesquieu, reacting against French absolutism, observed what seemed to him an effective separation of powers in the early 18th century government of Great Britain whereby absolutism was restrained—legislative power in the Parliament, executive power then more identified with the Crown) and judicial power insofar as the courts had a degree of independence. Americans such as John Adams contributed to the modification and refinement of the principle of separation of powers through a constitutional system of intricate checks and balances among the three branches of government. By the time the state and federal constitutions were framed, the power of the Crown in Britain had continued further to decline while Parliament tended to gain power. By the time separation of powers became crystallized as a principle in the United States, the government of Britain was already well on its way toward parliamentary supremacy.

manner generally contributing to a large degree of uniformity among the various jurisdictions with some variation as a result of constitutional structure. Well formulated principles developed by precedent and court interpretation have tended to prevent undue encroachment by one branch of government upon another beyond the constitutionally authorized check-and-balance exceptions.

In Michigan, as in other jurisdictions, administrative functions of boards and commissions having quasi-legislative and quasi-judicial characteristics have been upheld, as not violative of the provision for separation of powers.[2] The courts should not strike down statutes on grounds of policy or propriety, but only if they are clearly contrary to the constitution.[3] Attempted exercise of judicial power by the legislature and the possibility of judicial encroachment upon the executive have also been restrained.[4]

Other State Constitutions

Forty state constitutions provide specifically for the government to be divided into the three departments or branches. In 31 of these 40 constitutions, including Michigan, reference is made to checks and balances. In the other nine there is no specific reference to checks and balances, but even in these states checks and balances are provided for in the main body of the constitutions. The U.S. constitution and ten state constitutions have no specific provision relating to separation of powers. However, from the general framework and internal organization of these constitutions, the principle is clearly implied and given as much effect as if they contained specific reference to the principle. In any event, the federal government and all state governments are predicated on the theory and practice of separation of powers with the usual modifications and exceptions.[5]

Comment

In view of the long-standing and universal tradition of constitutional framework based upon separation of powers in the United States, it seems somewhat remote that Michigan or any of the states will greatly modify this prin-

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[2] Michigan Central Railroad Co. v. Michigan Railroad Commission, 160 Mich. 355; Rock v. Carney, 216 Mich. 280; Sullivan v. Michigan State Board of Dentistry, 268 Mich. 427.

[3] Thompson v. Auditor General, 261 Mich. 624; School District of Pontiac v. City of Pontiac, 262 Mich. 338.

[4] People ex rel. Butler v. Saginaw County Supervisors, 26 Mich. 22 Bankers Trust Co. of Detroit v. Russell, 263 Mich. 677; Born v. Dillman, 264 Mich. 440.

[5] Index Digest, p. 353-354.

ciple in the near future.[6] While a provision of this type is unnecessary as evidenced by the lack of such in the U.S. constitution and several state constitutions, there is no compelling reason for its deletion. While those who revise the constitution might rephrase this article or even combine the two sections into one as in the 1835 constitution, there appears to be no basic difficulty with the substance of the present provision.

Separation of Powers and the Governmental Framework. As noted above, Article IV is not specific with regard to the particular features relating to separation of powers or checks and balances in the main body of the present constitution. Among the more important check-and-balance features in the governmental system are: judicial power to determine questions relating to the constitutionality of statutes and of executive action—judicial review implicit in all American constitutions; the veto power of the governor; and the legislature's basic power to influence the other branches through the law-making process.

However, in Michigan the court system is relatively inflexible as a result of rigid details in the judicial article; the governor lacks unified control of his own department, yet has a more powerful veto over legislation than the governors of more than one-half of the states and the president; and the legislature's financial powers are severely restricted. In revising the Michigan constitution as a whole, judicious attention would naturally be centered on implementing the principle of separation of powers in the main body of the constitution so that a governmental framework would be established whereby each of the three main branches or departments may operate effectively in its own sphere without overly rigorous checks within or among them that may tend to destroy due balance or to deter responsible government.

[6] The federal constitution's guarantee of a republican form of government to the states would probably not stand in the way, however, if any state decided to experiment with a parliamentary system. Given the relative prevalence of political maturity and the continuance of a basically two-party system, such an experiment might not be unsuccessful.

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CHAPTER V LEGISLATIVE DEPARTMENT

(over)

Section Detail

V LEGISLATIVE DEPARTMENT

A. LEGISLATIVE POWER; INITIATIVE AND REFERENDUM

Article V: Section 1. The legislative power of the state of Michigan is vested in a senate and house of representatives; but the people reserve to themselves the power to propose legislative measures, resolutions and laws; to enact or reject the same at the polls independently of the legislature; and to approve or reject at the polls any act passed by the legislature, except acts making appropriations for state institutions and to meet deficiencies in state funds. The first power reserved by the people is the initiative. Qualified and registered electors of the state equal in number to at least 8 per cent of the total vote cast for all candidates for governor, at the last preceding general election at which a governor was elected, shall be required to propose any measure by petition: Provided, That no law shall be enacted by the initiative that could not under this constitution be enacted by the legislature. Initiative petitions shall set forth in full the proposed measure, and shall be filed with the secretary of state or such other person or persons as may hereafter be authorized by law to receive same not less than 10 days before the commencement of any session of the legislature. Every petition shall be certified to as herein provided as having been signed by the required number of qualified and registered electors of the state. Upon receipt of any initiative petition, the secretary of state or such other person or persons hereafter authorized by law shall canvass the same to ascertain if such petition has been signed by the requisite number of qualified and registered electors, and may, in determining the validity thereof, cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which said petitions were circulated, for properly determining the authenticity of such signatures. If the same has been so signed, the secretary of state or other person or persons hereafter authorized by law to receive and canvass same, determines that the petition is legal and in proper form and has been signed by the required number of qualified and registered electors, such petition shall be transmitted to the legislature as soon as it convenes and organizes. The law proposed by such petition shall be either enacted or rejected by the legislature without change or amendment within 40 days from the time such petition is received by the legislature.

If any law proposed by such petition shall be enacted by the legislature it shall be subject to referendum, as hereinafter provided. If any law so petitioned for be rejected, or if no action is taken upon it by the legislature within said 40 days, the secretary of state or such other person or persons hereafter authorized by law shall submit such proposed law to the people for approval or rejection at the next ensuing general election. The legislature may reject any measure so proposed by initiative petition and propose a different measure upon the same subject by a yea and nay vote upon separate roll calls, and in such event both measures shall be submitted by the secretary of state or such other person or persons hereafter authorized by law to the electors for approval or rejection at the next ensuing general election. All said initiative petitions last above described shall have printed thereon in 12 point black face type the following: “Initiative measure to be presented to the legislature.”

The legislature may prescribe penalties for causing or aiding and abetting in causing any fictitious or forged name to be affixed to any initiative or referendum petition, or for knowingly causing any initiative or referendum petition bearing fictitious or forged names to be circulated

The second power reserved to the people is the referendum. No act passed by the legislature shall go into effect until 90 days after the final adjournment of the session of the legislature which passed such act, except such acts making appropriations and such acts immediately necessary for the preservation of the public peace, health or safety, as have been given immediate effect by action of the legislature. Upon presentation to the secretary of state or such other person or persons hereafter authorized by law, within 90 days after the final adjournment of the legislature, of a petition certified to as herein provided, as having been signed by qualified and registered electors equal in number to 5 per cent of the total vote cast for all candidates for governor at the last election at which a governor was elected, asking that any act, section or part of any act of the legislature, be submitted to the electors for approval or rejection, the secretary of state or other person or persons hereafter authorized by law, shall canvass said petition to ascertain if the same is signed by the requisite number of qualified and registered electors. The secretary of state or such other person or persons hereafter authorized by law may, in determining the validity thereof, cause any doubtful signatures to be checked against the registration records by the clerk of any political subdivision in which said petitions were circulated, for properly determining the authenticity of such signatures. If the secretary of state or such other person or persons hereafter authorized

by law to receive and canvass the same determines that the petition is legal and in proper form and has been signed by the required number of qualified and registered electors, he shall then submit to the electors for approval or rejection such act or section or part of any act at the next succeeding general election; and no such act shall go into effect until and unless approved by a majority of the qualified and registered electors voting thereon. An official declaration of the sufficiency or insufficiency of the petition shall be made by the secretary of state or such other person or persons as shall hereafter be authorized at least 2 months prior to such election.

Any act submitted to the people by either initiative or referendum petition and approved by a majority of the votes cast thereon at any election shall take effect 10 days after the date of the official declaration of the vote by the secretary of state. No act initiated or adopted by the people, shall be subject to the veto power of the governor, and no act adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in said initiative measure but the legislature may propose such amendments, alterations or repeals to the people. Acts adopted by the people under the referendum provision of this section may be amended by the legislature at any subsequent session thereof: Provided, however, If 2 or more measures approved by the electors at the same election conflict, the measure receiving the highest affirmative vote shall prevail. The text of all measures to be submitted shall be published as constitutional amendments are required by law to be published.

Any initiative or referendum petition may be presented in sections, each section containing a full and correct copy of the title and text of the proposed measure. Each signer thereto shall add to his signature, his place of residence, street names and also residence numbers in cities and villages having street numbers, and date of signing the same. Any qualified and registered elector of the state shall be competent to solicit such signatures within the county in which he is an elector. Each section of the petition shall bear the name of the county or city in which it is circulated, and only qualified and registered electors of such county or city shall be competent to sign such section. Each section shall have attached thereto the affidavit of the person soliciting signatures to the same, who shall be required to identify himself by affixing his address below his signature stating that he is a qualified and registered elector and that all the signatures to the attached section were made in his presence, that each signature to the section is the genuine signature of the person signing the same,

and no other affidavit thereto shall be required.

Each section of the petition shall be filed with the clerk of the county in which it was circulated, but all said sections circulated in any county shall be filed at the same time. Within 20 days after the filing of such petition in his office, the said clerk shall forward said petition to the secretary of state or such other person or persons as shall hereafter be authorized by law.

Constitution of 1835 and 1850

The constitution of 1835 (Article IV, Section 1) provided: "The legislative power shall be vested in a senate and house of representatives." The constitution of 1850 (Article IV, Section 1) set forth that: "The legislative power is vested in a senate and house of representatives." The constitutions of 1835 and 1850 did not provide for the initiative or referendum.

Constitution of 1908

No change in the 1850 provision was made in carrying it over to the 1908 constitution. In the convention of 1907-08, referendum upon petition by ten per cent of the electors was proposed but defeated.[1] However, authority was granted to the legislature to submit any bill signed by the governor, except appropriation bills, to a referendum vote (Article V, Section 38). Local referendum in the area affected by local or special acts of the legislature was provided for in Section 30 of Article V, and referendum on various local matters was required in various sections of Article VIII.

Amendment of 1913. By legislative concurrent resolution of 1913, a proposal of amendment providing for the initiative and referendum on legislation was submitted to the electorate and adopted at the April election, 1913, by a vote of 219,057 to 152,388.[2]

Amendment of 1941. In 1941, this section was further amended by a legislative proposal adopted at the April election. The section (as amended in 1913) was not changed substantially thereby, but changes were made in the section which were intended to enable officials concerned to check on various phases of the initiatory petition and referendum processes for accuracy and validity.[3] The initiative on

[1] Proceedings and Debates, pp. 1372-1375.

[2] Article V, Section 19 was altered by the same amendment in order that it would not conflict. The amendment was proposed and adopted at the same time as was the amendment which made the initiative on constitutional amendments direct—see discussion of Article XVIII, Section 2.

[3] The 1941 amendment was proposed and adopted at the same time as was the similar supplementary amendment which related to the initiative on constitutional amendments—see discussion of Article XVII, Section 2.

legislation as provided for in this section (under the form as amended in 1913 and continued in the amendment of 1941) is indirect to the extent that the petition is submitted to the legislature.[4] The legislature, however, cannot effectively veto the measure, since if the legislature rejects it (unchanged), the measure will be submitted to a vote of the electorate. The legislature, however, has the opportunity to submit an alternative proposal.[5]

Statutory Implementation

Section 1 which vests the legislative power is basic to the state lawmaking power in general. The entire body of Michigan statutory law is related to it and an implementation of it.

The provisions of Section 1 which relate to the initiative and referendum for statutes are largely self-executing (as is Article XVII, Section 2 relating to the initiative for constitutional amendments). The duties assigned by this provision to the "secretary of state or such other person or persons hereafter authorized by law" have been given to a board composed of the board of state canvassers and the attorney general.[6]

Judicial Interpretation

The legislature's power is restricted only by express or necessarily implied limitations in the federal constitution and in the state constitution.[7] The state constitution is not a grant of power, but a limitation on its exercise. Numerous court decisions have dealt with the extent of legislative power including such matters as the police power and restrictions on delegation of legislative power. The opinions in these cases seem not to have diverged from interpretations of state legislative power in general in other jurisdictions.[8]

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[4] In order for the initiative to be direct, a proposal must be voted on by the electorate—without any legislative consideration.

[5] For a detailed study of the use of the initiative and referendum for statutes and constitutional amendments to 1940, see J. K. Pollock, The Initiative and Referendum in Michigan, University of Michigan, 1940.

[6] M.S.A. 6.1474. Other statutory details relating to the initiative and referendum under Article V, Section 1 and Article XVII, Section 2 are in M.S.A. 6.1471-6.1484.

[7] Attorney Genera1 v. Perkins, 73 Mich. 303; Young v. City of Ann Arbor, 267 Mich. 241; In re Palm, 255 Mich. 632; Huron-Clinton Metropolitan Authority v. Board of Supervisors of Five Counties, 300 Mich. 1.

[8] See cases cited in M.S.A. Volume 1, Constitutions, pp. 283-292; 1959 Cumulative Supplement of same, pp. 100-106.

Procedures relative to petitions for referendum were interpreted in Thompson v. Secretary of State and Michigan State Dental Society v. Secretary of State.[9] Leininger v. Secretary of State deals with certain phases of the initiative for statutes as amended in 1941.[10]

Other State Constitutions

The legislative power is vested in state legislatures in a relatively uniform manner among the states. Some 26 state constitutions refer to the "legislature;" 19 to the "general assembly;" three to the "legislative assembly;" and two to the "general court." All states except Nebraska are bicameral and refer to the "upper" house as the senate. The "lower" house, having a larger membership than the senate in each of these states, is known as the house of representatives in most of them. In a few states, the term "assembly," "general assembly" or "house of delegates" is used.[11]

Initiative for Statutes. Twenty state constitutions provide for the initiative for statutes, of which 12 provide only for the direct initiative. Six (including Michigan) provide only for indirect initiative, and the remaining two (California and Washington) provide for both under certain circumstances. Even in the states where the initiative is indirect, the proposal may be submitted to the people if rejected by the legislature, as in Michigan.[12]

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[9] 192 Mich. 512; 294 Mich. 503. These cases were decided prior to the changes in this section by amendment in 1941, but would remain authoritative except where the 1941 amendment makes them in part obsolete.

[10] 316 Mich. 644.

[11] Index Digest, pp. 642-643; Manual on State Constitutiona1 Provisions, p. 3. On legislative power in general among the states, see Belle Zeller, Editor, American State Legislatures (Report of the Committee on American Legislatures of the American Political Science Association, 1954); J. B. Fordham, The State Legislative Institution, 1959; M. L. Faust, Manual on the Legislative Article for the Missouri Constitutional Convention of 1941; B. R. Abernathy, Constitutional Limitations on the Legislature (University of Kansas, 1959); H. Walker, The Legislative Process (1948).

[12] The legislature in most cases can submit an alternative at the same time, as in Michigan. Information on the statutory initiative and referendum is derived from Index Digest, pp. 553-566 and Manual on State Constitutional Provisions, pp. 119-133.

STATUTORY INITIATIVE

State	Number of Petition Signers	Other Conditions
Direct		
Utah	As determined by law	
Idaho	As determined by law	
North Dakota	10,000	
Missouri	5% vote for governor in two-thirds of congressional districts	
Nebraska	7% of vote for governor	5% in 2/5 of counties
Arkansas	8% of vote for governor	4% in 15 counties
Colorado	8% of vote for secretary of state	
Montana	8% of vote for governor	8% in 2/5 of counties
Oklahoma	8% of vote for officer having most votes	
Oregon	8% of vote for justice of highest court	
Alaska	10% of votes cast in 2/3 of election districts	
Arizona	10% of vote for governor	
Indirect		
Massachusetts	3% of vote for governor	Not more than 25% from one county
Ohio	3% of vote for governor	Supplementary petition by same percentage if legislature rejects
South Dakota	5% of vote for governor	
MICHIGAN	8% of vote for governor	
Maine	10% of vote for governor	
Nevada	10% of vote for justice of highest court	
Both Direct and Indirect		
California	8% of vote for governor—direct 5% of vote for governor—indirect	
Washington	8% of vote for governor —direct if submitted not less than four months before election. —indirect if submitted not less than 50 days before legislative session.	

Referendum for Statutes. The constitutions of 22 states provide for the referendum on legislative acts. This includes Maryland and New Mexico in addition to the 20 that also have the initiative for statutes. In all of these states the referendum cannot apply to some forms of legislation, such as appropriation bills and those given immediate effect, as in Michigan. Application of the referendum to parts or sections of a bill and the 90-day period stipulated in the Michigan provision are common to most of these states. There are, in general, more restrictions on the use of the referendum than on the initiative in these states. Seven states, including Michigan, also allow the legislature to submit bills to a referendum vote.

STATUTORY REFERENDUM

State	Number of Petition Signers	Other Conditions
Idaho	As determined by law	
Utah	As determined by law	
North Dakota	7,000	30,000 for emergency measure
Maryland	10,000	Not more than one-half from Baltimore or any county
Massachusetts	2% of vote for governor	Not more than 25% from one county
Washington	4% of vote for governor	
Arizona	5% of vote for governor	
California	5% of vote for governor	
Colorado	5% of vote for secretary of state	
MICHIGAN	5% of vote for governor	
Missouri	5% of vote for governor in 2/3 congressional districts	
Montana	5% of vote for governor	5% in 2/5 of counties
Nebraska	5% of vote for governor	5% in 2/5 of counties
Oklahoma	5% of vote for officer having most votes	
Oregon	5% of vote for justice of highest court	
South Dakota	5% of vote for governor	
Arkansas	6% of vote for governor	3% in 15 counties
Ohio	6% of vote for governor	
Maine	10% of vote for governor	
Nevada	10% of vote for justice of highest court	
New Mexico	10% of total votes cast	Including 10% in 3/4 of counties
Alaska	10% of votes cast	Resident in 2/3 of election districts
Kentucky*		

*Kentucky has the referendum for certain tax legislation.

Comment

Bicameral Legislature. Article V, Section 1 of the present constitution requires a bicameral legislature. The strong and almost universal tradition of bicamerialism in the United States seems likely to continue in most states. The question of having one house or two in the legislature is related to the problem of legislative apportionment and reapportionment, but there is little evidence that adoption of a one-house legislature would solve that problem. There could, of course, be more than one basis for apportionment of the seats in a unicameral legislature, as evidenced by the two bases of representation for the delegates to the Michigan constitutional convention of 1961 under Article XVII, Section 4.

Experimentation by a few states with a unicameral legislature was abandoned in the early nineteenth century. Nebraska adopted a unicameral form in 1937, and the Alaska constitution compromised somewhat between the bicameral and unicameral systems by requiring the legislature to meet in joint session for several purposes. The Model State Constitution provides for a unicameral legislature. This provision of the Model seems not to have had great influence upon the framing and revision of state constitutions in recent years.

The issue of unicameralism against bicameralism has been raised in Michigan in recent years and might be considered by the convention.[13]

Legislative Power in General. The power of the Michigan legislature is restricted and limited not only by the initiative and referendum, but by several other sections in Article V which are discussed in Part C of this chapter. The legislature's taxing power and power of making appropriations are also limited substantially by various provisions of the constitution. Many of the more stringent constitutional restrictions on the legislature in Michigan and many other states resulted from intensive and extensive distrust of state legislatures in the nineteenth and early twentieth centuries.[14] In revising the Michigan constitution, a new evaluation might be made of the need for continuing many of the present restrictions on legislative power.

Legislative Auditor. Many states have found that one of the best methods for enhancing the effectiveness of the legislature in exercising its general legislative power is to grant the legislature control over the post-audit of expenditures. The "power of the purse" has traditionally been considered one of the most basic legislative prerogatives. However, in some states, including Michigan, the legislature has been unable to use its "power of the purse" with full efficacy because it lacks control over the post-audit of expenditures. That is, the legislature has been unable to determine whether the funds appropriated have been used in accordance with the policies and purposes set forth in the laws of the state.

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[13] See Council Comments, No. 706, Citizens Research Council, February 18, 1960.

[14] While such restrictions seemed to be a relatively simple method of curtailing misuse of legislative power, many state government specialists point out that these restrictions seem increasingly to have curtailed the effectiveness of state government in coping with complex problems of the present century.

The traditional American concept of separation of powers among the executive, legislative and judicial branches with appropriate checks and balances, would seem to suggest that the post-audit function be vested in the legislative branch. The post-audit is an "after the fact" check on the expenditure of public funds. As such, responsibility for the post-audit function should be separate and distinct from the responsibility for the actual spending of public funds which is vested in the executive branch. The legislative post-audit gives the legislature, the branch of government responsible for appropriating funds, an independent check on the executive branch in its expenditure of the funds that are appropriated.

In fifteen states the legislature has responsibility for the post-audit function. In eleven of these the responsibility is of statutory origin, while in four it is constitutional.[15] The four states which have constitutional provision for legislative auditors are Virginia, New Jersey, Hawaii, and Alaska—the last three being the states which have the most recently framed state constitutions. The Model State Constitution also provides for a legislative auditor.

The New Jersey constitution (Article VII, Section I 6) requires the state auditor to be appointed by the legislature in "joint meeting" for a five-year term; he is required to "conduct post-audit of all transactions and accounts kept by or for all departments, offices and agencies of the State government." He is required to report to the legislature or any of its committees and perform "such other similar or related duties" as required by law.

The Hawaii constitution (Article VI, Section 8) requires the legislature "by a majority vote of each house in joint session" to appoint an auditor for an eight-year term. The legislature may remove the auditor at any time for cause by a "two-thirds vote of the members in joint session." The description of his major duties is similar to the New Jersey provision, but he is also required to post-audit the accounts of the political subdivisions of the state. He is further required to "certify to the accuracy of all financial statements" by accounting officers, report his "findings and recommendations" to the governor as well as to the legislature and perform additional duties "as may be directed by the legislature."

The Alaska provision (Article IX, Section 14) is brief, but comprehensive. It requires the legislature to appoint "an auditor to serve at its pleasure." He must be a certified public accountant, and he "shall conduct post-audits as prescribed by law and shall report to the legislature and to the governor."[16]

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[15] In four other states the legislature shares control of the post-audit function with the executive branch. See Chapter VI, Table II, p. 5.

[16] The provision of the Model State Constitution is similar to the Alaska provision except that it does not require the auditor to be a certified public accountant.

The Virginia provision (Article V, Section 82) is also brief. It requires an "Auditor of Public Accounts" to be elected "by the joint vote of the two houses" for a four-year term. "His powers and duties shall be prescribed by law."

An auditor general elected by the people is provided for in the Michigan constitution (Article VI, Section 1; see discussion in Chapter VI, "The Executive Department," pp. 1-8). The auditor general is responsible by statute for the post-audit function and other duties not related to post-audits. The auditor general is generally considered at the present time to be a part of the executive branch of state government and he has a number of ex officio duties in the executive branch, such as serving on the state administrative board.

The Michigan "Little Hoover" Committee (Staff Report No. 11) recommended in 1951 that the elective office of auditor general be abolished, to be replaced by a legislative auditor general appointed by a joint legislative audit committee subject to the approval of each house "voting separately." This officer would serve at the pleasure of the legislature for not longer than 15 years, subject to removal only after public hearing. The Citizens Committee (a supplement to the "Little Hoover" Committee) recommended that the term of office be ten years, and that the auditor be subject to removal by a "two-thirds vote of each house voting separately."

The staff report further recommended that the legislative auditor general be required to conduct post-audits of "all transactions or accounts of all agencies of the state," to conduct investigations and to report to the legislative audit committee as required. It was further recommended that an independent accounting firm audit the state's departments and agencies and review the program of the legislative auditor general every five years. The Citizens Committee further recommended that a post-audit of each state agency be conducted at least once every three years.

Legislative Council. Many state legislatures, including Michigan's, do not have adequate expert staff assistance for their members and committees. Lack of adequate staff and facilities, particularly for legislative research among the states, seems often to have resulted in legislators being overly dependent upon executive departments and interest groups for information and analysis of material bearing upon the formulation of legislative policy. Approximately three-quarters of the states have a legislative council or its equivalent whereby a legislative committee (usually a permanent joint committee) is responsible for the development and maintenance of research staff (responsible only to the legislature) whose duty it is to supply the legislators with background material and information useful in developing legislative policy.

Most legislative councils do not have constitutional standing.[17] While legislative councils can be established by any state legislature without constitutional authorization, their potential importance in enhancing the effectiveness of the legislature's power has been felt to warrant the inclusion in the Missouri and Alaska constitutions, as well as in the Model State Constitution, of provisions for an agency of this type. Some consideration might be given to a provision of this type in the Michigan constitution.[18]

Initiative and Referendum. If the present self-executing provisions for the use of the initiative and referendum for statutes are to be continued in a revised constitution, little revision would seem necessary. Changes in procedure were made by the 1941 amendment which refined this procedure and added safeguards. Only one statute (Public Act No. 1, 1949) has been initiated by petition. This was adopted at the November, 1950, election. Petition for referendum has been used for seven legislative measures, six of which were defeated at the polls. The legislature, under authority of Article V, Section 38, has submitted two measures to a referendum, one of which was adopted, and the other defeated. That the statutory initiative and referendum by petition have not been used frequently is not fully indicative of their influence or impact on legislation. The possibility that the initiative or referendum for statutes might be used would tend to have some influence upon the normal law-making process.[19]

The convention may wish to consider the possibility of removing from the present provision some of the detail, leaving this to be provided by law.

Use of the statutory referendum petition is restricted to the extent that the legislature orders immediate effect for a substantial portion of all bills passed, although a two-thirds vote in each house is required for this by Article V, Section 21. While legislative discretion for such action in emergencies is desirable, this device can be used by the legislature to forestall referendum by petition. Possible solutions for this problem would be to make determination of the necessity for immediate effect a judicial question by a specific constitutional provision, or to allow referendum by petition after an act had taken immediate effect.

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[17] In 1933, a legislative council was established in Michigan by statute but this was repealed before its potential value could be accurately determined. Michigan is the only state which has discontinued a legislative council after one was established. E. F. Staniford, Legislative Assistance (University of California, 1957), pp. 12-15. The Legislative Service Bureau is an important aid to the Michigan legislature, but it is not a substitute for a legislative council.

[18] B. Zeller, Editor, American State Legislatures, pp. 124-162; S. Scott, Streamlining State Legislatures (University of California, 1956); The Council of State Governments, Legislative Councils (Organization, Staff and Appropriations, 1959).

[19] With little extra effort those who initiate measures can write them into the constitution by amendment. This would appear to be one reason for the lack of use of the initiative for statutes.

B. APPORTIONMENT OF THE LEGISLATURE

By
Charles W. Shull
Professor of Political Science, Wayne State University

1. Senators; Number, Term; Districts

Article V: Section 2. The senate shall consist of 34 members. Senators shall be elected for 2 years and by single districts. Such districts shall be numbered from 1 to 34, inclusive, and shall consist of the territory within the boundary lines of the counties existing at the time of the adoption of this amendment, as follows: First through fifth, eighteenth, twenty-first, Wayne county; nineteenth, Lenawee and Monroe counties; tenth, Jackson and Hillsdale counties; ninth, Calhoun and Branch counties; sixth, Kalamazoo and St. Joseph counties; seventh, Cass and Berrien counties; eighth, Van Buren, Allegan and Barry counties; fourteenth, Ingham and Livingston counties; twelfth, Oakland county; eleventh, Macomb county; twentieth, Tuscola, Sanilac and Huron counties; thirteenth, Genesee county; fifteenth, Clinton, Shiawassee and Eaton counties; sixteenth and seventeenth, Kent county; twenty-third, Muskegon and Ottawa counties; twenty-fifth, Mecosta, Montcalm, Gratiot and Ionia counties; twenty-second, Saginaw county; twenty-fourth; Bay, Midland and Isabella counties; twenty-sixth, Newaygo, Oceana, Mason, Lake and Manistee counties; twenty-eighth, Osceola, Clare, Gladwin, Arenac, Iosco, Ogemaw, Roscommon, Crawford, Oscoda and Alcona counties; twenty-seventh, Missaukee, Wexford, Benzie, Grand Traverse, Kalkaska, Leelanau and Antrim counties; twenty-ninth, Charlevoix, Emmet, Cheboygan, Otsego, Montmorency, Alpena and Presque Isle counties; thirtieth, Chippewa, Mackinac, Luce, Schoolcraft, Alger, Menominee and Delta counties; thirty-first, Marquette, Dickinson, Iron and Gogebic counties; thirty-second, Baraga, Keweenaw, Houghton and Ontonagon counties; thirty-third, Washtenaw county; thirty-fourth, Lapeer and Saint Clair counties. Each of the 34 districts shall elect 1 senator. Counties entitled to 2 or more senators shall be divided into senatorial districts as herein provided equal to the number of senators to elected; said districts shall be arranged in as nearly as may be an equal number of inhabitants and shall consist of convenient and contiguous territory; and said districts shall be arranged during the year 1953, by the board of supervisors in such counties assembled at such time and place as prescribed by law.

Constitutions of 1835 and 1850

The Michigan constitution of 1835 provided for a senate, equal to one-third of the size of the house of representatives. Since the house size could range from 48 to 100 members, the senate could consist of 16 to 33 members, depending on the actual size of the house. Each senator was to be elected for two years. Terms were staggered, and one-half of the membership was chosen each year (Article IV, Sections 2, 5). Provision was made for not less than four nor more than eight senatorial districts, with each district electing an equal number of senators, annually. Counties were not to be divided in forming senatorial districts and districts were to be contiguous (Article IV, Section 6).

In the constitution of 1835, the legislature was given responsibility for providing for an enumeration of the inhabitants in 1837, 1845, and each tenth year thereafter. At the first session after the state enumeration as well as the first session after the enumeration by the United States, the legislature was to "apportion anew the representatives and senators among the several counties and districts, according to the number of white inhabitants." (Article IV, Section 3) Thus, the legislature was to be reapportioned every five years.

In the 1850 constitution as amended the number of senators was fixed at 32. All 32 were elected at the same time for two-year terms from single member districts. Only counties entitled to two or more members could be divided (Article IV, Section 2). The 1850 constitution also contained a provision (Article XIX, Section 4) for at least one senator from the Upper Peninsula.

The 1850 constitution provided that the legislature was to provide by law for an enumeration of the inhabitants in 1854 and every ten years thereafter. At the first session after each such enumeration and after each enumeration by the authority of the United States, the legislature was to "rearrange the senate districts and apportion anew the representatives among the counties and districts, according to the number of inhabitants, exclusive of persons of Indian descent who are not civilized or are members of any tribe" (Article IV, Section 4).

Constitution of 1908

The original provisions in the 1908 constitution for the senate were similar to the provisions in the 1850 constitution. The 1908 provision continued a 32-member senate, elected for two-year terms by single districts and continued the prohibition against dividing a county unless it was entitled to two or more senators. The requirement for a periodic rearrangement of the senatorial districts among the counties and districts according to the number of inhabitants was also continued.

However, the 1908 provision eliminated the 1850 requirement for a state census and for a rearrangement every five years. The 1908 provision required a rearrange-

ment every ten years, following the federal decennial census. The 1908 provision also omitted as unnecessary the exclusion of uncivilized Indians. Finally, the 1908 provision dropped the 1850 provision requiring that one senator be elected from the Upper Peninsula at all times.

Amendment in 1952. At the November election in 1952 the voters approved an amendment to Sections 2, 3, and 4 of Article V which had been placed on the ballot by initiative petition. The amendment to Section 2 changed the provisions for establishing senatorial districts and the amendment of Section 4 deleted from it the 1908 provision for periodically rearranging senatorial districts. The text of Section 2 as amended in 1952 appears on page 14. A comparison of the 1908 provision and the 1952 amendment shows the following:

1. The size of the senate was increased from 32 members to 34 members.

2. The provisions that senators be elected for a two-year term and by single districts each of which shall elect one senator were continued.

3. The 1952 amendment defined the senatorial districts in the constitution by enumerating the county or counties that were to comprise each senatorial district. The original 1908 constitution provided that the legislature should by law arrange the senatorial districts among the counties and districts.

4. The 1952 amendment froze permanently in the constitution the composition of senatorial districts. No provision was made for periodic rearrangement of senatorial districts in the 1952 amendment. The original 1908 provision called for the legislature by law to rearrange the senate districts each ten years among the counties and districts according to the number of inhabitants.

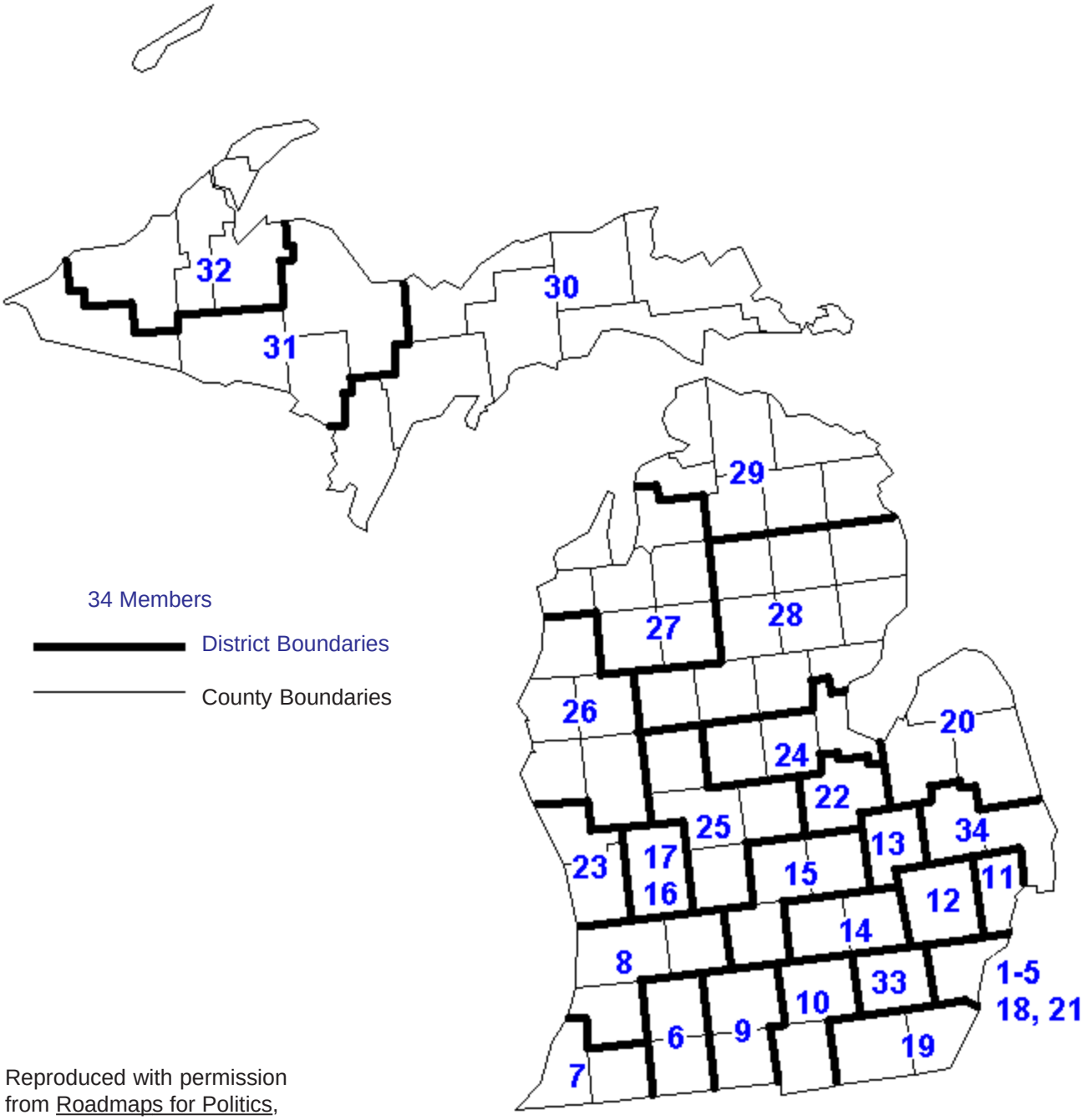
5. The 1908 provision prohibited the division of counties in forming senatorial districts unless the county was equitably entitled to two or more senators. The 1952 amendment provided that any county entitled to two or more senators should be divided by the board of supervisors in the year 1953 into single member districts containing “as nearly as may be an equal number of inhabitants” and consisting of “convenient and contiguous territory.” The 1952 amendment also apparently froze these districts—that is, there is no provision for the boards of supervisors to rearrange the districts within the county after the year 1953.

MAP 1

MICHIGAN

SENATORIAL DISTRICTS

1954



Judicial Interpretation

There has been a major state supreme court test of Section 2 (Scholle v. Secretary of State, 360 Mich. 1, 1960). In 1959 a mandamus action was brought in the state supreme court seeking to command the secretary of state, as the chief election official in Michigan, not to issue 1960 election notices for state senators. The plaintiff sought to have Sections 2 and 4 of the Michigan constitution as amended in 1952 declared invalid in that plaintiff and other citizens of Michigan are denied equal protection of the laws and due process of law as guaranteed by the U.S. constitution and the Michigan constitution. Plaintiff further sought to have the senate elected at large until such time as a valid senate apportionment act was adopted by the legislature in accordance with the provisions of the 1908 constitution, Sections 2 and 4, prior to their amendment in 1952. The plaintiff alleged that the senate districts formed in the 1952 amendment were wholly arbitrary, having no correlation between population and representation, between area and representation, or between political units and representation. Therefore, the plaintiff contended, the method of division of senate districts is arbitrary and capricious and denies equal protection and due process of law.

The case was decided in April, 1960. The majority opinion dismissed the request for mandamus on the grounds that the U.S. supreme court is the final authority on interpretations of the U.S. Constitution and that the U.S. supreme court had not construed the equal protection and due process clauses to prohibit a state constitutional amendment which establishes districts substantially unequal in voting power for election of state senators. The case has been appealed to the supreme court of the United States and is now pending before that body.

Other State Constitutions

The provisions of other state constitutions concerning senates are discussed at the end of Part B, together with their provisions for houses of representatives and apportionment.

Comment

See the discussion at close of this Part B.

2. Representatives; Number, Term; Districts; Apportionment

Article V: Section 3. The house of representatives shall consist of not more than 110 members. Representatives shall be chosen for 2 years and by single districts except as otherwise provided herein, which shall contain as nearly as may be an equal number of inhabitants and shall consist of convenient and contiguous territory. The ratio of representation for representative districts shall be the quotient obtained by dividing the total population of the state as

determined by the latest or each succeeding official federal decennial census by 100. Each county, or group of counties forming a representative district, shall be entitled to a separate representative when it has attained a population equal to 50 per cent of the ratio of representation, and in addition thereto, shall be entitled to 1 additional representative for each additional full ratio of representation. In every county entitled to more than 1 representative, the board of supervisors shall assemble at such time and place as shall be prescribed by law, divide the same into representative districts, which shall contain as nearly as may be an equal number of inhabitants and shall consist of convenient and contiguous territory, equal to the number of representatives to which such county is entitled by law, and shall cause to be filed in the offices of the secretary of state and clerk of such county a description of such representative districts, specifying the number of each district and the population thereof according to the latest or each succeeding official federal decennial census: Provided, That no township or city shall be divided in the formation of a representative district, except that when a city is composed of territory in more than 1 county, it may be divided at the county line or lines: Provided further, That in the case of cities hereafter organized or created or territory annexed to an existing city, the territory thereof shall remain in its present representative district until the next apportionment: And provided further, That when any township or city contains a population which entitles it to more than 1 representative, then such township or city shall elect by general ticket the number of representatives to which it is entitled; except that when such township or city shall be entitled to more than 5 representatives, then such township or city shall be divided into representative districts containing as near as may be an equal number of inhabitants and consisting of convenient and contiguous territory, but with not less than 2 nor more than 3 representatives in any 1 district: Provided, That the average number of inhabitants per representative in such districts shall be as nearly equal as possible.

Section 4. Within the first 180 days after the convening of the first regular session, or after the convening of any special session called for that purpose, following January 1, 1953, and each tenth year thereafter, the legislature shall apportion anew the representatives among the counties and districts in accordance with section 3 of this article, using as the basis for such apportionment the last United States decennial census of this state: Provided,

> however, That should the legislature within the first 180 days, after the convening of the first regular session, or after the convening of any special session called for that purpose, following January 1, 1953, and each tenth year thereafter, fail to apportion anew the representatives in accordance with the mandate of this article, the board of state canvassers, within 90 days after the expiration of said 180 days, shall apportion anew such districts in accordance with the provisions of this article and such apportionment shall be effective for the next succeeding Fall elections.

Constitutions of 1835 and 1850

The constitution of 1835 provided for not less than 48 nor more than 100 members of the house of representatives, chosen annually; each organized county was to receive at least one representative, but each newly organized county was not to receive a separate representative until it attained a population equal to the ratio of representation (Article IV, Sections 2, 4).

As was the case with the senate, the legislature was to apportion anew the representatives among the several counties and districts, according to the number of white inhabitants. The house was to be reapportioned every five years following the state census and the federal census.

The 1850 constitution as amended in 1869 provided for not less than 64 nor more than 100 members, elected for two-year terms from single-member districts. The districts were to contain, as nearly as possible, an equal number of inhabitants, "exclusive of persons of Indian descent who are not civilized or are members of any tribe," and were to consist of convenient and contiguous territory (Article IV, Section 3).

The 1850 constitution prohibited dividing cities or townships in forming representative districts and further required that when any city or township was entitled to more than one representative, the election was to be at large. The 1850 provision authorized "each county hereafter organized...to a separate representative when it has obtained a population equal to a moiety of the ratio of representation." This marked a significant departure from the 1835 provision which apparently required a full ratio of representation. The term "moiety" means one-half and the 1850 provision authorized each county to have a separate representative when it attained one-half of a full ratio of representation. The 1850 constitution provided that in counties having more than one representative, the board of supervisors should divide the county into single-member districts.

The 1850 constitution also provided (Article XIX, Section 4) that until entitled to more by its population, the Upper Peninsula was to have three members of the house of representatives, to be apportioned among the several counties by the legislature.

The 1850 constitution provided that in the session following the state census in 1854 and every ten years thereafter and following the federal census the legislature should "apportion anew the representatives among the counties and districts, according to the number of inhabitants, exclusive of persons of Indian descent who are not civilized or members of any tribe." Thus, as in the case of the rearrangement of senate districts, the house was to be reapportioned every five years.

Constitution of 1908

The 1908 constitution carried over the 1850 provisions, as amended, with only two changes: 1) the exclusion of Indians was omitted; and, 2) the requirement for a state census was eliminated; thus reapportionments were to be conducted every ten years following the federal decennial census. The provisions of the 1908 constitution were amended in 1928 to authorize cities in more than one county to be divided at the county line in forming districts and to provide that newly incorporated cities or annexed areas should remain in their present district until the next apportionment.

The 1908 provisions were as follows:

> The house of representatives shall consist of not less than sixty-four nor more than one hundred members. Representatives shall be chosen for two years and by single districts, which shall contain as nearly as may be an equal number of inhabitants and shall consist of convenient and contiguous territory; but no township or city shall be divided in the formation of a representative district, except that when a city is composed of territory in more than one county, it may be divided at the county line or lines: And provided, That in the case of cities hereafter organized or created or territory annexed to an existing city, the territory thereof shall remain in its present representative district until the next apportionment. When any township or city shall contain a population which entitles it to more than one representative, then such township or city shall elect by general ticket the number of representatives to which it is entitled. Each county, with such territory as may be attached thereto, shall be entitled to a separate representative when it has attained a population equal to a moiety of the ratio of representation. In every county entitled to more than one representative, the board of supervisors shall assemble at such time and place as shall be prescribed by law, divide the same into representative districts equal to the number of representatives to which such county is entitled by law, and shall cause to be filed in the offices of the secretary of state and clerk of such county a description of such representative districts, specifying the number of each district and population thereof according to the last preceding enumeration. (Article V, Section 3, amended in 1928)

> At the session in nineteen hundred thirteen, and each tenth year thereafter, the legislature shall by law rearrange the senatorial districts and apportion anew the representatives among the counties and districts according to the number of inhabitants, using as the basis for such apportionment the last preceding United States census of this state. Each apportionment so made, and the division of any county into representative districts by its board of supervisors, made thereunder shall not be altered until the tenth year thereafter. (Article V, Section 4)

Amendment in 1952. As indicated in the analysis of Section 2, an amendment placed on the ballot by initiative petition was approved by the voters in November, 1952. This amendment revised Sections 3 and 4 as they pertain to the house of representatives. The text of Sections 3 and 4 as amended appears on pages 18, 19, and 20.

There were a number of significant changes in the 1952 amendments regarding apportionment of the house of representatives.

1. The 1908 provision called for a range of membership from 64-100, while the 1952 amendment provided for not to exceed 110 members.

2. The practice under the 1908 provision was to determine the ratio of representation by dividing the population of the state by the actual size of the house (100). The use of a factor equal to the maximum possible number of members to determine the ratio of representation together with allocating seats to "moiety" counties, resulted in the constitutional maximum of 100 seats being fewer than the number actually required to fulfill entirely the population formula. This was resolved by first allocating seats out-state with Wayne County receiving the seats that were left.

The 1952 amendment provided for a house of not to exceed 110 members with the full ratio of representation determined by dividing the population of the state by 100. Thus, the maximum number of seats exceeded by 10 the figure used in determining the full ratio. As a result, even after allocating seats to moiety counties, enough seats were left (in 1953) to provide Wayne County with the number of seats to which it was entitled under full ratios of representation.

3. In the 1952 amendment the term "moiety" was replaced by the term "50 per cent of the ratio of representation." "Moiety" had a rather vague meaning and although apparently intended to mean a major part or 50 per cent or more, the meaning of the term had been modified by legislative applications. In 1925 Livingston County had been considered a "moiety" county and given a representative with only 42 per cent of a full ratio of representation.

4. Under the 1908 provision any city or township entitled to two or more representatives could not be districted—all the representatives had to be elected at large.

The 1952 amendment provided that if a city or township were entitled to more than five representatives, then it should be divided into representative districts with each district electing not more than 2 nor less than 3 representatives with each district containing as nearly as may be an equal number of inhabitants per representative and consisting of convenient and contiguous territory. A city or township entitled to two to five representatives would elect them at large.

The 1952 amendment did not change the original provision that counties entitled to more than one representative were to be divided into representative districts equal to the number of representatives to be elected.

5. The 1952 amendment provided that in 1953 and each tenth year thereafter "the legislature shall apportion anew the representatives among the counties and districts in accordance with section 3 of this article, using as the basis for such apportionment the last U.S. decennial census of this state." This provision was similar to the original 1908 provision. However, the 1952 amendment included the requirement that should the legislature fail to reapportion following January, 1953, and each tenth year thereafter within 180 days after the convening of the first regular session or special session called for that purpose, the responsibility for apportioning would be placed in the board of state canvassers.

Thus, the 1952 amendment placed a time limit within which the legislature must act and, if it fails to act within the stipulated period, the responsibility is shifted to the board of state canvassers (see Article III, Section 9) which has 90 days in which to act. The significance of this change is that the board of state canvassers can be compelled to act by mandamus, while under the previous provision the legislature could and did refuse to reapportion house seats and could not be forced to act.

Judicial Interpretation

There have been several decisions by the Michigan supreme court on Section 3 of Article V. The court has held that the legislature may exercise fair and reasonable discretion to pass a statute which compiles as far as practicably possible with constitutional requirements. The legislature has some discretion in determining whether the districts "contain as nearly as may be an equal number of inhabitants and shall consist of convenient and contiguous territory." The legislature may create districts of counties contiguous only through navigable water.[20]

In regard to moiety or the 50 per cent ratio, the court has held that where a county has less than a moiety, but is surrounded by counties having more than a moiety, the county lacking a moiety could be joined to one of the contiguous moiety counties to form a district as a matter of legislative necessity. This can be done even though the county lacking the moiety might have been joined to other counties contiguous by water.[21]

[20] Stenson v. Secretary of State, 308 Mich. 48.

[21] Ibid.

The court has also held that the constitution does not prohibit joining a township and a city in a representative district.[22]

Opinions of the Attorney General

The attorney general has ruled that a city that is not entitled to more than five representatives nor located in more than one county may not be divided into representative districts by the board of supervisors (Opinion of the Attorney General, October 14, 1953, No. 1717).

Statutory Implementation

In accordance with the requirements of Section 4, the legislature reapportioned the house of representative districts in 1953. The maximum possible number of seats (110) was used. The 1953 apportionment, which is still in effect today, is shown on the map on the following page.

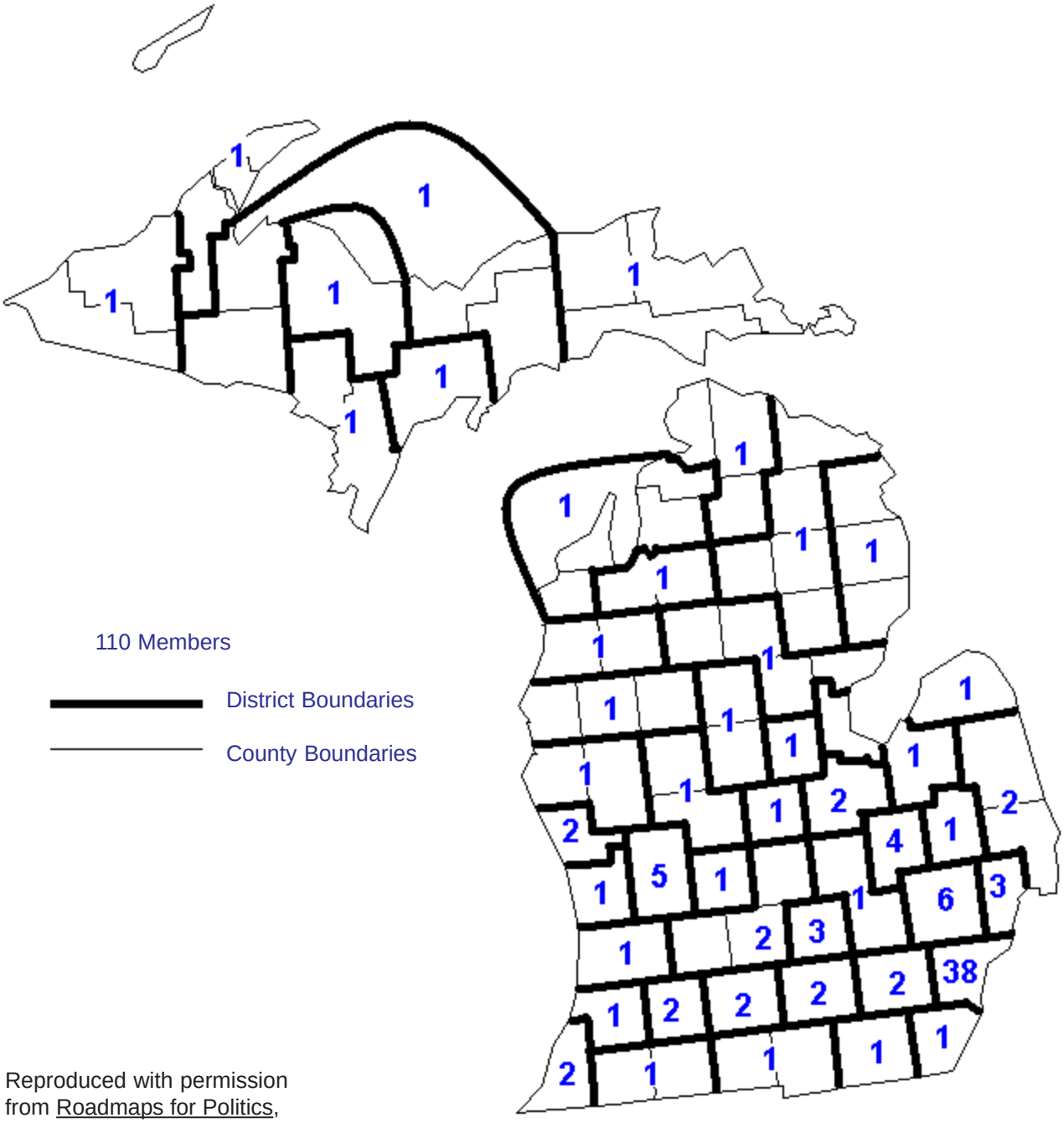
[22] City of Lansing v. Ingham County Clerk, 308 Mich. 560.

MAP 2

MICHIGAN

REPRESENTATIVE DISTRICTS

1954



Other State Constitutions

Table 2 at the end of this Part B shows the provisions in other states for size and apportionment of state legislatures.

Size

State senates range in size from 17 in Delaware and Nevada to 67 in Minnesota. The most popular sizes are 33, 35, 40, and 50 members, with four states having senates of each of these sizes. The average size is 38.

Houses of representatives vary in size from 35 in Delaware to 400 in New Hampshire. Seven states have houses containing 100 members. The average size is 119.

Bases of Apportionment

A variety of bases of apportioning state legislatures are prescribed by the constitutions of the 50 states. These bases of apportionment are described briefly for each state in Table 2. While there are many variants, the bases can be narrowed down to six major types as shown in Table 1 below.[23]

Table 1
STATE LEGISLATIVE APPORTIONMENT BASES

Basis	Senates	Houses	Total
Population (including one unicameral)	20	12	32
Population, but with weighted ratios	1	7	8
Combination of population and area	17	28	45
Equal apportionment for each unit	7	1	8
Fixed constitutional apportionment	4	1	5
Apportionment by taxation	1	0	1
Total	50	49	99

Population. While 32 chambers among the states use population as the basis of representation, only nine states use population for both houses (a total of 18 houses). In the other 14 states (Nebraska included) only one house is based on population. It should be noted that the definition of "population" varies widely among these states.

Population With Weighted ratios. The eight chambers in this category, including Michigan's house of representatives, allow a county or district a representative when it has a stipulated portion of a ratio. For one of these eight houses a two-thirds ratio is stipulated, while for the other seven houses a one-half ratio is provided.

[23] The table is reproduced with permission from Baker, Gordon E., State Constitutions: Reapportionment, State Constitutional Studies Project, No.2, National Municipal League, New York, 1960. Other information in this section on bases of apportionment is summarized from this source. This document is a valuable source of current information on state legislative apportionment.

Population and Area. The 45 chambers that are apportioned on a combination of population and area utilize a variety of combinations. In a number of these, each county or other political unit is entitled to at least one representative with the remaining representatives apportioned on the basis of population. In others no county can have more than a specified number of or percentage of representatives. And same houses are based on a classified and graduated system; e.g., counties within a certain population range are entitled to one representative, counties with three times that population may be entitled to two representatives, etc.

Equal Apportionment to Each Unit. In six states each county receives one member in the senate and in one state each county has two senate seats. Vermont gives each inhabited town one house member.

Fixed Constitutional Apportionment. Five legislative bodies, including Michigan's senate, have their districts specified in the state constitution and the districts can be changed only by constitutional amendment.

Apportionment Based On Direct Taxes. In New Hampshire the senate districts are determined "by the proportion of direct taxes paid by the said districts."

Apportioning Agency

In 42 of the states (including Michigan) the legislature is the primary agency specified in the constitution for apportioning one or both houses. Six of these states (California, Illinois, Michigan, Oregon, South Dakota, and Texas) provide for alternative procedures if the legislature fails to act. In Washington, reapportionment is specifically provided for by either the legislature or by initiative. In Michigan the legislature has the first responsibility to reapportion; if it does not act the state board of canvassers can act. The voters can initiate a constitutional amendment for reapportionment, as was done in 1952, at any time. Only two states (Delaware and Maryland) make no constitutional provision for periodic reapportionment.

Provision for apportionment by non-legislative officials is made in six states (Alaska, Arizona, Arkansas, Hawaii, Missouri, and Ohio).

Term

Legislative terms are two or four years. Senators in 35 states serve four-year terms. In the other 15 (including Michigan and Nebraska) they serve for two years. House members serve four-year terms in only four states (Alabama, Louisiana, Maryland, and Mississippi).

Terms of Office*		
Senate	House	Number of States
4 years	4 years	4
4 years	2 years	31
2 years	2 years	15

*Council of State Governments, The Book of the States, 1960-61, page 37. See also Chapter VI of this publication re governor's term.

Comment

Legislative apportionment has been one of the most controversial areas in Michigan's constitution. Proper apportionment is one of the basic problems in a representative government.

The two bases commonly used in apportioning American state legislatures are population and area. As mentioned before, population is used in varying degrees by most states in establishing districts for either or both houses of their legislatures. Many people believe that population is the only defensible basis for representation in both houses of the legislature. Opponents of this point of view usually accept population as the basis for representation in one house but contend that it should not be the basis for both houses. They suggest that one of the advantages of a bi-cameral legislature is that the two houses can represent different interests. They feel that area or counties should be given consideration in the apportionment of at least one branch of the legislature.

Senate. There will undoubtedly continue to be considerable controversy as to whether the present apportionment of the senate should be continued; whether additional members should be allocated to the more populous areas; or whether the senate should be apportioned on a straight population basis.

Whatever basis of apportionment is chosen, a decision will have to be made as to whether the districting should be frozen into the constitution or some provision made for periodic reapportionment of the senate. If senate districts are to continue to be frozen into the constitution, consideration might be given to providing for periodic re-districting within a county entitled to two or more members.

House. The major issue in the provision for the house of representatives appears to be on the phrase "ratio of representation." Should a county, or group of counties, be entitled to a representative when it has attained a population equal to 50 per cent of the ratio of representation (the present provision), or should a county, or group of counties, be required to have a full ratio or more nearly a full ratio (60%, 75%, 85%, etc.) of representation before being entitled to a representative?

Even though a single county might receive a representative when it attains a half (or some other portion) of a ratio, should groups of counties be required to achieve a full ratio?

Term. Another area for consideration is the length of term, particularly for senators. Thirty-five of the states have four-year terms for senators. An increase in terms for legislators will probably be related to the executive term.

Apportionment. Consideration might be given to making the new apportioning effective for the election in the second year following the decennial census (1972,

1982, etc.) rather than for the election four years after the census as now provided (1964, 1974, etc.). This would minimize the mal-distribution of house seats resulting from population shifts.

There has been no opportunity to determine the effectiveness of the present provision for the board of state canvassers to reapportion if the legislature should fail to do so.

Table 2

CONSTITUTIONAL PROVISIONS FOR APPORTIONMENT OF STATE LEGISLATURES AND SUPPLEMENTARY DATA

State	Basis of Apportionment [1]		Apportioning Agency [1]	Size of Legislature [1]		Apportionment required [1]	
	Senate	House [2]		Senate	House	Senate	House
Alabama	Population, except no district more than one member.	Population, but each county at least one member.	Legislature.	35	106	Every ten years.	
Alaska	Population (civilian), 24 districts.	Population (civilian) plus area based on population ratios in election districts.	Apportionment board	20	40	Every ten years.	
Arizona	Prescribed by constitution.	Votes cast for governor at last preceding general election, but not less than if computed on basis of election of 1930.	No provision for senate; redistricting for house by county boards of supervisors.	28	80	Fixed in constitution.	After every gubernatorial election (every 2 years).

State	Basis of Apportionment [1]		Apportioning Agency [1]	Size of Legislature [1]		Apportionment required [1]	
	Senate	House [2]		Senate	House	Senate	House
Arkansas	Fixed at districts then established (Nov. 1956)	Each county at least one member; remaining members distributed among more populous counties according to population.	Board of apportionment (governor, secretary of state, and attorney general). Subject to revision by state supreme court.	35	100		Every ten years.
California	Population, exclusive of persons ineligible to naturalization. No county, or city and county, to have more than one member; no more than three counties in any district.	Population, exclusive of persons ineligible to naturalization.	Legislature or, if it fails, a reapportionment commission (lieutenant governor, controller, attorney general, secretary of state, and superintendent of public instruction). In either case, subject to a referendum.	40	80		Every ten years.
Colorado	Population ratios.	Population ratios.	Legislature.	35	65		Every ten years.
Connecticut	Population, but each county at least one member.	Prescribed by constitution: two members from each town having over 5,000 population; others, same number as in 1874.	Legislature for senate, no provision for house.	6	279a		After each census.

Constitution total of house members may vary according to population increase.

State	Basis of Apportionment [1]		Apportioning Agency [1]	Size of Legislature [1]		Apportionment required [1]	
	Senate	House [2]		Senate	House	Senate	House
Delaware	Districts specifically established by constitution.	Districts specifically established by constitution.	No provision.	17	35	None required at regular intervals.	
Florida	Population, but no. county more than one member.	Population, i.e., 3 to each of 5 largest counties, 2 to each of next 18, 1 each to others.	Legislature.	38	95	Every ten years.	
Georgia	Population, but no county or senatorial district more than one member.	Population, i.e., 3 to each of 8 largest counties, 2 to each of next 30, 1 each to others.	Legislature.	54	205	May be rearranged at any time within limitations of constitution.	After each U.S. census.
Hawaii	Districts specified by constitution.	Population.	Governor.	25	51	Every ten years.	

State	Basis of Apportionment [1]		Apportioning Agency [1]	Size of Legislature [1]		Apportionment required [1]	
	Senate	House [2]		Senate	House	Senate	House
Idaho	One member from each county.	Total house not to exceed 3 times senate. Each county entitled to at least one representative, apportioned as provided by law.	Legislature.	44	59	None.	Every ten years.
Illinois	Fixed Districts based on area.	Population.	Legislature or, if it fails, a reapportionment commission appointed by the governor.	58	177	Fixed.	Every ten years.
Indiana	Male inhabitants over 21 years of age.	Male inhabitants over 21 years of age.	Legislature.	50	100	Every six years.	
Iowa	Population, but no county more than one member	One to each county, and one additional to each of the nine most populous counties.	Legislature.	50	108	Every ten years.	
Kansas	Population.	Population, but each county at least one.	Legislature	40	125	Every five years.	

State	Basis of Apportionment [1]		Apportioning Agency [1]	Size of Legislature [1]		Apportionment required [1]	
	Senate	House [2]		Senate	House	Senate	House
Kentucky	Population.	Population, but no more than two counties to be joined in a district.	Legislature.	38	100	Every ten years.	
Louisiana	Population.	Population, but each parish and each ward of New Orleans at least one member.	Legislature.	39	101	Every ten years.	
Maine	Population, exclusive of aliens and Indians not taxed. No county less than one nor more than five.	Population, exclusive of aliens and Indians not taxed. No town more than seven members, unless a consolidated town.	Legislature.	33	151		Every ten years.
Maryland	Prescribed by constitution; one from each county and from each of six districts con stituting Balti-more city.	Prescribed by constitution; population, but minimum of 2 and maximum of 6 per county. Each of the Baltimore districts as many members as largest county.	No provision.	29	123	Never reapportioned unless by constitutional change.	Formerly every ten years. Constitutional amendment adopted in 1950 froze districts as they were in the decade of the 1940's.
Massachusetts	Legal voters.	Legal voters.	Legislature.	40	240	Every ten years.	

State	Basis of Apportionment [1]		Apportioning Agency [1]	Size of Legislature [1]		Apportionment required [1]	
	Senate	House [2]		Senate	House	Senate	House
Michigan	Prescribed by constitution	Population.	Legislature or, if it fails, state board of canvassers apportion house.	34	110	Fixed.	Every ten years.
Minnesota	Population, exclusive of non-taxable Indians.	Population exclusive of non-taxable Indians.	Legislature "shall have power."	67	131	Every ten years and after each state census.	
Mississippi	Prescribed by constitution	Prescribed by constitution, each county at least one. Counties grouped into three divisions, each division to have at least 44 members.	Legislature "may."	49	140	May after each federal census.	
Missouri	Population.	Population, but each county at least one member.	House: secretary of state apportions among counties; county courts apportion within counties. Senate: by commission appointed by governor.	34	157	Every ten years.	
Montana	One member from each county.	Population, but each county at least one member.	Legislature.				After each federal census.
Nebraska	Unicameral legislature—population excluding aliens		Legislature "may."			From time to time.	

State	Basis of Apportionment [1]		Apportioning Agency [1]	Size of Legislature [1]		Apportionment required [1]	
	Senate	House [2]		Senate	House	Senate	House
Nevada	One member from each county.	Population.	Legislature.	17	47	Every ten years.	
New Hampshire	Direct taxes paid.	Population.	Legislature.	24	400	From time to time.	Every ten years.
New Jersey	One member from each county.	Population, but at least one member from each county.	Legislature.	21	60	Every ten years.	
New Mexico	One from each county.	At least one member for each county and additional repre-sentatives for more populous counties.	Legislature "may."	32	66	Every ten years.	
New York	Population, excluding aliens. No county more than 1/3 membership, nor more than 1/2 membership to two adjoining counties.	Population, excluding aliens. Each county (except Hamilton) at least one member.	Legislature. Subject to review by courts.	58	150	Every ten years.	
North Carolina	Population, excluding aliens and Indians not taxed.	Population, ex-cluding aliens and Indians not taxed, but each county at least one member.	Legislature.	50	120	Every ten years.	

State	Basis of Apportionment [1] Senate	House [2]	Apportioning Agency [1]	Size of Legislature [1] Senate	House	Apportionment required [1] Senate	House
North Dakota	Population.	Population.	Legislature.	49	113	Every ten years, or after each state census.	
Ohio	Population.	Population, but each county at least one member.	Governor, auditor, and secretary of state, or any two of them.	33	139	Every ten years; each biennium.	
Oklahoma	Population.	Population, but no county to have more than seven members.	Legislature.	44	121a	Every ten years.	
Oregon	Population.	Population.	Legislature, or failing that, secretary of state reapportions subject to supreme court review.	30	60	Every ten years.	
Pennsylvania	Population ,but no city or county to have more than 1/6 of membership.	Population, but each county at least one member.	Legislature.	50	210	Every ten years.	

[a] Constitutional number of house members may vary according to population increase.

State	Basis of Apportionment [1]		Apportioning Agency [1]	Size of Legislature [1]		Apportionment required [1]	
	Senate	House [2]		Senate	House	Senate	House
Rhode Island	Qualified voters, but minimum of 1 and maximum of six per city or town.	Population, but at least one member from each town or city, and no town or city more than 1/4 of total, i.e., 25.	Legislature "may" after presidential election.				May after any presidential election.
South Carolina	One member from each county.	Population, but at least one member from each county.	Legislature.				Every ten years.
South Dakota	Population.	Population.	Legislature, or failing that, governor, superintendent of public instruction, presiding judge of supreme court, attorney general, and secretary of state.		Every ten years.		
Tennessee	Qualified voters.	Qualified voters.	Legislature.				Every ten years.
Texas	Qualified electors, but no county more than one member.	Population, no county more than 7 representatives unless population greater than 700,000, then 1 additional representative for each 100,000.	Legislature, or if fails to act, legislative redistricting board (ex officio) shall proceed.				Every ten years.

State	Basis of Apportionment [1]		Apportioning Agency [1]	Size of Legislature [1]		Apportionment required [1]	
	Senate	House [2]		Senate	House	Senate	House
Utah	Population.	Population, but each county at least one member, with additional representatives on a population ratio.	Legislature.	25	64	Every ten years.	
Vermont	Population, but each county at least one member.	One member from each inhabited town.	Legislature apportions senate; no provision for house.	30	246	Senate—or after each state census.	
Virginia	Population.	Population.	Legislature.	40	100	Every ten years.	
Washington	Population, excluding Indians not taxed and soldiers, sailors, and officers of U.S. Army and Navy in active service.	Population, excluding Indians not taxed and soldiers, sailors, and officers of U.S. Army and Navy in active service.	Legislature, or by initiative.	49	99	Every ten years.	
West Virginia	Population, but no two members from any county, unless one county constitutes a district.	Population, but each county at least one member.	Legislature.	32	100	Every ten years.	

State	Basis of Apportionment [1] Senate	House [2]	Apportioning Agency [1]	Size of Legislature [1] Senate	House	Apportionment required [1] Senate	House
Wisconsin	Population.	Population.	Legislature.	33	100	Every ten years.	
Wyoming	Population, but each county at least one member.	Population, but each county at least one member.	Legislature.	27	56	Every ten years.	

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1 The Book of the States, 1960-61, council of State Governments, pp. 37, 54-58.

The term “house” means the lower house of the legislature. In some states it is called the assembly or house of delegates.

C. OTHER LEGISLATIVE POWERS AND RESTRICTIONS

1. Power to Reduce Size of Juries

Article V: Section 27. The legislature may authorize a trial by a jury of a less number than 12 men.

Constitutions of 1835 and 1850

The 1835 constitution did not have a provision of this type. The 1850 constitution (Article IV, Section 46) originated this provision in language identical with the present provision. Article VI, Section 28 of the 1850 constitution limited the effect of this provision by restricting trial by a jury of less than twelve men to "all courts not of record."

Constitution of 1908

This provision was carried over from the 1850 constitution without change, as was the related part of Article II, Section 19, which guaranteed the right of an accused in a criminal prosecution to a trial by an impartial jury, "which may consist of less than twelve men in all courts not of record." This provision limits the effect of Section 27 to minor courts (not of record). Article II, Section 13, states that the "right of trial by jury shall remain," but may be waived in civil cases unless demanded by one of the parties.

Judicial Interpretation

No recent problem of interpretation has arisen under Article V, Section 27, and the related provision of Article II, Section 19. However, under the identical provisions of the 1850 constitution, it was held that trial by a jury of less than twelve was restricted to courts not of record.[24] Under the 1850 provision, it was also held that a law permitting a verdict by a jury of less than twelve, if any of the jurors was un-

[24] People v. Luby, 56 Mich. 551; Robison v. Wayne Circuit Judges, 151 Mich. 315. In the Robison case, a law establishing a juvenile court with limited criminal jurisdiction was held unconstitutional insofar as it authorized a six-man jury in the juvenile court, which was a court of record.

able to continue to serve for valid reasons, was unconstitutional since it delegated to the trial court its discretion in the matter and denied the litigant's right to an unanimous jury verdict.[25]

Statutory Implementation

Present statutes provide for juries of less than twelve only in justice of the peace courts. In those courts, the jury is made up of six; and in civil cases by agreement of the parties, less than six.

Other State Constitutions

Two other states—Colorado and Wyoming—have similar provisions. Nine states in addition to these have provisions whereby a jury may have less than twelve, in general for minor offenses and in courts of minor jurisdiction. Some of these provisions specify a number, such as five or six in certain instances.[26]

Comment

This provision, because of the restrictive provision of Article II, Section 19, seems not to have had an important influence in the state's court system. Some consideration might be given to extending the permissive effect of Section 27 to courts of record. Revision of Section 27 would be related to revision of Article II, Sections 13 and 19. If any form of this provision is retained, any intended restrictions on the power granted should be made clear in the provision. A comprehensive section dealing with all phases of jury procedure might be more appropriate in a revised judicial article.

2. Indeterminate Sentences

Article V: Section 28. The legislature may provide by law for indeterminate sentences, so called, as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences.

[25] McRae v. Grand Rapids, L. & D.R. Co., 93 Mich. 399.

[26] Index Digest, p. 582.

Constitutions of 1835 and 1850

The constitution of 1835 did not contain a provision of this type. This provision originated in 1903 as an amendment to the constitution of 1850 (Article IV, Section 47). Before this amendment was adopted, the Michigan supreme court had held that a law of the type later authorized in the amendment was a legislative invasion of the judicial function. After the adoption of the amendment, an indeterminate sentence law pursuant to it was upheld.[27]

Constitution of 1908

This provision was carried over from the 1850 constitution, as amended, with only a minor change in punctuation. It has not been amended since the 1908 constitution went into effect.

Statutory Implementation

Statutory provisions relating to indeterminate sentences appear in the code of criminal procedure (Public Act 175 of 1927).[28] In some instances, it is specified in the law, but more often the minimum sentence is at the discretion of the court. The maximum sentence is specified by law. If certain conditions are complied with, the parole board has discretion to release a prisoner on parole when the minimum sentence has been served, less time allowed for good behavior.

Judicial Interpretation

Judicial discretion in imposing sentences may be exercised except insofar as it is curtailed by statutes pursuant to this section.[29] Granting and revocation of paroles may be made purely administrative functions of the parole board by statute.[30] This

[27] In re Campbell, 138 Mich. 597; In re Manaca, 146 Mich. 697. It was held in People v. Cook, 147 Mich. 127, that the legislature could confer discretion in matters relating to paroles in the governor, wardens, prison boards and the board of pardons.

[28] M.S.A.28.1080-28.108l. Responsibility in this area has been given to the parole board in the department of corrections, M.S.A. 28.2302-28.2315.

[29] In re Southard, 298 Mich. 75.

provision has been held not in conflict with the due process clause of the federal constitution (Article VI, Section 2, and the 14th amendment in particular).[31]

Other State Constitutions

Only five state constitutions have provisions relating to indeterminate sentences, one of which (Florida) prohibits them. Maryland and Nevada have provisions similar to the Michigan provision.[32]

Comment

If it is considered necessary to retain a provision of this type, this matter might be dealt with in a comprehensive provision relating to such matters as pardons, reprieves, and commutations of sentences.

3. Regulation of Employment

Article V: Section 29. The legislature shall have power to enact laws relative to the hours and conditions under which men, women and children may be employed.

Constitutions of 1835 and 1850

There was no provision of this type in the constitutions of 1835 and 1850.

Constitution of 1908

Section 29 originated in the constitution of 1908. This provision was proposed in the convention by the committee on the legislative department at the suggestion of Mr. Fairlie and the state labor commissioner. It was noted in the convention that

[30] In re Casella, 313 Mich. 393.

[31] In re Holton, 304 Mich. 534.

[32] Index Digest, p. 344. Indeterminate sentences, however, are related to a system of paroles with which the constitutions of 14 states deal. Index Digest, pp. 341-342. See discussion of Article VI, Section 9.

court decisions in other states had voided laws regulating the working conditions of women and children as violating "freedom of contract." This provision was intended to safeguard existing and future legislation of this kind in Michigan. A motion to add the word "men" to the provision was defeated 44 to 29.[33] This word, however, was added to Section 29 in 1920 by adoption of an amendment proposed by the legislature.

Statutory Implementation

Federal law relating to the subject matter of Section 29 has tended to have increasing effect in this area for several decades. However, some comprehensive Michigan statutes pertaining to hours and conditions of employment continue in effect.[34]

Judicial Interpretation

A statute passed in 1909 soon after this provision went into effect relating to employment of women was upheld in Withey v. Bloem.[35] The legislature may classify by type or types of employee in legislating in regard to maximum hours of employment.[36]

Other State Constitutions

Only a few states have provisions resembling Section 29 in its full subject matter, but a sizable number of other state constitutions have provisions authorizing the legislature to provide for the health and safety of various types of employees or all employees, or specifically restricting males under a certain age or females from dangerous or unsuitable occupations.[37]

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[33] Proceedings and Debates, pp. 1003-1005.

[34] In particular, see M.S.A. 17.19-17.47, 17.241-17.308.

[35] 163 Mich. 419.

[36] Grosse Pointe Park Fire Fighters Association v. Village of Grosse Pointe Park, 303 Mich. 405.

[37] Index Digest, pp. 591-594. For general constitutional provisions relating to health and welfare, see ibid., pp. 518-519, 531.

Comment

The circumstances that gave rise to this provision gradually evaporated in the years following adoption of the 1908 constitution. If any other provision is made relating to the state's general power in the fields of health, welfare, etc., some consideration might be given to combining this provision with it in one section.

4. Special Contracts

Article V: Section 25. Fuel, stationery, blanks, printing and binding for the use of the state shall be furnished under contract or contracts with the lowest bidder or bidders who shall give adequate and satisfactory security for the performance thereof. The legislature shall prescribe by law the manner in which the state printing shall be executed and the accounts rendered therefor; and shall prohibit all charges for constructive labor. It shall not rescind nor alter such contract, nor release the person or persons taking the same or his or their sureties from the performance of any of the conditions of the contract. No member of the legislature nor officer of the state shall be interested directly or indirectly in any such contract.

Constitutions of 1835 and 1850

The constitution of 1835 did not contain a provision of this kind. This provision originated in the 1850 constitution (Article IV, Section 22).

Constitution of 1908

This provision was carried over from the 1850 constitution substantially rephrased, but retaining the same meaning and effect.

Statutory Implementation

Detailed statutes have implemented this provision pursuant to its mandatory features.[38]

[38] M.S.A. 4.251-4.273, 4.315, 4.316, 4.371-4.381, 3.391-3.404.

Opinions of the Attorney General

Various opinions of the attorney general have restated the restrictions set forth in this provision.[39]

Other State Constitutions

The constitutions of approximately 18 states contain provisions similar to, and dealing with, much of the subject matter of Section 25.[40]

Comment

This section is representative of detailed restrictions imposed upon the organs of government—particularly the legislature—in many state constitutions framed in the middle and late nineteenth century. Such restrictions reflect popular distrust of the organs of government in that period, and represent a rigid and somewhat ponderous remedy for potential abuse of political discretion. Consideration might be given to deletion of most or all of this section. The subject matter of Section 25 would be at the discretion of the law-making process, if the section were deleted.

5. Prison Chaplains; Religious Services

Article V: Section 26. The legislature may authorize the employment of a chaplain for each of the state prisons; but no money shall be appropriated for the payment of any religious services in either house of the legislature.

Constitutions of 1835 and 1850

There was no provision of this type in the constitution of 1835. This provision originated in the constitution of 1850 (Article IV, Section 24). It allowed the legislature to authorize "a chaplain for the state prison."

[39] In particular, opinions of February 19, 1941, March 17, 1944, and August 2, 1948.

[40] Index Digest, pp. 794-795.

Constitution of 1908

Except for the change "a chaplain for each of the state prisons" – this provision was carried over from the 1850 constitution intact. This provision is definite in purpose and appears not to have given rise to major problems of interpretation.

Other State Constitutions

The constitution of Washington has a provision similar to the Michigan provision in regard to prison chaplains. The Washington constitution states that provisions relating to religious freedom are not to be so construed as to forbid statutory authorization of a prison chaplain. A provision similar to the latter part of Section 26 can be found in the Oregon constitution.[41]

Comment

The provision as it relates to prison chaplains would seem to be unnecessary, since chaplains of this type or other types have not been interpreted in any other state jurisdiction (or in the federal system) as violative of the right to religious freedom or to the principle of separation of Church and State.

The second part of this provision is unusual among state constitutions, and consideration may be given to the question of whether this prohibition of the legislature is sufficiently important as to warrant its continuance in the fundamental law.

6. Prohibition of Special Divorce Law

Article V: Section 32. Divorces shall not be granted by the legislature.

Constitutions of 1835 and 1850

The constitution of 1835 (Article XII, Section 5) had a provision similar to the present provision with additional permission to the legislature to authorize the

[41] Index Digest, pp. 669, 772, 773. These state constitutions appear to put a somewhat more literal emphasis on factors involved in separation of Church and State than do most other constitutions.

"higher courts" to grant divorces "under such restrictions as they may deem expedient." In the 1850 constitution (Article IV, Section 26), the provision was the same as the present provision.

Constitution of 1908

This provision was carried over from the 1850 constitution unchanged.

Judicial Interpretation

The effect of this provision is to prevent divorces by special law. A general divorce law is not prohibited by Section 32.[42]

Other State Constitutions

The constitutions of approximately 40 states have similar provisions or provisions having similar effect.[43]

Comment

A provision of this type also reflects nineteenth century distrust of the legislative branch in many states; it might be considered unnecessary in a revised constitution, particularly if it could be covered by the prohibition against special acts.

7. Prohibition of Lotteries

Article V: Section 33. The legislature shall not authorize any lottery nor permit the sale of lottery tickets.

Constitutions of 1835 and 1850

The constitutions of 1835 (Article XII, Section 6) and 1850 (Article IV, Section 27) had similar provisions.

[42] See Teft v. Teft, 3 Mich. 67; DeVuist v. DeVuist, 228 Mich. 454. General statutes on divorce and related matters are in M. S .A. 25.81-25.201.

[43] Index Digest, p. 359.

Constitution of 1908

This provision was carried over from the 1850 constitution unchanged. The provision has not been amended since the adoption of the 1908 constitution. A proposal of amendment by an initiative petition – intended to permit the legislature to modify the prohibition for "non-profit, charitable organizations" was defeated by a vote of 944,388 to 903,303 in the November, 1954, election.

Judicial Interpretation

Statutory authorization of pari-mutuel betting on horse races has been upheld as not violative of Section 33.[44] Numerous and varied forms of games of chance have been interpreted as falling under the prohibition of Section 33. A lottery has been held to involve three essential elements – consideration, prize and chance.[45]

Other State Constitutions

The constitutions of approximately 35 states contain provisions of this type or of similar effect. Some of the other states have constitutional exceptions to the prohibition of lotteries, particularly for non-profit and charitable organizations.[46]

Comment

The subject matter of Section 33 is controversial and the question of "charitable" lotteries will probably be raised in the convention.

8. Prohibition of State Paper

Article V: Section 35. The legislature shall not establish a state paper.

[44] Rohan v. Detroit Racing Association, 314 Mich. 326.

[45] See cases cited under M.S.A. 28.604; in particular, Sproat-Temple Theatre Corp. v. Colonial Theatrical Enterprise, 276 Mich. 127; Society of Good Neighbors v. Mayor of Detroit. 324 Mich. 22; Eastwood Park Amusement Co. v. Mayor of East Detroit. 325 Mich. 60.

[46] Index Digest, pp. 487-488.

Constitutions of 1835 and 1850

The constitution of 1835 did not have a provision of this type. The 1850 constitution (Article IV, Section 35) originated this provision. In 1902, an amendment was adopted which eliminated the second sentence of the original provision which provided that every newspaper in the state was entitled to a sum of not more than $15 for publishing the general laws of any legislative session within 40 days of their passage.

Constitution of 1908

This provision carried over the 1850 provision, as amended, without change. Section 35 has not been amended since the 1908 constitution went into effect. No difficulty has arisen relative to its interpretation.

Other State Constitutions

This provision appears to be unique among state constitutions.[47]

Comment

There has been a strong tradition in the United States against the establishment of official newspapers of the type prohibited by Section 35. A detail of this type might therefore be considered unnecessary and unsuitable for constitutional status.

9. Appropriations for Local or Private Purposes

Article V: Section 24. The assent of two-thirds of the members elected to each house of the legislature shall be requisite to every bill appropriating the public money or property for local or private purposes.

Constitutions of 1835 and 1850

The 1835 constitution did not contain a provision of this type. The 1850 constitution (Article IV, Section 45) originated this provision.

Constitution of 1908

This provision was carried over from the 1850 constitution unchanged.

[47] Index Digest, p. 987.

Judicial Interpretation

Such matters as the administration of the workmen's compensation act and an act of 1927 for collection of a gasoline tax and its distribution to counties and municipalities for highway purposes were held to be for public rather than private purposes.[48]

Opinions of the Attorney General

The attorney general has held that legislative appropriations to assist private veterans' organizations in their activities are for private purposes and require a two-thirds vote.

Other State Constitutions

The constitutions of four other states have a provision similar to Section 24. The Alaska constitution forbids appropriations except for public purposes. In Texas appropriations for private or individual purposes are forbidden; in Illinois appropriations are not allowed in private bills.[49]

Comment

Section 24 is a safeguard against possible misuse of this type of local or private bill, while at the same time allowing a degree of flexibility under special circumstances through the requirement of the extraordinary vote in each house. There may be circumstances where what is allowed by this provision might impinge upon what seems to be definitely prohibited in Article V, Section 34 which states that "the legislature shall not audit nor allow any private claim or account." Some consideration might be given to clarifying factors in any area of possible conflict between Sections 24 and 34, if the substance of both provisions is to be retained. Revision of this provision should probably be related also to consideration of Article V, Sections 30 and 31 and Article X, Section 12 which forbids the grant of state credit to any "person, association or corporation, public or private." Private and special or local acts might be considered for treatment in one comprehensive section or provision in a revised constitution.

[48] Mackin v. Detroit-Timken Axle Co., 187 Mich. 8; Moreton v. Secretary of State, 24 Mich. 584.

[49] Index Digest, pp. 25-26.

10. Prohibition of Legislative Audit of Claims

Article V: Section 34. The legislature shall not audit nor allow any private claim or account.

Constitutions of 1835 and 1850

The constitution of 1835 did not have a provision of this type The 1850 constitution (Article IV, Section 31) originated this provision.

Constitution of 1908

This provision was carried over from the 1850 constitution unchanged. It is related to Article VI, Section 20 which requires the board of state auditors to "examine and adjust all claims against the state not otherwise provided for by general law."[50]

Judicial Interpretation

The legislature in its power of appropriation or authorization of payment has been restricted by this provision in special instances where charges of violation of this prohibition were sustained.[51]

Other State Constitutions

The constitutions of approximately ten states have provisions similar to Section 34, several of which make an exception for authorization of claims under previous authority of law.[52]

Comment

Revision of Section 34 would be related to consideration of Article VI, Section 20 and the function of the court of claims established by statute. Some consideration- might be given to deleting this provision, if it is thought desirable to grant the legislature greater flexibility in this area, or if improper action by the legislature

[50] The court of claims established under statutory authority has wide jurisdiction in the area of claims.

[51] Bristol v. Johnson, 34 Mich. 123; Graves v. Bliss, 235 Mich. 364.

[52] Index Digest, p. 973.

relating to private claims were considered to be unlikely. As pointed out in the comment on Section 24 above, if this provision is retained, clarification might be in order regarding possible conflict or difficulty in interpretation if a bill "appropriating the public money or property for local or private purposes" passed by a two-thirds vote of the legislature pursuant to Article V, Section 24 were also interpreted as auditing or allowing a private claim. The safeguard against possible abuse in this area in Article V, Section 24 (if retained in the revised constitution) would appear to be adequate if Section 34 were eliminated.

11. Prohibition of Special Law for Sale of Private Real Estate

Article V: Section 31. The legislature shall not authorize by private or special law the sale or conveyance of any real estate belonging to any person.

Constitutions of 1835 and 1850

There was no provision of this type in the 1835 constitution. The 1850 constitution (Article IV, Section 23) originated this provision. In addition to the language of the 1908 provision (with slight change of punctuation) after a semi-colon, the 1850 provision continued—"nor alter any road laid out by commissioners of highways or any street in any city or village, or in any recorded town plot."

Constitution of 1908

This provision was carried over from the 1850 constitution with slight change in punctuation but the final clause of the 1850 provision was included in Article VIII, Section 27 of the 1908 constitution. This provision does not appear to have caused any recent problem of interpretation.

Other State Constitutions

The constitutions of three states including Michigan have specific provisions of this type. In addition, the Louisiana constitution provides that illegal disposition of private property shall not be given effect by local or special law.[53]

[53] Index Digest, p. 786.

Comment

This provision might be considered to be an unnecessary detail reflecting an overly jaundiced attitude toward the exercise of legislative responsibility. Possible abuse in this area is not only restrained by the two-thirds vote requirement for special acts in Section 30, but it would also be a probable violation of the due process clauses of the Michigan constitution (Article II, Section 16) and the federal constitution. Consideration might be given to eliminating Section 31. Disposition of this provision, if it is not eliminated, should probably be considered in relation to the revision of Article XII on eminent domain.

12. Gubernatorial Veto and Item Veto

Article V: Sections 36 and 37.

See VI EXECUTIVE DEPARTMENT, part E—The Governor's Relations With the Legislature. These sections are discussed therein—pp. vi-46 - vi-55.

D. QUALIFICATIONS, ELIGIBILITY AND OTHER PROVISIONS RELATIVE TO LEGISLATORS

1. Qualifications of Legislators

Article V: Section 5. Each senator and representative shall be a citizen of the United States, at least twenty-one years of age, and a qualified elector of the district he represents, and his removal from the district shall be deemed a vacation of the office. No person who has been convicted of subversion or of a felony involving a breach of public trust shall be eligible for either house of the legislature.

Constitutions of 1835 and 1850

The constitutions of 1835 (Article IV, Section 7) and 1850 (Article IV, Section 5) had provisions almost identical with one another in phraseology and had the same meaning and effect Senators and representatives were required to be citizens of the United States and qualified electors in the respective counties and districts which they represented; removal from such was to be deemed a vacation of their office.

Constitution of 1908

The original form of Section 5 resembled the 1835 and 1850 provisions closely and had the same effect. In respect to representation, reference to counties was omitted, and "district" alone was specified.

Amendment in 1956. A legislative proposal of amendment to Section 5 was ratified at the November, 1956, election. This amendment inserted the 21 year minimum age requirement, and added the last sentence of the present form of Section 5 relative to denying eligibility to the legislature to those "convicted of subversion or of a felony involving a breach of public trust." Section 5 in its original and amended form has caused slight problem of interpretation.[54]

Other State Constitutions

The constitutions of 18 states including Michigan specifically require legislators to be U.S. citizens. In 14 states, legislators are required to be citizens of the state; in three of these this requirement must be met only at the time of election while in the

[54] For some details relating to residence in a district, see Opinion of the Attorney General, February 14, 1959.

others the period of time for state citizenship ranges from two to five years.

Most states have an age requirement for the "lower house" of which a minimum age of 21 years is the most common. Most states also have an age requirement for the senate ranging from 21 to 30 with 25 years the most common minimum requirement.

The constitutions of almost all states including Michigan require a legislator to be a qualified elector (or voter), or inhabitant, or resident of the district or county he represents. The constitutions of most states also require a legislator to be a voter, resident or inhabitant of the state, in most cases for a specified period of time. Twelve states including Michigan have a specific provision whereby a legislator's removal from his district removes him from his office.

The Michigan provision as it relates to subversion is evidently unique. Oklahoma makes anyone convicted of a felony ineligible to legislative office. In several states, persons convicted of any infamous crime, perjury, or embezzlement are also ineligible.[55]

Comment

Some may feel that there is no compelling reason for the requirement that legislators be qualified electors or residents in the districts they represent, since this restriction could be considered a limitation on the voters' freedom of choice with respect to their legislators. The most important reason for this requirement would probably be to enhance each legislator's concern for local interests. This might, however, be considered a matter on which the voters could appropriately exercise discretion if this restriction were removed.

[55] Index Digest, pp. 667-668. The U.S. constitution requires a senator to be at least 30 years of age and for nine years a U.S. citizen as well as an inhabitant of his state; a representative must have attained 25 years of age, been a U.S. citizen for seven years and an inhabitant of his state.

2. Ineligibility to the Legislature of Other Office Holders

Article V: Section 6. No person holding any office under the United States or this state or any county office, except notaries public, officers of the militia and officers elected by townships, shall be eligible to or have a seat in either house of the legislature; and all votes given for any such person shall be void.

Constitutions of 1835 and 1850

The 1835 constitution (Article IV, Section 8) excluded office holders under the United States or "this state," but did not specifically exclude county officers from eligibility to the legislature. Exceptions from the exclusion were made for officers of the militia, justices of the peace, associate judges of the circuit and county courts and postmasters.

The 1850 constitution (Article IV, Section 6) made county officers ineligible to the legislature and originated the substance of the present form of this provision. The words "or this state," however, were omitted by mistake in the engrossed copy of the 1850 constitution.

Constitution of 1908

This provision was carried over from the 1850 constitution without major change except for inclusion of the formerly omitted words.

Judicial Interpretation

A person elected to the legislature was held not to be precluded from candidacy for a county office, but his election to such office would vacate his legislative seat.[56]

[56] Lodge v. Wayne County Clerk, 155 Mich. 426. This would undoubtedly be true for any legislator elected or appointed to one of the offices excluded from legislative eligibility by this provision. Numerous opinions of the attorney general have held various state and county office holders ineligible to the legislature under this provision. An opinion of July 7, 1958, held that a legislator elected a member of a local school board vacates his seat in the legislature.

Other State Constitutions

The constitutions of almost all states make most or all of those holding office under the United States ineligible to the legislature. Approximately 12 states exclude only those holding a lucrative federal office. Some states except postmasters (or some postmasters), or other specific office holders such as the military from this exclusion.

The constitution of a majority of the states exclude all or most state office holders from eligibility to the legislature, although many of these exclude only those holding lucrative positions. The exceptions listed in the Michigan provision are not unusual among state constitutions. Few state constitutions resemble the Michigan provision in specifying county office holders as excluded from legislative eligibility.[57]

Comment

Consideration might be given to modifying the present restriction in order that all or most of the officers excluded could be candidates for the legislation without resigning. The more important feature to be preserved would be the prohibition against dual office holding once the legislator has taken office. This prohibition might be extended so that no one holding any governmental office or position (particularly having renumeration) would be allowed a seat in the legislature.

3. Legislators' Ineligibility to Other Office; Prohibition of Interest in Contracts

Article V: Section 7. No person elected a member of the legislature shall receive any civil appointment within this state or to the senate of the United States from the governor, except notaries public, or from the governor and senate, from the legislature, or any other state authority, during the term for which he is elected. All such appointments and all votes given for any person so elected for any such office or appointment shall be void. No member of the legislature shall be interested directly or indirectly in any contract with the state or any county thereof, authorized by any law passed during the time for which he is elected, nor for 1 year thereafter.

[57] Index Digest, pp. 662-3, 665-6. Approximately one-fourth of the states make those holding office under some other state or nation ineligible to the legislature.

Constitutions of 1835 and 1850

The constitution of 1835 (Article IV, Section 19) provided that no legislator "shall receive any civil appointment from the governor and senate, or from the legislature, during the term for which he is elected." The 1850 provision (Article IV, Section 18) originated substantially the present form of this provision, including that part of it which relates to contracts.

Constitution of 1908

This provision was carried over from the 1850 constitution with slight change of punctuation and phraseology. The words "except notaries public" were added to the 1908 version.

Judicial Interpretation

This provision is relatively clear in its restriction of legislators from appointment to the offices covered in the provision. Although prohibiting election of a legislator by the people to such offices would seem not to have been clearly intended by the framers of this provision, it has been interpreted to have that force.[58]

Other State Constitutions

The constitutions of 16 other states have provisions resembling Section 7 in its comprehensive prohibition of a legislator's being appointed to other state office during the term for which he is elected. The effect of Section 7, as interpreted, to preclude election of legislators to other state offices during the term for which elected is common to only a few state constitutions, but nine states prohibit election of any legislator to an office created, or whose emoluments were increased, during his term of office. The constitutions of 30 states prohibit appointment of legislators to other state offices created or whose emoluments were increased during such term.

The effect of Section 7 as it relates to appointment (or election) of a legislator to the United States Senate appears to be common to only one other state (Minnesota) which precludes any legislator during the term for which he is elected from holding any office under the United States, except that of postmaster.[59]

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[58] Attorney General ex rel. Cook v. Burhans, 304 Mich. 108. See cases and opinions cited under this section in M.S.A., Vol. 1.

[59] Index Digest, pp. 663-666.

The constitutions of nine other states have provisions similar to that part of Section 7 which prohibits legislators from having an interest in contracts with the state. The constitutions of seven other states have provisions similar to Section 7 in prohibiting legislators from having an interest in contracts with a county.[60]

Comment

Consideration might be given to modifying this provision in the direction of greater flexibility. There may be merit in the features of some other state constitutions which merely prohibit a legislator from being appointed to a remunerative office created, or whose emolument was increased, during his term of office. Whatever is retained or revised of the subject matter in Sections 5, 6 and 7 relating to the eligibility of legislators may be considered suitable for treatment in one comprehensive section of the revised constitution. Whatever is retained or revised in the subject matter of Section 7 relative to state and county contracts might be embodied in a general provision dealing with such matters, or conflicts of interest in general, for all state officers, if it is determined that discretion in this area should not be granted to the lawmaking process.

4. Legislators' Privilege From Arrest

Article V: Section 8. Senators and representatives shall in all cases, except for treason, felony or breach of the peace, be privileged from arrest during sessions of the legislature and for 15 days next before the commencement and after the termination thereof. They shall not be subject to any civil process during the same period. They shall not be questioned in any other place for any speech in either house.

Constitutions of 1835 and 1850

The constitution of 1835 (Article IV, Section 9) had a provision similar to the present provision, except that the substance of the last sentence of the present provision was not present. The constitution of 1850 (Article IV, Section 7) introduced the provision relative to legislators not being questioned in any other place.

[60] Index Digest, pp. 667,794, 167-168.

The language making legislators not subject to any civil process was identified more particularly and exclusively with the words "during the session of the legislature, or for fifteen days. . . before. . . and after . . . each session."

Constitution of 1908

This provision was rephrased substantially from the 1850 provision in order to make privilege from arrest and immunity from civil process more specifically effective for the same period of time.

Judicial Interpretation

Immunity of legislators from arrest does not apply to criminal matters.[61]

Other State Constitutions

The constitutions of a large majority of the states, like the U.S. constitution, have provisions similar in general to the Michigan provision, except that the constitutions of less than one-half of the states (17) grant immunity to legislators from civil process.[62]

Comment

The original purpose of provisions dealing with the subject matter of Section 8 was to safeguard legislators from possible harassment by the executive branch or the judiciary. This form of limited immunity may seem to be less necessary at the present time, but its long-standing tradition and possible occasional efficacy would appear to warrant its continuance. Although legislators may well be "questioned in any other place" by their constituents or others for speeches in the legislature, the implication is that they are not to answer for such before any other tribunal as is more accurately specified in some state constitutions, such as those of Alaska and Hawaii.

[61] In re Wilkowski, 270 Mich. 687.

[62] Index Digest, pp. 643-645, 651. The Model state Constitution limits legislative immunity to that in the last sentence of the Michigan provision.

5. Legislators' Compensation, Mileage and Publications

Article V: Section 9. The compensation and expenses of the members of the legislature shall be determined by law: Provided, That no change in compensation or expenses shall be effective during the term of office for which the legislature making the change was elected. Each member shall be entitled to one copy of the laws, journals and documents of the legislature of which he is a member, but shall not receive, at the expense of the state, books, newspapers or perquisites of the office not expressly authorized by this constitution.

Constitutions of 1835 and 1850

The constitution of 1835 (Article IV, Section 18) provided that legislators receive a compensation to be "ascertained by law." No increase in it was allowed during their term of office, and it was never to "exceed three dollars a day."

The constitution of 1850 had a long provision relating to this matter in Article IV, Section 15. Three dollars per day was specified "for actual attendance and when absent on account of sickness." The legislature was permitted, however, to allow extra compensation not exceeding two dollars per day during a session to members from the upper peninsula. When convened in extra session they were to receive three dollars a day for the first 20 days "and nothing thereafter." They were entitled to "ten cents and no more for every mile actually traveled" to and from the legislature on the "usually traveled route," and for stationery and newspapers not more than "five dollars for each member" for any session. The last sentence of the 1850 constitution had the same meaning and effect as the last sentence of the present provision.

Constitution of 1908

Original Provision. As it came from the convention of 1907-08, Section 9 specified that legislators receive $800.00 for the regular session, and $5.00 per day for the first 20 days of an extra session "and nothing thereafter." Members were entitled to "ten cents per mile and no more for one round trip to each regular and special session" by the usually traveled route. The last sentence of the original provision was the same as the last sentence in the present form of Section 9 as amended. In the address to the people, the convention noted their careful attention to this matter and explained at some length their decision to raise the effective compensation of

legislators with the hope that it would "induce a stronger class of men to accept service in the, legislature."[63]

Amendment in 1928. A legislative proposal of amendment to this section was approved by the voters 441,114 to 417,419 in November, 1928, whereby the compensation of legislators was established at three dollars per day for each day of their two-year term. The compensation of legislators "shall be three dollars per diem during the term. . . and. . . no further compensation than as specified . . . for service. . . in extra session." The other parts of this section remained unchanged from the original version.

Amendment in 1948. Another amendment to Section 9 proposed by the legislature was approved in November, 1948, by a vote of 911,473 to 587,691. This amendment revised Section 9 to its present form and made the compensation and expenses of legislators to be determined by law. The final sentence of the section remained again as it had been. This and other provisions dealing with compensation are related to Article XVI, Section 3 which deals with extra compensation and increase or decrease in salaries.

Judicial Interpretation and Opinions of the Attorney General

Although various problems of interpretation arose concerning the previous forms of Section 9, there has not been serious difficulty with the present form. An opinion of the attorney general disallowing social security coverage to legislators as violative of this provision and of Article XVI, Section 3 was reversed by a subsequent opinion of the attorney general.[64]

Other State Constitutions

The constitutions of many states continue to specify inflexibly the amount of compensation that legislators shall receive. However, the constitutions of approximately 20 states provide for the determination of such compensation by law, usually with the stipulation that a change in compensation will not be effective for the term in which this change is made. Details of the type outlined in the last sentence of Section 9 are not uncommon among state constitutions. Details relating to expenses of legislators—like those in the previous form of this Michigan provision—are also not unusual among state constitutions.[65]

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[63] Proceedings and Debates, p. 1420.

[64] Opinions of August 19, 1953, and September 8, 1954.

[65] Index Digest, pp. 645-650. The Model State Constitution leaves the matter of legislators' annual compensation to be determined by law, the amount to be neither increased nor diminished during the term for which they are elected. The U.S. constitution requires legislators' compensation to be ascertained by law.

Comment

The basic flexibility in Section 9 as amended appears to present no problem for revision. Consideration might be given to deleting some or all of the details in the last sentence of Section 9 insofar as they may be deemed unnecessary. A revision of Section 9 might be expanded to include like provision for the presiding officers of both houses. (See discussion of Section 10—following.)

6. Compensation for Presiding Officers

Article V: Section 10. The president of the senate and speaker of the house of representatives shall be entitled to the same compensation and mileage as members of the legislature and no more.

Constitutions of 1835 and 1850

The constitution of 1835 did not have a provision specifically relating to this subject matter. The 1850 provision (Article IV, Section 17) originated the substance of the present provision; the words "per diem," were inserted between "same" and "compensation."

Constitution of 1908

The only change in carrying this provision over from the 1850 constitution was the deletion of the words "per diem" in connection with "compensation." Section 10 has not been amended since the adoption of the 1908 constitution nor has it caused any important difficulty in its interpretation.[66]

Other State Constitutions

Section 10 is one of a few state constitutional provisions that are highly restrictive in limiting the compensation of the president of the senate (usually as in Michigan,

[66] An Opinion of the Attorney General, December 7, 1948, held that under Sections 9 as amended and 10, the legislature could provide a larger amount for expenses of the speaker than for other legislators. The lieutenant governor receives $3,500 additional compensation for his services on the state administrative board. Both presiding officers now receive $1,000 for expenses in addition to the regular allowance for legislators.

the lieutenant governor) and the speaker of the house to the same compensation as legislators. The constitutions of approximately 20 states provide that the compensation of presiding officers be fixed by law. In many other states where this compensation is not fixed by law, the president and the speaker are allowed extra or additional compensation. Some constitutions specify that the president and the speaker shall receive the same compensation.[67]

Comment

There would appear to be no compelling reason for retaining the substance of Section 10. Consideration might be given to combining the subject matter of this provision with a revision of Section 9, and to allowing the compensation (and expenses) of the presiding officers also to be determined by law without restriction of the amount to that for legislators. If it is determined that the lieutenant governor is not to preside over the senate, consideration might be given to providing that the president of the senate and the speaker of the house receive the same compensation (and expenses). Compensation for the lieutenant governor might more appropriately be provided for in the executive article of the revised constitution. (See discussion of Article VI, Section 21.)

7. Contested Elections to the Legislature

Article V: Section 11. In case of a contested election, compensation and mileage shall be paid only to the person declared to be entitled to a seat by the house in which the contest takes place.

Constitutions of 1835 and 1850

The constitution of 1835 did not have a provision of this type. The 1850 constitution (Article IV, Section 29) had a provision similar to the present Section 11. The words "per diem" appeared in connection with "compensation."

Constitution of 1908

This provision, somewhat rephrased and with the words "per diem" deleted, was carried over from the 1850 provision. This provision has not been amended since the adoption of the 1908 constitution nor has it caused any serious difficulty of interpretation.

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[67] Index Digest, pp. 658, 685-686. The Model State Constitution and the U.S. constitution leave such matters to be determined by law.

Other State Constitutions

This provision is unusual, if not unique among state constitutions.[68]

Comment

This provision might be considered unnecessary in a revision of the constitution. There would appear to be scant justification for doing what is prohibited by Section 11, even if this provision were not in the constitution. A relatively trivial detail of this variety could be provided for by law if determined to be necessary in the absence of a constitutional provision.

8. Time of Electing Legislators

Article V: Section 12. The election of senators and representatives, pursuant to the provisions of this constitution, shall be held on the Tuesday succeeding the first Monday of November, nineteen hundred ten and on the Tuesday succeeding the first Monday of November of every second year thereafter.

Constitutions of 1835 and 1850

The constitution of 1835 (Article IV, Sections 4 and 5, and Amendment 3) provided for annual election of all representatives and one-half of the senators (whose terms were two years). As amended, the legislators were to be elected on the first Tuesday of November. The 1850 constitution (Article IV, Section 34) originated the substance of the present provision except that 1852 was specified rather than 1910.

Constitution of 1908

This provision was carried over from the 1850 provision with slight change except for the substitution of the year 1910 for 1852. Section 12 has not been amended nor has it caused any serious difficulty of interpretation.

Other State Constitutions

Provisions of state constitutions relating to election of legislators naturally are influenced by the respective terms of office for legislators in the various states. In 35 of the states, senators are elected for four-year terms. In most of these the sen-

[68] Index Digest, pp. 638-639.

ate is divided into two classes with one-half of them elected every two years. The time of election as specified in the Michigan provision is the most common time specified among the states.[69]

Comment

Except for updating the base year for such elections to be specified in the revised constitution, there would seem to be little need for change in the time of election specified in this provision, even if the term of office, particularly for senators, were extended to four years. If the senate term is extended, a revision of this provision or that relating to the term of office for senators might divide the senate into two classes with one-half of the senators to be elected each two years. One-half of the senators to be elected the first time under such a provision would have only two-year terms in order to start the process properly.

[69] Index Digest, pp. 639, 645. See Table III in Chapter VI, Part A and discussion of Article IV, Sections 2 and 3.

E. LEGISLATIVE SESSIONS AND OTHER PROVISIONS

1. Meeting and Adjournment of Legislature; Prohibition of Bill Carrying Over

Article V: Section 13. The legislature shall meet at the seat of government on the second Wednesday in January of each year and at no other place or time unless as provided in this constitution; and each such annual regular session shall adjourn without day, at such time as shall be determined by concurrent resolution, at twelve o'clock noon. No motion, bill or resolution pending in one session of any term shall carryover into a later regular session.

Constitutions of 1835 and 1850

The 1835 constitution (Article IV, Section 21) provided that the legislature meet on the first Monday in January every year "and at no other period, unless otherwise directed by law, or provided for in this constitution." Section 7 of the schedule, however, specified that the first meeting of the legislature be at Detroit on the "first Monday in November next, with power to adjourn to any other place."

The 1850 constitution (Article IV, Sections 32 and 33) required the legislature to meet at the seat of government on the first Wednesday in January, 1851, and on the same date in every second year thereafter, and at "no other place or time" unless as provided in the constitution, and shall "adjourn without day at such time as the legislature shall fix by concurrent resolution." Section 32 required the legislature to adjourn at 12 o'clock noon on the final day of adjournment.

Constitution of 1908

Original Provision. As it came from the convention of 1907-08, this provision was identical in meaning and effect to the 1850 provisions (Sections 32 and 33) except for minor changes in phraseology and the updating of the base year to 1909. The two sections of the 1850 constitution were combined into one (Section 13) of the 1908 constitution.

Amendment of 1951. A legislative proposal of amendment to Section 13 was approved by the voters 405,570 to 176,873 at the April, 1951, election. This amendment changed Section 13 to its present form, provided for annual sessions of the legislature, changed the time for the legislature to meet, and added the last sen-

tence of the amended version relative to motions, bills and resolutions not carrying over to a later regular session. Section 13 in its original or amended form has not caused serious difficulty of interpretation.

Other State Constitutions

The constitutions of most states specify a date early in January for the legislature to meet. Thirty state constitutions provide for biennial legislative sessions, while the remainder provide for annual sessions or leave some discretion in the matter to the law-making process. The 12 o'clock noon requirement for sine die adjournment appears to be unique among the states. The Michigan provision which forbids a motion, bill or resolution pending in one session to be carried over to a later regular session is unusual among state constitutions.[70]

Comment

There appears to be no major problem for revision of Section 13 in view of its relatively recent amendment. The detail relating to adjournment without day at 12 o'clock noon which applies only to annual regular sessions might be considered unnecessary. If it were thought desirable to make the legislature a continuous body for its duration, the last sentence should be deleted. There may be some doubt as to when a legislator's term of office begins. It might be interpreted as January 1 under Article XVI, Section 1, or the second Wednesday in January under Article V, Section 13. Consideration might be given to clarification of this matter.

2. Meetings Public, Exception; Restriction on Separate Adjournment

Article V: Section 18. The doors of each house shall be open unless the public welfare requires secrecy. Neither house shall, without the consent of the other, adjourn for more than 3 days, nor to any other place where the legislature may then be in session.

Constitutions of 1835 and 1850

The 1835 constitution (Article IV, Section 14) had a provision similar in effect to the 1908 provision with slightly different phraseology. The last part of the 1835 provi-

[70] Index Digest, pp. 670-674. The Model State Constitution provides that the legislature shall be "a continuous body" during the term; "shall meet in regular sessions annually as provided by law" and may be convened by the governor, or, on request of a majority of members, by the presiding officer.

sion had the extra but clarifying words "than that" in the sequence "to any other place than that where the legislature may then be in session." The 1850 provision (Article IV, Section 12) originated the present form of this provision.

Constitution of 1908

This provision was carried over unchanged from the 1850 constitution. It has not been amended and little difficulty has arisen with respect to its interpretation. An opinion of the attorney general of March 27, 1958, held that the day on which one house adjourns without the consent of the other is not to be computed in the three days, but that the day to which the adjournment is made is to be included in the three days allowed.

Other State Constitutions

The constitutions of most states have provisions similar to Section 18 in its requirement that sessions of the legislature not be held in secret and in the specified exception to that rule.[71] Most state constitutions resemble the Michigan provision as it relates to a three-day limit on adjournment, or adjournment to another place, by one house without the consent of the other. Several other states leave a limit of two days, or two days, Sundays excepted, for such adjournment, while the Missouri constitution is unique in providing more than three days for such adjournment—in Missouri the limit is ten days.[72]

Comment

This provision would seem not to require extensive revision. There is good reason to continue the general requirement of open legislative sessions. The desirability of continuing the exception to this requirement might be questioned. If the three-day limit were extended, provision could be made that one house having adjourned without the consent of the other could be recalled by majority vote of the other house after three days. The wording of the 1835 provision "nor to any other place than that where the legislature may then be in session" might be preferable to the present language in clarifying the meaning of this phrase.

3. Legislative Quorums; Power to Compel Attendance

Article V: Section 14. A majority of each house shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members in such manner and under such penalties as each house may prescribe.

[71] Index Digest, p. 660.

[72] Index Digest, pp. 621-622.

Constitutions of 1835 and 1850

The 1835 provision (Article IV, Section 10) was similar to the present provision except for slight variation in punctuation and phraseology. Section 10 of the 1835 constitution had the additional sentence at the end: "Each house shall choose its own officers."

The 1850 provision (Article IV, Section 8) was identical with the present provision.

Constitution of 1908

This provision was carried over unchanged from the 1850 constitution. It has not been amended since the adoption of the 1908 constitution. This provision has not caused serious difficulty of interpretation with respect to quorums and compelling attendance of members in either house of the legislature.[73]

Other State Constitutions

The constitutions of most states resemble Section 14 in specifying a majority of each house as constituting a quorum. The constitutions of approximately one-fourth of the states require a quorum to consist of a majority of members elected to each house or its equivalent. Almost all state constitutions have a provision similar to Section 14 as it relates to the power of a smaller number to adjourn from day to day and compel attendance of absentees.[74]

Comment

This provision has been common to all three Michigan constitutions and its substance would appear to present little problem for revision.

If joint sessions of the two houses were prescribed for some legislative purposes in the revised constitution, consideration might be given to adding a general provision relative to organization and procedure for joint sessions of the legislature.

4. Elections by the Legislature; Senate Vote on Confirmation

Article V: Section 11. In all elections by either house or in joint convention the votes shall be given viva voce. All votes on nominations to the senate shall be taken by yeas and nays and published with the journal of its proceedings.

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[73] In regard to determination of such matters for a joint convention or session of both houses, see Wilson v. Atwood, 270 Mich. 317.

[74] Index Digest, pp. 668-669.

Constitutions of 1835 and 1850

The 1835 provision (Article IV, Section 13) was the same as the present provision in meaning and effect with slight difference in phraseology. The 1850 provision (Article IV, Section 11) originated the phraseology of the present provision except for an additional comma—and viva voce was italicized.

Constitution of 1908

This provision was carried over from the 1850 constitution with only slight change in punctuation. Section 17 has not been amended since the adoption of the present constitution. The specific provisions of Section 17 have not caused difficulty of interpretation. This provision as it relates to "votes on nominations to the senate" has not been interpreted to require the senate to confirm or reject gubernatorial appointments (or more literally, nominations), during the pertinent session, although the provision continues—"shall be taken by yeas and nays." This provision seems then merely to specify how the vote will be taken, if and when the senate may decide to act on such nominations or appointments.[75]

Other State Constitutions

Section 17 as it relates to viva voce elections and confirmation of appointments is not unusual among state constitutions.[76]

Comment

There appears to be little need for revision of this provision if its continuance is thought desirable. If any officer, such as a legislative auditor, were made elective by the legislature, such election would undoubtedly be more appropriate by the legislature in joint session. Joint session and joint convention have the same meaning, but joint session is the more usual term and might be considered preferable to the presently specified "joint convention." No specific legislative vote is required by this provision for elections or for confirmation of appointments. If it were thought desirable to specify the type of majority to be required for such purposes—of those present in (present and voting if a quorum), or of those elected to, each house and/or in joint session—this could be further provided.[77] The 1835 provision specified "nominations made to the senate" which appears to express more clearly the meaning intended.

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[75] Opinions of the Attorney General of December 29, 1950, and May 22, 1951, held that the governor could reappoint a person to the same office if that person's appointment had not been acted upon by the senate, or if the person had been appointed before the session of the legislature and the senate had not acted upon the appointment, the person nominated could continue in office. See discussion of Article VI, Section 10.

[76] Index Digest, pp. 637-638. Action is taken on gubernatorial nominations or appointments in joint legislative session in Alaska.

[77] Senate rules have long specified that the majority required is a majority of those elected to the senate (18).

F. LEGISLATIVE PROCEDURE

By
J. Edward Hutchinson, Attorney at Law

Introduction

The present constitution empowers each house of the legislature to determine its own rules of procedure (Article V, Section 15), but then sets forth certain procedures relating to legislation with which the legislature must comply. These constitutional legislative procedures are set forth in Sections 15, 16, 19, 20, 21, 22, 23, 24, and 30 of Article V. The consideration of those sections will next be undertaken. Because a number of these sections contain a number of different procedural rules, several have been sub-divided. So that the constitutional requirements for legislative procedure might be more understandable, the following listing sets forth these constitutional requirements in summary form in a logical sequence of procedure.

Rules of Legislative Procedure in Article V

References are to section numbers in the present constitution. The arrangement of the sections parallels the steps in legislative procedure.

Sec. 15. Each house, except as otherwise provided in the constitution, shall . . . determine the rules of its proceedings.

Sec. 19. All legislation by the legislature shall be by bill and may originate in either house of the legislature.

Sec. 21. No bill shall embrace more than one object, which shall be expressed in its title.

Sec. 20. The style of the laws shall be: The People of the State of Michigan enact.

Sec. 22. No bill shall be altered or amended on its passage through either house so as to change its original purpose.

Sec. 21. No law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length.

Sec. 22. No bill shall be passed or become a law at any regular session of the legislature until it is printed and in the possession of each house for at least five days. No bill shall be passed at a special session of the legislature on any other subjects than those expressly stated in the governor's proclamation or submitted by special message.

Sec. 23. Every bill shall be read three times in each house before the final passage thereof.

Sec. 15. Neither house shall adopt any rule that will prevent a majority of the members elected from discharging a committee from the further consideration of any measure.

Sec. 16. The yeas and nays of the members of either house on any question shall be entered on the journal at the request of one-fifth of the members present.

Sec. 23. No bill shall become a law without the concurrence of a majority of all the members elected to each house. On the final passage of all bills, the vote shall be by yeas and nays and entered on the journal.

Sec. 16. Any member of either house may dissent from and protest against any act, proceeding or resolution which he may deem injurious to any person or the public, and have the reason for his dissent entered on the journal.

Sec. 21. No act shall take effect or be in force until the expiration of 90 days from the end of the session at which the same is passed, except that the legislature may give immediate effect to acts making appropriations and acts immediately necessary for the preservation of the public peace, health or safety by a two-thirds vote of the members elected to each house.

1. Bills

Article V: Section 19. All legislation by the legislature shall be by bill and may originate in either house of the legislature.

a. Legislation by Bill

Sec. 19, Part a. "All legislation by the legislature shall be by bill."

Constitutions of 1835 and 1850

Neither the 1850 constitution (IV-13) nor the 1835 constitution (IV-15) limited legislative action to bills. Until the 1908 constitution, the legislature used concurrent and joint resolutions in the lawmaking process to such an extent that the constitution writers deemed they had abused the power. See the address to the

people by the constitutional convention of 1907 in connection with their discussion on Article V, Section 19, of the 1908 constitution.

Constitution of 1908

As originally adopted, this section of the constitution of 1908 read: "All legislation shall be by bill." The phrase, "by the legislature," was inserted by amendment in 1913, when the initiative provisions in the constitution were first placed there, and was thought necessary in connection therewith.

Judicial Interpretation

The supreme court, in holding invalid an earlier initiative petition, a 1947 effort to initiate a fair employment practices law, interpreted the constitution to require initiated statutes to contain a title, an enacting clause, and to set forth in full the text of the statute initiated, in the same manner as a bill. Leininger vs. Secretary of State, 316 Michigan 644.

However, legislation by the initiative was considered by the senate in 1949 (Senate Journal 23 of 1949, page 177) not to be a bill, and thus not subject to the procedural requirements of a bill. Such determination was made in the course of enactment of the only initiative statute ever received by the legislature, the colored oleo amendment to a 1901 act relating to deception in the sale of imitation butter.

Other State Constitutions

Michigan and 21 other states require that all legislation shall be by bill only.[78] The Model State Constitution provides that "The legislature shall pass no law except by bill."[79] The federal constitution includes no requirement on this subject.

Comment

A bill is a proposal to add to, or to change, or to repeal, the statute law, introduced by a member of the legislature into the house of which he is a member. It is not a resolution. When a proposed law is introduced and during the course of its enactment, it is called a bill. If it becomes a law, it is called an act. In form, a bill contains all of the requirements of an act. It must have a title, an enacting clause, and it must set forth the full text of sections to be added or amended, making proper

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[78] Index Digest, pp. 600-601

[79] Model State Constitution, Article III, Section 313.

reference to existing sections of law. If it proposes new law, it must set forth the complete text of the new law as proposed. Bills to repeal existing law must make proper reference thereto.

Resolutions are still used in the legislature, but they are not utilized in the lawmaking process. They do not have the effect of law, and are no part of the law. Resolutions receive the respect of the courts. They are used almost exclusively to govern internal matters within the legislature. A senate resolution is the expression of the senate alone. A house resolution is the expression of the house alone. A concurrent resolution expresses the joint action of both houses in matters of internal concern to the legislature as a whole, as for example, the determination of the legislature to adjourn.

Joint resolutions are the resolution form used to accomplish those matters in which the legislature has a constitutional function outside the lawmaking process, and which are entitled to all of the formalities of bills during the course of legislative consideration. Whenever the legislature proposes a constitutional amendment, it does so by joint resolution. Whenever the legislature ratifies an amendment to the Constitution of the United States, it does so by joint resolution. In these matters, the approval of the governor is not required. Any matter in which the governor's approval is not required, a matter in which he has no right of veto, but which is entitled to the respect of law, and which is deposited with the secretary of state, is the proper subject of a joint resolution.

b. Origin of Bills

> Sec. 19, Part b. ". . . and may originate in either house of the legislature."

Constitutions of 1835 and 1850

This phrase remains unchanged from the original constitution of 1835 (IV-15) and it was carried through the constitution of 1850 (IV-13).

Constitution of 1908

The 1908 constitution did not change the wording of this section and it has not been amended since.

Other State Constitutions

About half the state constitutions provide that all bills can originate in either house. Twenty states require that revenue bills originate in the lower house and one state, Georgia, has a similar requirement for appropriation measures. The

upper houses are, in all instances, given amendatory powers, though the Kentucky constitution prohibits the introduction of any new and extraneous matter into revenue bills.[80]

The requirements of the Constitution of the United States (I-7) that all bills for raising revenue by the congress of the United States shall originate in the house of representatives were thought desirable by the writers of the federal constitution to insure that all tax measures should spring from the representatives directly elected by the people. The senate of the United States was not originally popularly elected. The house of representatives was.

Comment

Since both houses in the Michigan state legislature have always been elected directly by the people, there never was any compelling reason why revenue measures should not as properly originate in the state senate as in the house of representatives. In Michigan practice, tax bills as frequently originate in the senate as in the house. Appropriation bills, on the other hand, have for many years been divided between the houses. Any appropriation bill may, of course, be introduced in either house. But by general agreement, the house of representatives will move on appropriation bills within the categories of general government, regulatory services, public safety and defense, welfare, agriculture, conservation and recreation, and appropriations out of restricted funds. The senate will move first on bills within the categories of higher education, mental health, public health, adult corrections, and deficiency appropriation bills if necessary. School aid appropriation measures have a history of moving in either house initially, as do capital outlay bills. Appropriations to meet the state debt are continuing in nature, so that an appropriation bill for that purpose does not need to be acted upon annually.

The reason for division of the appropriation categories between the houses is to equalize work load and to shorten the length of the session. Both houses may thus be working on different areas of appropriations at the same time.

2. Style of Laws

Article V: Section 20. The style of the laws shall be: "The People of the State of Michigan enact."

Constitutions of 1835 and 1850

The Michigan constitution of 1835 (IV-22) set forth the form as follows: "Be it enacted by the senate and house of representatives of the State of Michigan." In 1850

[80] Index Digest, pp. 600-601.

(IV-48) the constitution writers proposed the present form.

Constitution of 1908

There was no debate on this section in the 1907-08 convention.

Judicial Interpretation

This is an enacting clause, which must appear in every bill (People vs. Dettenthaler, 118 Michigan 595) and in every initiated statute (Leininger vs. Secretary of State, 316 Michigan 644). Absence thereof is fatal to enactment.

Other State Constitutions

The Michigan provision here departs from the national pattern. Over two-thirds of the states give the power of enactment to the legislative body; the typical wording is, "Be it enacted by the legislature (or general assembly) of the state of ... ." Most of the remaining states are similar to Michigan in that the power of enactment is in the name of the people.[81]

Comment

It is usual for state constitutions to set forth the enacting clause for legislation. Michigan's form was obviously motivated by the democratic principle that it is the people who make the laws, even though acting through their chosen representatives, the legislature.

3. Laws; Object and Title, Revision, Amendment, Effective Date

Article V: Section 21. No law shall embrace more than one object, which shall be expressed in its title. No law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be reenacted and published at length. No act shall take effect or be in force until the expiration of 90 days from the end of the session at which the same is passed, except that the legislature may give immediate effect to acts making appropriations and acts immedi-

[81] Index Digest, p. 602.

ately necessary for the preservation of the public peace, health or safety by a two-thirds vote of the members elected to each house.

a. Object and Title

Article V: Sec. 21, Part a. "No law shall embrace more than one object, which shall be expressed in its title."

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision, but the constitution of 1850 contained the identical phrase (IV-20).

Constitution of 1908

There was no debate at the 1907-08 convention on this provision, but it is likely that it had unanimous support, since a major purpose of that convention was to build further constitutional safeguards against legislation ill-considered by the legislature.

Judicial Interpretation

Every bill shall have a title which shall fairly state the object of the bill. The supreme court said in Loomis vs. Rogers (197 Michigan 265) that if an act centers to one main object or purpose which the title comprehensively declares, though in general terms, and if the provisions in the body of the act not directly mentioned in the title are germane, auxiliary, and incidental to that purpose, the requirements of this section are met. The purposes of this limitation on legislative procedure are to prevent the passage of acts without the legislators being aware of their intention and effect, and to challenge the attention of those affected by the act to its provisions (Commerce-Guardian Trust and Savings Bank vs. State, 228 Michigan 316).

No bill shall embrace more than one object. The supreme court said (Commerce-Guardian Trust and Savings Bank vs. State, 228 Michigan 316) that the purpose of this provision is to prevent action by the legislature obtained by combining diverse subjects in one bill to secure the favorable votes of members who might oppose certain of them if acting on them separately. It is designed to prevent so-called riders. The court also has held that legislative restriction on appropriations of state funds does not add a second object to a bill (Lewis vs. State, 352 Michigan 422).

Other State Constitutions

Forty of the 50 state constitutions, including that of Michigan, contain a general rule that each bill embrace only one object. Nearly all of these require that the

object be expressed in the title.[82] A few others have miscellaneous provisions, most of which are variations of the general rule. New York and Wisconsin, for example, apply the restriction to private and local bills. Approximately thirteen of the 40 state having the general rules then make specific exceptions to the rule; ten states exclude appropriation bills from the general rule. Alaska is unique in excluding appropriation bills from the general prohibition and then specifically prohibiting non-appropriation "riders" from appropriation bills (Article II, Sec. 13). Eight states (there is some overlapping) exclude bills dealing with revision, codification, etc. of statutes. The Model State Constitution was the source of the Alaska provision; and the Model also excludes "bills for the codification, revision or rearrangement of existing laws.

Comment

The title must be broad enough to cover the provisions of the act. If it is not sufficiently broad, those portions of the act outside the scope of the title will fall. A title more broad than the act is valid; but the title must express a single object.

b. Revision and Amendment

> Sec. 21, Part b. "No law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length."

Constitutions of 1835 and 1850

The constitution of 1835 contained no like limitation on the legislative process. The constitution of 1850 contained the identical language (IV-25).

Constitution of 1908

There was no debate during the 1907-08 convention on this provision; it was retained in toto.

Other State Constitutions

Thirteen state constitutions, including that of Michigan, specifically prohibit revision of acts by reference to title only. The Model State Constitution is silent on this point. It is the practice in the Congress of the United States to amend

[82] Index Digest, pp. 603-604.

laws by reference to their title only and to set forth only the amendatory language in the bill.

Comment

Michigan practice, requiring bills to set forth the text of the whole section to be amended, is salutory in that it places the proposed amendment in context.

Even so, it does not assure a consistency within the amended law itself. Unless the bill drafter familiarizes himself with the whole statute to be amended, all sections consistently necessary of amendment may not be incorporated in the bill. To the same effect, if attention is not properly given to the title of the act being amended, necessary title amendments to the act are sometimes overlooked.

c. Effective Date

> Sec. 21, Part c. "No act shall take effect or be in force until the expiration of 90 days from the end of the session at which the same is passed . . . ."

Constitutions of 1835 and 1850

The constitution of 1835 contained no such provision. The constitution of 1850 contained a like provision (IV-20).

Constitution of 1908

The 1908 constitution carried over the provision from the 1850 constitution omitting the word "public" before "act."

Since the adoption of the referendum by initiative petition in 1913, the 90-day provision has a further significance. In the mechanics of the referendum by initiative petition as, set forth in Article V, Section 1, the 90-day rule is repeated, so that it now appears twice in the constitution. During that 90 days before an act becomes effective a referendum on the act may be initiated.

Opinion of the Attorney General

An act not given immediate effect becomes effective on the 91st day after final adjournment of the session of the legislature at which it was enacted. Sundays and holidays are counted, but the day of adjournment is not (Opinion of Attorney General, April 10, 1945).

Other State Constitutions

There are four general methods by which state constitutions prescribe the time at which general acts take effect. A few states use the date on which the act is printed

or circulated, and a few others leave it entirely for the legislature in its discretion to prescribe the date of effect in the bill. Most states, however, set the date by reference to either the date of passage or the date of adjournment. They may, as does Tennessee, for example, stipulate a number of days (40 in this instance) after passage, or as does Illinois, set a given date (here July 1). Over a third of the states indicate the date by a provision setting a number of days after the adjournment of the session at which the act was passed; most of these states, including Michigan, use a 90-day period.[83]

Comment

The obvious purpose of this provision was to provide time for communication of the law throughout the state before it became effective. The 1850 constitution directed the speedy publication of public acts (IV-36) and the 1908 constitution (V-39) says that they shall be published in book form within 60 days after the final adjournment of the session. Thus it is intended that the complete text of the statute in permanent form shall be available a month before it becomes effective.

This provision does not prevent the legislature from providing a different effective date in an act, which effective date is further into the future than the 90 days following final adjournment of the session at which the act is passed. But if the legislature desires to fix an effective date which might fall within the 90-day period, it must give the bill immediate effect. (See below.)

When this provision was written, communication was much slower than now. The legislature met only once in a two-year term and its laws had a chance to prove their worth before another session came around to make further amendment. Now the legislature meets annually. Its sessions are becoming more lengthy. It is not uncommon now to have laws subjected to amendment within only a couple of months after they have become effective, and sometimes even before. In view of this, and in view of our faster communication, it may be that laws should be immediately effective, unless the legislature fixes a different effective date.

d. Immediate Effect

> Sec. 21, Part d. ". . . except that the legislature may give immediate effect to acts making appropriations and acts immediately

[83] Index Digest, pp. 604, 615-16.

necessary for the preservation of the public peace, health or safety by a 2/3 vote of the members elected to each house."

Constitutions of 1835 and 1850

The 1835 constitution contained no provision on the matter. From a constitutional standpoint all laws were immediately effective as soon as approved by the governor (or passed over veto), as is the case of laws passed by the Congress of the United States. In 1838 the legislature passed a general law that its acts would become effective 30 days after approval, which time was amended to 60 days by the revised statute of 1846. The 1850 constitution contained the provision that no public act take effect until 90 days from the end of the session at which the act was passed, but authorized the legislature to direct another effective date, including immediate effect, by a two-thirds vote of the members elected to each house, on any public act (IV-20).

The 1850 provision apparently permitted immediate effect of local and private acts even without the two-thirds vote, for the provision was "no public act shall take effect" etc. And under the 1850 constitution, before the days of municipal home rule, the legislature enacted literally hundreds of local acts at each regular session. These were too often given immediate effect.

Constitution of 1908

The convention of 1907-08 set as one of its major goals the slowing up of legislation and the placing of limitations on the immediate effect power of the legislature. The constitution revisers of 1907-08 thought that there would be few immediate effect acts under the new constitution. During the 1961 regular session 75 acts were ordered to take immediate effect out of a total of 241 enacted, more than 31 per cent.

In 1907 debate on this provision centered around a proposed amendment that immediate effect votes should be by a record roll call—yeas and nays. That proposed amendment was not adopted. It was pointed out that legislative practice at that time actually required a count in order to establish the required two-thirds vote. Such is still the case. In the senate, the secretary actually counts those who favor immediate effect to ascertain the constitutional two-thirds in a rising vote. In the house, the two-thirds vote is counted in a division of the house, members voting on the voting machine. And, on any immediate effect vote a record roll call may be ordered by one-fifth of those present. The amendment to Article V, Section 1

adopted in 1913 providing for a referendum by initiative petition duplicates these exceptions to the 90-day rule, there stating again that appropriation acts and acts immediately necessary for the preservation of the public peace, health or safety may be given immediate effect.

Other State Constitutions

A total of 28 states have some type or types of exceptions to the general rule as to when laws shall take effect. Seven states exclude acts in which the legislature has explicitly stated a date of effect other than that normally used for laws; three of these, including the newest state constitution (i.e., that of Alaska), require a two-thirds vote of the members elected to each house. Twenty states exclude emergency legislation, New Mexico and Michigan being the only two states requiring; a two-thirds vote in both houses. Twelve states, including Michigan, exclude appropriation bills; Michigan is apparently the only state wherein a two-thirds vote is necessary. A few other states have miscellaneous exceptions.[84] The Model State Constitution provides only that no act shall become effective until published, as provided by law.[85]

Comment

The present constitution sets forth the categories into which legislative acts must fall in order to be eligible for immediate effect. Those categories are four. An act may be given immediate effect by a two-thirds vote if it (1) makes an appropriation, or (2) preserves the public peace, or (3) preserves the public health, or (4) preserves the public safety. If an act does not meet at least one of those requirements, legislative votes for immediate effect are subject to attack as nullities.

The most recent instance where the immediate effect action of the legislature was construed as a nullity occurred toward the end of the 1961 session. The legislature had passed a bill making a uniform June election date for all primary and fourth class school districts and had ordered the act to be effective immediately. The governor had signed the bill. But his signature approving the bill came so late that

[84] Index Digest, p. 616.

[85] Article III, Section 314.

it was impossible for registration school districts affected by the act to comply in 1961. The attorney general found none of the four immediate effect categories into which the act would fit and ruled the immediate effect action was a nullity.

4. Bills; Printing; Subject Matter at Special Session; Amendment

Article V: Section 22. No bill shall be passed or become a law at any regular session of the legislature until it has been printed and in the possession of each house for at least five days. No bill shall be passed at a special session of the legislature on any other subjects than those expressly stated in the governor's proclamation or submitted by special message. No bill shall be altered or amended on its passage through either house so as to change its original purpose.

a. Printing

Sec. 22, Part a. "No bill shall be passed or become a law at any regular session of the legislature until it has been printed and in the possession of each house for at least five days."

Constitutions of 1835 and 1850

This provision is new in the constitution of 1908. Neither prior constitution contained anything similar.

Constitution of 1908

This constitutional provision was a major improvement in legislative procedure, in the opinion of the constitution writers of 1907-08. In its address to the people, the convention said of this provision: "It was inserted to prevent hasty and careless legislative action, also to deal effectively with so-called snap legislation. (It) means much greater publicity in legislative proceedings. Time is thus provided whereby the people may become acquainted with proposed legislation, and to petition, or remonstrate, before a bill is passed."

As introduced into the 1907-08 convention, the proposal was for a ten-day possession by each house in its consideration of a bill. In committee of the whole, amendments were offered but not adopted which would have required a ten-day possession

only in the house of origin. When the proposal emerged from the committee on phraseology; the provision had been reduced to five days' possession before passage in each house.

Other State Constitutions

Only two other states (New York and Nebraska) set a minimum time period during which the legislature must have a bill until it can be passed. A few states limit the actions of the legislature during the last few days of the session. Almost a third of the states require printing of the bills before passage.[86] The Model State Constitution requires that no bill shall become a law unless it has been printed and upon the desks of the members in final form at least three legislative days prior to final passage.

Comment

The five-day period cannot commence to run in the house of origin until the bill is printed. On each legislative day, announcement is made of the bills which have been printed and placed upon the files of the members since the last such announcement and indicating the day of receipt of the printed bills. This information is entered in the journal to evidence the start of the five-day period. When a bill is passed by the house of origin, it is transmitted to the other house and receipt of the bill in that other house is entered upon its journal, thus evidencing the start of its required five days of possession.

The constitution does not require that every bill which is introduced be printed; but, of course, unless a bill is printed, it cannot be passed, and it cannot be passed until five days after it has been printed. The rules in each house provide that all bills shall be printed upon introduction unless otherwise ordered by the house of origin.

This provision does not mean that amendments to a printed bill must be printed, or that the bill lie over for five days after the last of its amendments is printed. It does not mean that an unprinted bill cannot be substituted for a printed bill on the same subject.

This provision is applicable only during regular sessions of the legislature. Regular sessions are the annual sessions which commence on the second Wednesday in

[86] Index Digest, pp. 608-609.

January and continue until the legislature adjourns itself without day.

b. Subject Matter at Special Session

> Sec. 22, Part b. "No bill shall be passed at a special session of the legislature on any other subjects than those expressly stated in the governor's proclamation or submitted by special message."

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision. Nor does the Constitution of the United States. Under the 1835 constitution, as is the case in the Congress of the United States, the legislative branch could be specially reconvened, but once convened it could consider anything it chose.

The 1850 constitution limited consideration in special session to subjects submitted by the governor, and limited compensation of legislators in special session to 20 days (IV-15).

Constitution of 1908

In 1907-08, this limitation of subject matter in special session was considered in connection with the provision that in regular sessions all bills shall be printed and in possession of each house for five days before final passage. The address to the people argued that the governor's proclamation as to subject matter assured the same publicity in special session that the five-day rule assured in regular session.

Other State Constitutions

Half the state constitutions explicitly prohibit the legislature, while in special session, from acting on matters other than those for which the session was called or those set forth in the governor's special message. In a fifth of the states the legislature can consider other matters; restrictions vary.[87] The constitution of the United States and the Model State Constitution place no restriction on subject matter which can be dealt with at special sessions.

Comment

The governor is empowered to convene the legislature "on extraordinary occasions" (VI-7). These are special sessions as contrasted with the regular sessions of the

[87] Index Digest, pp. 676-77.

legislature which convene on the second Wednesday of January in each year.

At special sessions the governor has much tighter constitutional control than he does in regular sessions. This tighter control stems from this provision. He may control the subject matter of the session. Any enactment outside the scope of his call (and the call may be broadened by special messages) is a nullity.

The governor's control does not extend to limiting consideration to particular bills. It extends only to subject matter. But it is not unheard of that the governor extend the scope of a special session in exchange for support on a particular measure.

c. Amendment of Bills

> Sec. 22, Part c. "No bill shall be altered or amended on its passage through either house so as to change its original purpose."

Constitutions of 1835 and 1850

Neither the constitution of 1835 nor the constitution of 1850 contained this rule.

Constitution of 1908

In its address to the people, the convention of 1907-08 intended this provision to be air tight, for they said: "The provision that no bill shall be altered on its passage so as to change its original purpose is included so that by no possibility can the publicity secured by the five-day rule be nullified or evaded."

Other State Constitutions

Twelve states other than Michigan provide that a bill cannot be altered or amended on passage through either house to change the bill's original purpose.[88] There is no comparable provision in the Model State Constitution.

Comment

This is the rule of germaneness, written into the constitution, and it requires prompt challenge to any offered amendment. Once the house has accepted the amendment, it is too late. Indeed, once the house has taken any action on the amendment, it is too late to challenge germaneness.

Further, the determination as to whether any particular amendment is germane is left to the presiding officer at the time the issue is raised, and apparently the pre-

[88] Index Digest, p. 605

siding officer cannot raise the issue himself. His ruling of germaneness is subject to appeal to the whole house. In practice, unless both houses are equally sanguine in defending against intrusion of matters by amendment not germane, the rule of germaneness, however strong on paper, proves weak in practice.

Every session will furnish examples of instances where the original purpose of the bill is changed; where a bill defeated in committee will be tacked onto a bill reported to the floor, or where a bill defeated in one house will be tacked onto successful legislation in the other. This is accomplished either because the sponsors or defenders of the successful bill are not alert to object, or because they willingly permit the riders to be attached.

Such procedure would be fatally defective, except that after a bill is finally passed, and before it is presented to the governor for his approval, the legislature may amend its title. If the title as amended expresses a single object, even though phrased in broad terms in order to accommodate all those amendments tacked to the bill, the requirements of Article V-21 are satisfied. The courts look to the title of the act to test its constitutionality on this point (Opinion of Attorney General March 15, 1956, No. 2541).

The purpose of this limitation on legislative procedure is to permit a member, by timely challenge to any offered amendment, to raise the point of germaneness. If an offered amendment is not within the scope of the title of the bill as then written, the amendment is out of order. Thus the constitutional requirements of a single object in any bill may be safeguarded. Riders may be kept off.

5. Bills; Reading, Passage, Vote

Article V: Section 23. Every bill shall be read three times in each house before the final passage thereof. No bill shall become a law without the concurrence of a majority of all the members elected to each house. On the final passage of all bills, the vote shall be by yeas and nays and entered on the journal.

a. Reading of Bills

Sec. 23, Part a. "Every bill shall be read three times in each house before the final passage thereof."

Constitutions of 1835 and 1850

This provision originated in the 1850 constitution (IV-19). Since legislation under that constitution could be by joint resolution as well as by bill, the provision read that every bill and joint resolution shall be read three times, etc.

Constitution of 1908

The only revisions were aimed at making this Section consistent with Section 19 (prohibiting legislation by the legislature in any but bill form).

Other State Constitutions

Over 30 state constitutions, including that of Michigan, require all bills to receive three readings in each house.[89] In practice, this occurs in all states but five.[90] Various states permit the waiving of the requirement in the case of emergency legislation.[91] The Model State Constitution (Article III, Section 314) requires readings on three separate days.

Comment

This is a provision having a well recognized meaning in parliamentary law. It does not mean that every bill must be read literally word by word three times. It means that every bill shall be considered three different times before it is finally passed. That the convention of 1907-08 so understood its meaning is evidenced by their rejection of an amendment which would have inserted the words "in full" after the word "read."

The rules of the house and senate each provide that the first and second readings shall be by title only, and at the time of introduction. They provide that the third reading shall be in full unless unanimously ordered otherwise.

Every bill is three times considered in each house. It is considered by a standing committee, by the committee of the whole house, and upon final passage. At all three considerations it is subject to amendment, to defeat, to delay. On all three occasions it is subject to attack or defense by the whole system of parliamentary maneuver and debate.

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[89] Index Digest, p. 607.

[90] Book of the States 1960-61, p. 51.

[91] Index Digest, p. 607.

The word-by-word reading of a lengthy bill (occasionally there is one as long as 700 pages) would be time-wasting and uninstructive. The phrase "read three times" never meant that.

b. Bills; Passage; Vote

> Sec. 23, Part b. "No bill shall become law without the concurrence of a majority of all the members elected to each house. On the final passage of all bills, the vote shall be by yeas and nays and entered on the journal."

Constitutions of 1835 and 1850

The constitution of 1835 contained no provision corresponding to the requirements of this section. The constitution of 1850 contained a provision similar to the present provision. It included the requirement that no joint resolution could become a law without the concurrence of a majority of all the members elected to each house. But it did not require final passage of joint resolutions to be on a yea and nay vote as was required in the case of bills. The joint resolution provided a method for passing laws without a record roll call, and perhaps this explains why joint resolutions were frequently used in the law-making process under the 1850 constitution.

Constitution of 1908

The 1908 constitution merely omitted from the 1850 section the phrase "and joint resolutions" for the purpose of consistency, since all legislation must now be by bill.

Other State Constitutions

Twenty-five states require a majority of members elected for approval of a bill; Michigan is in this group. Alaska and Arkansas require a majority of the members of each house, and Hawaii and Tennessee demand a majority of members to which the house is entitled. Four states require a majority of members present and two more use the criterion of present and voting. Kentucky and Virginia require two-fifths of the members elected and a majority of the members voting. Colorado demands a majority of the members elected to each house, the vote to be taken on two separate days in each house. New Hampshire ties the majority to the number present.[92]

About two-fifths of the constitutions (including that of Michigan) require that the yeas and nays on final passage be entered in the journal. A few states require the

[92] Index Digest, p. 609.

names of those voting for and against the measure to be entered in the journal.

Comment

This is the rule of the constitutional majority. Without this limitation on the legislative process it would be possible to enact legislation by a majority of a quorum in each house. The constitution defines a quorum (Article V-14) as a majority of each house. In a house of 110 members a quorum is 56, and but for this provision requiring a concurrence of a majority of all of the members elected, a bill could be passed at a session where only 56 members were present by an affirmative vote of 29. The effect of this constitutional provision is to require 56 affirmative votes in the house and 18 in the senate for the passage of any bill.

On bills appropriating public money or property for local or private purposes (Article V-24), creating new courts (Article VII-1), providing for the incorporation or regulation of banks and trust companies (Article XII-9) , or repealing local or special acts in effect January 1, 1909, a two-thirds vote of the members-elect in each house is required.

Without this provision requiring a public record in the legislative journal as to how each member voted on every bill, it would be possible to adopt legislation without revealing how each member voted, as is the case in the Congress of the United States.

This provision, requiring the concurrence of a majority of all the members elected to each house in order to pass a bill, is construed as requiring 56 votes in the house and 18 in the senate, even though there be vacancies in the membership of the house or the senate.

The provision that on the final passage of all bills, the vote shall be by yeas and nays and entered on the journal is construed as requiring a roll call vote on final passage, with the names of those voting for and against the bill being entered upon the journal.

6. Senate and House; Journals; Right of Member to Protest

Article V: Section 16. Each house shall keep a journal of its proceedings and publish the same, except such parts as may require secrecy. The yeas and nays of the members of either house on any question shall be entered on the journal at the request of one-fifth of the members present. Any member of either house may dissent from

and protest against any act, proceeding or resolution which he may deem injurious to any person or the public, and have the reason for his dissent entered on the journal.

a. Journals

Sec. 16, Part a. "Each house shall keep a journal of its proceedings and publish the same, except such parts as may require secrecy. "

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 each contained the identical provision. The Constitution of the United States contains a similar provision.

Other State Constitutions

Forty-five states, including Michigan, require each house to keep a journal of its proceedings. Thirty-five states, including Michigan, require that it be published, although the time at which it is to be published varies—e.g., daily in one state; at end of session or adjournment in eight states. Five states specify that journals may be published at discretion of the legislature or upon request of one-third or one-fifth of the members. Seventeen states, including Michigan, make the exception of parts as may require secrecy, and one state excepts executive sessions.

Comment

Legislative journals do not include a verbatim transcript of what takes place on the legislative floor; nor even a summary of debate. Journals record only the actions of the house and senate. Matters other than actions of the body are incorporated in the journals only by express consent.

So far as can be ascertained, no part of the journals of the legislature have failed to be published under the secrecy provision. Prior to 1950 it was customary for the senate to consider and confirm or reject nominations to office submitted to the senate by the governor in executive session, from which all persons other than the members and officers of the senate were excluded; but the journals of the executive sessions were published in the permanent bound volume of the senate journals. While the journals of proceedings from day to day are available the day following, the executive journal was withheld until the end of the session.

This provision ties in with the provisions of Section 18 of this Article, that the doors of each house shall be open unless the public welfare requires secrecy.

b. Yeas and Nays on the Journal

Sec. 16, Part b. "The yeas and nays of the members of either house on any question shall be entered on the journal at the request of one-fifth of the members present."

Constitutions of 1835 and 1850

A similar rule is found also in each of the prior Michigan constitutions—1835 - IV-12; 1850 - IV-10. In 1850, however, the minority required to force the yeas and nays was increased from the 1835 requirement of one-fifth of the members present to one-fifth of the members elected.

Constitution of 1908

In the present constitution the requirement was reduced again to the traditional one-fifth of the members present.

Other State Constitutions

State constitutional provisions on this subject fall into three categories. First, 22 states require a minimum number of members to request that the yeas and nays be entered on the journal. In four states one member can request it; in ten states, two members are necessary; in four states four are required; and in four more, five members requesting it are necessary. Second, 18 states give a minimum percentage of the members present who must make the request and one state requires a percentage of those elected. One state requires one-fifteenth of those present, three use one-tenth, four use one-sixth, and 10 states, including Michigan, use one-fifth of those present. Louisiana requires one-fifth of those elected to make such a request. Finally, four states set different requirements for the two houses of the legislature. Vermont and Maryland require five in the house or one in the senate, Illinois requires five in the house or two in the senate, and South Carolina requires ten in the house or five in the senate.[93] The Model State Constitution and the federal constitution provide that one-fifth of those present may request that the yeas and nays be entered on the journal.[94]

[93] Index Digest, pp. 679-680.

[94] Article III, Section 3.13 and Article 1, Section 5 (3), respectively.

Comment

This is a constitutional rule of legislative procedure which makes it possible for a minority of only 20 per cent of those present to place on record any vote. Thus, as few as four senators can force a record vote if only a simple quorum of 18 is present.

The power of one-fifth of the members present to place on record the vote on any question by yeas and nays is interpreted within the legislature as broad enough to cover the vote on any motion, on any resolution, and on any amendment, so long as the house is not acting in committee of the whole. While acting as a committee of the whole house, no journal is kept, and the actions of the committee of the whole appear in the journal only as a report from that committee. However, it is in order for the requisite number of members to demand the yeas and nays on the question of concurring with the recommendations made by the committee of the whole as soon as the committee has risen and the report of its activities made, so that it is possible to place every member on record on any question coming before the house.

While a technical interpretation of this right by one-fifth might require that the demand for a record roll call by yeas and nays be made prior to any vote on the question, in practice the device is often used to get another vote on a question without going through the procedure for a reconsideration of the vote. For example, if after little or no debate on a question it is put to a voice vote and appears to fail, its sponsors then demand a division and carry on debate. If upon the division, which is done by a rising vote without record, the question still fails, its sponsors are in practice permitted to demand the yeas and nays, thus permitting still further debate.

c. Right of Member to Protest

> Sec. 16, Part c. "Any member of either house may dissent from and protest against any act, proceeding or resolution which he may deem injurious to any person or the public, and have the reason for his dissent entered on the journal."

Constitutions of 1835 and 1850

The constitutional right of a legislator to protest on the record has been a rule of legislative procedure written into all three Michigan constitutions—1835 - IV-12; 1850 - IV-10; 1908 - V-16.

Constitution of 1908

This provision was carried forward from the 1850 constitution without change. The only change from the 1835 constitution to the 1850 constitution was a very minor change in wording.

Other State Constitutions

Thirteen states in addition to Michigan guarantee the right of protest and the right to have the reasons therefor entered in the journal.[95]

Comment

The right of protest is granted only to those who dissent, not to those who support. This provision has not, however, been narrowly construed. It has been accorded those who vote against, even though they find themselves in the majority with the act, proceeding, or resolution defeated. While a strict construction of the wording would seem to require the protest to be based on some conceived injury to the public or to any person resulting from such act, proceeding, or resolution, in practice it has allowed any statement, however tangential, which any member may feel impelled to make in explanation of his "no" vote.

The rules of the house (present house rule 11) seem to require any member who desires to protest to "reserve" that right at the time of voting. Thus before a vote is completed it is known how many protests there will be. The senate has no such "condition precedent" to the exercise of the constitutional privilege and it is apparently in order in the senate to enter a protest at any time after the vote, be it on the same or any subsequent legislative day. It is customary, however, to enter protests immediately, and sometimes imprudently in momentary anger or disappointment. Occasionally such statements have degenerated into personal attack and in such cases they are usually expunged (house rule 11). Sometimes the right of protest has been used to carryon debate after the act, proceeding, or resolution has been voted upon when debate has been cut off before the vote through the ordering of the previous question.

7. Senate and House; Powers

Article V: Section 15. Each house, except as otherwise provided in this constitution, shall choose its own officers and determine the rules of its proceedings, but shall not adopt any rule that will prevent a majority of the members elected from discharging a committee from the further consideration of any measure. Each house shall judge of the qualifications, elections and returns of its members, and may, with the concurrence of two-thirds of all the members elected, expel a member. The reasons for such expulsion shall be

[95] Index Digest, p. 655.

entered upon the journal, with the names of the members voting on the question. No member shall be expelled a second time for the same cause.

a. Officers and Rules of Proceeding

Sec. 15, Part a. "Each house, except as otherwise provided in this constitution, shall choose its own officers and determine the rules of its proceedings."

Constitutions of 1835 and 1850

In 1835, these provisions were split between two sections. Article IV-10 ended with the sentence, "Each house shall choose its own officers." Article IV-11 started with the sentence, "Each house shall determine the rules of its proceedings." In 1850, the provision was brought together in the same section, Article IV-9. The exception in the 1908 provision was not found in either of the earlier constitutions.

Constitution of 1908

The phrase, "except as otherwise provided in this constitution," was added for consistency. The constitution provides that the lieutenant governor shall be president of the senate, and thus the senate cannot choose all of its officers. The excepting clause may also be interpreted to modify the power of the house to determine its rules.

Other State Constitutions

The majority of states authorize each house to choose its own officers. Several states specify certain officers. Almost all states authorize each house to determine rules of its proceeding, although several make exceptions in the constitution. Alaska requires each house to adopt uniform rules of procedure. The Constitution of the United States directs that the house of representatives shall choose its speaker and other officers, and that the senate shall choose its other officers (other than a president) and also a president pro tempore.

Comment

The senate by its rules elects a president pro tempore to preside in the absence of the lieutenant governor, a secretary, and a sergeant at arms who is the chief police officer of the senate. These constitute its officers. The house by its rules elects a

speaker (an officer mentioned in the constitution in Article V-10), a speaker pro tempore, a clerk, a sergeant at arms, a postmaster, and an assistant postmaster.

Each house customarily adopts rules governing its procedure at the opening of the first regular session in every term. The two houses also adopt joint rules and joint convention rules. Statute provides that the rules of the preceding legislature remain the temporary rules of a new legislature until new rules are adopted.

b. Discharging a Committee

> Sec. 15, Part b. "(Neither house shall) adopt any rule that will prevent a majority of the members elected from discharging a committee from the further consideration of any measure."

Constitution of 1908

This provision vas new in the constitution of 1908. There was a very strong suspicion of the committee system in the convention of 1907-08. There was a widely held belief that committees were easily influenced by powerful interest groups, if not corrupted by them, and one way to wrench away the power of such groups would be to empower the majority in the house or senate to take from a committee the further consideration of any measure.

Other State Constitutions

Michigan is apparently unique in expressly prohibiting any rule that would prevent the majority from exercising the power of discharging a bill from committee.[96]

Ten states require that a bill be returned by the committee before it can be considered for final passage. Two of these states (Virginia and Kentucky), however, and two additional states (Hawaii and Missouri) have discharge provisions in the constitution. Hawaii provides that one-third of the members of either house can vote to release a bill from committee. The Kentucky constitution sets a "reasonable time" period and provides that any member can call up a bill. The Missouri constitution requires an affirmative vote of one-third of the members elected. The Virginia constitution seems to require approval of a majority of those voting (which must include at least two-fifths of the membership) in each of the two houses.[97] The

[96] Index Digest, p. 606.

[97] Idem.

Model State Constitution (Article III, Section 312) provides that one-third of all the members of the legislature can relieve a committee of consideration of a bill.

Comment

Such discharge is often attempted but rarely successful. It has succeeded on only two or three occasions during the whole period in which this constitutional provision has been effective.

There are reasons why this device is so seldom successful. Legislators realize as soon as they get into the work of a legislative session that the committee system is indispensable. Without the use of committees to screen proposed legislation, the legislative process would be unmanageable. There would be no way to bring order out of chaos with many bills operating in direct conflict with others. There would be no way to move forward on a legislative program. The committee system is an essential element in legislative organization. It is essential in every legislature and in Congress.

This constitutional provision was intended to assure the right of the majority in the house or senate to overcome a minority controlling one of its committees. For that purpose it is wholesome. But legislators view it as a weapon for attack upon the committee system. And they rise to the defense of the committee system. To defend the committee system they routinely vote down, usually by party votes, motions to discharge their committees.

The composition of a committee is determined by the parliamentary majority. The majority party by rule can determine what committees there shall be, their size, and their political composition. The majority leadership (speaker of the house or committee on committees in the senate) appoints these committees. To discharge a committee from consideration of a measure is viewed as an attack upon the integrity of the committee and an attack upon the majority itself. So a motion to discharge is almost never successful. In the minds of some legislators, a motion to discharge is in the same category as a motion of no confidence against the government in parliamentary systems.

Nevertheless, indirect methods usually accomplish the purpose. The senate rules (present rule 24), for example, permit the senate by a majority of those voting to change the reference of a bill to a committee either on the day it is introduced or on the next succeeding legislative day. This has the effect of discharging a committee from further consideration of a bill. It takes from the first designated committee and assigns to another, even against the will of the first committee. But it is not considered a motion to discharge. Instead the rule was motivated by other considerations. Its purpose is to permit the senate to determine which of its committees shall consider a bill as against the wishes of the lieutenant governor, who makes the initial assignment. There are several ways to get around a recalcitrant commit-

tee if it is not doing the will of the parliamentary majority. Many a committee, by taking a position and holding to it against every pressure, is doing the will of the majority of the house. The committees take the blame, thus relieving other members from the pressures.

c. Each House Shall Judge Its Own Members

> Sec. 15, Part c. "Each house shall judge of the qualifications, elections and returns of its members, and may, with the concurrence of two-thirds of all the members elected, expel a member. The reasons for such expulsion shall be entered upon the journal, with the names of the members voting on the question. No member shall be expelled a second time for the same cause."

Constitutions of 1835 and 1850

Both of the earlier constitutions contained a limitation on the power of each house to expel a member which was not carried over into the 1908 constitution. That limitation was that neither house could expel a member "for any cause known to his constituents antecedent to his election."

Otherwise, the provision has remained substantially the same from the beginning.

Other State Constitutions

The constitutions of almost all the states resemble Section 15 in making each house of the legislature the judge of its members' qualifications, elections and returns, and in its provision for expulsion of members. This is also true of the Model State Constitution and the U.S. Constitution. The provision in the last sentence of Section 15 that no member be, "expelled a second time for the same cause" is not as generally provided for among the states, but is not uncommon among them.[98]

Comment

There are two distinct matters within these provisions. One is expulsion of a member. The other is exclusion from membership. The exclusion process refers to a member-elect and his qualifications for office. To expel a member, a two-thirds vote of all the members elected is required, and in computing the vote necessary to expel, it is probable that the member involved must be counted in the total number. To exclude a member-elect, judging him unfit for membership, requires only a simple majority of the members of the body. The power of the body to judge of the qualifi-

[98] Index Digest, pp. 662, 650-651.

cations of its members, under a situation where no expulsion process is required, has been established in Michigan by two cases in the senate in 1951 and one case in 1955. It would appear likewise that to judge upon the elections and returns of members requires only a majority vote and not a two-thirds vote. Each house has the sole constitutional power to recount the vote in election contests involving members of the legislature, by virtue of this provision.

8. Local or Special Acts; Referendum

Article V: Section 30. The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act, can be made applicable shall be a judicial question. No local or special act, excepting acts repealing local or special acts in effect January 1, 1909 and receiving a two-thirds vote of the legislature shall take effect until approved by a majority of the electors voting thereon in the district to be affected.

Sec. 30, Part a. "The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question."

Constitutions of 1835 and 1850

The only relevant section in the constitution of 1835 provided that "the legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each house" (XII-2).

The constitution of 1850 required a two-thirds vote of the members elected to each house to appropriate public money or property for local or private purposes (IV-45). It also prohibited the formation of corporations, except for municipal purposes, by special act (XV-1).

Constitution of 1908

The convention of 1907-08 was convinced that there had been abuse by the legislature in the area of local legislation. Before municipal home rule, the legislature was called upon to amend municipal charters. It had granted those charters and only

the legislature could amend them. Acts governing school districts, too, were often special and local in character, such as creating a school district and providing its powers and duties.

Other State Constitutions

A majority of states restrict in some way the use of special or local laws. Some prohibit it where general legislation has been or can be applied. Five states including Michigan stipulate this and make the determination of whether a general law is applicable a judicial question. Others forbid special or local laws in certain specified cases. Six others forbid local or special laws or local legislation in instances where the courts can provide relief.[99] The provision in the Model State Constitution (Article III, Section 3.12) is almost exactly the same as the Michigan provision.

Comment

This provision, together with the home rule provisions in the constitution, lifted a burdensome load of private and local legislation out of the legislature.

There may be some skepticism about whether this provision completely shut the door on special legislation, affecting a single city, or a single county. There is an increasing body of statute law applicable to any city or any county having a population in excess of a certain number, or within sometimes rather narrow limits.

The courts have recognized the legality of such legislation if there is some reasonable relation between the population limitations and the problem sought to be controlled or eradicated by the legislation. Certainly legislation for metropolitan areas and legislation for rural areas must be tailored differently in some categories.

b. Referendum in Local or Special Acts

> Sec. 30, Part b. "No local or special act, excepting acts repealing local or special acts in effect January 1, 1909 and receiving a two-thirds vote of the legislature shall take effect until approved by a majority of the electors voting thereon in the district to be affected."

Constitutions of 1835 and 1850

There was no comparable provision written into either the 1835 or the 1850 constitution.

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[99] Index Digest, pp. 939-940.

Constitution of 1908

In the 1908 constitution as originally adopted, the excepting clause was not there. The language read "No local or special act shall take effect until approved by a majority of the electors voting thereon in the district to be affected." The legislature is without power to pass a local act where a general act can be made applicable. But assuming a general act cannot be adapted and a local act is necessary, even then the legislature can in effect only recommend. It can pass the local act and submit it to local referendum. Thus all power was taken from the legislature to enact a local act and make it effective.

There were a great number of local acts on the statute books, adopted by the legislature before 1909. There are still some. Almost every session the legislature is called upon to repeal special school laws. In their determination to stop the legislature in the field of local legislation, the constitution writers in 1907 made it impossible even for the legislature to repeal those special acts which were on the books. This in a sense discouraged the removal of special acts when the purpose of the constitutional provision was to encourage the replacement of special acts by general laws.

Amendments Since 1908. As a result, in 1913 the constitution was amended. The legislature was then re-invested with a limited power. It could repeal, but not amend, any local act enacted under the old constitution, without submitting the repeal to a local referendum. But it could do so only by a two-thirds vote in each house. Thus, a simple majority of legislators could not take from a locality its local act.

The legislature still cannot amend any local act, no matter of what vintage, except the same be submitted to local referendum. In the case of municipal charters, however, this is no longer necessary. Under the home rule provisions, the legislature has enacted general laws permitting any city or village to amend its own charter without coming to the legislature.

Other State Constitutions

Michigan is apparently the only state requiring approval by voters in the district affected by the special or local act in all cases. The Alaska constitution requires approval of acts necessitating appropriations by the local subdivision.[100]

[100] Index Digest, p. 940.

9. Referendum on Certain Bills

Article V: Section 38. Any bill passed by the legislature and approved by the governor, except appropriation bills, may be referred by the legislature to the qualified electors; and no bill so referred shall become a law unless approved by a majority of the electors voting thereon.

Constitutions of 1835 and 1850

This power did not exist in the legislature under earlier constitutions.

Constitution of 1908

This provision was inserted to make explicit the right of the legislature to submit bills approved by it to the people.[101] It was approved in its final form only after long debate and complicated parliamentary procedures.[102]

Other State Constitutions

Apparently nine states authorize some type of referendum by legislative action. One state specifically prohibits referenda on anything except constitutional amendments.[103]

Comment

In all three constitutions, 1835, 1850, and 1908, the legislative power of the state is vested in a senate and house of representatives. Being so vested, the legislature is without power to delegate any part of it, except as authorized to do so by the constitution.

Here is a power to delegate. A part of the legislative responsibility may be relinquished to the people through this provision.

Only in the matter of appropriation is the legislature limited. It cannot renounce responsibility as to any appropriation by passing the question on to the people.

It should be noted that the wording strictly construed would suggest that the legislature might refer an act to referendum only after (1) the bill has been passed and

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[101] Proceedings and Debates, II, pp. 1372-1376.

[102] Ibid., p. 1424.

[103] Index Digest, p. 562.

(2) approved by the governor. In practice the referendum section is made a part of the act itself.

It should also be noted that the power of the legislature to submit its acts to referendum is broader than the power of the people to initiate a referendum by petition. The legislature may submit tax measures to referendum. The people may not force a referendum on a tax measure through the initiative (Article V-1). Neither may they initiate a referendum on an appropriation bill.

10. Publication of Statutes and Decisions

Article V: Section 39. All laws enacted at any session of the legislature shall be published in book form within 60 days after the final adjournment of the session, and shall be distributed in such manner as shall be provided by law. The speedy publication of such judicial decisions as may be deemed expedient shall also be provided for by law. All laws and judicial decisions shall be free for publication by any person.

a. Publication of Laws

Sec. 39, Part a. "All laws enacted at any session of the legislature shall be published in book form within 60 days after the final adjournment of the session."

Constitutions of 1835 and 1850

The 1835 constitution did not touch upon the subject. The 1850 constitution directed "the speedy publication of all statute laws of a public nature."

Constitution of 1908

It was left to the 1907-08 convention to specify 60 days. The present constitution is couched in phrases perhaps thought to be self-executing. Present law places in the secretary of state the responsibility of publishing the statutes.

b. Distribution of Laws

Sec. 39, Part b. "... and shall be distributed in such manner as shall be provided by law."

Constitution of 1908

The 1850 constitution (IV-36) did not direct the distribution of the laws. This clause is therefore new.

Statutory Implementation

The statute providing for distribution is Act 44 of 1899, and there were earlier statutes on the subject. It was evident, therefore, that the legislature needed no prodding by constitutional provision to perform this function. And the legislature has kept the statutes distribution law up to date, having amended it substantially in 1958 (Act 161 of 1958).

Other State Constitutions

Only five state constitutions require the distribution of the laws. Missouri gives the governor the responsibility.[104]

c. Publication of Judicial Decisions

> Sec. 39, Part c. "The speedy publication of such judicial decisions as may be deemed expedient shall also be provided for by law."

Constitutions of 1835 and 1850

The 1850 constitution contained a like directive (IV-36).

Constitution of 1908

It should be noted that the present constitution provides for the publication of all acts of the legislature within 60 days after the adjournment of the session at which they are enacted. In the case of judicial decisions, however, the directive is much less explicit. Only such judicial decisions as may be deemed expedient need be published. And they are to be published speedily. There is no constitutional directive as to their distribution.

Statutory Implementation

The present statute on the subject is Act 385 of 1927, as amended. The act prior thereto was Act 168 of 1879. The law provides for the publication, by contract, and

[104] Index Digest, p. 597.

the distribution and sale of decisions of the supreme court.

d. Free Publication

Sec. 39, Part d. "All laws and judicial decisions shall be free for publication by any person."

Constitutions of 1835 and 1850

This provision (IV-36), which originated in the 1850 constitution, was carried over verbatim into the 1908 constitution.

Constitution of 1908

Opinions of the Attorney General

The text of a decision is not subject to copyright. But the attorney general ruled in 1955 (March 4, 1955, No. 1976) that the text of the syllabi, headnotes, footnotes, indexes, and references, of which the court reporter and the publisher are the authors, as they appear in the official reports and in the advance sheets, are subject to copyright.

Laws may be published by any person without permission from the state, said the attorney general in 1956 (No. 2452 April 13, 1956).

Other State Constitutions

Michigan, New York and Nevada are apparently the only states that require in the constitution that all laws shall be free for publication.[105] Only Michigan and New York require freedom of publication of judicial decisions.[106] The Model State Constitution has no provision in either case.

11. Revisions of Laws; Compilation

Article V: Section 40. No general revision of the laws shall hereafter be made. Whenever necessary, the legislature shall by law provide for a compilation of the laws in force, arranged without alteration, under appropriate heads and titles. Such compilation shall be prepared under the direction of commissioners, appointed by the governor, who may recommend to the legislature the repeal of obsolete laws and shall examine the compilation and certify to its

[105] Index Digest, p. 597.

[106] Ibid., p. 213.

correctness. When so certified, the compilation shall be printed in such manner as shall be prescribed by law.

a. General Revision Prohibited

Sec. 40, Part a. "No general revision of the laws shall hereafter be made. Whenever necessary, the legislature shall by law provide for a compilation of the laws in force, arranged without alteration, under appropriate heads and titles."

Constitutions of 1835 and 1850

There was no comparable provision in the 1835 constitution. The constitution of 1850 (Article XVIII, Section 15) provided that the legislature in joint convention should appoint a person to compile, without alteration, acts or parts of acts in force. The law so arranged was to be submitted to two commissioners appointed by the governor for examination and if approved by them as to accuracy, was to be printed in such manner as prescribed by law.

Constitution of 1908

The committee on miscellaneous provisions recommended that the entire section of the 1850 constitution be eliminated from the new constitution; they felt that the legislature should have complete power "to provide for compilations or revisions, in their discretion and judgment."[107] The convention, however, felt that the prohibition against general revisions should be retained.

Other State Constitutions

Seven states as well as the Model State Constitution (Article III, Section 313) authorize revisions.[108] Michigan is apparently the only state that prohibits it.

Comment

We must differentiate between a general revision, which is prohibited; a compilation, which is specifically authorized; and a codification, which is not prohibited and so therefore allowable.

A general revision of the laws would include within a single legislative act all of the statute law of the state. It would facilitate the alteration of the statutes to make them consistent one part with another. It would perhaps remove from the statutes

[107] Proceedings and Debates, p. 476.

[108] Index Digest, p. 598; Alaska constitution, Article II, Section 13.

that which is obsolete or obsolescent. But its danger lies in unseen changes in the law brought about by rephrasing and rearrangement. A general revision of the laws is law itself, supplanting earlier statute.

Before the 1850 constitution, there were several general revisions. The last one was accomplished in 1846. While much in the Revised Statutes of 1846 has a history of enactment prior thereto, it was all re-enacted at that time. The revision of 1846 is, however, the effective statute in force, in wording and form as therein appears, unless subsequently amended by the legislature.

A compilation, on the other hand, is not itself the statute law. Instead it is a bringing together by arrangement and indexing all of the then existing statutes. The earlier statute stands. If through error or oversight, or by deliberate design, a particular act is not included in the compilation, it is nevertheless still law. In the case of a general revision, however, an act not included would be repealed, unless saved by a provision in the revision itself.

A codification is a revision, but it is limited and special in scope, rather than general. A codification of laws, if it is not to infringe this constitutional provision, must be an act codifying the laws relating to a single subject. Thus, a codification of the laws relating to elections; a codification of the laws relating to drains; a codification of laws relating to motor vehicles; a codification of school laws; and by way of most recent example the revised judicature act of 1961 have been enacted. These codifications are not general revisions.

The 1961 session of the legislature has submitted an amendment to the constitution, to be voted upon in November, 1962, which would again allow a general revision of the laws. Article V, Section 40, would read as follows: “The legislature shall provide by law for the general revision of the statutes at such time and in such manner as it shall determine.”

The language in the amendment is so phrased as to suggest that the legislature could pass a law providing for the appointment of revisers, who would then proceed to revise; i.e., to rewrite the statute law. If the result of their work was submitted to the legislature in the form of a single bill for consideration and enactment, the evils of a codification (hidden changes in law) would be a thousand times compounded.

b. Compilations

> Sec. 40, Part b. “Such compilation shall be prepared under the direction of commissioners, appointed by the governor, who may recommend to the legislature the repeal of obsolete laws and shall

examine the compilation and certify to its correctness. When so certified the compilation shall be printed in such manner as shall be prescribed by law."

Constitutions of 1835 and 1850

The 1850 constitution (XVIII-15) provided different mechanics. There the legislature in joint convention appointed a compiler, who took his work to two commissioners appointed by the governor. If upon examination the two commissioners certified the compilation to be correct, the compilation was then printed as prescribed by law.

Constitution of 1908

Statutory Implementation

The latest compilation is the compiled laws of 1948. This was brought about by an act of the legislature of 1943, directing the compilation, which was there described as the Compiled Laws of 1945. Difficulties arising out of shortages during World War II, then in progress, together with a very great increase of volume in legislative acts, delayed the completion of the work.

Earlier compilations had not been kept current with the result the 1948 compilation bad to be done from the ground up, so to speak. Deeming it wise to avoid that situation in the future, the 1943 act provided for a continuing compilation commission. The legislature was persuaded to make annual appropriations to keep the type of the 1948 compilation set up, and as sections are amended from time to time to reset the type for those sections, all this in order to permit a reasonably prompt compilation when one is ordered.

In 1958, the compilation commission set up in 1943 was abolished. Its work of keeping the type up to date was transferred to the legislative service bureau. When another compilation is ordered by the legislature, the legislative service bureau will do all the work in connection therewith, except those functions of recommendation, examination, and certification which only commissioners appointed by the governor may constitutionally do.

As previously indicated, this language would be stricken if the proposed amendment to be voted on in November, 1962, is adopted.

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CHAPTER VI EXECUTIVE DEPARTMENT

(See over for Section detail)

Foreword to Chapter VI, Executive Department

The references to the Model State Constitution in Chapter VI are to the 1948 edition. Since Chapter VI was originally issued, the 1961 "preliminary Discussion Draft" of a revised Model has become available. The changes in the 1961 draft from the material cited in Chapter VI from the 1948 Model are shown below:

Page 6—The 1961 draft has dropped the provision for a general assistant to the governor.

Page 17—The 1961 draft contains new wording, but the only substantive change is an exception to the not-to-exceed 20 departments provision. In the 1961 draft, "regulatory, quasi-judicial or temporary agencies established by law may, but need not, be allocated within a principal department."

Page 2—The 1961 draft has eliminated the former provision requiring an administrative manager. The governor's power to appoint and remove department heads remains unchanged. All other officers in the administrative service are to be appointed and may be removed as provided by law—a change from the fifth edition.

Page 38—The civil service provision of the draft is greatly altered and is now brief: "The legislature shall provide for the establishment and administration of a merit system in the civil service of the state and of its civil divisions."

Page 4l—The 1961 draft omits the previous provision which entitled the governor, the administrative manager, and department heads to seats in the legislature and allowed them to introduce bills and discuss measures, but not to vote.

Page 43—Legislative vacancies are to be filled as provided by law. This is a change from the alternate processes set forth in the 1948 edition.

Page 44—This provision remains unchanged as it relates to the governor's power to call special sessions of the legislature. However, in the 1961 draft, the alternate method of calling special sessions is by the presiding officer on request of a majority of the members.

Page 49—The veto provision is largely rephrased, but there is little change of substance. The provision no longer requires a roll call vote on reconsideration of a vetoed bill to be entered on the journal.

Page 60—In the 1961 draft, the provision relating to the governor's power to grant "reprieves, commutations and pardons, after conviction, for all offenses" is changed

to the extent that he “may delegate such powers, subject to such procedures as may be prescribed by law.”

Page 66—The 1961 draft evidently contemplates a specified minimum age requirement for the governor.

Page 70—The 1961 draft is unchanged insofar as it has no provision for a lieutenant governor. The former provision requiring an administrative manager has been omitted in the draft.

Page 73—The provision in the 1961 draft for executive succession is changed substantially. The 1961 draft provision is detailed and comprehensive. The supreme court has full power in questions of the governor’s absence, disability or of a vacancy in the office.

VI EXECUTIVE DEPARTMENT

A. STATE OFFICERS

ARTICLE VI: Section 1. There shall be elected at each general biennial election a governor, a lieutenant governor, a secretary of state, a state treasurer, a commissioner of the state land office, an auditor general and an attorney general, for the term of two years. They shall keep their offices at the seat of government, superintend them in person and perform such duties as may be prescribed by law. The office of commissioner of the state land office may be abolished by law.

Constitutions of 1835 and 1850

The Michigan constitution of 1835 provided for the election by the voters of only the governor and lieutenant governor. Their terms were two years in length (Article V, Sections 1, 3). The secretary of state, attorney general and auditor general were appointed by the governor with consent of the senate for a tenure of two years. The state treasurer was appointed by the legislature in joint vote for a two-year period (Article VII, Sections 1, 2, 3). The superintendent of public instruction was appointed for a two-year period by the governor with consent of the legislature in joint vote (Article X, Section 1). The governor, secretary of state, treasurer and auditor general were required to keep their offices at the seat of government (Article XII, Section 8).

The present section is similar to and derived from provisions of the 1850 constitution. Election of and term of office for governor and lieutenant governor appear in the 1850 Article on the Executive Department (Article V, Sections 1,3). Election of and term of office for secretary of state, superintendent of public instruction, state treasurer, commissioner of the land office, auditor general and attorney general were provided for in the State Officers Article of the 1850 constitution (Article VIII, Sections 1, 2).

Constitution of 1908

In the 1908 constitution provision for election and term of the superintendent of public instruction was transferred to the Education Article. The term of office remained two years, but he was to be chosen at the spring election in odd-numbered years.[1] The records of the 1907-1908 convention do not indicate any controversy on

[1] 1908 Article XI, Section 2.

the matter of election and term of office for the various state officials. The convention of 1908 added a new requirement that state officials were to superintend their offices "in person." The debates of 1907-1908 indicate some concern with the evidently prevalent practice of state officials being frequently absent. The departments were actually administered by the deputy department heads, or chief clerks, it was asserted. Criticisms of such executive-administrative practices arose in the debate on fixing salaries for the elected officials and in the debate on the proposal for a budget system.[2]

Article VI provides for the election of the secretary of state, the state treasurer, the auditor general and the attorney general in addition to the governor and lieutenant governor for a two-year term. Article XI, Section 2 provides for the election of a superintendent of public instruction for a two-year term. Section 3 of the same article provides for the election of eight members of the board of regents of the University of Michigan for eight-year staggered terms. Section 6 provides for the election of three members of the state board of education (the fourth member is the superintendent of public instruction) for staggered six-year terms. Section 7 provides for the election of six members of the board of trustees of Michigan State University of Agriculture and Applied Science (formerly state board of agriculture) for six-year staggered terms. Section 16 provides for the election of six members of the board of governors of Wayne State University for six-year staggered terms.[3]

In spite of a degree of independence arising from their being elected separately from the governor, the elected department heads were not intended to be immune from gubernatorial supervision. This is clear from the wording of Section 3 of Article VI which charges the governor with faithful execution of the laws and allows him to require information in writing "from all executive and administrative state officers, elective or appointive." The last part of Section 1 provided for legislative discretion

[2] Proceedings and Debates, pp. 740-745, 1295-1300. The committee on submission of the 1908 constitution stated that this new requirement was "dictated by sound business principles and the growing importance of the offices specified." Ibid., p. 1424

[3] As a result of these provisions and the election of a highway commissioner under statutory authority, the voters of Michigan elect eight executive officials (including governor and lieutenant governor) and 23 members of educational boards for a total of 31. Comparative features relating to the matter of electing various state officers will be presented in this part—see Tables I and II below

to abolish the office of the commissioner of the state land office. This was the result of somewhat controversial consideration by the convention on the proposal to abolish this office.[4]

Statutory Implementation

Most of the duties of elected state officials, except the governor and lieutenant governor, are not specified in detail in the constitution, but are prescribed by law in accordance with Section 1.[5]

By statute (Public Act 270, 1913) the office of commissioner of the state land office was abolished as of December 31, 1914. The functions of the land office were transferred to the public domain commission.[6] The superintendent of public instruction was designated to take the place of and exercise the same powers as the commissioner of the land office on the board of state auditors and all other boards, committees or commissions of which the land commissioner was a member by virtue of his office.

Other State Constitutions

Comparative information relative to the number of officials popularly elected as opposed to the most common alternative of appointment by the executive (or other agency) is set forth in Tables I and II below.

[4] Proceedings and Debates, pp. 732-737, 1313, 1377.

[5] For details on the duties performed by the elected department heads see M.S.A. 3.1-3.77, 3.81-3.115,3.121-3.173,3.181-3.251; Michigan Manual 1959-1960, pp. 217-220; C. O. Baker, A Guide to the Work of Executive Agencies in Michigan, (University of Michigan, 1959) pp. 1-4, 18-22, 27-36, 135-136. The highway commissioner is elected for a four-year term under statutory authority. M.S.A. 9.202. For the duties of the superintendent of public instruction and the members of educational boards, see the discussion of Article XI on education.

[6] This law was pursuant to Section 20 of Article VI. The functions transferred to the public domain commission were later transferred to the conservation department upon the abolishment of the public domain commission. (Public Act 17, 1921)

TABLE I

ELECTIVE STATE OFFICIALS—EXECUTIVE-ADMINISTRATIVE

(Executive councils, legislative auditors, and agencies generally headed by boards are omitted.)

Number of Officials Elected by People	Number of States		Comments
1	4	New Jersey,* New Hampshire,* Tennessee, Maine*	
2	2	Hawaii, Alaska*	Hawaii It. governor acts as secretary of state; Alaska secretary of state elected as and in lieu of lt. governor.
3	2	Virginia, Maryland*	
4	2	New York, Pennsylvania	
5	3	Rhode Island, Wyoming,* Utah *	
6	10	Massachusetts, Minnesota, Delaware, Colorado, Connecticut, Missouri, Ohio, Vermont (1), Wisconsin, Oregon* (3)	Oregon secretary of state acts as auditor; attorney general statutory. Vermont attorney general statutory.
7	11	Texas (1), Nevada (1), Nebraska, Illinois, Indiana (1), Montana, California, Arkansas, Iowa (I), Arizona,* Florida*	Indiana attorney general statutory.
8	8	South Dakota, Kansas (1), Alabama, MICHIGAN (1), New Mexico, Kentucky, Idaho (1), South Carolina (1)	
9	4	Washington (1), North Dakota, Louisiana, Georgia	
10	4	Oklahoma, Mississippi (3), North Carolina, West Virginia* (3)	Oklahoma five-member commissions of agriculture and land not included.

*States having no lieutenant governor.

In parentheses the number of officials popularly elected under statutory rather than constitutional authority.

Derived from The Book of the States 1960-61, pp. 124-125.

TABLE II

COMPARATIVE FIGURES FOR SPECIFIC OFFICES ELECTED IN MICHIGAN*

Official	States in Which Appointed	States in Which Elected By Voters	States in Which Elected By Legislature**
Governor	-	50	-
Lieutenant Governor	-	38	1
Secretary of State	7	39	3
Attorney General	7	42	1
Treasurer	5	41	4
Highway Commissioner	37	2[a]	1
Superintendent of Public Instruction	27	23	-
Auditor General (or other official) with post-audit function:			
Appointed	10		
Mixed control without legislative participation—	4		
Elected—		17	
Mixed control with legislative participation—		4[b]	
Legislative Appointment or Control—			15[c]

*Except board of education and university boards -- see discussion of Article XI. This table is derived from The Book of the States, 1960-61, pp. 123-125, 134-139.

**Several states have executive officials elected by the legislature. Tennessee has 3 officers so elected under constitutional authority and the lieutenant governor is elected by the senate under statutory authority. Maine has four officers so elected one of which is statutory. New Hampshire has two officers and Maryland and South Carolina each have one officer so elected.

[a] Michigan and three-member highway commission in Mississippi

[b] Alabama, California, Florida, Mississippi.

[c] Alaska, Arizona, Arkansas, Connecticut, Georgia, Hawaii, Maine, Nevada, New Hampshire New Jersey, Rhode Island, South Dakota, Tennessee, Texas, Virginia

The Model State Constitution provides for the popular election of the governor alone in the executive branch of government with no lieutenant governor. However, the Model does provide for a general assistant to the governor (administrative manager) appointive by the governor and removable by him at pleasure. Under the U.S. Constitution the president and vice president are the only elective officials in the executive branch.[7]

Term of Office -- Comparative. By 1943, 27 states had adopted the four-year term for governor. By 1960, this number had risen to 35 states, an increase of eight four-year term states in 17 years, including all of the states with recently framed or revised constitutions, such as New York, Missouri, New Jersey, Hawaii and Alaska.

An increase in the length of terms for legislators (particularly senators) is likely to be related to the question of a four-year executive term. In 1943, 31 states had a four-year senate term. By 1960, this number had increased to 35. Seven states with a four-year term for governor have a two-year term for senator and seven states have the reverse of this, so that 35 states have a four-year governor's term and 35 have a four-year senate term. Table III follows:

TABLE III

TERMS OF OFFICE

Governor's Term	Senate Term	House Term	Number of States
4 years	4 years	4 years	4
4 years	4 years	2 years	24*
2 years	4 years	2 years	7
4 years	2 years	2 years	7
2 years	2 years	2 years	8**

* Includes Minnesota—four-year term for governor, effective in 1962.

**Includes Michigan, and Nebraska's unicameral legislature

Derived from The Book of the States 1960-61, The Council of State Governments, Chicago, pages 37 and 122.

[7] Most of the states having new or recently revised constitutions have either reduced the number of executive officials to be elected (as in New York, Missouri, California and Virginia) or eliminated all such elective officials except governor and lieutenant governor, as in New Jersey (no lieutenant governor), Hawaii, and Alaska.

More than four-fifths of the states now have either a four-year term for the governor or for the state senate, and more than half of the states (28) have a four-year term for both governor and senate.

Restriction on Number of Term. Twenty-eight states, including Michigan, have no restriction on the number of terms a governor may serve. In 15 states, a governor may not succeed himself, but may become governor later. These states all have a four-year term for the governor. In six others, there is a limit of two consecutive terms (but later election allowed). In only one of these (New Mexico), the term is for two years. In Delaware, the governor may have only two four-year terms.[8]

Election in Non-Presidential Years. Of the 35 states with a four-year term for governor, 25 do not elect the governor at the time of the presidential election. In 21 of these 25 states the governor is elected at the biennial election midway between presidential elections.[9] In four of these states the governor is elected at off-year or other elections. The other ten states with the four-year term elect the governor at the time of the presidential election.[10]

Comment

Some consideration would undoubtedly be given in the constitutional convention to reducing the number of executive officials to be elected. The most general alternative to popular election of executive officials is gubernatorial appointment (with or without consent of senate) and removal (at pleasure or for cause). This matter would be related to the general issue of deciding the future extent of executive authority to be granted to the governor. It would therefore be considered in connection with the questions: should the governor be given wide authority in the executive-administrative department, having subordinates (department or agency heads) more strictly responsible to him?[11] — should the governor have increased power of appointment and removal? (See below — Parts B and C.)

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[8] The Book of the States, p. 122; Index Digest of State Constitutions (1959), p. 508.

[9] This is usually intended to allow state candidates and issues to be voted on separately from those involved in national elections, with which there is often little connection. Each biennial election thereby tends to attract the interest of voters, since election of either a president or a governor occurs each two years.

[10] The Book of the States, p. 122; Index Digest, pp. 498-499.

[11] Election of department heads naturally tends to give them some independence of gubernatorial direction and responsibility.

If it were decided that the number of elected executive officials is to be reduced, consideration might also be given to providing that such officials could not be made elective by statutory authority. Statutory election of officials is not uncommon among the states (see Table 1) and the highway commissioner in Michigan is elected under such authority.

In view of the growing acceptance of the four-year term among the states and the fact that it has been recommended by every major study of Michigan government for over 40 years,[12] the four-year term for governor and lieutenant governor and other elective executive officials (if not made appointive) would undoubtedly be considered.[13] The duties of the elective department heads in most cases do not really differ from those assigned to appointive department or agency heads. The functions of these elective department heads would probably be considered in relation to those of the many other department and agency heads, the general problems of executive-administrative integration and gubernatorial responsibility in the executive branch.

[12] The Community Council Commission, 1920; Commission on Reform and Modernization of Government, 1938; the Constitutional Revision Study Commission. 1942; and the Joint Legislative Committee on Reorganization of State Government ("Little Hoover" Study), 1951

[13] The elective auditor general in Michigan is now largely confined to the post-audit function. Most government specialists urge that this function. or the officer responsible for it should be independent of executive control. and preferably appointive by and responsible to the legislature.

B. GENERAL POWERS OF THE GOVERNOR

ARTICLE VI: Section 2. The chief executive power is vested in the governor.

Section 3. The governor shall take care that the laws be faithfully executed; shall transact all necessary business with the officers of government; and may require information in writing from all executive and administrative state officers, elective and appointive, upon any subject relating to the duties of their respective offices.

Constitutions of 1835 and 1850

The constitution of 1835 (Article V, Sections 1, 6, 7) provided that the "supreme executive power shall be vested in a governor;" that he "shall transact all executive business with the officers of government, civil and military; and may require information, in writing, from the officers in the executive department, upon any subject relating to the duties of their respective offices;" and that he "shall take care that the laws be faithfully executed."

The constitution of 1850 (Article V, Sections 1, 5, 6) stated that the "executive power is vested in a governor;" that he "shall transact all necessary business with officers of government, and may require information in writing from the officers of the executive department upon any subject relating to the duties of their respective offices;" and that he "shall take dare that the laws be faithfully executed."

Constitution of 1908

As reported by the convention's committee on the executive department, the wording of Section 2 would have reverted to that of the 1835 constitution—the "supreme executive power is vested in a governor." A motion that "supreme" be stricken and no word inserted carried and temporarily the section remained as it had been in the 1850 constitution. The word "chief" was later inserted upon the recommendation of the arrangement and phraseology committee.[14] The debates do not indicate the purpose of those who wanted the wording of this provision changed or of those

[14] Proceedings and Debates, pp. 706, 1141, 1171, 1301, 1379, 1424.

opposed to the change. Probably those who wanted "supreme" or "chief" inserted before "executive power" thought that it might enhance the executive power of the governor.[15]

The major change from the similar provisions of the previous constitutions was the clarification in Section 3 that the governor could require written information from administrative as well as executive state officers, elective and appointive. While executive officers could easily be interpreted as including most or all administrative officers, there was justification for removing any doubt on this matter, since the debate on this section indicated that some question had arisen as to the governor's power to require information from the elective state treasurer (on the grounds that he was a state officer rather than an executive officer). The insertion of the words "elective and appointive" was specifically intended to clarify the full extent of this power.[16]

In the debate on the proposed executive budget, which was finally defeated, one delegate who supported the executive budget expressed the view that "it is time in the state of Michigan that we begin to get into such a condition, so that sometimes and under some conditions we can fix some responsibility upon some one." However, the traditional fear of gubernatorial power appeared in this and other debates, including that on the proposal for the item veto.[17]

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[15] However, some have interpreted it as actually weakening the governor's authority, insofar as it can be understood as limiting the amount of executive power vested in the governor to that of the "chief executive power," and not all of the executive power. See Report of the Michigan Community Council Commission to the Michigan State Legislature, based upon an organization survey of the Institute for Public Service of New York City, 1920, pp. 31, 39. General Management of Michigan State Government, Staff Report No. 30 to the Michigan Joint Legislative Committee on Reorganization of State Government, 1951, p. II - 11. In view of the provision for other elected executive officials there is some reason for this interpretation. However, since Professor Fairlie (one of the early advocates of strengthening the governor's powers) favored the new phraseology and since the convention expressly increased the governor's power to require information in Section 3, the real intent to increase gubernatorial authority seems more reasonable.

[16] These changes were adopted as amendments to the original committee proposal despite objections that the 1850 provision should not be changed because the courts had interpreted it. Proceedings and Debates, pp. 305-307. Notes accompanying the submission of the 1908 constitution explained this change as making it clear that the governor might "exercise the fullest power of inquiry as to all other state officers." Proceedings and Debates, p. 1424.

[17] Proceedings and Debates, pp. 742-745, 412, 492-494.

In regard to administrative reorganization, a strenuous debate was generated over the proposal to require "separate central boards of control" to manage "all state institutions of an allied or kindred nature." First, an amendment was adopted merely to permit the legislature to establish such boards. Later the whole proposal was rejected. Those who favored the central boards complained of the legislature's habit of greatly increasing the number of boards. Mr. Fairlie, among others, pointed out the success of central boards in other states and the resulting decrease in expenditure.[18]

Statutory Implementation

There is no constitutional provision that relates to a method of establishing other departments and agencies than those headed by elected officers or by the few boards having constitutional status. However, other departments existed before the framing of the 1908 constitution. This constitutional gap has evidently been interpreted by the legislature as allowing them wide discretion in establishing other departments and agencies and providing for their executive heads.[19]

There are now approximately 123 state executive-administrative agencies recognized by the department of administration's budget division. These include the departments headed by the elective state officials, those agencies headed by single directors appointed by the governor (some with and some without consent of senate), those agencies (the most numerous) headed by boards and commissions with members appointed by the governor with or without restrictions (some with and some without consent of the senate), some elected boards and some in whole or part ex-officio in membership.

The vast number of agencies in Michigan intensifies the problem of gubernatorial supervision. Many agency heads, particularly those of the board and commission variety, have longer terms of office than the governor and the policies of a new governor may be obstructed as a result of this and other features which promote insulation of various agencies from executive direction. A listing of most of the executive-administrative agencies in Michigan is given following the comment on Sections 2 and 3.

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[18] Proceedings and Debates, pp. 411-415.

[19] Mr. Burton explained that the constitutional convention's committee on the executive department supposed that the "five superior executive officers" (governor, secretary of state, state treasurer, attorney general and auditor general) would ultimately have under their direction all the inferior state officers. Proceedings and Debates, pp. 744-745. This probably explains at least in part the failure to provide a framework for other agencies to be established by statute, or for those already so established.

Two major institutions have been developed in an endeavor to provide under the governor's direction some coordination of this multiplicity of agencies.

The State Administrative Board originated as a part of the reorganization plan fostered by Governor Groesbeck (in place of the community (council commission plan). This board, established by statute in 1921, was intended to centralize administrative direction under the control of the governor, with seven elective officers as members (the lieutenant governor was added in 1939). This board was an effective instrument of executive direction under Governor Groesbeck who had full control over the board. In 1927, however, its statutory framework was changed and the administrative board became a plural executive in that five members could override the governor's veto of board directives. This statutory board continues to be the most powerful instrument of general state administrative control, except perhaps for the governor.[20]

The department of administration was established in 1948 (Public Act 51, 1948) at the urging of Governor Sigler. It replaced the less effective department of business administration authorized in 1943. In the department of administration were combined the instruments of administrative fiscal control and service management functions, including: accounting, budgeting, purchasing, motor transport, building and property management, and office services.[21] The head of the department, the controller, is appointed by the governor with consent of the senate to serve at the pleasure of the governor.

Because the head of this department is effectively responsible to the governor, the establishment of this agency has aided the governor in the area of administrative management. However, statutorily required review and approval of many policy matters in the department's areas of operation by the state administrative board are limitations upon the governor's direct responsibility through the controller. Lines of authority in the relationship between the department of administration and the administrative board are somewhat hazy. Some liaison is provided by the

[20] For the impact of this statutory board on the executive power 0 the governor under Sections 2 and 3 of Article VI, see G. C. S. Benson and E. H. Litchfield, The State Administrative Board in Michigan, Univ. of Michigan, 1948; F. M. Landers and H. D. Hamilton, "State Administrative Reorganization in Michigan, The Legislative Approach," 14 Public Administration Review (1954), 99-111; General Management of Michigan State Government, Staff Report No. 30 (1951) to the Legislative Committee on Reorganization; Preliminary Report, Michigan Commission on Reform and Modernization of Government, 1938.

[21] Except for personnel—constitutionally restricted to the civil service commission by the amendment of 1940.

controller acting as secretary to the administrative board.[22] Michigan is one of only a few states having an executive agency of this kind—concerned with the budget and various service management functions.[23]

The Executive Organization Statute of 1958 (Public Act No. 125) was enacted as an attempt to deal with the problem of proliferation of agencies in the executive-administrative branch of Michigan government by consolidation and integration of them. Under this statute, the governor may submit executive reorganization plans to the legislature. Any such plan may then be implemented by executive order unless either the senate or the house disapproves of it within 60 days. In this way the governor is given initiative in administrative reorganization, while either branch of the legislature may exercise its veto check. The legislature, however, retains its own prerogatives of legislating in the executive-administrative organization field. This device has been used by the federal government for many years and its constitutionality has not been successfully challenged.[24]

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[22] Some complications have also developed in the relationship between the department of administration and the constitutionally independent civil service commission. The department has taken over most of the pre-audit function formerly carried on by the auditor general.

[23] See F. Heady and R. H. Pealy, The Michigan Department of Administration, Univ. of Michigan, 1956, pp. 11-69; J. A. Perkins, "State Management Limited," 39 National Municipal Review (1950) 72-78; C. O. Baker, Guide to Executive Agencies (1959), pp. 1-4,6-12,37; A Manual of State Government in Michigan (1949). On problems relating to the executive budget subsequent to the budget acts of 1919 and 1921, and prior to the establishment of the department of administration, see J. A. Perkins, The Role of the Governor in Michigan in the Enactment of Appropriations, 1943.

[24] T. B. Mason, "Miracle in Michigan", 47 National Municipal Review (1958) 318-324; L. W. Eley, "Executive Reorganization in Michigan," 32 State Government (1959) 33-37. The governor's advisory committee on reorganization has not yet formulated plan for wide-scale, comprehensive reorganization. Problems in limited areas have been dealt with and some of the proposals submitted to the legislature by the governor have been enacted by statute in order to avoid use of the new reorganization process as result of controversy concerning the statute's "constitutionality." The Alaska constitution has a provision similar to the Michigan statute—see below. The Missouri constitution has a provision whereby the governor has wide power in executive organization without the legislative veto—see below.

Other State Constitutions

A majority of state constitutions vest the governor with the "supreme executive power." The constitutions of seven states, including Michigan, vest the governor with the "chief executive power." Approximately 12 state constitutions, including most of those which provide for more executive responsibility, resemble the Model State Constitution and the U.S. Constitution in vesting the governor with "the executive power." Almost all state constitutions charge the governor with faithful execution of the laws in language identical to the Michigan provision, while in a few the wording varies slightly.[25] Provisions similar to Michigan's that the governor shall "transact all necessary business with the officers of government" are not unusual among state constitutions.[26] Power to require information in writing is provided for in most state constitutions. However, New Jersey and Alaska have extraordinary provisions (like that in the Model State Constitution) whereby the governor may enforce compliance with, or prohibit violation of, constitutional-statutory mandates by initiating proceedings in the courts, except such action may not be brought against the legislature.[27]

Executive Organization. The problem of administrative fragmentation resulting from the general tendency of state executive departments and agencies to increase greatly in number is not unusual among the states. Several states, particularly those with new or revised constitutions, have attacked this problem by setting a constitutional maximum number of departments (in most instances 20) thereby forcing integration and consolidation of agencies in a limited number of departments that can be more adequately supervised by the governor.[28]

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[25] Index Digest, p. 473, Provisions of the Model State Constitution and the U.S. Constitution are similar also.

[26] Neither the Model State Constitution nor the U.S. Constitution contains a similar provision.

[27] Index Digest, pp. 504-505, 843-844

[28] Some states have approached this problem by statutory process insofar as the lack of constitutional and other obstacles would permit. However, various obstacles in the way of effective statutory reorganization in many states have contributed to the movement for a constitutional mandate for administrative reorganization within the framework of a specified maximum number of departments.

Eight states now have some form of restriction on the number of executive departments (or agencies). The Missouri constitution specifies a maximum of 14 departments. The most common maximum number specified is 20 in New Jersey, Alaska, Hawaii, New York, and Massachusetts.[29] The Arkansas constitution provides that no permanent state office can be created that is not provided for in the constitution. Nebraska provides that no executive office can be established by statute except by two-thirds vote of all members of the unicameral legislature.[30]

The New Jersey constitution of 1947 provides as follows (Article V, Section IV):

> 1. All executive and administrative offices, departments, and instrumentalities of the State government, including the offices of Secretary of State and Attorney General, and their respective functions, powers and duties, shall be allocated by law among and within not more than twenty principal departments, in such manner as to group the same according to major purposes so far as practicable. Temporary commissions for special purposes may, however, be established by law and such commissions need not be allocated within a principal department.
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> 2. Each principal department shall be under the supervision of the Governor. The head of each principal department shall be a single executive unless otherwise provided by law.

[29] In Massachusetts, some constitutional exceptions have helped to vitiate the mandatory effect of the maximum number specified. The New York provision inflexibly specified the names of the various departments (with resultant problems and a movement to eliminate department names by amendment).

[30] Index Digest, pp. 471-473, and constitutional provisions. For problems relating to state administrative organization see: B. M. Rich, State Constitutions: The Governor (National Municipal League, 1961); F. Heady, State Constitutions: The Structure of Administration (National Municipal League:—1961); The Council of State Governments, Reorganizing State Government (1950); Public Administration Service Constitutional Studies (Prepared for the Alaska Constitutional Convention, 1956, three volumes) Volume II; L. S. Milmed, State Administrative Organization and Reorganization (New Jersey constitutional study, 1947); H. E. Scace, The Organization of the Executive Office of the Governor (1950); C. B. Ransome, Jr., The Official Governor in the United States (Univ. of Alabama, 1956). Some of these and other studies indicate growing concern with the number of multi-headed state executive-administrative agencies (boards and commissions). Many urge restriction of boards and commissions to functions clearly quasi-legislative-judicial, or merely advisory functions, with all other departments or agencies headed by single directors responsible to the governor.

The Alaska constitution (1956) has the following provision (Article III):

> Section 22. All executive and administrative offices departments, and agencies of the state government and their respective functions, powers, and duties shall be allocated by law among and within not more than twenty principal departments, so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may be established by law and need not be allocated within a principal department.
>
> Section 23. The governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders. The legislature shall have sixty days of a regular session, or a full session if of shorter duration, to disapprove these executive orders. Unless disapproved by resolution concurred in by a majority of the members in joint session, these orders become effective at a date thereafter to be designated by the governor.
>
> Section 24. Each principal department shall be under the supervision of the governor.
>
> Section 25. The head of each principal department shall be a single executive unless otherwise provided by law. . .

The Hawaii constitution (1950) provides (Article IV):

> Section 6. All executive and administrative offices, departments and instrumentalities or the state government and their respective functions, powers and duties shall be allocated by law among and within not more than twenty principal departments in such manner as to group the same according to major purposes so far as practicable. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

> Each principal department shall be under the supervision of the governor and unless otherwise provided in this constitution or by law, shall be headed by a single executive.

The Missouri constitution of 1945 provides (Article IV, Section 12):

> The executive department shall consist of all state elective and appointive officials and employees except the officials and employees of the legislative and judicial departments. In addition to the governor and lieutenant governor there shall be a state auditor, secretary of state, attorney general, a state treasurer and a department of revenue, department of education, department of highways, department of conservation, department of agriculture, and such additional departments, not exceeding five in number, as may hereafter be established by law. Unless discontinued all present or future boards, bureaus, commissions and other agencies of the state exercising administrative or executive authority shall be assigned by the governor to the department to which their respective powers and duties are germane.

The fifth edition (1948) of the Model State Constitution provides (Article V):

> Section 506. Administrative Departments. There shall be such administrative departments, not to exceed twenty in number, as may be established by law, with such powers and duties as may be prescribed by law. Subject to the limitations contained in this constitution, the legislature may from time to time assign by law new powers and functions to departments, offices and agencies, and it may increase, modify, or diminish the powers and functions of such departments, offices, or agencies, but the governor shall have power to make from time to time such changes in the administrative structure or in the assignment of functions as may, in his judgment, be necessary for efficient administration. Such changes shall be set forth in executive orders which shall become effective at the close of the next quarterly session of the legislature, unless specifically modified or disapproved by a resolution concurred in by a majority of all the members.

> All new powers of functions shall be assigned to departments, offices or agencies in such manner as will tend to maintain an orderly arrangement in the administrative pattern of the state government. The legislature may create temporary commissions for special purposes or reduce the number of departments by consolidation or otherwise.

Comment

The governor of Michigan has been vested successively with the "supreme executive power" (constitution of 1835), the "executive power" (constitution of 1850, and the "chief executive power" (present constitution). The executive powers actually granted to the governor (or denied to others in the executive department) in a revised constitution will have far more influence upon this office than the choice of words with which the power is vested. The words "chief" or "supreme" can be variously interpreted as enhancing his power or restricting it (not all executive power). The powers (and responsibility) of the governor are presently restricted by various constitutional and statutory features—to some extent negating the mandate in Section 3 that he "shall take care that the laws be faithfully executed."

The basic decision concerning the extent of the governor's authority and responsibility in the executive branch will be affected not only by the future constitutional framework for executive organization but also by the future extent of his power to appoint and remove department or agency heads. The organization of the executive branch in Michigan has been adversely criticized in major governmental studies for some 40 years.[31] Since there is room for doubt that 123 separate departments and agencies are necessary, some consideration might be given to establishing a constitutional maximum number of departments and to providing for gubernatorial initiative in executive organization and reorganization procedure.

[31] Particularly the proliferation of agencies and diffusion of, executive power: Community Council Commission (1920), the Commission on Reform and Modernization of Government (1938) and the "Little Hoover" Committee (1951).

STATE AGENCIES*

State Agencies Headed By A Single Director

Adjutant General
Administration, Department of
ATTORNEY GENERAL
AUDITOR GENERAL
Banking Department
Civil Defense, Office of
Corporations & Securities Commission
EXECUTIVE OFFICE
Health, Department of
Highway Department
Hospital Survey & Construction, Office of
Insurance, Department of
Labor, Commissioner of
LIEUTENANT GOVERNOR
Police, Michigan State
Quartermaster General
Racing Commission
Revenue, Department of
SECRETARY OF STATE
STATE TREASURER
SUPERINTENDENT OF PUBLIC INSTRUCTION

State Agencies Headed By A Board Or Commission

Accident Fund, Advisory Board for
Accountancy, Board of
Administrative Board
Aeronautics, Department of
Agriculture, Board of
Agriculture, Department of
Agriculture Marketing Council
Alcoholism, Board of
Apple Commission
Architects, Engineers, Surveyors, Board of Registration of
ASSESSORS, STATE BOARD OF
Athletic Board of Control
Barbers, Board of Examiners of
Basic Sciences, Board of Examiners in
BOARD OF STATE AUDITORS
BOARD OF GOVERNORS, WAYNE STATE UNIVERSITY
BOARD OF REGENTS, UNIVERS ITY OF MICHIGAN
BOARD OF TRUSTEES, MICHIGAN STATE UNIVERSITY

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* Agencies having constitutional status are in capital letters.

State Agencies Headed By A Board or Commission (Con't)

Board of Review of State Police Pensions
Bridge Commission
Building & Loan Appeal Board
Building Commission
Building Safety Council
CANVASSERS, BOARD OF
Chiropody, Board of Registration in
Chiropractic Examiners, Board of
CIVIL SERVICE COMMISSION
Conservation, Department of
Corporate Privilege Tax Appeal Board
Corrections, Department of
Cosmetology, State Board of
Crippled Children Commission
Dentistry, State Board of
Economic Development, Department of
EDUCATION, STATE BOARD OF
Electrical Administration Board
Emergency Appropriations Commission
Employees' Retirement Board, State
Employees Security Advisory Council
Employees Security Commission
Employees Security Commission Appeal Board
EQUALIZATION, BOARD OF
ESCHEATS, BOARD OF
Fair Employment Practices Commission
Ferris Institute, Board of Control for
Foresters, Board of Regis. of
Fund Commissioners, Board of
Great Lakes Basin Compact Commission
Great Lakes Tidewater Commission
Health, Council of
Highway Reciprocity Board
Historical Commission, Michigan
Hospital Council, Advisory
Hotel Inspection Commission
International Bridge Authority
Interstate Cooperation, Commission on
Judges' Retirement Board
Labor Mediation Board
Law Examiners, Board of
Legislative Retirement System
Libraries, State Board for
LIQUOR CONTROL COMMISSION
Mackinac Bridge Authority
Mackinac Island State Park Commission
Medicine, Board of Registration in
Mental Health, Department of

* Agencies having constitutional status are in capital letters

State Agencies Headed by A Board or Commission. (Cont.)

Michigan Cherry Commission
Michigan College of
Mining & Technology, Board of Control for
Michigan Turnpike Authority
Michigan Veterans' Facility Military Board
Mortuary Science, Board of Examiners in
Municipal Employees Retirement Fund Board
Municipal Finance Commission
Naval Board, State
Nursing, Board of
Nursing, Advisory Council to Board of
Optometry, Board or Examiners in
Osteopathic Regis. & Exam. State Board of
Parole Board
Pharmacy, Board of
Plumbing Board
Probate Judges' Retirement Fund
Public School Empl. Ret. Fund Board
Public Service Commission
Recreation, Inter-Agency Council. for
Safety Commission, State
Sault Ste. Marie Locks Cen. Commission
Social Welfare Commission
Soil Conservation Committee
State Fair Commission
Tax Appeals, State Board of
TAX COMMISSION, STATE
Teachers' Tenure Commission
Tourist Council
Tuberculosis Sanatorium Commission
Uniformity of Legis., Board for Promotion of
Veterinary Exam., Board of
U.P. State Fair, Board of Managers of
Veterans' Benefit Trust Fund, Board of
Vocational Education, Board of Control for
Vocational Rehabilitation, Board of Control for
Water Resources Commission
Waterways Commission, State
Workmen's Compensation Appeal Board
Workmen's Compensation Department

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* Agencies having constitutional status are in capital letters

C. THE GOVERNOR'S POWER OF APPOINTMENT AND REMOVAL

1. Power of Appointment

Article VI: Section 10. Whenever a vacancy shall occur in any of the state offices, the governor shall fill the same by appointment, by and with the advice and consent of the senate, if in session.

Constitutions of 1835 and 1850

Under the 1835 constitution (Article V, Section 12), the governor had a wide power of appointment, particularly of his major subordinate officials, in contrast to his power under the later constitutions. When a vacancy occurred he was to fill it by granting a commission to the appointee which would expire at the end of the next legislative session. Even vacancies in offices ordinarily appointed by the legislature were to be filled in this way. In the 1850 constitution (Article VIII, Section 3), this provision was the same as the 1908 provision.

Constitution of 1908

Article VI, Section 10 has not been amended since the adoption of the present constitution. This section provides for gubernatorial appointment power only to fill vacancies. Since there is no general method provided in the constitution for gubernatorial appointment of officers, appointment (or other procurement) of heads of agencies not having constitutional status has been provided for by a variety of statutes (see below).

Other Provisions for Appointment. Other provisions of the 1908 constitution relate to the governor's power of appointment.

Gubernatorial power to appoint commissioners to compile state laws is in Article V, Section 40. Specific vacancies in various offices to be filled by gubernatorial appointment are also provided for: delegate to a constitutional convention (Article XVII, Section 4); judge of courts of record until a successor is elected and qualified for the remainder of the unexpired term (Article VII, Section 20); regent of the university (Article XI, Section 3); a state officer under impeachment who has been suspended by the governor (Article IX, Section 5). In addition to these, Article XVI, Section 5 states that the legislature "may provide by law the cases in which any office shall be deemed vacant and the manner of filling vacancies, where no provision is made in this constitution."

Statutory Implementation

Present statutes in force which implement Article VI, Section 10 and other appoint-

ment provisions listed above presently provide a uniform method of appointment to fill vacancies in executive-administrative offices.[32] The constitution does not provide a manner of procuring heads of agencies not having constitutional status. Because of this gap in the constitution, the legislature has assumed wide discretion in this area and statutorily provided for a wide variety of methods of appointment, types of agency head (single or multiple), and terms of office (in many instances longer than the governor's). These matters are dealt with in the numerous statutes whereby the scores of agencies not having constitutional status have been established. Most of the single directors of the 20-odd agencies having such are appointed by the governor (some with, and some without, consent of senate).[33] Most of the 120-odd agencies in the state are headed by boards and commissions, some 17 of which are in whole or part ex-officio.

The governor appoints (sometimes with, sometimes without, consent of senate) the members of about 80 of the existing boards and commissions. However, in many cases, the governor is restricted to appointment of persons nominated by private professional or occupational groups.[34]

Judicial Interpretation

Article VI, Section 10 has been interpreted to apply only to, vacancies in executive offices having constitutional status. The term of officers appointed to fill such vacancies has been interpreted to mean until their successors are elected and qualified. However, under authority of Article XVI, Section 5 statutory restriction of the

[32] M.S.A. 6.711.

[33] Several of the single-headed agencies are, of course, directed by elective officers..

[34] The reorganization ("Little Hoover") study of 1951 pointed out the lack of logical pattern in the manner of appointment, removal, term of office, etc. for single-headed and multi-headed agencies. General Management of Michigan State Government Part II; see also Baker, Guide to Executive Agencies. Most boards and commissions have the power to appoint their administrative director, and thus these agencies tend to be somewhat insulated from gubernatorial direction (not only through problems inherent in the operation of a board or commission, but also by the tendency of a board or commission to stand between the active administrator of an agency and the governor). In most cases, statutory provisions for appointment of agency heads with consent of senate and for those without consent of senate seem to bear no general relation to their relative need or lack of need for closer responsibility to the governor.

term until the next session of the legislature of an officer appointed to fill a vacancy in an office not having constitutional status was upheld by the court.[35]

Opinion of the Attorney General

In 1934, the attorney general held that if the governor filled a vacancy by appointment while the legislature was in session and confirmation was later refused by the senate, the governor could not appoint the same person to that office when the legislature had adjourned.[36]

Other State Constitutions

The most common method of procuring heads of major departments (other than those elected) among the states is by gubernatorial appointment with the consent of the senate.[37] Comparative data for all of the states on gubernatorial power to appoint many of the more important department heads are indicated by the table inserted following this page.[38]

Among the more recent state constitutions, the New Jersey Constitution (Article V, Section IV) after specifying that the head of each of the not more than 20 principal departments "shall be a single executive unless otherwise provided by law," provides that these single executives shall be appointed by the governor with consent of the senate to serve at the governor's pleasure, except that the secretary of state and attorney general shall be so appointed to serve during the governor's term. The

[35] Attorney General v. Oakman, 126 Mich. 717. Present statutes, however, provide for a uniform process of appointment to vacancies in executive-administrative offices. M.S.A. 6.711.

[36] Many states have explicit constitutional provisions to this effect.

[37] A preponderance of state governmental specialists favor increasing the governor's power to appoint department heads (with or without consent of senate). The U.S. Constitution and some recent state constitutions provide for wider power of appointment by the chief executive than do most other state constitutions. There has been a trend for some years in many states for increase in the governor's power of appointment and removal by statutory enactment insofar as the lack of constitutional obstacles would permit. The Council of State Governments, Reorganizing State Government (1950) pp. 20-27; The American Assembly, The Forty-Eight States: Their Tasks as Policy Makers and Administrators (1955) pp. 112-115; General Management of Michigan State Government, Part II.

[38] From The Book of the State 1960-61, p. 123.

State	Sec. of State	Treasurer	Auditor (a)	Attorney General	Tax Commission	Administration and Finance	Budget Officer	Comptroller (a)	Education	Agriculture	Labor	Health	Welfare	Insurance	Highways	Conservation
Ala.	E	E	E	E	G	G	DG (b)	DG (b)	E	E	G	B	B	G	G	G
Alaska	E	O	O	GSH	GSH	GSH	G	DG (b)	GSH	D	GSH	GSH (c)	GSH (c)	D	D	O
Ariz.	E	E	E	E	E	O	O	O	E	G	GSH	GSH (c)	GSH (c)	(d)	GS	G
Ark.	E	E	E	E	G	O	DG	G	B	O	GS	BG	GSH (c)	GS	B	BG
Calif.	E	E	L (e)	E	E	GS	(f)	E	E	GS	GS	GS	GS	GS	G	GS
Colo.	E	E	E	E	CS	O	CS	CS	B	CS	CS	CS	CS	CS	CS	CS
Conn.	E	E	L	E	GE	DG	E	B	GE	GE	GE	GE	GE	GE	GE	GE
Dela.	GS	E	E	E	GS	O	B (g)	O	B	B	B	B	B	B	B	B
Fla.	E	E	GS	E	E (h)	O	G (i)	E (h)	E	E	G	GS	G	E	G	B
Ga.	E	E	L (j)	E	GS	O	G (j)	E (k)	E	E	E	GS	GS	E (k)	L	O
Hawaii (l)		GS (m)	L	GS	GS	O	GS	GS	B	GS (n)	GS	GS	GS	GS (m)	GS	GS (n)
Idaho	E	E	E	E	GS	O	G	O	E	GS (n)	GS	GS	GS	GS (m)	GS	O
Ill.	E	E	GS (o)	E	GS	GS	(f)	O	E	GS	GS	GS	GS	GS	G	GS
Ind.	E	E	E	E	GS	O	G	O	E	E (p)	G	G	G	G	G	G
Iowa	E	E	E	E	GS	O	GS (q)	GS	B	E	GS	GS	GS	GS	GS	GS
Kan.	E	E	E	E	GS	G	DG (b)	DG (b)	E	B	GS	GS	B	E	G	O
Ky.	E	E	E	E	GS	GS	DG	DG	E	E	GS	B	G	G	G	G
La.	E	E	O	E	GS	GS	G (s)	E	E	E	G	GS	B (r)	E	B (r)	GS
Maine	L	L	L	L	DG	GC	DG	DG	B	L	GC	GC	GC	GC	GC	GC
Md.	GS	L	G	E	GS	G (s)	G (s)	E	B	GS	G	B	B (r)	G	G	G
Mass.	E	E	E	E	GC	GC	GC	GC	B	GC	GC	GC	GC	GC	GC	GC
Mich.	E	E	E	E	GS	G (t)	G (t)	G (t)	E	GS	GS	GS	GS	GS	E	GS
Minn.	E	E	E	E	GS	GS (s)	GS (s)	O	B	GS	GS	B	GS	GS	GS	GS
Miss.	E	E	E	E	GS	O	G	G (t)	E	E	O	GS	GS	E	E	B
Mo.	E	E	E	E	GS	GS (t)	GS (t)	GS (t)	B	GS	GS	GS	GS	GS	GS	B
Mont.	E	E	E	E	G	O	G	GS (t)	E	GS	GS	GS	GS	E	G	O
Nebr.	E	E	E	E	GS (u)	O	GS (u)	O	B	GS	GS	B	GS	GS	GS	O
Nev.	E	E	E	E	G	O	G	E	B	B	G	B	B	G	B	G
N.H.	L	L	l	l	SC	GC (t)	GC (t)	GC (t)	B	GC	GC	B	B	GC	GS	O
N. Jer.	GS	GS	GS	GS	GS	GS	GS (q)	GS	GS	BG	GS	GS	BG	GS	G	GS
N. Mex.	E	E	E	E	GS	G (v)	DG	O	B	GS	GS	GS	GS	E (w)	GS	O
N. York	GS	GS	GS	GS	GS	O	G	E	B	GS	GS	GS	B	GS	B	GS
N. Car.	E	E	E	E	G	G	D	O	E	E	E	GS	G	E	GC	GS
N. Dak.	E	E	E	E	E	O	B (x)	O (x)	E	E (y)	E (y)	G	B	E	GS	O
Ohio	E	E	E	E	GS	GS	GS (s)	O	B	GS	GS	GS	GS	GS	GS	GSB
Okla.	E	E	E	E	GS	O	GS (s)	O	E	(z)	E	(z)	(z)	E	(z)	(z)
Ore.	E (aa)	E	E (aa)	E	G	G	(f)	O	E	G	E	GS	G	G	GS	G
Pa.	GS	E (ab)	E	GS	GSH	O	GSH	E (ab)	GS	GS	GS	GS	GS	GS	GS	GS
P.R.	GSH	GS	O	SC	O	GS	GSH	GSH	GS	GS	GS	GS	O	(ac)	O	O
R.I.	E	E	O	E	DG	O	DG	D	B	GS	GS	GS	GS	DG	GS	GS
S. Car.	E	E	B (ad)	E	GS	O	B (ad)	E	E	E	GS	GS	B	L	B	B
S. Dak.	E	E	E	E	GS	GS	D	L	E	GS	E (ae)	GC	G	GS	G	B
Tenn.	L	L	O	SC	G	G (s)	G (s)	L	G	G	GS	G	G	G	G	B
Texas	GS	E	L (af)	E	(ag)	O	G (ah)	E	E	E	GS	B	B	B	B	O
Utah	E	E	E	E	GS	GSH	BG	BG	B	GS	GS	GS	GS	GS	BG	GS
Vt.	E	E	E	E	GS	O	GSH	O	B	GS	GS	GS	GS	GS	GSH	GS
Va.	GSH	GSH	L	E	GSH	O	GSH	GSH	GSH	GSH	GS	G	GSH	B (d)	GSH	GSH
Wash.	E	E	E	E	GS	G	G	O	E	GS	GS	GS	GS	E	GS	GS
W. Va.	E	E	E	E	GS	GS (s)	GS (s)	O	B	E	GS	B	GS	GS	GS	GS
Wisc.	E	E	GS	E	GS	GS	D (b)	D (b)	E	B	GS	B	B	GS	GS	B
Wyo.	E	E	E	GS	(ai)	G (s)	G (s)	O	E	B	G	B	B	GS	B	O

Legend: E—Elected, G—Appointed by Governor, GS—Appointed by Governor, approved by Senate. O—Office or equivalent does not exist. B—Appointed by departmental board. GE--Appointed by Governor, approved by either House. L—Chosen by Legislature. GC—Appointed by Governor and Council. SC--Appointed by Judges of Supreme Court. D-Appomted by director of department. DG—Director with approval of Governor. GSB—Appointed by Governor, approved by Senate and departmental board. GSH—Appointed by Governor, approved by both houses. BG—Appointed by departmental board with approval of Governor. CS--Civil service appointment by competitive examination.

(a) See table on page 134 for pre- and post-audit functions.
(b) Subject to civil service act.
(c) Health and welfare comprise one department.
(d) Appointed by State Corporation Commission.
(e) Auditor General is appointed by Jt. Leg. Audit Comm.
(f) Budget officer a designated official in a department of administration and finance.
(g) Budget officer is appointed by the Budget Commission.
(h) The Comptroller collects most of Florida's taxes.
(i) Governor appoints with approval of Budget Commission.
(j) Governor ex-officio budget officer assisted by Auditor.
(k) Comptroller General is ex-officio Insurance Commissioner.
(l) Lieutenant Governor functions as Secretary of State.
(m) Treasurer regulates insurance.
(n) Agriculture and conservation comprise one department.
(o) Aud. Gen. appointed; Aud. of Pub. Accts. elected.
(p) Lt. Gov. is ex-officio Commissioner of Agriculture.
(q) Comptroller is budget officer.
(r) Board of Eight appointed by Governor; Governor is ex-officio member.
(s) Budget officer is head of a dept. of administration. and fin.
(t) Controller in head of dept. of admin. and budg. officer.
(u) Tax Commissioner is the Budget Officer.
(v) Head of dept. of fin. and admin. IS comptroller.
(w) Insurance Board is three elected members of the Corporation Commission.
(x) Under a new law effective July 1, 1961, a Director of Accounts and Purchases will be ex-officio budget officer.
(y) A combined Department of Agriculture and Labor is headed by a single elected official.
(z) Governor appoints board with consent of Senate, board appoints Executive Director except in Agriculture where board elects a member as President.
(aa) Secretary of State is ex-officio auditor.
(ab) Treasurer also serves as comptroller.
(ac) Appointed by Secy. of Treas, with approval of Governor.
(ad) State Auditor IS appointed by Budget and Control Board and serves as budget officer.
(ae) Attorney General serves ex-officio as Industrial Commissioner.
(af) Appointed by Legislative Audit Committee and approved by Senate.
(ag) The Tax Comm. is an ex-officio body which fixes tax rate. The Comptroller is Tax Administrator.
(ah) Legislative Budget Board separate; works in same field as Governor's budget officer.
(ai) None; duties under State Board of Equalization.

members of a board or commission heading a principal department are appointed in the same manner.[39] Such board or commission may appoint a principal executive officer if authorized by law, but this appointee must be approved by the governor.[40]

The Alaska constitution (Article III, Sections 25, 26) is similar to the New Jersey provision, except that confirmation of appointments is by a majority of the members of the legislature in joint session (and the secretary of state is elected in lieu of a lieutenant governor).[41]

The Hawaii constitution (Article IV, Section 6) is similar to the Alaska provision in regard to appointment of single executive department heads, but these may be removed by the governor with consent of the senate. (The legislature may provide, however, for such removal without consent of senate.) The members of boards and commissions heading a principal department are appointed by the governor with consent of the senate for a term prescribed by law.[42]

The Missouri constitution (Article IV, Section 17) provides for the election of the secretary of state, state treasurer, attorney general and state auditor (in addition to governor end lieutenant governor). The heads of all the other departments are appointed by the governor with consent of senate. All appointive officers "may be removed by the governor."[43]

The Model State Constitution (Article V, Sections 505,506) provides that the governor shall appoint an administrative manager with an indefinite term at the governor's pleasure. The heads of all administrative departments "shall be ap-

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[39] These "may be removed in a manner provided by law."

[40] The executive officer is removable by the governor "upon notice and an opportunity to be heard."

[41] The governor must approve appointment of a principal executive officer by a board or commission, as in New. Jersey, but gubernatorial removal of such an executive is not specified as in the New Jersey constitution.

[42] These boards or commissions may appoint a principal executive officer (who may, by law, be made an ex-officio voting member of the board). Approval of such appointment by the governor is not specified. This principal officer may be removed by majority vote of members appointed by the governor.

[43] This would involve removal at the pleasure of the governor.

pointed by and may be removed by the governor."[44]

In the U.S. Constitution, the president is granted power to appoint, with advice and consent of the senate, ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers "not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Comment

In view of the evident need for more departments (or agencies) than are given constitutional status, some consideration might be given to providing for some form of general gubernatorial power to appoint executive-administrative department heads (except for any that might be retained as elective officers). The lack of a constitutional basis for such appointment power (except to fill vacancies) has lead to a chaotic variety of statutory provisions relating to methods of original appointment.

Although some general method for appointment of executive-administrative officials would probably be desirable in the constitution, some flexibility could be retained. A general method of such appointment might be by the governor—either with or without consent of the senate. Although the governor's responsibility would be enhanced by not requiring senate confirmation for most of the governor's subordinates, such confirmation is traditional in the general power of appointment by the chief executive on the state and federal levels.[45] Legislative concern with the more important appointive executive officers is reflected by the traditional confirmation of appointments. If senate confirmation, (or a related method such as by both houses in joint session) is determined to be the requirement for most appointments, some flexibility could be provided for by exceptions in the provision itself or, through granting discretion to make such exceptions to the law-making process. An

[44] Consent of the legislature is not required for such appointment—removal is at pleasure, not for cause.

[45] A possible alternative to the traditional requirement for legislative confirmation would be a provision that the governor submit appointments to the legislature, such appointments to be effective unless rejected by the legislature within a stipulated period of time.

exception would be particularly logical for those more immediately responsible to the governor, such as staff aides and the controller (head of the department of administration) whose appointment by the governor alone might be more appropriate.

2. Power of Removal

Article IX: Section 7. The governor shall have power and it shall be his duty, except at such time as the legislature may be in session, to examine into the condition and administration of any public office and the acts of any public officer, elective or appointive; to remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and report the causes of such removal to the legislature at its next session.[46]

Constitutions of 1835 and 1850

The 1835 constitution had no specific provision relating to removal of officials by the governor. The governor's power of appointment was wider under this constitution than under those of 1850 and 1908. Insofar as it resembled the U.S. Constitution, removal power could have been viewed as incidental to the power of appointment.

The U.S. Constitution is particularly flexible in this regard. Some agency heads (both single and multiple) in Michigan are presently appointive by the governor alone under statutory authority, but there is no clear pattern or standard related to need for closer responsibility to the governor in the present statutory appointment provisions, whereby some single and multiple heads of agencies are appointed with consent of the senate and some without consent of the senate.

[46] The presence of the section on removal by the governor in Article IX (Impeachments and Removals) rather than Article VI (The Executive) is not accidental. As indicated below, it originated as a substitute for the impeachment process, even though the grounds or causes for such removal are less serious than those for impeachment. The governor's removal power is discussed here because of its usual association with the powers of the Governor, particularly that of appointment.

[47] These circumstances indicate that this provision originated as a substitute for the impeachment process (when the legislature was not in session). K. N. Hylton, The Executive Power of Removal in Michigan (Wayne State Univ. thesis; 1953), pp. 19-22.

The original 1850 constitution had no provisions for removal of officials by the governor (and his appointment power was sharply curtailed). The substance of the present provision originated as an amendment to the 1850 constitution (Article XII, Section 8) in 1862. The governor, shortly before this amendment was added, felt that he did not have authority to remove the state treasurer for failure to perform his duties properly while the legislature was not in session.[47]

Constitution of 1908

The convention made no change in the meaning or effect of the removal provision in carrying it over from the 1850 constitution as amended. Enumeration in the former provision of the state officers to be removable by the governor was omitted as unnecessary. The former clause requiring the governor to appoint a successor for the remaining term of office was also discarded. The convention's committee on submission noted that this clause was a mere repetition of the authority granted in Article VI, Section 10 of the 1908 constitution.[48] This provision has not been amended since the adoption of the present constitution.

Power to Examine. The power granted to the governor in Section 7 "to examine into the condition and administration of any public office and the acts of any public officer, elective or appointive" is directly related to the governor's power of removal for cause. This power of examination, as a part of the removal process, is allowed only when the legislature is not in session.

It is apart from the governor's authority under Article VI, Section 3 to require written information from executive and administrative officers upon any matter relating to their duties.

Statutory Implementation

Statutes pursuant to Article IX, Section 7 provide that the secretary of state, attorney general, state treasurer, or auditor general may be removed by the governor when the legislature is not in session, for any of the causes specified in Section 7, provided that such person is served with a written notice of the charges against him, and is afforded an opportunity for a public hearing conducted personally by the governor.[49] Among those specified in statutes as removable for cause by the governor are: members of the state tax commission; all officers who are, or shall be,

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[48] Proceedings and Debates, p. 1434.

[49] M.S.A., 6.1083.

[50] M.S.A., 7.632, 6.695, 3.294, 3.612, 3.613, 3.598, 3.600, 3.263.

appointed by the governor to fill vacancies during recess of the legislature; any officer of the state government, including members of any state board or commission, who fails to comply with the budget act; any person found negligent, incompetent, or responsible for irregularities in handling, or in the accounting of state funds—hearing specified; officers failing to keep accounts and records, or not making reports as required by the auditor general—hearing specified; officials of administrative departments, boards, commissions, and institutions failing to follow the orders of the state administrative board.[50]

Judicial Interpretation

By court interpretation, the governor's removal power is judicial in nature. It can be used only when the legislature is not in session and for the causes listed in Section 7. His charges against officers must be specific regarding alleged acts or neglect. Notice of the charges must be given, and opportunity for defense.[51] The legislature may vest removal power relating to subordinate officers in officers other than the governor.[52]

Such removal power normally would be vested in the appropriate appointing agency.

The facts related to the constitutionally specified cause for removal must actually exist; the governor must not act arbitrarily, and the courts may inquire into such questions. However, the governor's finding of fact is conclusive on the court.[53] The governor's removal power is coupled with his duty to examine the acts of public officers, and members of quasi-judicial agencies are not excluded from the group of officials removable by him (for cause).[54]

[51] Dullam v. Willson, 53 Mich. 392; 1884. The decision in this case states expressly that the governor "acts in the place of a court of impeachment" when the legislature is not in session.

[52] Fuller v. Ellis, 98 Mich. 96; 1893.

[53] People ex rel. Johnson v. Coffey, 237 Mich. 591; 1927.

[54] People ex rel. Clardy v. Balch, 268 Mich. 196; 1934. This case was decided shortly before the Humphrey Case decision, in 1935, in which the federal supreme court disallowed presidential removal of a member of the quasi-judicial Federal Trade Commission. Statutory causes for such removal had not been invoked. Since the federal case involved removal at the president's pleasure, these decisions are not opposite in effect.

Other State Constitutions

Most, state constitutions restrict the governor's removal power (in contrast to the federal constitution). However, some constitutions, particularly those framed or revised in recent years, have provided wider removal power for the governor.[55] Most state constitutions give removal power to the governor, but by a method to be prescribed by law. Generally this removal is allowed only for cause (such as malfeasance) and removal for administrative reasons is thereby precluded. Some states require consent of senate for removal—the governor of Florida may remove officials for cause with consent of senate. A few states provide for gubernatorial removal on address (resolution) of the legislature. Some states allow removal of officials for certain causes by court action.[56] The Model State Constitution and the U.S. Constitution (by interpretation) provide for unfettered executive removal power over officials responsible to the executive.

Comment

The governor's power to remove officials (affected by this section) is limited to those periods when the legislature is not in session. A further limitation on this power resulted from the adoption of the amendment requiring annual legislative sessions.[57] When the legislature is not in session, the governor's power to remove officials having constitutional status (and many statutory officials) is restricted by

[55] See comparative state provisions on appointment power above-removal provisions of recent constitutions summarized. In some states, the governor's power of appointment and removal has been enhanced by statute where constitutional obstacles were not prohibitive. Lack of substantial removal power for the governor in many states tends to lessen the governor's responsibility for administration. State officers who might be expected to be responsible to the governor are somewhat remote from gubernatorial control as a result. State government specialists lean preponderantly in favor of more extensive removal power for the governor, in conjunction with more extensive power of appointment. Reorganizing State Government, pp. 20-27; General Management-of Michigan State Government, pp. 1-15, 16; 11-8,19-23; Belle Zeller, Editor, American State Legislatures, 1954, pp. 165-167; Abram S. Freeman, "The Governor—Constitutional Power of Investigation and Removal of Officers," Preparatory Research Studies (New Jersey Constitutional Convention, 1947) pp. 8-10.

[56] Index Digest, pp. 839-842.

[57] The governor's responsibility for administration would naturally be increased if his power to investigate and remove officials were made effective at all times. The Commission on Reform and Modernization of Government recommended this in 1938, and the "Little Hoover" study in 1951.

the stipulation that it be for cause. Because of this restriction, the governor's power to remove officials for administrative reasons (or at pleasure) is restricted to those officials made so removable by statute.

By statute, some officials and agency heads have been made removable by the governor at pleasure. The controller of the department of administration, as pointed out above, is one of these. In view of the language of Section 7, and the lack of any other provision on removal, constitutional justification for such statutory provisions is not clear. Section 7 states that "any elective or appointive state officer, except legislative or judicial" shall be removed for the causes specified. However, there is no positive constitutional prohibition of gubernatorial power to remove at pleasure. There has not as yet been a court test of such statutes but justification for removal of some officials under statutory authority at the governor's pleasure might not be interpreted as being in conflict with this section. The competency of the law-making process to provide for permissive removal of some officials by the governor at pleasure might be justified as an alternate or concurrent mode of removal, since removal for cause as set forth in Section 7 is mandatory and binding upon the governor, and evidently intended to apply mainly to the constitutional state offices of the executive department. If removal only for cause of some officials were retained in a revision of the constitution, clarification of this matter would be desirable. The constitution could specify which officials, or types of officials, would be removable at pleasure and which for cause, or it could allow such matters to be determined by law.

If the governor were given power to remove most or all officials responsible to him at his discretion or pleasure, exceptions could still be retained, such as removal of members of quasi-judicial bodies only for cause. Such exceptions should be clearly defined, however, if it is considered desirable to avoid a basis for encroachment upon the governor's power of appointment and removal. If the governor were granted extensive power to remove officials at pleasure, procedures presently required by the constitution, statutes and court decisions in removal for cause would no longer apply for such officials.

These procedures related to removal for cause, however, could be retained for officials such as members of quasi-judicial agencies who would not be directly responsible to the governor.

Because of the close association between the governor's powers of appointment and removal of his subordinates, provisions relating to such powers should probably be combined or linked in a new executive article in order to avoid the curious divorce of the governor's power of removal from his other powers—particularly that of appointment—as presently provided.

D. CIVIL SERVICE COMMISSION

Article VI: Section 22. The state civil service shall consist of all positions in the state service except those filled by popular election, heads of departments, members of boards and commissions, employees of courts of record, of the legislature, of the higher educational institutions recognized by the state constitution, all persons in the military and naval forces of the state, and not to exceed two other exempt positions for each elected administrative officer, and each department, board and commission.

There is hereby created a non-salaried civil service commission to consist of four persons, not more than two of whom shall be members of the same political party, appointed by the governor for eight-year, overlapping terms, the four original appointments to be for two, four, six and eight years respectively. This commission shall supersede all existing state personnel agencies and succeed to their appropriations, records, supplies, equipment, and other property.

The commission shall classify all positions in the state civil service according to their respective duties and responsibilities, fix rates of compensation for all classes of positions, approve or disapprove disbursements for all personal services, determine by competitive performance exclusively on the basis of merit, efficiency and fitness the qualifications of all candidates for positions in the state civil service, make rules and regulations covering all personnel transactions, and regulate all conditions of employment in the state civil service. No person shall be appointed to or promoted in the state civil service who has not been certified as so qualified for such appointment or promotion by the commission. No removals from or demotions in the state civil service shall be made for partisan, racial, or religious considerations.

The administration of the commission's powers shall be vested in a state personnel director who shall be a member of the state civil service and who shall be responsible to and selected by the commission after open competitive examination.

To enable the commission to execute these powers, the legislature shall appropriate for the six months' period ending

> June 30, 1941, a sum not less than one-half of one per-cent, and for each and every subsequent fiscal year, a sum not less than one per cent, of the aggregate annual payroll of the state service for the preceding fiscal year as certified to by the commission.
>
> After August 1, 1941, no payment for personal services shall be made or authorized until the provisions of this amendment have been complied with in every particular. Violation of any of the provisions hereof may be restrained or observance compelled by injunctive or mandamus proceedings brought by any citizen of the state.
>
> This amendment shall take effect on the first day of January following the approval thereof.

Constitution of 1908

Convention of 1907-08. In the constitutional convention of 1907-08, Professor Fairlie introduced a proposed constitutional provision for the establishment of the merit system in appointments to the public service similar, as he pointed out, to a provision in the New York constitution. The convention's committee on miscellaneous provisions refused to report the proposal, and Fairlie's motion to refer the matter to the committee of the whole was voted down, since only 33 yeas favored his motion.[58]

Mr. Adams felt that it was a matter purely for legislation; that the merit system for Michigan would be an "experiment," that the convention should not "tie the hands of the legislature for fifty years." Mr. Fairlie pointed out to the contrary that his proposal would leave complete discretion to the legislature for implementing the principle. Mr. Manchester stated that the proposal would not add to the powers of the legislature, but would simply be "an addition of so much deadwood to the instrument."[59]

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[58] Proceedings and Debates, pp. 50, 1018, 1019

[59] Ibid, p. 1019.

Statutory Commission. In the absence of this type of constitutional mandate for statutory implementation of the merit system, a civil service act became effective some 30 years later in 1938.[60] In 1939, the civil service commission established by this act had much of its power taken from it by statutory reduction in appropriation and statutory provision for a widespread removal of positions from the classified service.

Constitutional Commission by Amendment, 1940. Reaction to this form of tampering with the statutory commission resulted in the organization of a drive by reform groups to put the merit system beyond the reach of statutory interference. They initiated a proposed amendment by petition in 1940 which became Section 22 of Article VI when approved by a vote of 766,764 to 709,894 in the November, 1940, election. This amendment (largely as a result of the circumstances that brought it about) set up a civil service commission with a large degree of independence from the legislative and executive branches of the state government.

Statutory Implementation

No statutory basis was needed to implement this provision owing to the self-executing nature of the amendment.

Judicial Interpretation

Much litigation has developed as a result of the civil service amendment. The commission's powers are extensive and they tend somewhat to impinge upon areas of activity normally associated with the executive and legislative branches. This would seem to be one reason for the extensive litigation. Another seems to result from some lack of clarity in the scope of its authority, extensive as it is. Numerous court decisions have construed the powers of the commission.

Two Exempt Positions. The first paragraph of Section 22 defines what the state civil service will consist of mainly by specifying those positions exempted from it. After the more obvious exemptions including elective officials and both single and multiple heads of departments, there is further provision for "not to exceed two other exempt positions for each elected administrative officer, and each department, board and commission." The turnpike authority's employees were held to be exempt

[60] Public Act 346, 1937; effective January 1, 1938.

from civil service provisions, because the authority was an autonomous agent of the state, not an alter ego of the state.[61]

Approval of Creation and Abolition of Positions. In Kunzig v. Liquor Control Commission (1950), the supreme court held that the civil service commission has power to approve or disapprove abolition of positions in the classified service by administrative agencies.[62] The majority opinion in the Kunzig case appears substantially to have based its interpretation that the commission has power to approve or disapprove all abolitions of positions upon the last sentence of paragraph three—that no removals or demotions shall be made "for partisan, racial, or religious considerations." This decision states that the commission "may exercise authority over removals" in the civil service for otherwise "it would have no initial supervisory control over a question as to whether a removal or demotion has been made for partisan, racial, or religious considerations." After stating that "the authority of the liquor control commission to reorganize its department" was not involved in the case, this opinion later stated that the finding of the civil service commission was based on the facts brought out at its hearing and "need not necessarily be consid-

[61] City of Dearborn v. Michigan Turnpike Authority, 344 Mich. 37. The attorney general held similarly with regard to the Mackinac bridge authority. Opinion of August 13, 1956. The attorney general also held that if two or more agencies were consolidated into one department that department would be entitled to not more than the two exempt positions. Opinion of December 30, 1955.

[62] 327 Mich. 474. According to an opinion of the attorney general (December 30, 1946) this would also be true for the creation of such positions. The statutory commission (1937-1940) had some power in this area, and it is undoubtedly part of the background for interpretations of the present constitutional commission's power in this regard which, perhaps, amplify or extend its power beyond what could normally be understood from the language of this specific provision (see paragraph three of provision). The attorney general held that the commission had power to approve creation of new positions (if determined to be "necessary") in view of its specified powers to "approve or disapprove disbursements for all personal services," and to "classify all positions" in the civil service.

ered as a finding that the attempt to abolish" this position "was induced by subterfuge or fraud."[63]

The dissenting opinion in this case took issue with the majority interpretation and held that administrative agencies could abolish positions without commission approval. This opinion argued that if the commission had such power of approval, it could actually control administrative policies; that if this extraordinary power over abolishment of positions had been intended by the people to be granted to the commission, the amendment easily could have been framed to grant this power expressly, and that there was no logical reason for reading this power into the amendment provisions.[64]

Power to Fix Rates of Compensation. Civil Service Commission v. Auditor General is the basic case dealing with this power of the commission.[65] The civil service commission has full authority to fix rates of compensation for those in the classified service and the legislature in its power of appropriation has discretion concerning only the total amount of funds to be spent for personal services, but has no power to specify rates (or ranges) of compensation for those in the classified civil service. Appropriations for personal services for each department or agency cannot be detailed by the legislature to the extent that they would infringe upon the compensation-fixing powers of the commission.

[63] Since the civil service commission based its decision upon considerations of efficiency, and since no charge of fraud (to avoid removal for the prohibited reasons) was involved in the case, the majority opinion seems somewhat inconsistent. It would suggest that the civil service commission could interfere in substantive administrative organization problems of executive agencies, when abolition of positions was concerned, even when such fraud and subterfuge were not involved. It was pointed out in this case, however, that the civil service-commission had never refused to allow a position to be abolished.

[64] For general discussion of the majority opinion's possible effect on executive responsibility and administrative management, see Personnel Administration in Michigan State Government. (Staff Report No. 9, 1951 to the Michigan Joint Legislative Committee on Reorganization of State Government), pp. 26-32; Hylton, Power of Removal, pp. 54-63.

[65] 302 Mich. 673.

Mandatory One Per Cent Appropriation. The fifth paragraph of the civil service section requires the legislature to appropriate each year not less than one per cent of the preceding fiscal year's payroll for those in the "state service." The basic supreme court case for interpretation of this provision is Civil Service Commission v. Department of Administration.[66] The opinion in this case held that the mandatory appropriation is restricted to one per cent of the aggregate classified civil service payroll. This opinion also determined that the appropriation was not self-executing, since the legislature was to have some discretion in the matter of the appropriation—which could be more than the mandatory one per cent.[67]

Other State Constitutions

Many states have statutory provision for partial or extensive civil service classification of state personnel.[68] Only 13 states have constitutional provisions for a civil service system, and for the most part these constitutional provisions are not specific and detailed. While making the institution of the merit system mandatory, discretion is usually left to the legislature as to the specific mode of its implementation.[69]

The civil service provision in the Hawaii constitution (Article XIV, Section 1) is very brief: "The employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle." The Alaska provision (Article

[66] 324 Mich. 714.

[67] An earlier court decision—Civil Service Commission v. Auditor General, 302 Mich. 673—was reversed thereby to the extent that it had held that this was a continuing appropriation without the necessity of legislative initiation.

[68] For 1955 modification of Illinois statutory provision, see S. K. Gave, "The Executive," Illinois State Government: A Look Ahead, University of Illinois (1955), pp. 27-28. A department of personnel assumed most of the functions of the civil service commission which then became primarily a quasi-judicial body. On comparative systems see W. W. Crounch and J. N. Jamison, The Work of Service Commissions (Civi1 Service Assembly, no date—C. 1955).

[69] Index Digest, pp. 94-100.

XII, Section 6); is equally brief and similar in content. The New Jersey provision (Article VII, Section 1, 2) is longer but maintains flexibility and leaves much discretion to the law-making process. The Missouri provision (Article IV, Section 19) is similar to that of New Jersey, as is the New York provision (Article V, Section 6), except for its details relating to veterans' preference. The California provision is detailed and self-executing. The powers of the civil service commission under the California provision (Article XXIV) are similar to those of the Michigan commission, except that no mandatory appropriation is required.[70]

The New York provision is mandatory upon all units of local government as well as the state government. The New Jersey provision makes civil service mandatory for the state service, but that for local government is at the discretion of the legislature. The provision of the Model State Constitution relating to civil service (Article IX) is similar to the New York provision. The principle is made mandatory for local governments as well as for the state service, but the "civil divisions" of the state may choose whether or not to come under the jurisdiction of the state department of civil service. Those that do not so elect, and do not provide for personnel functions in a home rule charter, will be provided for by state law.[71]

Comment

Some consideration might be given to the adequacy of the two-exempt-position provision in this section in view of problems that might develop relative to political policy direction. A constitutional standard for positions that should be classified

[70] The Michigan civil service provision is almost unique among state constitutions in the extent of independent authority granted to the commission, and its special constitutional standing.

[71] In addition to the civil service provision in its Model State Constitution, the National Municipal League has published A Model State Civil Service Law. Under this model law, the director of personnel, appointed by the governor and removable by him for cause, is responsible for most administrative phases of the state personnel program. The three-member commission is partly advisory; but it has power to investigate personnel administration; and it has power of approval over rules for the classified service prescribed by the director of personnel. The provision for exempt positions is similar to that in the Michigan provision. The director of personnel under the model law has power similar to that of the Michigan commission to approve or disapprove disbursement for personal services.

(non-policy-making) and those that should not be classified (policy-making) is difficult to establish with workable flexibility in view of the probability that the policy-making level might vary from department to department.[72]

Some consideration might also be given to modification or clarification of the scope of power granted by this section to the civil service commission. One alternative to the present practice would be to make the governor responsible for the personnel function of the present commission.[73] If this were done, the civil service commission could continue as a quasi-judicial agency to set standards for and to enforce the merit system (and principle). If it is determined that the civil service commission should retain the powers and functions presently specified in the constitution, some clarification of the commission's power relative to approval of creation and abolition of positions might be made.[74] The advantages and disadvantages involved in the

[72] This present provision is rigid, since the size of the department or agency has no effect on the number of exempt positions to which it is entitled. The provision may be somewhat restrictive for some of the larger departments or agencies, and if administrative reorganization through consolidation of agencies in a smaller number of departments were effected, the maximum of two exempt positions for the consolidated departments would be more restrictive.

[73] The present department of administration has all the so-called "tools of management" except for personnel. Heady and Pealy, Department of Administration, pp. 59-64. See also Scace, Executive Office of the Governor, pp. 22-28. A director of personnel in the department of administration would be closely responsible to the governor.

[74] The major reason for the commission to have, authority in this area is to forestall abolishment of positions by subterfuge to effect removal of a state employee for partisan, racial or religious considerations. Review of complaints in such matters by a quasi-judicial civil service commission, or such review by the courts, could restrain possible abuse in such matters without the potential for infringement upon traditional executive (and legislative) authority to create and abolish positions resulting from inter-agency or intra-agency reorganization.

commission's power to fix rates of compensation would probably be weighed against the advantages and disadvantages of legislative (and executive) discretion in this area.[75]

The present provision includes a mandatory one per cent appropriation for the civil service commission. Despite the rigidity in this provision, it appeared necessary when the amendment was adopted in 1940 in view of the then inadequate political support for the merit system. A determination of the question of whether or not this provision should be continued might be based upon a new evaluation of the basis for popular and political support of the merit system.

[75] In regard to this and other powers of the civil service commission see Personnel Administration in Michigan Government, Reports of the Civil Service Commission, R.W. Conant, Editor, General Government in Michigan (Samuel Hegby Camp Foundation, 1960), pp. 17-20. It has been held by supporters of the commission's power to set rates of compensation that chaotic disparity in such rates commonly results from exercise of such power by the political process.

E. THE GOVERNOR'S RELATIONS WITH THE LEGISLATURE

1. Messages to the Legislature

Article VI: Section 5. He shall communicate by message to the legislature, and at the close of his official term to the incoming legislature, the condition of the state, and recommend such measures as he may deem expedient.

Constitutions of 1835 and 1850

In the 1835 constitution (Article V, Section 8) it was required that the governor "communicate by message to the legislature, at every session the condition of the state, and recommend such matters to them as he shall deem expedient."

The 1850 provision (Article V, Section 8) had the same meaning and effect as the 1908 provision under discussion, although the language was somewhat different. The 1850 provision originated the so-called exaugural address.

Constitution of 1908

This section has not been amended since the adoption of this constitution.

Other State Constitutions

Almost all state constitutions require the governor to report on the condition of the state and to make recommendations to the legislature. Most require this at each session of the legislature; many follow the federal provision of requiring it "from time to time." Many require this at the beginning of each session, while others require it at the beginning of each regular session. Only six states in addition to Michigan require the exaugural message.[76]

[76] Index Digest, pp. 503-504. The Model State Constitution requires the governor to give information to the legislature at the beginning of each session; he may at other times. Under the Model the governor may participate in legislative discussions and introduce bills, but cannot vote.

Comment

There appears to be no great problem with this provision in a revision of the constitution. Requiring the state-of-the-state message at the beginning of each regular session—or every session—might be considered. The power to recommend legislation to the legislature is one of the most important executive powers, and the present provision seems to allow full latitude for this power. While the exaugural message is somewhat unusual, it appears to offer no serious disadvantages and could be helpful to the extent that the governor may use it as an occasion to make recommendations in the light of experience at a time when more immediate political considerations would ordinarily be less pressing.

2. Writs of Election for Legislative Vacancies

Article VI: Section 6. He shall issue writs of election to fill such vacancies as occur in the senate or house of representatives.

Constitutions of 1835 and 1850

The constitution of 1835 (Article IV, Section 20) had a provision similar to this in the legislative article. The provision in the 1850 constitution (Article V, Section 10) is the same as the present provision.

Constitution of 1908

This section has not been amended since 1908.

Statutory Implementation

The Michigan election law of 1954 provides for gubernatorial discretion in calling such special elections or leaving the matter for the next general election.[77]

[77] M.S.A., 6.1178, 6.1634. These sections are derived from Public Act No. 351 of 1925. An opinion of the attorney general, July 19, 1950, held that the governor has discretion either to call a special election to fill such vacancies or to leave the matter for the next general election.

Other State Constitutions

Some eighteen states in addition to Michigan have a similar provision. Several state constitutions specify a method to be provided by law. In some states a vacancy is filled by selection of the county commissioners, or party committees.[78]

Comment

Since this provision has been interpreted (by statute and the attorney general) very flexibly, it has not been a source of difficulty. In view of the desirability of the governor having discretion in this matter (particularly for vacancies occurring near the end of a term), some consideration might be given to changing the language of this provision in order to avoid its present suggestion of mandatory intent.[79] This matter could, of course, be left to the discretion of the law-making process. Some consideration might also be given to placing this provision, or a revision of it, in the legislative article where it appeared in the 1835 constitution.

3. Convening Special Legislative Session

Article VI: Section 7. He may convene the legislature on extraordinary occasions.

Constitutions of 1835 and 1850

The 1835 constitution (Article V, Section 8) and the 1850 constitution (Article V, Section 7) had similar provisions.

Constitution of 1908

This section is directly related to Article V, Section 22 of the present constitution which restricts the business of a special session to the subjects "expressly stated in the governor's proclamation or submitted by special message."

[78] Index Digest, pp. 678-679. The Model State Constitution provides that legislative vacancies be filled by majority vote of the remaining members from the district concerned, or in a manner provided by law. but if the vacancy is not filled within 30 days the governor shall appoint an eligible person.

[79] Perhaps to make it conform more closely to its meaning as interpreted.

Judicial Interpretation

The court case most important to the interpretation of the restriction in Article V, Section 22 on the legislative business of a special session to the subjects specified by the governor is Smith v. Curran.[80] The legislation must be germane to, or covered by, the general scope of the subjects indicated by the governor. The governor's signature is not sufficient justification that the legislation was within the scope of the governor's call.[81]

Other State Constitutions

All of the states grant the governor power to convene the legislature in special session. In 12 states he may convene the legislature or the senate alone. In one of these (Alaska) the governor may convene either or both houses, or both houses in joint session. In this, Alaska is closest to the federal provision for convening either or both houses. Same 19 states have provisions similar to Michigan's restriction of legislative business in a special session to the subjects designated by the governor.[82] This feature enables the governor to focus legislative attention and, at times, public opinion upon specific measures which he feels have particular importance.

Nine states provide for legislative initiation of special sessions by a simple or extraordinary majority. Four states (Alaska, Arizona, Louisiana and Virginia) require two-thirds of both houses; three states (Georgia, New Mexico and West Virginia) require three-fifths of both houses; and two states (New Hampshire and New Jersey) require only a simple majority.[83]

Comment

Consideration might be given to some form of legislative initiative in calling special sessions, as a supplement to the present provision.

[80] 268 Mich. 366.

[81] See discussion of Article V, Section 22.

[82] Index Digest, pp. 674-675, Manual on State constitutional Provisions, p. 140. See also provisions of state constitution for discrepancies.

[83] Index Digest, pp. 674-675. The Model State Constitution allows the governor and a majority of the legislative council to call special sessions.

4. Convening Legislature Elsewhere Than at State Capital

Article VI: Section 8. He may convene the legislature at some other place when the seat of government becomes dangerous from disease or a common enemy.

Constitutions of 1835 and 1850

The 1835 constitution (Article V, Section 10) and the 1850 constitution (Article V, Section 9) had similar provisions.

Constitution of 1908

This provision has not been amended, nor have there been any difficulties with respect to its interpretation.[84]

Other State Constitutions

The constitutions of 15 states have similar provisions. However, in Oklahoma, two-thirds of the members elected to each house of the legislature must concur with the governor in a convocation elsewhere. Three other states provide the legislature with initiative in this matter. In Delaware and Florida, the legislature may decide to meet elsewhere; while in Kentucky, the governor must give his permission for the legislature to do so.[85]

Comment

Violent epidemics are not now likely to make it necessary for the legislature to leave the state capital, except for the possibility of bacteriological warfare. The state government (or any of its branches) might be considered as having inherent power based upon sovereignty to remove from or carryon their work elsewhere than the state capital in the event of disaster or invasion without constitutional authorization. However, a provision of this type can have value in establishing a workable, flexible procedure. Consideration might be given to combining or coordinating this section with Section 5 of Article XVI (adopted in 1959) which grants the legislature authority to provide for the continuity of governmental operations in the event of disaster occurring in the state caused by enemy attack on the United States.

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[84] Article I, Section 2 requires the seat of government to be at Lansing.

[85] Index Digest, p. 672.

5. Gubernatorial Veto

Article VI: Section 36. Every bill passed by the legislature shall be presented to the governor before it becomes a law. If he approve, he shall sign it; if not, he shall return it with his objections to the house in which it originated, which shall enter the objections at large upon its journal and reconsider it. On such reconsideration, if two-thirds of the members elected agree to pass the bill, it shall be sent with the objections to the other house, by which it shall be reconsidered. If approved by two-thirds of the members elected to that house, it shall become a law. In such case the vote of both houses shall be determined by yeas and nays and the names of the members voting for and against the bill shall be entered on the journals of each house, respectively. If any bill be not returned by the governor within ten days, Sundays excepted, after it has been presented to him, it shall become a law in like manner as if he had signed it, unless the legislature, by adjournment, prevents its return, in which case it shall not become a law. The governor may approve, sign and file in the office of the secretary of state within five days, Sundays excepted, after the adjournment of the legislature any bill passed during the last five days of the session, and the same shall become a law.

Constitutions of 1835 and 1850

In the 1835 constitution (Article IV, Section 16), the governor's veto could be overridden by a vote of "two-thirds of all the members present" in each house. The 1850 constitution (Article IV, Section 14) made a "concurrent resolution, except of adjournment" in addition to bills, liable to the veto. The 1850 constitution originated the requirement of two-thirds of those elected to each house to override the veto. The "ten days, Sundays excepted," allowed the governor for return of a bill is common to all three constitutions.

Constitution of 1908

The present provision resembles that of the 1835 constitution in that only bills were specified as liable to the veto. However, Article V, Section 19 requires that all legislation "shall be by bill." The 1908 provision continued the 1850 requirement that two-thirds of those elected to each house were necessary to override the veto.[86]

Judicial Interpretation

Court cases concerning the gubernatorial veto power in Michigan have not been frequent, and in general the decisions have not diverged from the ordinary meaning of the constitutional provision, or from the usual interpretation of similar provisions in other jurisdictions. The governor may return a bill to the house in which it originated when that house is in recess.[87] If the governor complies with a legislative resolution asking him to return a bill presented to him, the bill will not become law due to lapse of time while not in his possession.[88]

Opinion of the Attorney General

A recent opinion of the attorney general held that the day on which the governor receives a bill is not to be included in the ten days, Sundays excepted, allowed for his disapproval of a bill.[89]

Other State Constitutions

Exceptions to the Veto. All of the state constitutions except that of North Carolina provide for the gubernatorial veto. In two states (Maryland and West Virginia), the general appropriation bill is not liable to the governor's veto. In 17 states (including Michigan) of the 22 having the initiative for statutes, the governor is prohibited from vetoing initiated measures. In Maine, the governor may veto initiated mea-

[86] The last clause of the 1908 provision—allowing the governor five days to "approve, sign and file" bills passed in the last five days of the session—originated substantially in the 1850 constitution. However, "Sundays excepted" was added to this clause by the 1908 convention. Proceedings and Debates, p. 121. In a case decided under the 1850 constitution, it was held that a bill passed before the last five days of a session and approved after adjournment, within ten days of its passage, became law. Detroit v Chapin, 108 Mich. 136.

[87] Wood v. State Administrative Board, 255 Mich. 200.

[88] Anderson v. Atwood, 273 Mich. 316.

[89] Opinion of May 25, 1961. The legislative practice has been to allow the governor 240 hours, Sundays excepted.

sures, and if the veto is sustained by the legislature the measure is referred to popular vote at the next general election. In 17 states (including Michigan) of the 27 having the referendum on statutes the governor is prohibited from vetoing referred measures.[90]

Number Required to Override Veto. The Table below summarizes comparative data on legislative vote necessary to override gubernatorial vetoes among the states:

VOTE REQUIRED

Majority of Members:		Three-Fifths:		Two-Thirds:	
Present	Elected	Present	Elected	Present	Elected
1	6	1	4	14	23

In one state (Connecticut) merely a majority of the members present in either house is required to override the veto; six states (Alabama, Arkansas, Indiana, Kentucky, Tennessee and West Virginia) require a majority of the members elected to each house or its equivalent; one state (Rhode Island) requires three-fifths of the members present and voting to override the veto; four states (Delaware, Maryland, Nebraska and Ohio) require three-fifths of those elected to override. Twelve states (Florida, Idaho, Massachusetts, Montana, New Mexico, Oregon, South Dakota, Texas, Vermont, Virginia, Washington and Wisconsin) require a vote of two-thirds of the members present in each house in order to override.[91] Nineteen states (Alaska, Arizona, California, Colorado, Hawaii, Illinois, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, New Jersey, New York, North Dakota, Oklahoma, Pennsylvania, Utah and Wyoming) require two-thirds of the members elected (or all members) to each house, or its equivalent, in order to override the veto.[92]

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[90] The Book of the States, 1960-61, p. 51.

[91] The Virginia constitution requires that the two-thirds vote of those present include a majority of those elected to each house.

[92] The Iowa constitution requires a veto to be overridden by "two-thirds of the members of each house" which is interpreted similarly. The Alaska constitution uniquely requires reconsideration of vetoed bills in joint session of the legislature, a joint vote on reconsideration as in confirmation of appointments. In order to override vetoes of revenue bills and appropriation bills (or items) a three-quarters vote in joint session of those elected is required.

Six states (Georgia, Maine, Minnesota, Mississippi, New Hampshire and South Carolina) have provisions resembling the U.S. Constitution in vagueness concerning the number of votes necessary to override a veto. The Georgia provision requires "two-thirds of each house" to override. The others require "two-thirds of that house. . ." as does the U.S. Constitution.[93] The Model State Constitution requires a two-thirds vote of all members of the unicameral legislature to override the veto.

Most states whose constitutions provide the governor with extensive executive power also provide for strong gubernatorial veto power—overridden only by two-thirds of those elected to each house. However, Michigan and many other states whose governors have largely restricted authority have this same feature. In such "weak-governor" states having the somewhat incongruous powerful veto, the governor has more control (through the veto and other powers) over legislation than he has in his own executive-administrative department.

In 23 states (19 by specific constitutional provision and at least four others by interpretation) having the requirement of two-thirds of those elected to override, the gubernatorial veto is almost absolute. Comparatively few vetoes tend to be overridden throughout all the states, but in those requiring a two-thirds vote of those elected to each house, overridden vetoes are particularly rare.[94]

Amendment by the Governor. Five states (Virginia, Alabama, Hawaii, Massachusetts and New Jersey) now have a feature related to the governor's veto known as the "Virginia plan." Under this, the governor may propose amendments to any bill which he may return without signing. The legislature may act upon or accept or reject the governor's amendment. The bill may then be presented to the governor for his consideration in the usual manner. The Alabama provision is unique among the five, since if either house refuses to amend the bill as desired by the governor, the bill is reconsidered as a vetoed bill.[95]

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[93] By rulings from the chair (in Congress) sustained by court decisions, this has been interpreted to require only two-thirds of those present and voting, if a quorum, to override the presidential veto in each house. Such interpretation seems to have been attached to similar provisions in the Maine and South Carolina constitutions; while the other four states are generally classified with the states requiring two-thirds of those elected to override. Book of the States, p. 51 (Alaska provision in part misstated); Index Digest, p. 615 (Mass. provision not properly classified); Manual on State Constitutional Provisions, p. 55 (in contrast to The Book of the States classification, the Manual places Maine and South Carolina among those requiring two-thirds of the members elected). For discrepancies see pertinent provisions of state constitutions.

[94] B. M. Rich, State Constitutions; The Governor, pp. 20-22.

[95] Index Digest, pp. 614-615.

In some other states, amendment by the governor is used informally—the governor returning bills before signing or vetoing particularly for minor changes in order that they may be re-passed. The formal constitutional device of returning bills to the legislature for amendment appears to have been successful and to have provided flexibility in relations between the governor and legislature in the law-making process.[96]

Veto of Parts of Bills Other Than Appropriation Items. The veto power over appropriation items is provided for in 41 states. This "item veto" will be discussed below. However, the constitutions of three states (Virginia, Washington and South Carolina) provide the governor with power to veto parts or sections of any bill. The Oregon constitution permits the governor to veto emergency provisions in bills separately from the remainder of such bills.[97]

Number of Days to Consider with Legislature in Session. In nine states the governor has only three days (Sundays excepted) in which to return a disapproved bill or it becomes law. In 21 states, the limit is five days; in four states, six days; in 13 states (including Michigan) ten days; and in two states, 15 days.[98] Most states having new or revised constitutions allow the governor ten days or more. Alaska is one of those specifying 15 days. The Missouri constitution provides that if the governor has not returned a bill in 15 days, the legislature may by joint resolution direct the secretary of state to enroll the bill as enacted.

After Adjournment—The "Pocket" Veto. Of the 17 states that provide for a "pocket" veto in the sense that a bill does not become law unless signed by the governor within a specified period after adjournment of the legislature, most provide a longer period than the five days, Sundays excepted, allowed the Michigan governor. Only one state provides for a shorter period—three days. The five-day period is effective in Michigan and two other states.[99] In Wisconsin and Maryland the period is six days from presentation which may take place after adjournment; in Virginia and

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[96] Rich, The Governor, p. 22; A. W. Bromage, "Constitutional Revision in Michigan." 36 University of Detroit Law Journal, 102.

[97] Index Digest, p. 614. Emergency provision in legislative bills in Oregon is similar to "immediate effect" for bills in Michigan.

[98] In most of these, Sundays are excepted, as in Michigan. Some except holidays or the day the governor receives the bill. Index Digest, pp. 611-612.

[99] Massachusetts—in practice the legislature remains in session until all bills are acted upon—and Vermont whose provision is somewhat hazy.

Alabama, 10 days; Oklahoma and Montana, 15 days; New Mexico, 20 days; California, Delaware, Georgia and New York, 30 days; and Missouri, 45 days.[100]

Requirement of an Express Veto. Thirty of the 32 states which provide for the veto, but have no "pocket" veto, require an express veto (or the bill becomes law after the time allowed for it lapses) after adjournment.[101] Of these 30 states which require the express veto during adjournment or the bill becomes law, three allow the governor five days; 11 allow ten days; three allow 15 days; six allow 20 days; two (Connecticut and Pennsylvania) allow 30 days; two (New Jersey and Hawaii) allow 45 days; and in three (Maine, Mississippi and South Carolina) if the bill is not returned to the legislature within the first few days of the next session, it becomes law. The New Jersey constitution provides that the legislature shall convene in special session on the 45th day after adjournment to act on vetoed bills. Bills not signed or vetoed by the 45th day become law. The Hawaii provision is similar except that the legislature may decide whether or not it will convene in such a special session; if the legislature fails to convene, vetoed bills do not become law.[102]

Comment

In revising the Michigan constitution, if the executive article were rewritten to make the governor more responsible for the operation of a unified executive-administrative branch of government, some consideration might be given to reducing the governor's power as a third branch of the legislature in view of the extreme effectiveness of the veto as a check on the legislature.[103] Possible alternatives to the

[100] The Book of the States, p. 51 (Georgia provision misstated); Index Digest, pp. 612-613. In only about one-half of the 17 "pocket-veto" states is the device used to any extent. Rich, The Governor, p. 22. In practice, the "pocket" veto has been avoided in Michigan (as in other states) by the legislative practice of recessing for more than ten days before final adjournment in order that the governor may consider all bills.

[101] In the other two (Kansas and New Hampshire), the governor can neither sign nor veto a bill following adjournment.

[102] The Book of the States, p. 51; Index Digest, pp. 612-613.

[103] The present requirement to override a veto—two-thirds of the members elected—might be desirable to retain for vetoes of appropriation bills or items, even if other vetoes were made less difficult to override. See discussion of item veto below.

present provision for overriding the veto would be to require three-fifths of those elected in each house or in joint session, or two-thirds of those present (this number might also be required to include at least a majority of those elected as in the Virginia constitution). Separation of powers as proclaimed in Article IV of the present constitution might thereby be given more effect, with "balances" being given equal emphasis with "checks."

In view of the constitutional procedure in some states for gubernatorial amendment of bills, with the approval of the legislature, through which the formal veto process can be avoided particularly for less consequential matters, some consideration might be given to its possible efficacy in Michigan. Consideration might also be given to the somewhat related, but not incompatible, device of allowing the governor to veto parts or sections of any bill.

While the "ten days, Sundays excepted" allowed the governor, to sign or veto bills when the legislature is in session, is probably adequate in most instances, consideration might be given to extending the period allowed for such action. Since only 17 states provide for the "pocket" veto, and in only half of these is it used to any extent, its continuance might be questioned. In Michigan, use of the "pocket" veto is avoided by the practice of keeping the legislature in session (although recessed) until at least the ten days, Sundays excepted, have elapsed for the governor's consideration of bills (before final adjournment of the legislature). By constitutionally requiring an express veto after adjournment, the legislature could be given an opportunity to reconsider vetoed bills at a special session (as in New Jersey and Hawaii) or at the next legislative session; and a longer period of time could be allowed the governor for adequate consideration of the bills.[104]

If the "pocket" veto is retained in a revised constitution, consideration should probably be given to extending substantially the period now allowed for consideration by the governor after adjournment (five days, Sundays excepted).[105]

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[104] In view of the problems concerned with the full legislative process of once again passing a bill the same as, or similar to, one having been "pocket" vetoed, there may well be advantages to some of the formal constitutional devices used in other states so that the legislature may later have an opportunity to override the governor's express veto (with the "pocket" veto not permitted).

[105] In view of the usual rush of bills at the end of a session, the period for consideration of bills after adjournment should probably be longer than for such consideration when the legislature is in session, rather than the reverse as now provided. If the present practice of recessing the legislature (until after the time has elapsed for vetoes) were expected to continue, there would be advantage in extending the period allowed for vetoes when the legislature is in session.

The veto and item veto sections of the constitution are here discussed in connection with the executive department. In a revised constitution these provisions would be appropriate in either the legislative or the executive article.

6. Item Veto

Article VI: Section 37. The governor shall have power to disapprove of any item or items of any bill making appropriations of money embracing distinct items; and the part or parts approved shall be the law; and the item or items disapproved shall be void, unless re-passed according to the rules and limitations prescribed for the passage of other bills over the executive veto.

Constitution of 1908

This section of the executive article originated in the convention of 1907-1908. In the debate on the item veto, some fear was expressed that it was a "very dangerous" power to give to the governor. However, those supporting the item veto pointed out that it would prevent "log-rolling," and allow the governor to strike out unwarranted items without having to veto an entire appropriation bill. Mr. Fairlie (who introduced the proposal) pointed out that every state having revised its constitution in the preceding 30 years had adopted an item veto provision, and that 30 states had already adopted it at that time. This proposal passed on second reading by a vote of 64-26.[106]

Judicial Interpretation

In 1911, Governor Osborn started the practice of reducing appropriation items in addition to vetoing entire items. At that time, a Pennsylvania court decision had interpreted a similar provision in the Pennsylvania constitution as authorizing the governor to reduce as well as to strike items subject to legislative override. Later courts in five other states denied the power to reduce items in the absence of specific constitutional authority to do so. It was during the administration of Governor Brucker in 1931 that the Michigan supreme court denied the governor the power to

[106] Proceedings and Debates, pp. 492-494. The item veto originated in the confederate constitution.

reduce items in appropriation bills—prohibiting by this interpretation a practice that had been used for 20 years.[107]

Opinion of the Attorney General

The procedure for the item veto in Michigan as specified in Section 37 is not detailed. The governor in 1951 signed and filed with the secretary of state an appropriation bill with disapproved items indicated on the bill. Although this manner of vetoing items might be inferred from the language of this section, and is used in some of the 41 item-veto states, an attorney general's opinion held that the veto of those items was null—that the entire bill should have been returned to the legislature for its action on the items.

Other State Constitutions

Forty-one state constitutions provide the governor power to veto items in appropriation bills. The vote required in the various states to override item vetoes is in general the same as that required to override other vetoes, as in Michigan. As pointed out above, the Alaska constitution is unique in requiring a larger vote (three-fourths of the members elected to both houses, in joint session) to override the veto of an appropriation bill, or items of such a bill, than for other vetoes (two-thirds of those elected, in joint session). The Model State Constitution provides for the item veto in the article on finance (Section 704) in connection with budget procedure. The U.S. Constitution does not provide for the item veto.

[107] Wood v. Administrative Board, 225 Mich. 220-225 (1931). The court's strict interpretation of the item-veto power took from the governor an implement that had been useful in achieving governmental economy. Continued lack of adequate and sufficiently detailed itemization in appropriation bills had made the practice of reducing items helpful. Some governors in the period following this decision used the expedient of vetoing some item appropriations for the second year and spreading the first year's amount over the two-year period (for which appropriations were then made) but this was not as effective as the former practice of reducing items. Another method of dealing with the continuing problem of an unbalanced budget was enactment in 1935 of authority for the governor to reduce appropriations to the extent that they exceeded revenue receipts. A provision of this type was continued until 1939. Perkins, Role of the Governor, pp. 51-76. This statutory feature was revived in 1958. The Missouri constitution has a provision (Article IV, Section 27) similar to this statute in Michigan.

Power to Reduce Items. Several state constitutions have specific provisions authorizing the governor to reduce items by the veto procedure in addition to vetoing whole items. Alaska, California, Hawaii, Massachusetts and Tennessee (like the Model State Constitution) have specific provisions for reduction of items. New Jersey and Missouri have provisions that operate with the same effect, whereby the governor may veto items or parts or portions of items. The Missouri constitution, however, denies the governor power to reduce any appropriation for free public schools, or for payments related to the public debt.[108] While not specifically provided for in the constitutions of Pennsylvania and New York, the governor's power to reduce items appears to have been established by precedent.[109]

Comment

If the vote necessary to override vetoes were reduced to some extent such as to require only three-fifths of those elected or two-thirds of those present in each house, some consideration might be given to providing for a higher vote requirement for overriding vetoes of appropriation bills and items (and possibly parts of items). The present requirement to override all vetoes—two-thirds of those elected (to each house)—might be retained for such vetoes.[110]

In view of its potential for adding flexibility to the item veto provision, consideration might also be given to authorizing the governor to reduce items or parts of items in appropriation bills, in addition to his present item veto authority.

If in revising the constitution, an executive budget that the legislature cannot raise beyond the governor's request were provided for, the item veto would lose most, if not all, of its effectiveness.[111]

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[108] Index Digest, pp. 27-29,613-614.

[109] S. Goldmann and B. C. B1and, The Governor's Veto Power (New Jersey Constitutional Study, 1947), pp. 13, 18.

[110] As pointed out above, Alaska requires a higher vote to override such vetoes than for other vetoes.

[111] A proposal for an executive budget was made in the convention of 1907-08) but was rejected by a narrow vote. In the original proposal no appropriation was to be allowed in excess of the amount recommended by the board of auditors. Another version offered as a motion would have restricted the legislature to the total amount of the appropriation recommended with the legislature having discretion as to items within this total. Proceedings and Debates, pp. 732, 738, 745, 1000, 1177-1179.

F. OTHER POWERS OF THE GOVERNOR

1. Military Powers

Article VI: Section 4. He shall be commander-in-chief of the military and naval forces, and may callout such forces to execute the laws, to suppress insurrection and to repel invasion.

Constitutions of 1835 and 1850

The constitution of 1835 (Article V, Section 5) provided that: "The governor shall be commander-in-chief of the militia, and of the army and navy of this state." The 1850 provision (Article V, Section 4) was identical in meaning with the 1908 provision with only minor differences in phraseology.

Constitution of 1908

In Article VI, Section 16 (last sentence of first paragraph) of the present constitution it is provided that the governor shall continue to be "commander-in-chief of all the military force of the state" when he is out of the state "at the head of a military force thereof." Provisions concerning the membership and organization of (and selection of officers for) the militia are in Article XV of the present constitution.

Statutory Implementation

Extensive statutes deal with the military establishment in Michigan.[112]

Other State Constitutions

Some 31 state constitutions (not including Michigan) specify that the governor shall not be commander-in-chief when the state's forces are called into the service of the United States.[113] The reasons specified in the Michigan provision for which the governor may callout the state forces and the designation of these forces are not unusual among state constitutions.[114] The above-mentioned clause of Article VI, Section 16 of the Michigan constitution is based upon the assumption that the

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[112] M.S.A. 4.591-4.826. See also the discussion of Article XV—on the militia.

[113] Index Digest, p. 701; Manual on State Constitutional Provision, p. 141.

[114] Manual on State Constitutional Provision, p. 141. The Alaska and Hawaii constitutions refer with commendable flexibility to the state's "armed forces."

governor may personally command state forces outside of the state (or presumably in the state). Although this provision for commanding forces out of the state is unique among state constitutions, several other states allow the governor to command state forces when out of the state with consent of the legislature. Four states allow the governor to command state forces personally when the legislature so consents or directs.

The most important state force in Michigan and other states is the national guard. Some states, including Michigan, have naval militia, but in Michigan this is virtually an adjunct to the U.S. naval reserve.[115] There was some misuse of the national guard for political purposes by governors in a few states prior to the Second World War.[116] However, judicial proceedings have disallowed use of armed forces for unjustified purposes in some jurisdictions.[117]

Comment

Some consideration might be given to making the description of the forces over which the governor is commander-in-chief more general and flexible—such as "armed forces." If the present provision is not sufficiently flexible to allow the governor discretion to callout the state forces in any emergency for which they

[115] Michigan Joint Legislative Committee on Reorganization of State Government, Staff Report No. 26, Michigan Military Establishment, 1952, pp. 33-35.

[116] Graves, American State Government, 3rd Edit., pp. 384-385.

[117] State governors have tended recently to rely more heavily on state and local police forces to deal with many emergencies for which the national guard was formerly used. However, the national guard tends to be used in recent years more extensively for disaster relief in many states. Establishment by statute of state disaster relief agencies organized to deal with such problems (and thereby avoiding the use of the national guard and the rigidity of martial law in event of local or more widespread disaster) has been recommended by authorities in this area. Graves, American State Government, 4th Edit., pp. 395-398. See also B. M. Rich and P. H. Burch, Jr., "The Changing Role of the National Guard," 50 American Political Science Review (1956) pp. 702-706.

might be needed, some consideration might be given to broadening the provision's scope in this regard. The possibility that a governor might abuse the power to callout state forces to execute the laws (or preserve order) is difficult to check or limit in a constitutional provision of this kind without making it overly inflexible.[118]

The related provision of Article VI, Section 16 (last sentence of first paragraph), insofar as it appears to assume that the governor may take direct personal command of state forces, should be considered in relation to the American tradition of a broad distinction between civil and military authority (emphasized, perhaps, more at the federal than at the state level).

It should also be viewed in relation to Article II, Section 6 of the Michigan constitution which provides: "The military shall in all cases and at all times be in strict subordination to the civil power."[119] Since situations developed that actually or potentially occasioned a governor to lead troops out of his own state only in the colonial or early federal period (and since such action at the present time would be highly unusual), this sentence of Article VI, Section 16 might well be considered for revision or elimination.

2. Reprieves, Commutations and Pardons

Article VI: Section 9. He may grant reprieves, commutations and pardons after convictions for all offenses, except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may think proper, subject to regulations provided by law relative to the manner of applying for pardons. Upon conviction for treason, he may suspend the execution of the sentence until the case shall be reported to the legislature at its next session, when the legislature shall either pardon or commute the sentence, direct the execution of the sentence or grant a further reprieve. He shall communicate to the legislature at each session information of each case of reprieve, commutation or pardon granted and the reasons therefor.

[118] Unjustified use of such power has been checked by court action in other jurisdictions.

[119] While the executive is rightly styled as "commander-in-chief," authority for him to take direct personal commend of armed forces would seem to vitiate the distinction between civil and military authority by unifying the two in the executive.

Constitutions of 1835 and 1850

In the constitution of 1835 (Article V, Section 11), the governor was given power "to grant reprieves and pardons after conviction, except in cases of impeachment." The 1850 provision (Article V, Section 11) was the same as, and the origin of, the present provision.

Constitution of 1908

No change was made in carrying this provision over from the 1850 constitution, nor has it been amended since 1908. Article V, Section 28 authorizes the legislature to provide by law for "indeterminate sentences so called as a punishment for crime, on conviction thereof, and for the detention and release of persons imprisoned or detained on said sentences."

Statutory Implementation

A board of pardons with advisory functions was established in Michigan by statute in 1893. The general functions of this board in matters relating to this section are now carried on by the parole board in the department of corrections. While its powers are still advisory, its hearings and recommendations to the governor are naturally influential.

Judicial Interpretation

As interpreted by the courts, the governor's powers with regard to reprieves, commutations and pardons are restricted to criminal offenses.[120] The governor has wide discretion in making conditional pardons—those receiving pardons being required to perform or not perform specified acts.[121] The power to pardon and to commute a sentence is exclusively that of the governor. Neither the judiciary nor the legislature may restrict or infringe upon this power.[122]

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[120] In re Probasco, 269 Mich. 453.

[121] People v. Marsh. 125 Mich. 410; In re Cammarata, 341 Mich. 528.

[122] People v. Freleigh, 334 Mich. 306.

Other State Constitutions

Pardons. Almost all state constitutions, give the governor authority to grant pardons; in many states, however, there are restrictions on this power. One Michigan exception—cases of impeachment—is common to the great majority of states. The other exception, treason (qualified in the second clause), is common to a majority of the states. In approximately one-third of the states, the governor alone may not exercise the power to pardon; in most instances it is shared with a board. In some 14 states, the legislature may regulate the procedure by law. In the remaining one-third of the states (16 including Michigan) the governor's power of pardon is relatively unrestricted, with the law-making process governing only the manner of applying for pardons.[123]

Reprieves. In approximately one-half of the states, the governor's power to grant reprieves is relatively unrestricted. In the remainder, except for the few in which the governor has no such power, his authority in the area of reprieves is restricted by such features as board action and/or the lawmaking process.[124]

Commutations of Sentence. In some 17 states, the governor's power to commute sentences is relatively unrestricted. In some 20 other states, the power is shared (chiefly with boards), or controlled by the law-making process; while in the remainder (approximately 13), the governor has no such power.[125]

The Model State Constitution provides the governor with power to grant reprieves, commutations and pardons, "after conviction, for all offenses." The manner of applying therefor is subject to regulation by law. The U.S. Constitution provides the president with power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

Remit Fines and Forfeitures. Although not a part of the Michigan constitution, a slight majority of the state constitutions provide for gubernatorial power to remit fines and forfeitures (in connection with the powers here dealt with). In most of

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[123] Manual on State Constitutional Provisions, p. 139; Index Digest, pp. 338-339.

[124] Manual on State Constitutional Provisions, p. 139-140; Index Digest, pp. 346-347.

[125] Manual on State Constitutional Provisions, p. 140; Index Digest, pp. 346-347. The features set forth in the second and third sentences of this section of the Michigan constitution are not unusual among state constitutions.

these, however, the governor's power is restricted by the law-making process, or by sharing the power (usually with boards).[126]

Paroles. Few state constitutions deal with a system of paroles, thereby leaving it to the law-making process as in Michigan. Most of the 14 state constitutions that deal specifically with paroles require that the system be regulated by the law-making process; in a few of these state constitutions, the power is largely delegated to a board.[127]

Comment

In view of the constitutional framework for the exercise of these powers in the various state governments, those revising the Michigan constitution would probably consider the present operation of this provision (which allows the governor wide latitude) against the advisability of qualifying the governor's power by a constitutional provision for more discretion to the law-making process, or by a constitutional provision whereby these responsibilities would be shared by a board or taken over entirely by a board.

The important powers here dealt with are somewhat judicial in nature although usually conferred upon the executive (with or without restrictions). They are in general unrelated to the governor's major area of responsibility in executive-administrative matters. Gubernatorial power in such matters as pardons and reprieves, whether restricted or not, is therefore not essential to his major executive function and probably hampers this function.[128]

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[126] Manual on State Constitutional Provisions, p. 140; Index Digest, pp. 344-346.

[127] Index Digest, p. 341.

[128] Since matters concerned with executive clemency have often been extremely time-consuming and nerve-wracking for governors (particularly in states having capital punishment) leading authorities have urged that the governor be relieved entirely of such duties, which could be taken over by a board of pardons. W. B. Graves, American State Government, 4th Edition, pp. 347-350.

Some consideration might be given to expanding a revised provision dealing with the present subject matter of this section to include power to remit fines and forfeitures (or other penalties). The last two sentences of the present section, if retained, seem to present slight difficulty for revision, unless the first sentence were so revised as to make harmonious changes necessary.

3. Use of the Great Seal

Article VI: Section 11. All official acts of the governor, except his approval of the laws, shall be authenticated by the great seal of the state, which shall be kept by the secretary of state.

Constitutions of 1835 and 1850

The great seal of the state originated in the convention which framed the constitution of 1835. In Article V, Section 20 of that constitution, the governor was directed to provide the seal as specified by a committee of the convention, but it was not described in the constitution. The secretary of state was to keep the seal and all official acts of the governor, except his approval of the laws, were to be authenticated by it. The provision in the 1850 constitution (Article V, Section 18) is the same as that in the 1908 constitution, except for a very slight difference in phraseology. The basic provision concerning use and custody of the great seal has been the same in all three constitutions.

Constitution of 1908

This provision has not been amended since 1908. Some distinction has been made between "official acts" of the governor and other acts by court interpretation.[129]

[129] Attorney General v. Jochim, 99 Mich. 358 (under the similar provision of the 1850 constitution). Null v. Tanner, 280 Mich. 22. The attorney general has held that the great seal must remain at the seat of government at all times, and that no dies or mechanical duplicates of the great seal may be made. However, a facsimile of the seal may appear on official publications. Opinions of January 27, 1947 (Nos. 53, 54), November 8, 1955.

Other State Constitutions

Custody of the seal by the secretary of state is the most common provision among state constitutions, although some place such custody in the governor. Few state constitutions make the use of the great seal as mandatory and specific for "official acts" as does the Michigan provision. The most common provision among the states is that the governor shall use it officially—without specifying particular uses. Other provisions require the secretary of state to use it officially, or as directed by law, or as directed by the governor.[130]

Comment

Some consideration might be given to making this provision less rigid and mandatory as it affects the use of the great seal for "official acts." Although the term "official acts" is vague and open to somewhat flexible interpretation, court decisions should probably be avoidable in regard to such clearly ministerial duties as use of the state seal. This provision could be revised to allow use of the great seal to be prescribed by law. If this matter is not to be prescribed by law, the present mandatory effect could be modified.

4. Issuance of Commissions

Article VI: Section 12. All commissions issued to persons holding office under the provisions of this constitution shall be in the name and by the authority of the people of the state of Michigan, sealed with the great seal of the state, signed by the governor and countersigned by the secretary of state.

Constitutions of 1835 and 1850

The constitution of 1835 (Article VI, Section 21) provided very briefly in this area: "All grants and commissions shall be in the name and by the authority of the people of the state of Michigan." The 1850 provision (Article VI, Section 19) was identical to the present provision (except for having a comma after governor).

Constitution of 1908

This section has not been amended since 1908, nor has it caused any difficulty in interpretation.

[130] Index Digest, pp. 920-921.

Other State Constitutions

This provision is not unusual among state constitutions. There are more state constitutional provisions that require commissions to be attested by the secretary of state after signature by the governor than there are such that require commissions to be countersigned by the secretary of state.[131]

Comment

If the preceding section relating to use of the great seal were revised, some related revision of this section might be made. The necessity of requiring commissions to be sealed with the great seal might be questioned. Some or all of the details in this provision could also be left to the discretion of the law-making process.

[131] Index Digest, p. 812.

G. ELIGIBILITY, LIEUTENANT GOVERNOR, SUCCESSION AND OTHER PROVISIONS

1. Eligibility to Office of Governor

Article VI: Section 13. No person shall be eligible to the office of governor or lieutenant governor who shall not have attained the age of thirty years and who has not been five years a citizen of the United States and a resident of this state two years next preceding his election.

Constitutions of 1835 and 1850

In the 1835 constitution (Article V, Section 2) there was no age requirement for governor or lieutenant governor.[132] The 30-year minimum age requirement originated in the 1850 constitution (Article V, Section 2) and was carried over in the 1908 provision. U.S. citizenship and state residence requirements have been the same in all three constitutions.

Constitution of 1908

Section 13 has not been amended since the adoption of the present constitution. This provision is clear and definite without need for statutory implementation. Furthermore, it leaves little room for variance of interpretation. There has been no litigation with respect to this provision.

Other State Constitutions

A sizeable majority of states (36) have constitutional provision for a minimum age of 30 years for governor. Eight states specify no minimum age. In four states (Arizona, California, Minnesota and Nevada), the minimum age is 25 years; in Oklahoma, 31 years; and Hawaii, 35 years.

Thirty-nine of the 50 states require the governor to be a U.S. citizen—the remainder do not. Seventeen of the 39 states merely require such citizenship without specifying a number of years. Two years of U.S. citizenship is required in one state; five years in seven states (including Michigan); six years in one state; seven years in one state; ten years in five states; 12 years in one state; 15 years in three states; and 20 years in three states.

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[132] Michigan's first governor was well under the present age requirement.

State residence requirements preceding filing for office, election, or taking office, vary as follows among the states: six states not specified; one year in one state; two years in eight states (including Michigan); three years in one state; four years in one state; five years in nineteen states (including Maryland where a total of ten years of state citizenship at any time is also required); six years in three states; seven years in eight states; and ten years in three states.[133]

The only qualification required by the Model State Constitution (Section 501) is that the governor be a qualified voter of the state. The U.S. constitution requires (in Article II, Section I, Clause 5) that the president be a natural born citizen who has attained the age of 35 years, and been a U.S. resident for fourteen years.

Comment

In view of the long-standing qualification for governor, particularly in regard to U.S. citizenship and state residence, there would probably be some reluctance to change the present requirements and little need to do so. Michigan's age requirement is in line with most other states; the length of the U.S. citizenship required is slightly above the average, while the state residence qualification is somewhat below the average.

2. Prohibition of Dual Office Holding and Legislative Appointment

Article VI: Section 14. No member of congress nor any person holding office under the United States or this state shall execute the office of governor, except as provided in this constitution.

Section 15. No person elected governor or lieutenant governor shall be eligible to any office or appointment from the legislature, or either house thereof, during the time for which he was elected. All votes for either of them for any such office shall be void.

Constitutions of 1835 and 1850

The 1835 constitution (Article V, Section 16) and 1850 constitution (Article V, Sec-

[133] Index Digest, pp. 506-508, Manual on State Constitutional Provisions, pp. 135) 136, 152. Incomplete coverage checked against constitutional provisions.

tion 15) had similar provisions concerning the ineligibility of office holders under the United States or Michigan to execute the office of governor. These in turn are similar to Section 14 of the present constitution. However, the words "except as provided in this constitution" were added in the convention of 1907-08.

The constitution of 1835 did not have a provision similar to Section 15. This provision originated in the constitution of 1850 (Article V, Section 16). It makes the governor or lieutenant governor ineligible to an appointment or office from the legislature during the period for which he was elected.

Constitution of 1908

Sections 14 and 15 have not been amended since the present constitution was adopted.

Judicial Interpretation

These sections have not given rise to much litigation. In regard to the prohibition of dual office holding in Section 14, the Michigan supreme court held that under the similar provision of the 1850 constitution a city mayor elected to the governorship could not also continue to carryon as mayor of the city.[134]

Other State Constitutions

Close to one-half of the states have provisions similar to the restrictions set forth in Section 14. Except for the similar provision in the New Jersey constitution (Article V, Section 1, 3), Section 15 of the Michigan constitution appears to be unique among state constitutions. However, some five states make the governor ineligible to any other office during the term for which he was elected. In addition to these, Utah makes the governor ineligible for election as U.S. senator during the term for which he was elected. Alabama carries this further and makes the governor ineligible for election or appointment as U.S. senator during the term for which he was elected or for one year thereafter.[135]

Neither the Model State Constitution nor the U.S. Constitution has provisions of this type.

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[134] Attorney General v. Common Council of Detroit, 112 Mich. 145.

[135] Index Digest, pp. 507-508.

Comment

Dual office holding of the type prohibited in Section 14 presents an aspect of incompatibility so obvious that there would probably be no need to forbid it in the constitution. However, if a provision of this type is to be retained, the language of the section could be broadened to prohibit dual office holding by other state officers in addition to the governor. Although the legislature would undoubtedly have power to deal with such matters if the present section were eliminated, a provision could be framed to authorize the legislature to provide for such matters by law.

In regard to Section 15, it is somewhat difficult to conceive of either the governor or lieutenant governor being appointed to any office by the legislature or either of its houses, particularly since the ratification of the seventeenth federal amendment for the popular election of U.S. senators in 1913. This section, therefore, might well be considered for elimination in a revision of the constitution. There is probably no compelling reason for following the example of the few states in which the governor is made ineligible to any other office or only to that of U.S. senator during the term for which he was elected. There might be more reason to make the governor ineligible to appointment as U.S. senator during the term for which he was elected, if those who revise the constitution desired to preclude the resignation of a governor in order that he could be appointed to a vacancy in the U.S. senate by his successor.

3. Lieutenant Governor

Article VI: Section 19. The lieutenant governor shall be president of the senate, but shall have no vote.

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 were similar in phraseology. Changes in punctuation, however, allowed room for a different interpretation. The 1835 provision (Article VI, Section 15) was as follows:

> The lieutenant governor, shall, by virtue of his office, be president of the senate; in committee of the whole, he may debate on all questions; and when there is an equal division, he shall give the casting vote.

The 1850 constitution (Article V, Section 14) provided:

> The lieutenant governor shall, by virtue of his office, be president of the senate. In committee of the whole he may debate all questions; and where there is an equal division, he shall give the casting vote.

The only change in phraseology—"debate all questions" rather than "debate on all questions" in the 1835 constitution—could have no influence on the meaning of the section. However, the change from a semicolon after "senate" to a period seems to have changed the meaning from the vagueness in the 1835 constitution and seemed to identify the lieutenant governor's power to vote in event of equal division more specifically with his power to debate in committee of the whole. It was judicially determined in 1907 (under the 1850 constitution) that the lieutenant governor could vote to break a tie only in committee of the whole.[136]

Constitution of 1908

Under the draft provision as presented to the convention of 1907-1908 by the committee on the executive department, the lieutenant governor was not authorized to debate in committee of the whole and was to have no vote in the senate, "except in case of equal division." Mr. Fairlie, a member of the committee, explained that the committee found that only six other states besides Michigan allowed the lieutenant governor to debate in committee of the whole, and had therefore eliminated that part of the 1850 provision. It had inserted in the draft provision authority for him to vote in event of a tie because that was the universal practice in other states having a lieutenant governor. The clause which would have allowed the lieutenant governor to vote on final passage of a bill in the event of an equal division was deleted in the course of the convention debate.

It was pointed out in the convention debate that lieutenant governors had not exercised their right to vote or debate in committee of the whole for many years. However, it was also pointed out that the lieutenant governor then holding office (under the 1850 constitution) had cast the deciding vote on final passage of a bill in the evenly divided senate. This controversy and the senselessness of continuing the lieutenant governor's power to vote on equal division only in committee of the whole (under the 1850 provision as recently judicially determined) seem to have been influential in the convention's decision to deprive the lieutenant governor of all power to vote in the senate. Another factor in the decision not to allow the lieutenant governor to vote, particularly on final passage of a bill, was the probably exag-

[136] Kelley v. Secretary of State, 149 Mich. 343.

gerated fear expressed by some in the debate that such power would violate the principle of separation of powers.[137]

This section has not been amended, nor has there been any problem of its interpretation since the adoption of the present constitution

Other State Constitutions

In eleven states (see table in Part A above—ten if Alaska is not included), there is no office of lieutenant governor. In Tennessee, the office is statutory. In the Washington constitution the legislature is authorized to abolish the office, but has not done so. In 37 of the 39 states having the office, the lieutenant governor presides over the senate. In 32 of these 37 states, the lieutenant governor has power to cast the deciding vote in case of equal division. In Massachusetts, the lieutenant governor does not preside over the senate but does preside over the governor's council. In Hawaii, the lieutenant governor is not president of the senate, but under statutory authority acts as secretary of state. In Alaska, the secretary of state is elected jointly with the governor. Except for not having the title, this officer is really a lieutenant governor. The practice is the same in Alaska and Hawaii, although the titles are reversed.[138]

The Model State Constitution does not provide for a lieutenant governor. However, it does provide for an administrative manager appointive by, and removable at the pleasure of, the governor—to serve as a general assistant to the governor. The vice presidency on the federal level is in the process of evolving toward greater responsibility in the executive branch. However, the vice president's only constitutional duty remains that of presiding over the U.S. senate.[139]

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[137] Proceedings and Debates, pp. 340-341, 490-492, 1426.

[138] The five states in which the lieutenant governor as president of the senate does not have the casting vote: Georgia, Louisiana, Michigan, Minnesota and Tennessee (office is statutory). Index Digest, pp. 658-659,689; Manual on State Constitutional Provisions, pp. 150,192-193; pertinent constitutional provisions. In about one-half of the states having lieutenant governors, he is a member of one or more boards, as in Michigan. In Michigan, this officer's most important duty under statutory authority is his membership on the state administrative board (since 1939).

[139] In several states, the executive functions of the lieutenant governor have also been expanded in practice. R. L. Nichols, Constitutional Revision in Kansas: The Executive and the Legislative (Univ. of Kansas, 1960), pp. 5-6.

Comment

In view of the fact that the office of lieutenant governor is not universal among the states, some might question the desirability of continuing it. If this office were abolished, other provisions would have to be made relative to succession and a presiding officer for the senate (probably senate election of a president). However, an office of this kind is largely traditional on the state as well as the federal level. Reasons for retaining the lieutenant governor as a constitutional officer would be related to the duties to which he might be assigned in the constitution and/or by statute.

If the office of lieutenant governor is retained in a revision of the constitution, and if he is to continue to be president of the senate, consideration may be given to authorizing him to cast the deciding vote in event of an equal division in the senate. This power has always existed for the vice president of the U.S. and is exercised in 32 of the 37 states having a lieutenant governor as president of the senate.

No serious threat to the principle of separation of powers seems to have arisen thereby in these jurisdictions. Where the senate has an even number of members, as in Michigan, the casting vote of the president has some value in resolving possible deadlock. Under parliamentary procedure a motion is defeated by an equal division.[140]

The office of lieutenant governor could be retained without requiring that he preside over the senate. He might be assigned departmental responsibilities as in Alaska and Hawaii. The practice in Alaska and Hawaii is similar although the titles are reversed.

In Alaska he is called secretary of state (and is elected jointly with the governor). In Hawaii, the constitution requires a lieutenant governor, but the determination of his duties is prescribed by law. The legislature has assigned him the duties of secretary of state.

Another alternative use of the office of lieutenant governor would be to make this officer more specifically an assistant governor required neither to preside over the senate nor to administer a department. The governor at his discretion might then delegate more general or specific duties or responsibilities to the lieutenant gover-

[140] Article V, Section 23 of the present constitution stipulates that no bill "shall become a law without the concurrence of a majority of all the members elected to each house." The lieutenant governor is not a member of the senate.

nor; and the lieutenant governor might relieve the governor of some of his ceremonial and social functions.[141]

Joint Election With Governor. If the lieutenant governorship is retained, it undoubtedly would continue to be filled by popular election. Joint election of governor and lieutenant governor as in Alaska and New York (and president and vice president as is the actual practice on the federal level) might be considered whether this officer would continue to preside over the senate or administer a department. If it were intended to make the lieutenant governor a general assistant to the governor, joint election would be a practical necessity in order to preclude the possibility of these two officers being of different party affiliation.

4. Devolution of the Governor's Powers Upon Lieutenant Governor

Article VI: Section 16. In case of the impeachment of the governor, his removal from office, death, inability, resignation or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the disability ceases. When the governor shall be out of the state at the head of a military force thereof, he shall continue commander-in-chief of all the military force of the state.

In case of the death of the governor-elect before taking and subscribing to the constitutional oath of office, or before entering upon the duties of his office, the powers and duties of the office shall devolve upon the lieutenant governor-elect on the commencement of his term of office.

Constitutions of 1835 and 1850

The provision in the constitution of 1835 (Article V, Section 13) was similar to the first sentence of the present section. However, "inability" of the governor was not included as a reason for the duties to devolve upon the lieutenant governor. The

[141] The most useful of recent material dealing with the office of lieutenant governor: Byron R. Abernathy, Some Persisting Questions Concerning the Constitutional State Executive (Univ. of Kansas, 1960), pp. 17-31; see also Bromage, "Constitutional Revision in Michigan," p. 99.

words "for the residue of the term" were not included and the powers were to devolve "until such disability shall cease, or the vacancy be filled." The 1850 provision (Article V, Section 12) was identical with the first paragraph of the present section, except for the additional phrase "in time of war" following the words "out of state" in the second sentence, and some variation in punctuation.

Constitution of 1908

Amendment in 1948. The second paragraph of this section was added by amendment—proposed by the legislature in 1947 and approved at the November election in 1948. Problems of succession in other states, including the death of a governor-elect, stimulated this action and concurrent amendment of the two succeeding sections (17 and 18) of Article VI in order to deal with the problem of succession comprehensively.

Opinions of the Attorney General

An opinion of the attorney general (January 6, 1938) held that the powers and duties of the governor do not devolve upon the lieutenant governor, if the governor is absent from the state for only a few days (in view of speedier transportation and communication) unless an emergency arises or the governor officially requests the lieutenant governor to act as governor. Ten years later (November 8, 1948), an opinion of the attorney general reversing this ruling held that the lieutenant governor becomes acting governor whenever the governor is out of the state. An opinion of the attorney general (March 28, 1939) held that when a lieutenant governor succeeds a governor who has died or resigned, the office of lieutenant governor cannot be filled by appointment (nor can the line of succession be broken by such action).

Other State Constitutions

In all states having a lieutenant governor, this officer is first in the line of succession to the governorship. In six of the eleven states having no lieutenant governor, the president of the senate is first in line of succession; in four, the secretary of state; and in one, the legislature elects a successor. The reasons specified in the Michigan provision for the governor's powers and duties to devolve upon the lieutenant governor and the duration of his service as governor or acting governor are common to most state constitutions, the Model State Constitution, and the U.S. Constitution. Provisions similar to that in the second paragraph of this section are not now unusual among state constitutions.

Some states require a special election for governor under various circumstances.[142]

Incidents have occurred in some states giving rise to the problem of how to determine whether or not the governor is capable of performing the duties of his office due to physical or mental disorder. Only three states have attacked the problem of temporary or permanent succession in such a contingency by inserting provisions in their constitutions which set forth a procedure for the determination of inability or disability.[143]

In New Jersey, after six months of gubernatorial absence or disability, if a resolution is passed by two-thirds of the total membership of both legislative houses, the state supreme court may make a determination of vacancy in the office of governor. The delay of six months, the two-thirds vote necessary, and the lack of procedure for restoring the governor to office seem to be serious defects in this provision. The Mississippi procedure is not overly ponderous. If there is doubt concerning the existence of a disability or the termination of a disability, lithe secretary of state shall submit the question in doubt to the supreme court which shall determine the question and give an opinion in writing to the secretary of state which shall be "final and conclusive." The Alabama provision applies specifically to unsoundness of mind. The supreme court upon written request of two officers in the chain of succession (but not including the officer next in line of succession) shall make a determination concerning the soundness of mind of the governor. This court may also determine the question of restoration of sanity and office.[144]

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[142] Index Digest, pp. 503,509-513,514-515. Comparative constitutional provisions relating to the governor commanding military forces out of the state are discussed in the preceding Part F—"Military Powers of the Governor."

[143] "Inability" is used with the specific causes for succession, and "disability" in regard to the cessation of such causes in the U.S. Constitution, the present Michigan provision and other state constitutions. The present meaning and usage of these terms seem to be reversed—"disability" more specific from onset of some physical or mental disorder) and "inability" the more general term.

[144] New Jersey constitution, Article V, Section 1,8; Mississippi constitution, Article V, Section 131; Alabama constitution, Article V, Section 128; Rich, The Governor, pp. 8-12.

The Mississippi provision seems to be the most satisfactory and comprehensive of the three, since it appears to cover all contingencies, and applies to the full line of succession. It seems also to have the virtue of simplicity to the extent possible in dealing with this complicated matter.

The Model State Constitution and the U.S. Constitution, like most state constitutions, are vague and indefinite with regard to determination of executive incapacity in regard to succession.

Comment

Unless the office of lieutenant governor were eliminated in a revision of the Michigan constitution, there appears to be no great difficulty with the present contents of this section.[145] Those revising the constitution might consider it advisable to modify the provision as it affects the governor's absence from the state necessitating an acting governor. However, the present practice in Michigan appears to be prevalent among the states, and there are good reasons for the governor or an acting governor to be present in the state at all times. Since the lieutenant governor, if the office is retained, would generally be the acting governor in the absence of the governor, problems might arise from the possibility of the governor and lieutenant governor being of different political parties.

Joint election of governor and lieutenant governor would preclude such possibility and its potential for partisan confusion.

Because the problem of determining the fact of gubernatorial disability might arise in Michigan as it has in other jurisdictions (e.g. Louisiana), it might be desirable to frame a revision of this section in order to establish a procedure similar to those in Mississippi, Alabama and New Jersey or with those features that seem best in their provisions. It is difficult to provide for flexibility in this sensitive area of temporary or permanent succession in event of executive incapacity due to physical or mental disorder, and at the same time guard against possible political abuse or opportunism.

The supreme court may be the most appropriate tribunal for determination of such incapacity. While some might fear a violation of the separation-of-powers principle in this feature, it would be difficult to allow an officer or officers in the executive department to determine gubernatorial incapacity without the possibility of action being taken that could verge, or seem to verge, upon insubordination.

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[145] Except for possible elimination of the second sentence of the first paragraph--see discussion of military powers above, Part F.

5. Succession Beyond Lieutenant Governor

Article VI: Section 17. After the lieutenant governor, the line of succession and order of precedence of state officers, who shall act as governor, shall be secretary of state, attorney general, state treasurer and auditor general, and during a vacancy in the office of governor, if the lieutenant governor or any state officer or officers in this line of succession die, resign, be impeached, displaced, be incapable of performing the duties of office, or be absent from the state, leaving no state officer prior in the line of succession to fill the office of governor, the state officer next in line of succession shall act as governor during the residue of his term or until the absence or disability giving rise to the succession ceases.

In case of the death of the lieutenant governor-elect or any state officer or officer-elect in this line of succession before taking and subscribing to the constitutional oath of office, or before entering upon the duties of office, leaving no state officer-elect prior in line of succession to fill the office of governor, the powers and duties of the office of governor shall devolve upon the state officer elect next in line on the commencement of his term of office.

Section 18. The lieutenant governor or other state officer in the line of succession, while performing the duties of governor, shall receive the same compensation as the governor.

Constitutions of 1835 and 1850

Provisions of the constitutions of 1835 (Article V, Section 14) and 1850 (Article V, Section 13) were somewhat similar to the original form of Section 17 in the 1908 constitution (see below) except that the president pro tempore of the senate was specified for the succession after the lieutenant governor rather than the secretary of state. The 1835 provision did not have the words “be incapable of performing the duties of his office” or the final words “or the disability cease” (vacancy was to be filled at the next annual election for legislators—Article V, Section 17).

In regard to the content of Section 18 of the present constitution, the 1835 constitution (Article V, Section 19) provided that the lieutenant governor “except when acting as governor” and the president of the senate pro tempore receive the same compensation as the speaker of the house. The 1850 provision (Article VI, Section

17) was similar to the original form of Section 18 in the 1908 constitution (see below) except that the president of the senate pro tempore was specified instead of secretary of state.

Constitution of 1908

These two sections were amended jointly with Section 16 by a legislative proposal of 1947 ratified by a vote of 1,055,632 to 495,214 in November, 1948. Thereby, problems of succession were dealt with more comprehensively. Before this amendment, the provisions were as follows in the 1908 constitution:

> Section 17. During a vacancy in the office of governor, if the lieutenant governor die, resign or be impeached, displaced, be incapable of performing the duties of his office, or absent from the state, the secretary of state shall act as governor until the vacancy be filled or the disability cease.
>
> Section 18. The lieutenant governor or secretary of state, while performing the duties of governor, shall receive the same compensation as the governor.

Other State Constitutions

Section 17 of the Michigan constitution, as amended, is one of the most comprehensive among state constitutional provisions dealing with this matter. Although several state constitutions provide for succession by the lieutenant governor-elect if the governor-elect dies before taking office, few carry this feature into effect for the entire line of succession. Several states require a special election of a governor, or governor and lieutenant governor, in event of vacancy, under certain circumstances. Approximately one-half of the states having a lieutenant governor still provide that the president of the senate pro tempore is second in line of succession.[146]

Approximately one-half of the state constitutions have a provision similar to Section 18.[147]

The Model State Constitution like the U.S. Constitution does not provide beyond the first officer in line of succession. However, since the Model provides that this officer shall be the presiding officer of unicameral legislature, a successor would presumably be available from that office at all times.

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[146] Index Digest, pp. 511-515.

[147] Loc. Cit.

Comment

Sections 17 and 18 as amended, related as they are to Section 16, provide a relatively comprehensive chain of succession. Most eventualities, except the possibility that all state officers in the specified line of succession might die or be incapacitated at the same time, seem to be covered by the present provision. This one eventuality was provided for by the 1959 amendment of Article XVI, Section 5 which gave the legislature power to provide for full continuity in state government in event of disaster due to enemy attack. Under this amendment, the legislature has power to deal with the problem of continuity in all branches of the state government. In revising the constitution, some question might arise as to whether or not some of the material of this 1959 amendment might be integrated in the part of the executive article under discussion. In any event, the words "thereafter as may be provided by law" might be added after the line of succession specified in Section 17, if a line of succession is retained in the constitution. The line of succession could, of course, be left to the discretion of the legislature, as could some of the material presently dealt with in detail in these sections.

For purposes of simplification, whatever is retained of the subject matter of Sections 16, 17, 18 and possibly 19 of the executive article might be rearranged and integrated, together with any related new material, to form one unified section of the revised constitution.

6. Compensation of State Officers

Article VI: Section 21. The governor, secretary of state, state treasurer, auditor general, and attorney general shall each receive such compensation as shall be prescribed by law which shall be in full for all services performed and expenses incurred during his term of office: Provided, That the same shall not be changed during the term of office for which elected.

Constitutions of 1835 and 1850

The 1835 constitution allowed full latitude with regard to salaries to the law-making process. Article VI, Section 18 provided that the governor "shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the term for which he has been elected."

The 1850 provision (Article IX, Section 1) was similar to the original 1908 provision (see below) but included the salary for the judges of the circuit court in addition to those for the state officers. Under the 1850 section, the governor's salary was originally $1,000 annually, but was raised to $4,000 by an amendment ratified in 1889. The state treasurer and superintendent of public instruction each received $1,000 annually; the secretary of state, commissioner of the state land office, and attorney general each received $800 annually.

Constitution of 1908

Before its amendment in 1948, Section 21 specified the amount of compensation for the elective state officers. In the convention of 1907-08, one of the most spirited debates arose over the question of whether to fix the salaries of the state officers in the constitution or leave discretion in this matter to the law-making process. Advocates of flexibility through the lawmaking process lost out.[148]

As originally fixed in this section of the 1908 constitution, the governor and attorney general received $5,000 annually; the secretary of state, state treasurer, commissioner of the state land office and auditor general each $2,500 annually. The section then continued: "They shall receive no fees or perquisites whatever for the performance of any duties connected with the offices. It shall not be competent for the legislature to increase the salaries herein provided." Salary provision for the lieutenant governor as president of the senate (the same as for the speaker of the house and other legislators) is in Article V, Section 10 of the present constitution.

This section was amended to its present form by a legislative proposal ratified by a vote of 935,44l to 531,950 in November, 1948. Under present statutes, the governor receives $27,500 per year and the elective officers specified in this section receive $17,500 per year (Public Act l62, 1960).

Other State Constitutions

A large majority of state constitutions either provide that the salaries of the governor and other state officers shall be fixed by law, or indicate an amount which can be changed by law. The New York constitution fixes a maximum for the governor of

[148] Proceedings and Debates, pp. 341-343, 888-889. 1003, 1313-1317, 1059-1062, 1257-1267. Some elements of public opinion and the press seem to have exerted pressure in order to secure the inflexible fixed salaries. In their view, the delegates would be lacking in courage if they failed to fix the compensation of these state officers in the constitution.

$50,000 annually. Provisions that prohibit changes in salaries for state officers during the term for which they are elected are common among state constitutions.[149]

The Model State Constitution has no provision relating to the governor's compensation. The U.S. Constitution requires that the president shall receive a compensation which cannot be increased or diminished during his term of office.

Comment

In a revision of the constitution, some change might be made in the list of state officers as specified in Section 21. The list of state officers other than governor presently specified might be eliminated, particularly if these were made appointive rather than elective. However, the lieutenant governor (if retained) might be included with the governor; provision for his compensation would probably be considered more appropriate in the executive article than in the legislative article as at present.

Those who argued strenuously, if vainly, against constitutionally fixing the state officers' salaries in the convention of 1907-1908 appear to have been vindicated by the amendment ratified some 40 years later. The basic flexibility in this section as amended appears to present no problem for revision.

7. Boards of State Auditors, Escheats, and Fund Commissioners

Article VI: Section 20. The secretary of state, state treasurer and such other state officers as shall be designated by law shall constitute a board of state auditors. They shall examine and adjust all claims against the state not otherwise provided for by general law. They shall act as a board of escheats and a board of fund commissioners. They shall perform such other duties as may be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution had no provision similar to this. The 1850 constitution (Article VIII, Section 4) had a provision similar to the first three sentences in the original form of this section of the 1908 constitution. The officers designated were not

[149] Index Digest, pp. 495-496, 813, 924-925.

required to act as a state board of escheats, a board of fund commissioners, nor to perform other duties as prescribed by law.

Constitution of 1908

In its original form this section designated the secretary of state, state treasurer, and commissioner of the state land office to constitute the various boards designated including a board of state canvassers. Since the office of the commissioner of the state land office was made subject to abolition by law (Article VI, Section 1), the last sentence of the original Section 20 stated that if that office were abolished, another officer "shall be designated by law" to replace the land commissioner on the various boards mentioned in the section. In 1913 the office of commissioner of the state land office was abolished and the superintendent of public instruction was designated to take the commissioner's place on the various boards (see above—part A). The 1955 amendment of Section 20 continued the discretion of the law-making process (following abolishment of the office of commissioner of the state land office) in designating the third member of the various boards.

The present form of Section 20 is in part the result of an amendment ratified in April, 1955, by a vote of 456,986 to 297,250. The chief purpose of this amendment was to terminate the duties and function of the officers designated in this section as a board of state canvassers as provided for in the original section. A four-member bipartisan board of state canvassers to be established by law was made mandatory by the amendment (in Article III, Section 9 of the present constitution).

Statutory Implementation

Before the establishment of the budget commission in 1919 and the state administrative board in 1921, the board of state auditors was the most important agency for central control and management of state government.

Some of its statutory authority was transferred to these agencies and most of its remaining function to the newly created department of administration in 1948. Its power to examine and adjust all claims against the state was restricted by the statute establishing the court of claims in 1939 (Public Act 135).[150]

Extensive statutes deal with the matter of escheated property. Much of the procedure relating to escheats pertains to duties required of the attorney general's office.

[150] Heady and Pealy, Department of Administration, pp. 11-21. M.S.A., 3.451-4.511; 27.3548. Abbott v. Michigan State Industries, 303 Mich. 575.

Ultimate responsibility for escheated property remains in the state board of escheats.[151]

The board of fund commissioners under statutory authority is required to invest any treasury surplus in "the purchase of bonds and other liabilities of the state."[152] This function is similar to that of the securities division of the treasury department.

Other State Constitution

This section of the present Michigan constitution appears to be unique among state constitutions.[153] Neither the Model State Constitution nor the U.S. Constitution has a similar provision.

Comment

In view of the likelihood that the elective state officers designated to be members of the various boards given constitutional status in this section would often be members of the same political party, the 1955 amendment which established a bipartisan board of canvassers was a well justified reform.

The residual power of the board of state auditors is restricted and its function somewhat marginal. In view of this, the desirability of continuing the board's constitutional status is questionable.

Since the function of the designated officers as the board of fund commissioners is related to the operation of the treasury department's securities division, and the duties of the board of escheats is largely dependent upon action taken by the attorney general's office, continued constitutional status for these boards might also be questioned.[154]

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[151] M.S.A., 26.1011-26.1054.

[152] M.S.A., 3.681-3.691. The state treasurer has statutory authority to invest surplus funds in U.S. securities, and under certain conditions to deposit surplus funds in banks.

[153] Index Digest, pp. 48, 461, 486.

[154] The "Little Hoover" report recommended that the board of state auditors, the board of escheats, and the board of fund commissioners be abolished; that the function of the board of escheats be transferred to the treasury department and that of the board of fund commissioners be transferred to the securities division of the treasury department. Revenue Administration, Staff Report No. 6, pp. 39-40; General Management of Michigan State Government, pp. II-73-76. The attorney general's office is responsible for much of the procedure relative to escheated property. Ultimate responsibility for property escheated to the state could be transferred to the treasury department, if the board of escheats were abolished. Such matters could be dealt with by statute if this section were eliminated.

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CHAPTER VII JUDICIAL DEPARTMENT

(over)

Section Detail

VII JUDICIAL DEPARTMENT

by

University of Michigan Law School
under the supervision of
Dean Allen F. Smith

A. JUDICIAL POWER

Article VII: Section 1. The judicial power shall be vested in one supreme court, circuit courts, probate courts, justices of the peace and such other courts of civil and criminal jurisdiction, inferior to the supreme court, as the legislature may establish by general law, by a two-thirds vote of the members elected to each house.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 1 provided:

> The judicial power shall be vested in one supreme court, and in such other courts as the legislature may from time to time establish.

The 1850 constitution, Article VI, Section 1 provided:

> The judicial power is vested in one supreme court, in circuit courts, in probate courts, and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities.

Constitution of 1908

The constitution of 1908 dropped the provision on municipal courts and authorized the legislature to establish by general law other courts of civil and criminal jurisdiction. According to the "Address to the People" the two-thirds vote was designed to guard against the creation of unnecessary courts.

Other State Constitutions

(In making the comparisons with other constitutions, reliance has been placed upon a 1959 study conducted by the Legislative Research Fund of Columbia University—Index Digest of State Constitutions. That source is hereafter referred to as ID.)

Most states (46) make provision in the constitution for establishment of the highest state court; ID, p. 215. Similarly, most states (40) provide for establishment of general trial courts (called circuit courts in Michigan); ID, p. 215. More-

over, 34 states have a general provision for the establishment of other courts by the legislature.

On the other hand, only 13 state constitutions provide for the establishment of probate courts, ID, p. 215; and only 26 provide for justices of the peace, ID, p. 215.

Nine states provide constitutionally for an intermediate court of appeals; ID, p. 215.

Comment

Three separate problems are posed by this section. The first has to do with the question of the unification of the court system; the second, with the need for and creation of a court of appeals; and the third with the place in the judicial system for courts of limited jurisdiction such as the justices of the peace.

Integration of Courts. The Model State Judiciary Article of the Section of Judicial Administration of the American Bar Association suggests this provision:

> § 1. The Judicial Power.
>
> The judicial power of the state shall be vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the district court, and one trial court of limited jurisdiction known as the magistrate's court.

Such a provision would achieve full unification and avoid many questions concerning the technicalities of jurisdiction of various separate courts.

Professor Charles W. Joiner of the University of Michigan Law School, who served as Chairman of the Joint Committee on Michigan Procedural Revision which recently promulgated a bill passed by the 1961 legislature to revise and modernize the judicature act in Michigan, comments on this subject in an article appearing in 38 U. of Detroit Law Journal 505 (1961):

> Although Michigan has not achieved complete integration of its court structure, it has succeeded in taking a number of substantial and worthwhile steps in recognizing the propriety and the need for an integrated court system. The appointment of a court administrator having active obligations in connection with the gathering of judicial statistics and recommending the transfer of circuit judges from one circuit to the other as needs are revealed; the power of the court to transfer judges to assist other circuits, to clean up dockets and to provide better judicial administration even against their will; the active judicial conference meeting annually involving all circuit judges in

> the state and meeting regionally in all areas of the state to discuss problems of judicial administration all point to a concern on the part of the judges about the need for an active integrated court system.
>
> How much more sound it would be to take the next step and provide that all courts in the state should be a part of a single court having all-inclusive powers including law, equity, probate, juvenile, family, criminal, etc. In the metropolitan areas, these courts could be divided into divisions to hear different types of cases. The advantage of this system would be that there could be no jurisdictional problems raised, no dismissals for technicalities of jurisdiction, greater expertise, and in many instances, economy in judicial manpower.
>
> The need is for far-reaching statutes and constitutional provisions creating an integrated court structure for the state embracing Pound's four general principles: (1) unification, (2) flexibility, (3) conservation of judicial manpower, and (4) responsibility. Unification can be accomplished by making all courts in the state a part of one court. Flexibility and conservation of judicial manpower can be accomplished by permitting the judges to be transferred as needs arise from one division to another and from one area to another. The center of responsibility for the ultimate enforcement of justice will be located in the judges of the highest division of that court, the Supreme Court. Provision must also be made for the growing metropolitan area in the state and the special problems encountered as a result of population growth and shift. Within the framework of the court structure provision must be made for a metropolitan court embracing the metropolitan area of Detroit and its environs, not limited by the arbitrary lines of city and county, having all-inclusive powers and sitting in various places in the metropolitan area, but a part of the larger single unified court of the state.

An alternative method of achieving substantial unification would be to provide in the constitution only for the supreme court, a court of appeals (if one is to be created), and the general trial court (circuit court). An additional provision could permit the legislature to establish such other courts as it deemed necessary. Thus, it may be felt that our present system of having separate probate courts, separate municipal courts in some cities, justice courts, recorder's court in Detroit, etc., presents too complicated a structure to be handled at the constitutional level, and that the problem should be handled at the legislative level under general constitutional authority.

Intermediate Court of Appeals. The question of establishing an intermediate court of appeals is an important one. The convention will have to decide both the question of need and the question of structure. Thirteen states today have such a court, and these states are those of heavy population and having large urban centers such

as New York, Ohio, Indiana, California and Illinois. Michigan is, to this extent, an exception to the pattern.

Professor Joiner, in the article referred to above, has commented on this question:

> During the past several years four separate and distinct facts point to the need for a re-examination of the appellate judicial structure of the state: (1) Population is increasing rapidly; economic activity is on the rise; people are living closer and closer together, creating more and more litigation. (2) The number of cases filed per year in the circuit courts of the state has increased during the past twenty years by fifty percent. (3) The Supreme Court has indicated a willingness to spend more time in the field of improving the administration of justice through the operation of the court administrator and through the Judicial Conference. (4) The concept of the minimum quality of justice for the state is changing. Although for many years criminal cases have not been appealed as a matter of right, the State Bar of Michigan has gone on record as recommending appeals as a matter of right in criminal cases.
>
> The work of the Michigan Supreme Court is as heavy as that of any other supreme court in a state of its size. Michigan is the only state of the heavily populated states that does not have an intermediate court of appeals. In 1959 a study was made which recommended and documented the need for an intermediate court of appeals as the means of providing a sound system of judicial administration at the appellate level. Alternatives were suggested and discussed but the only long-range solution to the problem faced by Michigan was for an intermediate court of appeals. If it were to be provided, all appeals should go from the circuit courts to the intermediate court of appeals. All appeals from the intermediate court of appeals to the Supreme Court would be by leave. This would bring appellate justice closer to the citizens of Michigan for the intermediate court would sit at various places throughout the state, would act more speedily and probably on many more interlocutory matters. This would also provide a method whereby the function of law-making by the judiciary could be supervised effectively at the highest level. The Supreme Court could concentrate on those cases in which guidance is needed in the development of the law of the state or in which conflicts exist between the various courts at the intermediate level or trial level.

The Model State Judiciary Article contains this provision:

> § 3. <u>The Court of Appeals</u>.
>
> The court of appeals shall consist of as many divisions as the supreme court shall determine to be necessary. Each division of the court of appeals shall

consist of three judges. The court of appeals shall have no original jurisdiction, except that it may be authorized by rules of the supreme court to review directly decisions of administrative agencies of the state and it may be authorized by rules of the supreme court to issue all writs necessary or appropriate in aid of its appellate jurisdiction. In all other cases, it shall exercise appellate jurisdiction under such terms and conditions as the supreme court shall specify by rules which shall, however, provide that a defendant shall have an absolute right to one appeal in all criminal cases and which may include the authority to review and revise sentences in criminal cases.

Courts of Limits Jurisdiction. Reference bas already been made to the possible unification of these courts, either in the constitution or by the legislature. Specific comment on the justices of the peace is found later under Section 15, and on probate courts under Section 13.

B. THE SUPREME COURT

1. Justice; Election; Term

Article VII: Section 2. The supreme court shall consist of one chief justice and associate justices, to be chosen by the electors of the state at the regular biennial spring election; and not more than two justices shall go out of office at the same time. The term of office shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 2, provided:

> The judges of the supreme court shall hold their offices for the term of seven years; they shall be nominated, and by and with the advice and consent of the senate, appointed by the governor. They shall receive an adequate compensation which shall not be diminished during their continuance in office. But they shall receive no fees nor perquisites of office, nor hold any other office of profit or trust under the authority of this state or of the United States.

The 1850 constitution, Article VI, Section 2 provided:

> For the term of six years and thereafter, until the legislature otherwise provide, the judges of the several circuit courts shall be judges of the supreme court, four of whom shall constitute a quorum. A concurrence of three shall

> be necessary to a final decision. After six years the legislature may provide by law for the organization of a supreme court, with the jurisdiction and powers prescribed in this constitution to consist of one chief justice and three associate justices, to be chosen by the electors of the state. Such supreme court, when so organized, shall not be changed or discontinued by the legislature for eight years thereafter. The judges thereof shall be so classified that but one of them shall go out of office at the same time. The term of office shall be eight years.

Constitution of 1908

The provision in the 1908 constitution for a supreme court was changed from the 1850 provision. The 1850 constitution provided that judges of the circuit court should serve as judges of the supreme court until the legislature provided by law for the organization of a supreme court.

The 1850 provision required one chief justice and three associate justices, while the 1908 constitution did not specify the number of associate justices. The 1908 constitution provided that the term of office be prescribed by law, while the 1850 provision specified an eight-year term.

Other State Constitutions

Other state constitutions do not always specify the mode of judicial selection, the number of judges, or the term of office. Thus, only 20 states provide for election at large, seven provide for a qualified election at large, four provide for selection by joint vote of the legislature, six states use a combination of appointment by the governor or nomination by the governor with approval by the legislature or the senate (ID, pp. 259-62).

So far as the number of judges is concerned, 11 states provide for seven judges; six states provide for five judges; 15 states provide for three, five, or seven judges with an added provision that the legislature may increase the number (ID, pp. 261-62).

A term of six years is provided for in nine states, while 22 states provide in the constitution for ending the term at different times for different members of the court (ID, p. 266).

Comment

A study in 1958 (Judicial Administration at the Appellate Level—Michigan) shows 21 states with a seven-man court, 19 states with five or fewer. The number may be specified in the constitution or left to legislative determination. The Model State Judiciary Article provides:

§ 2. The Supreme Court.

1. Composition. The supreme court shall consist of the chief justice of the state and (four) (six) associate justices of the supreme court.

Michigan's present constitution specifies neither the term nor the number of judges—both matters being left to the legislature. It would not be inappropriate to prescribe a term in the constitution for it is the length of the term that gives to the judge a substantial amount of judicial independence. A very long term tends to make him a more independent judge and of course independence of thought and action is one of the requisites of a good judge.

The question of the method of selecting judges is more fully discussed under Section 23.

2. Terms of Court

Article VII: Section 3. Four terms of the supreme court shall be held annually at such times and places as may be designated by law.

Constitutions of 1835 and 1850

The 1835 constitution was silent in respect to the number of terms of court and the place of meeting. The 1850 constitution contained a provision identical to the present provision.

Constitution of 1908

This section has not been amended and there has been no litigation.

Other State Constitutions

It is not too common for the state constitution to prescribe the number of terms of court. In some states the matter is left to the legislature, while in others it is left to court rule (ID, pp. 278-9).

Comment

This does not appear to be a desirable provision in a constitution.

3. Jurisdiction

Article VII: Section 4. The supreme court shall have a general superintending control over all inferior courts; and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only.

Constitutions of 1835 and 1850

The 1835 constitution was silent as to jurisdiction and the supreme court.

The 1850 constitution, Article VI, Section 3 provided:

> The supreme court shall have a general superintending control over all inferior courts, and shall have power to issue writs of error, habeas corpus, mandamus, quo warranto, procedendo, and other original and remedial writs, and to hear and determine the same. In all other cases it shall have appellate jurisdiction only.

Constitution of 1908

The 1850 provision was carried over in the 1908 constitution without change and there have been no amendments.

Other State Constitutions

It is quite difficult to compare state constitutions with respect to their provisions for the jurisdiction of the highest court. A great deal depends upon the underlying court structure. There is a general comparison in the ID, pp. 269-282. The nature of the problems involved are set out in the Comment below. It is possible to find in one or more constitutional examples of almost every kind of provision that is mentioned, and no particular pattern is apparent.

Comment

This small section covers three very important and somewhat technical matters concerning the court structure of the state. They relate (1) to the power in the supreme court to exercise superintending control over the lesser courts; (2) the jurisdiction of the supreme court (that is, what cases will it consider); and (3) the power to issue certain extraordinary writs.

Power of Superintending Control. The general superintending control power over all inferior courts given the supreme court by this section is one of the most significant powers given to the court in the constitution. This same power exists in a number of other states and is the envy of other states not having it. Without any express grant, the power is exercised in a haphazard way through the use of extraordinary writs. The provision should be retained for it serves to fix responsibility and it has enabled the supreme court to make great strides in the management of the judicial business of the state.

The Jurisdiction of the Supreme Court. The Model State Judiciary Article contains these provisions:

§ 2. Jurisdiction.

A. Original Jurisdiction. The supreme court shall have no original jurisdic-

> tion, but it shall have the power to issue all writs necessary or appropriate in aid of its appellate jurisdiction.
>
> B. Appellate Jurisdiction. Appeals from a judgment of the district court imposing a sentence of death or life imprisonment, or imprisonment for a term of 25 years or more, shall be taken directly to the supreme court. In all other cases, criminal and civil, the supreme court shall exercise appellate jurisdiction under such terms and conditions as it shall specify in rules, except that such rules shall provide that a defendant shall have an absolute right to one appeal in all criminal cases. On all appeals authorized to be taken to the supreme court in criminal cases, that court shall have the power to review all questions of law and, to the extent provided by rule, to review and revise the sentence imposed

There are several distinct questions which the convention will have to resolve in connection with this aspect of the present provision. One is whether the supreme court will be compelled to hear all cases, or compelled to hear certain cases, or whether it will have discretion to select only cases of substantial significance or cases which will resolve conflicts which may develop among the lower courts. This is basically a question of determining which litigants can appeal as a matter of right (that is, the supreme court must hear the case). Obviously, if there is an intermediate court of appeals so that all litigants can get at least one appeal to that court as a matter of right, then it is easier to provide for discretionary jurisdiction in the highest court, and to limit the compulsory jurisdiction. If there is no intermediate court of appeals, then it is usual to give the highest court much more compulsory jurisdiction. There are many ways to describe the jurisdiction. For example, some states provide that the supreme court shall hear cases only from certain specified lower courts; some states provide compulsory jurisdiction according to the kind of case (certain criminal cases, or land titles, etc.); some provide for a combination; some provide that the supreme court must hear cases certified by certain lower courts as involving important questions; and some provide that the supreme court itself will accept cases just as the United States supreme court now does.

Another important question is whether the supreme court shall have any original jurisdiction—that is, can any cases be started in the supreme court. The present constitution lists certain writs which it may issue, and there is generally some inherent power in the judicial branch of the government. Moreover, the express power of superintending control would seem to carry with it a power to issue such orders and hear such cases as are necessary to exercise the superintending control over the inferior courts. This matter is closely allied to the next subject.

Power to Issue Extraordinary Writs. If it be decided to grant the court power to issue extraordinary writs, it hardly seems necessary to list them. A general clause, such as may be found elsewhere, that "the court may issue prerogative writs either

as original jurisdiction, in aid of its power of superintending control, or in aid of its appellate jurisdiction, and may hear and determine the same" would be adequate and would seem preferable to the restricted listing.

4. Court Rules; Law and Equity

Article VII: Section 5. The supreme court shall by general rules establish, modify and amend the practice in such court and in all other courts of record, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings. The office of master in chancery is prohibited.

Constitutions of 1835 and 1850

The 1835 constitution was silent with respect to the power of the supreme court to establish rules of practice and with respect to the distinction between law and equity.

The 1850 constitution, Article VI, Section 5 provided:

> The supreme court shall, by general rules, establish, modify, and amend the practice in such court and in the circuit courts, and simplify the same. The legislature shall, as far as practicable, abolish distinctions between law and equity proceedings. The office of master in chancery is prohibited.

Constitution of 1908

The only change from 1850 was to extend the rules to "all other courts of record." This section has not been amended.

Other State Constitutions

Ten constitutions provide in varying ways that there is to be no distinction between law and equity (ID, pp. 197-198).

Comment

This seems an extremely good provision which places the responsibility on the court for the smooth administration of justice by requiring it to make general rules to see that justice operates in an effective manner. This provision has been used as the model for provisions in other constitutions.

There is no longer any reason to maintain distinction between law and equity proceedings. Until these proceedings are merged, with the exception of the jury trial, it is wise to carry a provision such as contained in this rule. Perhaps the provision should be broadened to read: "The legislature and the supreme court shall... ." See the Union of Law and Equity: A Prerequisite to Procedural Revision, Joiner, C. W. and Geddes, R. A., 55 Mich. 1 Rev. 1059 (1957).

The Model State Judiciary Article suggests this provision:

§ 9. Rule Making Power.

The supreme court shall have the power to prescribe rules governing appellate jurisdiction, rules of practice and procedure, and rules of evidence, for the judicial system. The supreme court shall, by rule, govern admission to the bar and the discipline of members of the bar.

5. Appointments; Clerk, Reporter, Crier; Fees

Article VII: Section 6. The supreme court may appoint and remove its clerk, a reporter of its decisions and a court crier, each of whom shall perform such duties and receive such salary as shall be prescribed by law; and all fees, perquisites and income collected by the clerk shall be turned over by him to the state treasury and credited to the general fund. No justice of the supreme court shall exercise any other power of appointment to public office.

Constitutions of 1835 and 1850

The l835 constitution, Article VI, Section provided:

The supreme court shall appoint their clerk or clerks; ... .

The 1850 constitution, Article VI, Section 10 provided:

The supreme court may appoint a reporter of its decisions...but no judge of the supreme court...shall exercise any other power or appointment to public office.

And, the 1850 constitution, Article VI, Section 12:

...The supreme court shall have power to appoint a clerk for such supreme court.

Constitution of 1908

The 1908 constitution added provision for a court crier and provided a salary prescribed by law for the clerk, reporter, and crier.

Other State Constitutions

Clerks are normally appointed by the court or the judges (25 states) (ID, pp. 250-51). Seven states provide for election. Most state constitutions are silent on duties, though nine contain a provision that his duties shall be prescribed by law (ID, p. 251). In some states the term is fixed (14 states have fixed terms ranging from two to eight years), while in others the clerk serves at the pleasure of the court (ID, p. 252).

Only fourteen state constitutions provide for the appointment of a reporter. In nine he holds office at the pleasure of the court. In six, his duties are referred to "as provided by law."

Comment

The present provision of the constitution has been criticized as being unduly restrictive so far as appointing administrative personnel is concerned. The business of the court has grown tremendously, in addition to the fact that the supreme court is generally thought to be obligated to supervise the entire judicial system. Appointive selection seems desirable.

The Model State Judiciary Article contains this provision:

> § 2. Head of Administration Office of the Courts.
>
> The chief justice of the state shall be the executive head of the judicial system and shall appoint an administrator of the courts and such assistants as he deems necessary to aid in the administration of the courts of the state. The chief justice shall have the power to assign any judge or magistrate of the state to sit in any court in the state when he deems such assignment necessary to aid the prompt disposition of judicial business. The administrator shall, under the direction of the chief justice, prepare and submit to the legislature the budget for the court of justice and perform all other necessary functions relating to the revenues and expenditures of the courts.

6. Decisions; Dissenting Opinions

Article VII: Section 7. Decisions of the supreme court, including all cases of mandamus, quo warranto and certiorari, shall be in writing, with a concise statement of the facts and reasons for the decisions;

> and shall be signed by the justices concurring therein. Any justice dissenting from a decision shall give the reasons for such dissent in writing under his signature. All such opinions shall be filed in the office of the clerk of the supreme court.

Constitutions of 1835 and 1850

The constitution of 1835 contained no such provision.

The constitution of 1850, Article VI, Section 10 provided:

> ...The decisions of the supreme court shall be in writing and signed by the judges concurring therein. Any judge dissenting therefrom shall give the reasons of such dissent in writing under his signature. All such opinions shall be filed in the office of the clerk of the supreme court... .

Constitution of 1908

The constitution of 1908 added "all cases of mandamus, quo warranto and certiorari" and the requirement for "a concise statement of the facts and reasons for the decisions." There have been no amendments.

Other State Constitutions

It is not uncommon to find provisions as to the number of judges who must concur to render a decision (ID, pp. 253-54). Only two constitutions other than Michigan's provide for filing the decisions with the clerk; only nine recite that the legislature is to provide for publication; only 11 provide that the decisions shall be in writing; and six set a time limit for disposition of a decision (ID, p. 254).

Comment

This section seems to be of doubtful value today in the constitution, and, in fact, at times it seems to be violated. There are times today when dissents do not carry a separate opinion giving the reasons for the dissent. There are also times when it would be wise for the court to file a memorandum instead of an extensive opinion. It covers matters which would seem appropriate for legislation or court rule.

C. CIRCUIT COURTS

1. Judicial Circuits; Terms; Districts

Article VII: Section 8. The state shall be divided into judicial circuits in each of which there shall be elected one circuit judge. The legislature may provide by law for the election of more than one circuit judge

> in any judicial circuit. A circuit court shall be held at least four times in each year in every county organized for judicial purposes. Each circuit judge shall hold court in the county or counties within the circuit in which he is elected, and in other circuits as may be provided by law. The legislature may by law arrange the various circuits into judicial districts, and provide for the manner of holding courts therein. Circuits and districts may be created, altered or discontinued by law, but no such alteration or discontinuance shall have the effect to remove a judge from office.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 4 provided:

> Judges of all county courts, associate judges of circuit courts, and judges of probate, shall be elected by the qualified electors of the county in which they reside, and shall hold their office for four years.

The 1850 constitution provided:

> The State shall be divided into judicial circuits, in each of which the electors thereof shall elect one circuit judge who shall hold his office for the term of six years, and until his successor is elected and qualified. The legislature may provide for the election of more than one circuit judge in the judicial circuit in which the city of Detroit is or may be situated, and in the judicial circuit in which the county of Saginaw is or may be situated, and in the judicial circuit in which the county of Kent is or may be situated, and in the judicial circuit in which the county of St. Clair is or may be situated. And the circuit judge or judges of such circuits, in addition to the salary provided by the constitution, shall receive from their respective counties such additional salary as may from time to time be fixed and determined by the board of supervisors of said county. And the board of supervisors of each county in the Upper Peninsula, and in the counties of Bay, Washtenaw, Genesee, Ingham and Jackson and the counties in the judicial circuit in which the county of Isabella is or may be situated in the Lower Peninsula, is hereby authorized and empowered to give and to pay the circuit judge of the judicial circuit, to which said county is attached, such additional salary or compensation as may from time to time be fixed and determined by such board of supervisors. This section as amended shall take effect from the time of its adoption. (Article VI, Section 6)
>
> The legislature may alter the limits of circuits or increase the number of the same. No alteration or increase shall have the effect to remove a judge from

> office. In every additional circuit established the judge shall be elected by the electors of such circuit and his term of office shall continue, as provided in this constitution for judges of the circuit court. (Article VI, Section 7)
>
> A circuit court shall be held at least twice in each year in every county organized for judicial purposes, and four times in each year in counties containing ten thousand inhabitants. Judges of the circuit court may hold courts for each other, and shall do so when required by law. (Article VI, Section 11)

Constitution of 1908

The three provisions in the 1850 constitution were combined into one section in the 1908 constitution with the provision relating to specific counties omitted. Other changes from 1850 included the requirement that court be held at least four times instead of two times in some counties. Provision was also added for combining circuits into judicial districts.

Other State Constitutions

Courts of general jurisdiction are called circuit courts in Michigan and 16 other states; district courts in 15 states; superior courts in six states; and common pleas courts in three states (ID, p. 244).

Twenty-nine other states provide that the legislature shall establish (or increase or decrease) the number of districts. Only three make each county a judicial district (ID, pp. 237-39).

Eight states specifically provide for one judge per district. Fourteen others provide for one judge per district with power in the legislature to increase or decrease. Seven states limit the power of the legislature to change by reference to population (ID, pp. 228-9).

Only eight states provide that the number of terms shall be prescribed by the legislature; only three provide that the judges shall fix the terms; and only six states besides Michigan provide for a fixed number of terms (ID, pp. 247-8).

Some other state constitutions provide for judges acting in other courts and districts. Five provide that he may so act as prescribed by law; six provide that he may act at the request of the other judge; eight provide that judges may hold court for each other; and three besides Michigan provide that a judge is obliged to act in other districts when required by law (ID, pp. 230-31).

Fourteen other states provide that where the legislature changes the districts, such change is not to effect removal of a judge from office (ID, p. 235).

Comment

The question of the method of selection of circuit court judges will be discussed later under Section 23.

The present provision permits the creation, alteration and discontinuance of circuits and districts, but even with that provision the circuits in this state are now woefully out of balance. Some circuits have a caseload of as few as 200 cases per judge, while other circuits have as many as 1,600 cases per judge. The provision of the Model State Judiciary Article, set out below, gives the supreme court the power to determine districts and could perhaps alleviate this maldistribution.

§ 4. The District and Magistrate Courts.

1. Composition. The district court shall be composed of such number of divisions and the district and magistrate's courts shall be composed of such number of judges as the supreme court shall determine to be necessary, except that each district shall be a geographic unit fixed by the supreme court and shall have at least one judge. Every judge of the district and magistrate's courts shall be eligible to sit in every district.

2. Judges; Elections and Terms

Article VII: Section 9. Circuit judges shall be elected on the first Monday in April, nineteen hundred eleven, and every sixth year thereafter. They shall hold office for a term of six years and until their successors are elected and qualified. They shall be ineligible to any other than a judicial office during the term for which they are elected and for one year thereafter.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 4 provided:

Judges of all county courts, associate judges of circuit courts, and judges of probate, shall be elected by the qualified electors of the county in which they reside, and shall hold their office for four years.

The 1850 constitution provided:

Each of the judges of the circuit courts shall receive a salary, payable quarterly. They shall be ineligible to any other than a judicial office during the term for which they are elected, and for one year thereafter. All votes for any person elected such judge for any office other than judicial, given either by

the legislature or the people, shall be void. (Article VI, Section 9)

The first election of judges of the circuit courts shall be held on the first Monday in April, one thousand eight hundred and fifty-one, and every sixth year thereafter. Whenever an additional circuit is created, provisions shall be made to hold the subsequent election of such additional judge at the regular elections herein provided. (Article VI, Section 20)

Constitution of 1908

There was no substantial change in the 1908 constitution—salaries are now provided for in Section 12.

Other State Constitutions

Method of Selection of General Trial Court Judges

21 states provide that these judges shall be elected by the qualified voters of a district (ID, pp. 226-28).

5 states other than Michigan provide they shall be elected by qualified voters of circuit, county or district (supra).

1 state provides that the legislature shall appoint said judges upon nomination of governor (supra).

2 states declare that the governor shall appoint them with advice and consent of senate (supra).

3 states provide they shall be elected by legislature (supra).

Term of General Trial Court Judges

8 states specifically provide for a term of four years (ID, p. 235).

7 states provide for a term of four years and until their successors are elected and qualified (supra).

9 states specifically declare a term of six years (supra)

4 states other than Michigan provide for a term of six years and until successors are elected and qualified (supra).

4 states declare term to be eight years (supra).

1 state provides term is to be fourteen years (supra).

Twenty states including Michigan provide that the judge is not to hold any other office during term (ID, pp. 225-26).

Comment

The question of the method of selecting circuit judges will be discussed under Section 23.

3. Jurisdiction

Article VII: Section 10. Circuit courts shall have original jurisdiction in all matters civil and criminal not excepted in this constitution and not prohibited by law, and appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same. They shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto and certiorari and to hear and determine the same; and to issue such other writs as may be necessary to carry into effect their orders, judgments and decrees and give them general control over inferior courts and tribunals within their respective jurisdictions, and in all such other cases and matters as the supreme court shall by rule prescribe.

Constitutions of 1835 and 1850

The 1835 constitution contained no provision relating to the jurisdiction or powers of the circuit courts.

The 1850 constitution, Article VI, Section 8 provided:

> The circuit court shall have original jurisdiction in all matters civil and criminal not excepted in this constitution, and not prohibited by law, and appellate jurisdiction from all inferior courts and tribunals and a supervisory control of the same. They shall also have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other writs necessary to carry into effect their orders, judgments and decrees, and give them general control over inferior courts and tribunals within their respective jurisdictions, and in all such other cases and matters as the supreme court shall by rule prescribe.

Constitution of 1908

The 1850 provision was carried over in the constitution of 1908 with only minor changes in phraseology. Section 10 has not been amended.

Other State Constitutions

Original Jurisdiction

10 states provide that the general trial courts shall have original jurisdiction, as provided by law (ID, pp. 241-43).

9 states recite that the courts will have original jurisdiction over cases at law (supra).

12 states declare original jurisdiction over equity cases (supra).

9 other states provide that general trial courts shall have original jurisdiction over civil matters except as provided in constitution or law (supra).

9 other states provide that general trial courts shall have original jurisdiction over criminal matters except as provided by constitution or law (supra).

5 states including Michigan provide that the general trial courts shall have original jurisdiction over all matters criminal and civil not excepted by this constitution or prohibited by law (supra).

Appellate Jurisdiction

17 states provide appellate jurisdiction shall be prescribed by law (ID, pp. 240-41).

5 states describe appellate jurisdiction by character of cases (supra).

24 states including Michigan provide appellate jurisdiction as described by courts (supra).

Supervisory Jurisdiction

4 states other than Michigan declare that the general trial court shall have supervisory control over inferior courts and tribunals (ID, p. 275).

Very few states specify in their constitutions for specific writs (ID, pp. 248-9).

Comment

It would seem unnecessary to detail the specific writs in the constitution. A broader grant of power would be better drafting. The supervisory control over inferior courts and tribunals which is authorized by this section is as valuable to the circuit courts as is the superintending control to the supreme court. Only recently has this power begun to be used in an extensive way to bring improvement to the justice of

the peace system. It would be continued. The last clause in the section should be clarified to make certain that supreme court rule can vest the circuit courts with jurisdiction. The present sentence contains an ambiguity on this point.

The Model State Judiciary Article provides as follows:

> § 2. District Court Jurisdiction.
>
> The district court shall exercise original general jurisdiction in all cases, except in so far as original jurisdiction may be assigned exclusively to the magistrate's court by the supreme court rules. The district court may be authorized, by rule of the supreme court, to review directly decisions of state administrative agencies and decisions of magistrate's courts.

4. Clerk; Vacancies

Article VII: Section 11. The clerk of each county organized for purposes shall be clerk of the circuit court for such county. The judges of the circuit courts may fill any vacancy in the offices of county clerk or prosecuting attorney within their respective jurisdictions, but shall not exercise any other power of appointment to public office.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 5 provided:

> ... the electors of each county shall elect a clerk, to be denominated a county clerk, who shall hold his office for the term of two years, and shall perform the duties of clerk to all the courts of record to be held in each county, except the supreme court and court of probate.

The 1850 constitution provided:

> ... The judges of the circuit court within their respective jurisdictions may fill vacancies in the office of county clerk and of prosecuting attorney; but no judge of the supreme court or circuit court shall exercise any other power or appointment to public office. (Article VI, Section 10)
>
> The clerk of each county organized for judicial purposes shall be the clerk of the circuit court of such county. (Article VI, Section 12)

Constitution of 1908

The present provision was carried over from the 1850 constitution with only changes in wording. Section 11 has not been amended.

Other State Constitutions

Election or Appointment of Clerks

14 states provide that he be elected by the qualified electors of the county (ID, pp. 219-20).

4 states besides Michigan provide he is to be the county clerk (supra).

Vacancies in Office of Clerk

5 states besides Michigan provides in various ways that the judge or judges shall fill the vacancy (ID, pp. 221-22).

Comment

This provision has given rise to no difficulty.

5. Salary of Judges

Article VII: Section 12. Each of the judges of the circuit courts shall receive a salary payable monthly. In addition to the salary paid from the state treasury, each circuit judge may receive from any county in which he regularly holds court such additional salary as may be determined from time to time by the board of supervisors of the county. In any county where such additional salary is granted it shall be paid at the same rate to all circuit judges regularly holding court therein.

Constitutions of 1835 and 1850

The 1835 constitution was silent with respect to judicial salaries.

The 1850 constitution provided:

... And the circuit judge or judges of such circuits, in addition to the salary provided by the constitution, shall receive from their respective counties such additional salary as may from time to time be fixed and determined by the board of supervisors of said county. And the board of supervisors of each county in the Upper Peninsula, and in the counties of Bay, Washtenaw,

Genesee, Ingham and Jackson and the counties in the judicial circuit in which the county of Isabella is or may be situated in the Lower Peninsula, is hereby authorized and empowered to give and to pay the circuit judge of the judicial circuit, to which said county is attached, such additional salary or compensation as may from time to time be fixed and determined by such board of supervisors. This section as amended shall take effect from the time of its adoption. (Article VI, Section 6)

Each of the judges of the circuit courts shall receive a salary, payable quarterly. They shall be ineligible to any other than a judicial office during the term for which they are elected, and for one year thereafter. All votes for any person elected such judge for any office other than judicial, given either by the legislature or the people, shall be void. (Article VI, Section 9)

Constitution of 1908

The present provision provides for monthly payment of salary instead of the quarterly payment provided for in the 1850 constitution.

Other State Constitutions

Judge's Salary Amount

24 states provide he shall be compensated as prescribed by law (ID, pp. 224-25).

8 states provide for a fixed dollar amount, or a dollar minimum (supra).

2 states besides Michigan provide that he may receive supplemental compensation from the county (supra).

12 states specifically recite that his salary is not to decrease during term (supra).

2 states provide for mileage (supra).

6 states forbid any fees or perquisites (supra).

Judge's Salary - When Paid

6 states provide it shall be payable at stated time (supra).

4 states declare it to be paid quarterly (supra).

2 other states provide it shall be paid monthly (supra).

Comment

This section permits circuit judges in one circuit to be paid more than circuit judges in another if the local circuit so desires. This is thought by many to be a wise provision since each local circuit can then pay what it feels necessary to attract and hold high quality judges. It has on occasion created some misunderstanding as between judges. A uniform pay could be prescribed, or, the present system could be retained with an added proviso that the additional salary is to be paid at the same rate to all circuit judges holding court in the county. This then will include judges who are assigned to a county in which the judges are receiving a higher salary and will permit the assigned judge to draw from that county the additional salary paid to local judges. This seems fair for he is doing the work of the local judges.

D. PROBATE COURTS

1. Jurisdiction

Article VII: Section 13. In each county organized for judicial purposes, there shall be a probate court. The jurisdiction, powers and duties of such courts and of the judges thereof shall be prescribed by law, and they shall also have original jurisdiction in all cases of juvenile delinquents and dependents.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 3 provided:

> A court of probate shall be established in each of the organized counties.

The 1850 constitution, Article VI, Section 13 provided:

> In each of the counties organized for judicial purposes there shall be a court of probate. The judge of such court shall be elected by the electors of the county in which he resides, and shall hold his office for four years, and until his successor is elected and qualified. The jurisdiction, powers and duties of such courts shall be prescribed by law.

Constitution of 1908

The present provision is similar to the 1850 provision, but the “original jurisdiction in all cases of juvenile delinquents and dependents” was added.

Other State Constitutions

15 other states set out probate jurisdiction in various ways; e.g., as conferred by law; matters pertaining to orphans' business; power to grant letters testamentary and administration (ID, pp. 321-22).

6 states specifically provide that general trial courts are to have probate jurisdiction (ID, p. 243).

Comment

If the Pound idea of unification, flexibility, conservation of judicial manpower, and responsibility is to be carried forward in this state, the power now vested in the probate courts should be vested in circuit court as is done in a number of states. This would permit the circuit courts to divide the judicial business, to have their own experts as is done at the present time, but prevent dismissals for lack of jurisdiction or for being in the wrong court. It also would tend to reduce the total number of judges to some extent. In a great many counties in the state the probate court would become a probate division of the circuit court to which judges would be assigned on the basis of their competence and interest but with some flexibility of judicial manpower.

In any event, there is some question of the desirability of having the probate courts, as a court of limited jurisdiction, specified in the constitution.

2. Election and Term of Office

Article VII: Section 14. Judges of probate shall be elected in the counties in which they reside, and shall hold office for four years and until their successors are elected and qualified. They shall be elected on the Tuesday succeeding the first Monday of November, nineteen hundred twelve, and every four years thereafter. The legislature may provide by law for the election of more than one judge of probate in counties with more than one hundred thousand inhabitants, and may provide for the election of such judges in such counties at alternate biennial elections.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 4 provided:

> Judges of all county courts, associate judges of circuit courts, and judges of probate, shall be elected by the qualified electors of the county in which they reside, and shall hold their office for four years.

The 1850 constitution provided:

> In each of the counties organized for judicial purposes there shall be a court of probate. The judge of such court shall be elected by the electors of the county in which he resides, and shall hold his office for four years, and until his successor is elected and qualified. The jurisdiction, powers and duties of such courts shall be prescribed by law. (Article VI, Section 13)
>
> The first election of judges of the probate courts shall be held on the Tuesday succeeding the first Monday of November, one thousand eight hundred and fifty-two, and every fourth year thereafter. (Article VI, Section 21)

Constitution of 1908

The present provision was carried over from the 1850 constitution with the added provision of providing by law for more than one probate judge in counties with more than 100,000 inhabitants. This section has not been amended.

Other State Constitutions

Election or Appointment

> 8 other states provide that probate judges shall be elected by the electors in the counties (ID, p. 320).

Term

> 3 states specifically set term at two years (ID, p. 321).
>
> 2 states specifically set term at four years (supra).
>
> 3 states specifically set term at four years and until successor is qualified (supra).
>
> 1 state declares term to be five years (supra).
>
> 1 state declares term to be six years (supra).
>
> 1 state declares term to be six years (supra).

Number

3 states declare there shall be one judge for each court (ID, p. 320).

1 other state recites that legislature may provide for election of additional judge in counties over so many population (supra).

Comment

The question of the selection of the judge of probate will be discussed under Section 23.

E. JUSTICES OF THE PEACE

1. Election; Vacancies; Justices in Cities

Article VII: Section 15. There shall be elected in each organized township not to exceed four justices of the peace, each of whom shall hold the office for four years and until his successor is elected and qualified. At the first election in any township they shall be classified as shall be prescribed by law. A justice elected to fill a vacancy shall hold the office for the residue of the unexpired term. The legislature may provide by law for justices in cities.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 6 provided:

> Each township may elect four justices of the peace, who shall hold their offices for four years; and whose powers and duties shall be defined and regulated by law. At their first election they shall be classed and divided by lot into numbers one, two, three, and four, to be determined in such manner as shall be prescribed by law, so that one justice shall be annually elected in each township thereafter. A removal of any justice from the township in which he was elected, shall vacate his office. In all incorporated towns, or cities, it shall be competent for the legislature to increase the number of justices.

The 1850 constitution, Article VI, Section l7, provided:

> There shall be not exceeding four justices of the peace in each organized township. They shall be elected by the electors of the township, and shall

hold their offices for four years and until their successors are elected and qualified. At the first election in any township they shall be classified as shall be prescribed by law. A justice elected to fill a vacancy shall hold his office for the residue of the unexpired term. The legislature may increase the number of justices in cities.

Constitution of 1908

The present provision was carried over from the 1850 constitution with some changes in wording. Section 15 has not been amended.

Other State Constitutions

Justices of Peace, Election or Appointment

9 states provide they shall be elected in each district (ID, pp. 307-8).

5 states declare they shall be elected in each county (supra).

4 other states provide they shall be elected in each township (supra).

2 states provide that judges of general trial courts are to be justices of peace in certain cases (supra).

3 states recite that the governor shall appoint them with consent of the senate (supra).

Justices of Peace, Vacancy

2 other states provide for election for unexpired term (ID, p. 310).

5 states declare that some other judicial officer shall have duties of justice of peace until next election (supra).

Justices of Peace, Term

12 other states provide for a term of four years (ID, p. 310).

8 other states set term at two years (supra).

2 states set term at six years, 2 states set term at seven years (supra).

Comment

Professor Charles Joiner, in the article referred to in the Comment to Section 1, gives the following analysis of the justice courts:

> The justice of the peace is an outgrowth of township government in the state. With the change in the character of the state resulting from population increase and shift, townships more and more are becoming obsolete. In addition to this, the greatly increased ease of transportation has made county government more closely related to the individual citizen at the present time than was township government at an earlier time in our history.
>
> It is difficult for lay justices to perform adequately the functions of a judge. If the qualifications of the justice could be raised so that a reasonably competent lawyer could serve as a justice in a way to make him sufficiently independent from court fees and give him the necessary independence of thought and action, there is no reason why the justice system could not be maintained in a modified form. This necessarily, however, means consolidation of justice courts and integration into the judicial system with the circuit and other courts of the state. What really is needed is a county judicial officer or officers on salary to handle, among other like matters, the minor judicial business covered now by the justices of the peace. These judicial officers should be a part of the whole court system of the state.
>
> A suggested statute to establish county courts of record was proposed by the judicial council of 1945. Since that time the legislature on several occasions has given consideration to the problem of the justices of the peace. On no occasion, however, has sufficient pressure been brought to bear to upgrade the minor court justice, thus to provide the essential kind of judicial officer.
>
> The problem does not exist in the cities, for in cities there are municipal courts superseding the activities of the justice of the peace. In the counties, however, we find many justices, some of whom are good and some of whom are very, very bad. Our citizens are entitled to better than we have thus far given them.

To this might be added the fact that there is a serious question as to the constitutionality of the justice of the peace system as it is now operating in the state of Michigan. Although the justice's fees in an individual case do not vary depending upon whether or not the defendant is found guilty (this would clearly be unconstitutional), there is some evidence to the effect that law enforcement officials find some justices more effective than others and bring their cases to these justices, thereby substantially increasing the fees available for these justices. This has been the basis for a judicial attack upon the justice of the peace system elsewhere. To have the compensation of a judicial officer tied to the fees he collects from litigants presents what seems to be an unnecessary hazard to proper judicial impartiality.

As was suggested in the Comment to Section 1, consideration may be given to leaving the justice courts in operation but removing them from the constitution. This would leave them as legislative courts subject to unification after a proper study of all lower courts had been made.

2. Jurisdiction

Article VII: Section 16. In civil cases, justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars and concurrent jurisdiction to the amount of three hundred dollars, which may be increased to five hundred dollars, with such exceptions and restrictions as may be provided by law. They shall also have such criminal jurisdiction and perform such duties as shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 6 provided:

> Each township may elect four justices of the peace, who shall hold their offices for four years; and whose powers and duties shall be defined and regulated by law.... In all incorporated towns, or cities, it shall be competent for the legislature to increase the number of justices.

The 1850 constitution, Article VI, Section 18 provided:

> In civil cases, justices of the peace shall have exclusive jurisdiction to the amount of one hundred dollars, and concurrent jurisdiction to the amount of three hundred dollars, which may be increased to five hundred dollars, with such exceptions and restrictions as may be provided by law. They shall also have such criminal jurisdiction and perform such duties as shall be prescribed by the legislature.

Constitution of 1908

This section was carried over from the 1850 provision. There have been no amendments. An amendment was proposed by J.R. 1, 1933, to increase jurisdictional amount to $1,500 in cities of over 250,000, but was defeated at the November election, 1934.

Other State Constitutions

Jurisdiction - civil

> 20 other states' constitutions give justice of peace courts jurisdiction in civil cases not to exceed a certain amount, ranging from $100 to $300 (ID, pp. 304-5).
>
> 15 states provide that the jurisdiction (in some cases limited by amount) shall be conferred by law (supra).

Jurisdiction - criminal

> 9 other states declare that criminal jurisdiction shall be as provided by law with no exceptions (ID, pp. 305-6).
>
> 8 states provide the legislature may confer criminal jurisdiction but with some exceptions (supra).

Jurisdiction - in general

> 17 states specifically state that justice of peace court jurisdiction is not to be regulated by private, local or special laws (supra, p. 306).

Comment

The Model State Judiciary Article contains this provision:

3. Magistrate's Court Jurisdiction. The magistrate's court shall be a court of limited jurisdiction and shall exercise original jurisdiction in such cases as the supreme court shall designate by rule.

Under a completely unified court system, the jurisdiction of the lower courts could be set either by court rule (as suggested in this provision) or by the legislature if the convention so decided. The present Michigan provision authorized the legislature to fix jurisdiction.

It has been suggested that the $500 limit is too low, and that the court which handles "small claims" should have a broader jurisdiction.

F. GENERAL PROVISIONS

3. Courts of Record; Seal; Qualification of Judges of Supreme and of Circuit Courts

Article VII: Section 17. The supreme court and the circuit and probate courts of each county shall be courts of record, and shall each have a common seal. Justices of the supreme court and judges of all circuit courts in this state elected or appointed after July 1, 1955, shall at the time of such election or appointment be under 70 years of age and licensed to practice law in this state.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 5 provided:

> The supreme court shall appoint their clerk or clerks; and the electors of each county shall elect a clerk, to be denominated a county clerk, who shall hold his office for the term of two years, and shall perform the duties of clerk to all the courts of record to be held in each county, except the supreme court and court of probate.

The 1850 constitution, Article VI, Section 15 provided:

> The supreme court, the circuit and probate courts of each county shall be courts of record, and shall each have a common seal.

Constitution of 1908

The first sentence of the present provision was carried over from the 1850 constitution. At an election April 4, 1955, an amendment was ratified which added this language to the present Section 17: "Justices of the supreme court and judges of all circuit courts in this state elected/or appointed after July 1, 1955, shall at the time of such election or appointment be under 70 years of age and licensed to practice law in this state."

Other State Constitutions

Court of Record

Only 7 other states specifically provide that the highest and general trial courts shall be courts of record (ID, p. 219).

Only 6 other states specifically provide that the probate court shall be a court of record (ID, p. 318).

Seal

Only 2 other states provide that the probate court shall have a seal (ID, p. 322).

5 other states declare the highest court and general trial courts shall have a seal (ID, p. 278; p. 245).

Qualifications of Highest Court Judges

14 states declare the highest court judge must be at least 30 (ID, pp. 263-64).

1 state declares he must be at least 25 (ID, pp. 263-64).

1 other state says he may not be over 70 (ID, pp. 263-64).

10 states specifically provide he must be learned in law (supra, p. 263).

11 others state he must have been admitted to practice, with varying qualifications (supra).

14 declare he must be citizen of United States (supra, p.263).

9 declare he must be citizen of state (supra, p. 263).

Qualifications of General Trial Court Judges

Qualifications set out by other states include these:

12 states require that he be a citizen of the United States (ID, pp. 231-32).

5 states require that he have had residence in the district for some years preceding election (supra).

13 states require that he have had his residence in the state for from 1 to 5 years (supra).

21 states also provide that the judge's residence while in office is to be in the district (ID, pp. 233-34).

2. Conservators of the Peace

Article VII: Section 18. Justices of the supreme court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision.

The 1850 constitution, Article VI, Section 19 provided:

Judges of the supreme court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions.

Constitution of 1908

The 1850 provision was continued in the 1908 constitution with minor wording changes. This section has not been amended.

Other State Constitutions

Only 2 other states have a similar provision for general trial court judges (ID, p. 229).

Only 6 other states have a similar provision for highest court judges (ID, p. 262).

Only 8 other states have a similar provision for justices of the peace (ID, p. 307).

Comment

It is not clear that this provision in the constitution serves any useful purpose.

3. Vacation of Office

Article VII: Section 19. Whenever a judge shall remove beyond the limits of the jurisdiction for which he was elected, or a justice of the peace from the township in which he was elected, or by a change in the boundaries of such township shall be placed without the same, he shall be deemed to have vacated the office.

Constitutions of 1835 and 1850

The 1835 constitution, Article VI, Section 6 provided:

> ... A removal of any justice from the township in which he was elected shall vacate his office. In all incorporated towns, or cities, it shall be competent for the legislature to increase the number of justices.

The 1850 constitution, Article VI, Section 22 provided:

> Whenever a judge shall remove beyond the limits of the jurisdiction for which he was elected, or a justice of the peace from the township in which he was elected, or by a change in the boundaries of such township, shall be placed without the same, they shall be deemed to have vacated their respective office.

Constitution of 1908

The 1850 provision was carried over in the 1908 constitution with only minor changes in wording. This section has not been amended.

Other State Constitutions

Several states have comparable provisions

Comment

If the section is to be retained, and it probably should be retained, the meaning of the word “remove” should be clarified. It is probably intended to refer to the domicile of the judge, and not to the body of the judge, and the drafting could be improved.

4. Vacancy; Appointment of Successor

Article VII: Section 20. When a vacancy occurs in the office of judge of any court of record, it shall be filled by appointment of the governor, and the person appointed shall hold the office until a successor is elected and qualified. When elected, such successor shall hold the office the residue of the unexpired term.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision.

The 1850 constitution, Article VI, Section 14 provided:

> When a vacancy occurs in the office of judge of the supreme, circuit or probate court, it shall be filled by appointment of the governor, which shall continue until a successor is elected and qualified. When elected, such successor shall hold his office the residue of the unexpired term.

Constitution of 1908

The 1908 constitution contained, with minor changes in wording, the 1850 provision.

Other State Constitutions

Highest Court

> 22 other states provide that the vacancy shall be filled by the governor, with different provisions for next term (ID, pp. 266-67).

General Trial Court

> 19 states recite that a vacancy here is to be filled by the governor, with provisions for new election (ID, pp. 235-36).

Comment

This section is so intimately tied with the method of selecting judges that it will be discussed along with the election of judges under Section 23.

5. Circuit Court Commissioner

Article VII: Section 21. The legislature may provide by law for the election of 1 or more persons in each organized county who may be vested with judicial powers not exceeding those of a judge of the circuit court at chambers.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision.

The 1850 constitution, Article VI, Section 16 provided:

> The legislature may provide by law for the election of one or more persons in each organized county, who may be vested with judicial powers not exceeding those of a judge of the circuit court at chambers.

Constitution of 1908

The 1850 provision was identical to the present provision.

Other State Constitutions

Four other states recite that legislature may provide for election of circuit court commissioners (ID, p. 222).

Comment

The circuit court commissioners provided for in this section perform valuable services in this state. Perhaps thought should be given to the appointment of circuit court commissioners by the circuit judge, since they serve really to expedite the work of the general court.

6. Style of Process

Article VII: Section 22. The style of all process shall be: "In the Name of the People of the State of Michigan."

Constitutions of 1835 and 1852

The 1835 constitution, Article VI, Section 7 provided:

> The style of all process shall be, "In the name of the people of the state of Michigan"; and all indictments shall conclude against the peace and dignity of the same.

The 1850 Constitution, Article VI, Section 35 provided:

> The style of all process shall be, "In the Name of the People of the State of Michigan."

Constitution of 1908

This section was carried over in the 1908 constitution. Article V, Section 20 provides that "The style of the laws shall be: 'The People of the State of Michigan enact.'"

Other State Constitutions

Only two other states have the same provision (ID, p. 325).

Twenty-two states provide the style shall be "The state of....." (supra).

7. Non-partisan Elections for Judiciary

Article VII: Section 23. All primary elections and elections of justices of the supreme court, judges of the circuit court, judges of probate courts and all county judicial officers provided for by the legislature under section 21 of article 7 of the constitution shall be non-partisan and shall be conducted as prescribed by law. All elections at which candidates for said judicial offices are nominated are designated "primary elections." Nominations for justices of the supreme court shall be made as now or hereafter provided by law; nominations for all other said judicial offices shall be made at non-partisan primary elections. Except as in the constitution otherwise provided, all primary election and election laws, including laws pertaining to partisan primaries and elections, shall, so far as applicable, govern nominating procedures, primary elections and elections hereunder.

> There shall be printed upon the ballot under the name of each incumbent judicial officer, who is a candidate for nomination or election to the same office, the designation of that office.

Constitutions of 1835 and 1850

Neither the 1835 nor the 1850 constitution contained such a provision.

Constitution of 1908

The constitution of 1908, as originally adopted, did not contain this provision. The section was originally adopted in 1939 and contained several times as many words which, by specifying in detail election procedures, was designed to make the provision self-executing. The provision was amended in 1947 to add still further detail regarding the primary. In 1955 the provision was amended to its present form, with most of the detail omitted and providing that the primaries and elections shall be conducted as prescribed by law.

Other State Constitutions

Highest Court Judges

4 states provide for non-partisan ballot (ID, pp. 259-61).

3 states constitutionally provide for non-partisan nomination of judges (supra).

1 state provides in constitution for partisan nomination (supra).

General Trial Courts

3 states recite that both nomination and election of judges is to be non-partisan (ID, pp. 226-28).

There are no provisions in other states for non-partisan election of probate judges.

Comment

The question of the method of selection of judicial officers in all courts is one of great importance. At issue are the two fundamental safeguards: (1) an independent judiciary; and (2) high quality judicial personnel. It is, of course, known that either an elective system (which Michigan now has) or an appointive system (which the federal courts and some other states have) can produce some excellent judges and also some mediocre or poor judges. The question to be decided is which system is more likely to produce consistently the high quality, impartial judges which are essential to the proper functioning of our judicial system.

The Model State Judiciary Article contains these provisions:

§ 5. Selection of Justices, Judges and Magistrates.

1. Nomination and Appointment. A vacancy in a judicial office in the state,

other than that of magistrate, shall be filled by the governor from a list of three nominees presented to him by the judicial nominating commission. If the governor should fail to make an appointment from the list within sixty days from the day it is presented to him, the appointment shall be made by the chief justice or the acting chief justice from the same list. Magistrates shall be appointed by the chief justice for a term of three years.

2. Eligibility. To be eligible for nomination as a justice of the supreme court, judge of the court of appeals, judge of the district court, or to be appointed as a magistrate, a person must be domiciled within the state, a citizen of the United States, and licensed to practice law in the courts of the state.

§ 6. Tenure of Justices and Judges

1. Term of Office. At the next general election following the expiration of three years from the date of appointment, and every ten years thereafter so long as he retains his office, every justice and judge shall be subject to approval or rejection by the electorate. In the case of a justice of the supreme court, the electorate of the entire state shall vote on the question of approval or rejection. In the case of judges of the court of appeals and the district court, the electorate of the districts or district in which the division of the court of appeals or district court to which he was appointed is located shall vote on the question of approval or rejection.

2. Retirement. Every justice and judge shall retire at the age specified by statute at the time of his appointment, but that age shall not be fixed at less than sixty-five years. The chief justice is empowered to authorize retired judges to perform temporary judicial duties in any court of the state.

3. Retirement for Incapacity. A justice of the supreme court may be retired after appropriate hearing, upon certification to the governor, by the judicial nominating commission for the supreme court that such justice is so incapacitated as to be unable to carry on his duties.

4. Removal. Justices of the supreme court shall be subject to removal by the impeachment process. All other judges and magistrates shall be subject to retirement for incapacity and to removal for cause by the supreme court after appropriate hearing. No justice, judge, or magistrate shall, during his term of office, engage in the practice of law. No justice, judge, or magistrate shall, dur-

ing his term of office, run for elective office other than the judicial office which he holds, or directly or indirectly make any contribution to, or hold any office in, a political party or organization, or take part in any political campaign.

§ 7. Compensation of Justices and Judges.

1. Salary. The salaries of justices, judges, and magistrates shall be fixed by statute, but the salaries of the justices and judges shall not be less than the highest salary paid to an officer of the executive branch of the state government other than the governor.

2. Pensions. Provision shall be made by the legislature for the payment of pensions to justices and judges and their widows. In the case of justices and judges who have served ten years or more, and their widows, the pension shall not be, less than fifty per cent of the salary received at the time of retirement or death of the justice or judge.

3. No Reduction of Compensation. The compensation of a justice, judge, or magistrate shall not be reduced during the term for which he was elected or appointed.

§ 8. The Chief Justice.

1. Selection and Tenure. The chief justice of the state shall be selected by the judicial nominating commission from the members of the supreme court and he shall retain that office for a period of five years, subject to reappointment in the same manner, except that a member of the court may resign the office of chief justice without resigning from the court. During a vacancy in the office of chief justice, all powers and duties of that office shall devolve upon the member of the supreme court who is senior in length of service on that court.

§ 10. Judicial Nominating Commissions.

There shall be a judicial nominating commission for the supreme court and one for each division of the court of appeals and the district court. Each judicial nominating commission shall consist of seven members, one of whom shall be the chief justice of the state, who shall act as chairman. The members of the bar of the state residing in the geographical area for which the court or division sits shall elect three of their number to serve as members of said commission, and the governor shall appoint three citizens, not admitted to practice law before the courts of the state, from among the residents of the geographical area for which the court or division sits. The terms of office and compensation for members of a judicial nominating commission shall be fixed by the legislature, provided that not more than one-third of a commission

> shall be elected in any three-year period. No member of a judicial nominating commission shall hold any other public office or office in a political party or organization and he shall not be eligible for appointment to a state judicial office so long as he is a member of a judicial nominating commission and for a period of five years thereafter.

Professor Joiner, in the article referred to in the Comment to Section 1, provides this analysis:

> Two special qualifications distinguish the judge from other state officials: (l) reasonable legal ability, and (2) independence of thought and action. Other qualities essential to the good judge, such as honesty, intelligence, and the ability to understand human problems with detachment, are also necessary for other types of public officials. Because of these additional qualities, it is important to examine the means of selecting men to be judges and the term of their office to determine whether we are obtaining men with these qualities.
>
> At the present time Michigan judges are elected to the Supreme Court on a non-partisan ballot after a partisan convention nomination, and for the circuit courts in a non-partisan election after a non-partisan primary. Their terms of office respectively are eight years and six years. I submit that neither the method of selection nor the term of office is conducive to producing the kind and quality of persons essential for the Michigan judiciary and the independence of thought and action that is essential to carrying out the job of the judge. New ideas and new devices need to be brought forward to improve our system.
>
> The National Conference of Judicial Selection and Court Administrators, held in 1959, recommended that 'security of tenure must be provided for judges. If methods of selection are such that the highest quality of lawyers are chosen for the bench, long terms of office or good behavior appointments are desirable.' The Conference went on to recommend that the American Bar Association's plan for the selection of judges is a means whereby qualified persons can be selected for the bench and tenure assured. In this plan the appointment is made by the governor from a panel suggested by a judicial commission. Thereafter the judge runs against his record only, not against other persons who may desire his job. This permits the electorate to remove an incompetent judge but prevents a popularity contest to determine whether or not a judge should continue in office. Because the judge will not have to stand for re-election against a popular prosecuting attorney, etc., he is more assured of tenure and can devote himself to the solution of his problems with the independence of thought and action essential to good judicial conduct. Certainly in this state more thought needs to be given to means whereby

> judicial personnel are originally selected and more protection should be given the judge from the chance of losing an election solely because a more popular person may happen to be running.
>
> In the federal government, judges are appointed by the chief executive with the advice and consent of the Senate. The term is good behavior. This has provided a quality of judicial personnel that is very high indeed. In areas in which there is a great popular pressure for one kind of judicial decision, as for example, in the South on the issue of civil rights, it has been the federal bench that withstands the pressure and decides the cases upon the merits. Perhaps our state can learn from this experience.

In 1953, the state bar of Michigan presented the affirmative and the negative on a then new proposal for gubernatorial appointment of judges nominated by a commission—the so-called "Missouri Plan." The following are excerpts from the negative argument presented by Stanley E. Beattie.[1]

> At the risk of referring to the obvious let us recall some of the landmarks in the progress of the American people toward democracy.
>
> First, the bill of rights is reckoned by many an integral part of the original constitution of the United States. It is said that without the promise of the bill the constitution could not have been adopted. (The first Congress sponsored the said bill in its first session.) The whole tenor of the bill of rights is a vigorous assertion of the power of the people. Is it necessary to remind the reader that the bill of rights lays emphasis on freedom of speech, of the press, of the right to assemble, of the right to jury trial in civil and criminal cases and of the reservation of rights in the people, except as expressly delegated? Second, the body of electors of the president was and remains constituted in form as possessing power of discretion and of decision in the electors in their choice of president. Third, amendments XIII, XIV and XV expanded the right of suffrage, re-emphasized the inherent rights of the people, and secured them against invasion by the states. Fourth, amendment XVII took the election of senators from a select group, viz., the state legislators, and placed that right in the people. Fifth, amendment XIX expanded the franchise of the people by giving women the vote.

[1] Michigan State Bar Journal, Vol. 32, 1953, pp. 42-3.

While these expansions of democratic sovereignty were in ferment and in process, the people of Michigan by the constitution of 1835 (VI, section 4) determined that they would elect judges of their county courts, associate judges of circuit courts and judges of probate. In the constitution of 1850, article VI, section 2, the people determined to elect supreme court justices.

The foregoing instances are cited to demonstrate the admittedly obvious: The people are determined that they shall have the say not only as to what the law shall be, but as to those who shall make, enforce and interpret the law.

Law is logic, ethics, economics, sociology and politics. (The word "politics" is used in the sense of political science.) Is it seemly for the governing body of the State Bar of Michigan, for the lawyers of Michigan, and indeed for anyone, to tell the people of Michigan that they are not competent to have their say as to who shall be judges of law, so defined?

Please look back to the constitutional amendment rejected in 1938. It concerns supreme court justices, but the basic principle of the rejected amendment is in part the warp and woof of the plan now under debate. The governor shall appoint but he shall appoint upon nomination by a commission. Who composes the commission? Three lawyers, three judges and three laymen. If a candidate does not receive the endorsement of that commission, he cannot be judge. How can it be expected that the people will take kindly to such a disparagement of their elective choice? Surely the proponents of the Plan will admit that they cannot as sure the people that judges so appointed will turn out well. And surely it is impossible to present a statistic to demonstrate that, percentage wise, appointive judges are more faithful, honorable, diligent and learned than those elected by the people.

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CHAPTER VIII LOCAL GOVERNMENT

(over)

Section Detail

VIII LOCAL GOVERNMENT

A. COUNTIES

1. Counties; Corporate Character, Suits

Article VIII: Section 1. Each organized county shall be a body corporate, with such powers and immunities as shall be established by law. All suits and proceedings by or against a county shall be in the name thereof.

Constitutions of 1835 and 1850

No similar provision is found in the 1835 constitution. The 1850 constitution contained an exact duplicate of this section (Section 1, Article X).

Constitution of 1908

This section has not been amended.

Judicial Interpretation

This section has been interpreted to mean that the "fundamental and necessary characteristics" which were possessed by counties prior to the adoption of the 1850 constitution, whether by usage or recognition, could not be changed by legislation (Attorney General v. Detroit Councilmen, 58 Mich. 213). The interpretation of what is "fundamental and necessary," however is left to the legislature.

With respect to "new" powers which the county may acquire, it is established judicial doctrine that the county is a creature of the state. The county is a quasi-municipal corporation which can exercise only those powers conferred upon it by the legislature (Mosier v. Wayne County Board of Auditors, 295 Mich. 27; Wright v. Bartz, 339 Mich. 55).

Other State Constitutions

Four states have similar provisions—Arizona, Article XII, Section 11; Oklahoma, Article XVII, Section 9; and Georgia, Article XI, Section 1. In at least 26 other states, however, introductory sections confirm the existence of counties by name or description or by defining their relationship as subdivisions of the state. Neither

the 1961 draft version of the Model State Constitution nor the United States constitution confirms existing counties. The Model State Constitution assumes the existence of counties and leaves their organization to the legislature.

Comment

None of Michigan's three constitutions has any preambles or introductory sections which contain a clear statement confirming existing counties. In each of the three constitutions the existence of counties is taken for granted and no mention is made of their relationship to the state.

Subsequent statutory legislation in Michigan makes it clear that the legislature assumed that the boundaries of the several counties were fixed at the time the 1908 constitution was adopted. The legislature actually has power to create new counties (M.S.A. 5.281) but has not done so.

For general comments on Sections 1 through 15a, see end of Part A, this chapter.

2. Townships in County; City as Separate County

Article VIII: Section 2. No organized county shall be reduced by the organization of new counties to less than 16 townships as surveyed by the United States, unless in pursuance of law a majority of electors voting on the question in each county to be affected thereby shall so decide. When any city has attained a population of 100,000 inhabitants, the legislature may organize it into a separate county without reference to geographical extent, if a majority of the electors of such city and of the remainder of the county in which such city may be situated voting on the question shall each determine in favor of organizing said city into a separate county

Constitutions of 1835 and 1850

The constitution of 1835 contained a provision which stated that no organized county could be reduced by the organization of new counties to less than 400 square miles (Section 7, Article XII). The constitution of 1850 (Section 2 of Article X) contained a provision similar to the present provision.

Constitution of 1908

The 1908 version modified the 1850 provision by making certain substantive changes: 1) The population requirement for the formation of new counties was raised from 20,000 to 100,000 in recognition of the population growth of the state, 2) approval for the formation of the new county was to be required of the city desiring county status and the remainder of the county voting separately. The latter clause was inserted to protect the interest of minorities residing in the "rump" of the county in the event large cities were to seek separate county status. It is significant that this provision has never been used.

Judicial Interpretation

Judicial interpretation has determined that a county cannot be organized in areas in which there are no organized townships (People v. Maynard, 15 Mich. 463); the constitutional prohibition against counties of fewer than 16 townships precludes counties of unreasonably small size but is not intended to prohibit the division of townships if convenience or necessity so dictates (Bay County v. Bullock, 51 Mich. 544); fractional townships as surveyed by the United States are townships within the meaning of this section (Rice v. Ruddiman, 10 Mich. 125).

Other State Constitutions

Some 22 other states make constitution provision for the creation of new counties, whether out of territory not previously organized, or by a division (or city-county separation) of an established and organized county. In 16 of these states some form of referendum in the affected areas is required in order to effect a division of the county. In four states such a division of the county is dependent upon some geographical requirement. In only two states, New York and Virginia, is such a division of counties at the virtual discretion of the legislature. In Virginia the discretion only applies to counties whose length is three times their breadth or which exceed fifty miles in length.

The 1961 draft version of the Model State Constitution empowers the legislature to provide for "...incorporating; merging, consolidating and dissolving such counties, cities and other civil divisions…." This presumably also empowers the legislature to divide counties at its discretion.

Comment

The convention may wish to review this section to see whether it meets the needs of the state in facilitating the trend toward larger and more economical units of government. As the section reads, the restriction to 16 townships, except by a vote of

the electorate, probably serves to discourage any kind of consolidation. The second portion of this section providing for city-county separation of cities of 100,000 or over appears to make possible the creation of another unit of government in an area which may already have too many overlapping units of government. The question is whether this section in any way facilitates or hinders progress in solving problems of metropolitan government, urban sprawl and fringe areas.

3. County Officers

Article VIII: Section 3. There shall be elected biennially in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be prescribed by law. The board of supervisors in any county may unite the offices of county clerk and register of deeds in one office or separate the same at pleasure.

Constitutions of 1835 and 1850

The 1835 constitution provided for the election for a two-year term of all of the officers now specified and, in addition, for the election of one or more coroners and a county surveyor (Article VII, Sections 3 and 4 and Article VI, Section 50). The 1850 constitution omitted reference to the election of a coroner and a surveyor and added a provision for combining the offices of clerk and register of deeds.

Constitution of 1908

The only change in the 1908 version is one of wording and the deletion of a stipulation for the filling of vacancies. In the 1908 constitution the filling of vacancies, including those occurring in county offices is provided for in Article XVI, Section 5, which authorizes the legislature to provide by law for the filling of all vacancies where no specific constitutional provision has been made.

Judicial Interpretation

The only portion of this section which has raised important litigation is that which deals with the power of the supervisors to combine the offices of clerk and register of deeds. It is now well established that boards of supervisors cannot consolidate these offices in mid-term (Op. Atty. Gen., Oct. 25, 1939) and cannot combine these offices once candidates for both offices have been nominated at primary election (Op. Atty. Gen., August 19, 1946, No. 0-4968).

Other State Constitutions

Over three-fourths of the state constitutions have provisions similar to this section of the constitution. The number and variety of county officers constitutionally provided for may vary from state to state but most states provide for at least five such offices by name and many stipulate eight or more. Sheriffs, prosecuting attorneys, clerks, treasurers, and coroners are among the officers most frequently provided for by constitutional provisions.

The 1961 draft version of the Model State Constitution makes no mention of county officers.

Comment

This section is rather specific in its requirements as to the election and terms of office of certain county officials. There is a real question whether such matters ought to be provided for in the constitution. In the interest of flexibility and adaptability, the advisability of leaving these matters to regulation by general law is an alternative which might be seriously considered. At least that part of the section dealing with the biennial election of these officers might perhaps better be statutory. The authorization to the board of supervisors to combine the offices of clerk and register of deeds might be reconsidered in the light of a broader grant of power to boards of supervisors to effect administrative reorganization of county governing machinery whether by constitutional or statutory authorization.

4. Offices at County Seat

Article VIII: Section 4. The sheriff, county clerk, county treasurer, judge of probate and register of deeds shall hold their offices at the county seat.

Constitutions of 1835 and 1850

The 1835 constitution had no similar provision. The 1850 constitution contained an exact duplicate of this provision.

Constitution of 1908

This section was carried over from the 1850 constitution without change and has not been amended. This provision apparently is sufficiently clear and precise as to have raised no important legal question.

Other State Constitutions

Ten other state constitutions specify that the office and records of some or all county officers must be located at the county seat or at a particular place in the county designated by law. Of these, only four—Florida, Montana, Nevada, and Pennsylvania—specifically state that it shall be the county seat where the offices and records are to be kept. The 1961 draft of the Model State Constitution has no such provision.

Comment

Consideration might be given to removing this section and to making provision for this by statute.

5. Sheriff

Article VIII: Section 5. The sheriff shall hold no other office. He shall be elected at the general election for the term of 2 years. He may be required by law to renew his security from time to time and in default of giving such security, his office shall be deemed vacant. The county shall never be responsible for his acts.

Constitutions of 1835 and 1850

The 1835 constitution contained a similar provision except that the time of election was not specified and there was a prohibition against holding the office of sheriff longer than four years in any period of six (Article VII, Section 4). The 1850 constitution continued the 1835 provision with minor changes in wording (Article X, Sections 3 and 4).

Constitution of 1908

The constitution of 1908 as originally adopted continued without change the 1850 provision. This section was amended in 1926 to delete the prohibition against holding office for more than four years out of a six-year period and to provide for a two-year term and election at the general election.

Other State Constitutions

The constitutions of most other states mention the office of sheriff. Election of this officer is provided for in the majority of them. In California, the legislature may provide either for election or appointment. In some 11 other states the term is fixed

for two years. In three states, Massachusetts, Washington, and California, the legislature is authorized to fix the term of office. In some 14 states dual office holding by sheriffs is prohibited for particular or all other public offices. The office most commonly prohibited, when specified, is that of legislator. At least six other states require that bond be posted and in at least two other states failure to post bond from time to time creates a vacancy in the office. The 1961 draft of the Model State Constitution contains no similar provision.

Comment

Dual office holding, whether of constitutional or statutory incompatibility, is a matter which should be reviewed as a total problem rather than as an isolated problem affecting particular public offices. There are a variety of reasons for prohibiting dual office holding and provisions, whether constitutional or statutory, for some or all public offices might be provided for in one place. Provision for biennial election and the matter of the security might both be deleted. The election provision is already covered in Section 3 of this article and the security matter is one which might properly be regulated by a general provision as it is a broader problem than one touching only the office of sheriff.

6. Jury Commissioners

Article VIII: Section 6. The legislature shall by general law provide for the appointment of a board of jury commissioners in each county; but such law shall not become operative in any county until a majority of the electors of the county voting thereon shall so decide.

Constitutions of 1835 and 1850

Neither the 1835 nor the 1850 constitutions contained a similar provision.

Constitution of 1908

The new section was included in the 1908 constitution on the ground that up to 1908 many of the larger cities and counties were in fact appointing jury commissioners on the basis of special acts. This section made it possible, by passage of a general law, to make this privilege available to all counties.

Other State Constitutions

There is no indication from available sources that a system of jury commissioners is constitutionally provided for in any other state.

Comment

As indicated, jury commissioners are not generally provided for in other states. Regardless, however, of whether or not jury commissioners ought to be part of our judicial system, matters of judicial procedure might better be left to a statutory judicial code which can be periodically reviewed and modified without recourse to constitutional amendment.

7. Board of Supervisors; Representation of Cities

Article VIII: Section 7. A board of supervisors, consisting of one from each organized township, shall be established in each county, with such powers as shall be prescribed by law. Cities shall have such representation in the boards of supervisors of the counties in which they are situated as may be provided by law.

Constitutions of 1835 and 1850

No such provision was contained in the 1835 constitution. The 1850 constitution contained substantially the same provisions except that they were contained in two separate sections—Sections 6 and 7 of Article X.

Constitution of 1908

This section has not been amended.

Judicial Interpretation

This section confers upon the legislature the power to fix the representation of cities on boards of supervisors (Op. Atty. Gen., 1913). The membership of a board of supervisors cannot be reduced to less than one supervisor from each organized township, without a constitutional amendment, even though an unwieldy board may exist (Op. Atty. Gen., 1933-1934). The board of supervisors of a county, as an administrative body, has no inherent powers.[1]

[1] Mason County Civic Research Council v. Mason County, 343 Mich. 313.

Boards of supervisors have such powers as shall be prescribed by law.[2]

Other State Constitutions

Except in the six New England states, where counties are primarily judicial districts rather than legislative or administrative units, all states provide for some effective governing body for the county (borough in Alaska and parish in Louisiana). In some 20 states, this body is called a board of county commissioners, county board, or county commissioners. Some six other state constitutions mention or authorize a board of supervisors. In the other states the name of the county governing authority varies greatly. A number of Southern states have county courts; Louisiana has a police jury; and Arkansas has a quorum court. At least nine state constitutions prescribe the size of the governing boards in the constitution. A number of state constitutions specify the term of office.

Comment

In view of the size of certain county boards of supervisors (Wayne County with over 100 supervisors), consideration might be given to the question of whether tying representation to a constitutional requirement such as this is in the best interest of efficient county government. Even if the unwieldy size of boards of supervisors is of itself insufficient reason to change the basis of representation, consideration of whether the whole question of representation might better be left to statute is of importance.

8. Powers of Counties

Article VIII: Section 8. The legislature may by general law confer upon the boards of supervisors of the several counties such powers of a local, legislative and administrative character, not inconsistent with the provisions of this constitution, as it may deem proper.

Constitutions of 1835 and 1850

No similar provision was contained in the 1835 document. The 1850 constitution, Article IV, Section 38, contained a provision similar to the present section which, however, was applicable to townships, cities, villages as well as counties. The 1850 provision did not require that the legislature act by "general law."

[2] Wright V. Bortz, 339 Mich. 55.

Constitution of 1908

In the 1908 constitution this grant of power can be found in separate sections dealing with each unit of local government.

The addition of the requirement "by general law" was an important change from the 1850 provision. The 1908 provision also added the stipulation "not inconsistent with the provisions of this constitution." This section has not been amended since 1908.

Judicial Interpretation

This provision is clear and precise and no significant litigation has arisen. Early in the history of the constitution two points were clarified (1) that the legislature in the exercise of its powers is only limited by the national and state constitutions (Attorney General v. Marr, 55 Mich. 445) and (2) boards of supervisors have no power to repeal or nullify valid enactments of the state legislature (Op. Atty. Gen., 1914, p. 327).

Other State Constitutions

At least 10 state constitutions have provisions which authorize the legislature by general law to confer powers upon counties. Several additional constitutions grant the substance of this power to their respective legislatures but are more specific in enumerating the general classes of powers that may be conferred upon counties.

Comment

This provision is a broad grant of power to the legislature to deal with the details of county government. It is the core of the legislature's power to deal with the civil subdivisions of the state. All other provisions dealing with county government in the present constitution are, in effect, limitations on this broad grant of power. See Comment at the end of Part A, this chapter.

9. Salaries; Claims Against Counties

Article VIII: Section 9. The boards of supervisors shall have exclusive power to fix the salaries and compensation of all county officials not otherwise provided for by law. The boards of supervisors, or in counties having county auditors, such auditors, shall adjust all claims against their respective counties; appeals may be taken from such decisions of the boards of supervisors or auditors to the circuit court in such manner as shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution contained no similar provision. The 1850 constitution contained a provision (Article X, Section 10) dealing with the substance of the section but differing from the present section in the following:

> The 1850 provision as amended limited the power to fix salaries, compensation, and to adjust claims to a few counties rather than all counties.
>
> The 1850 section made no provision for appeal from the decisions of boards of supervisors or auditors.

Constitution of 1908

In changing this section the 1908 convention felt that the newer provision gave greater latitude to all counties in this matter.

In addition, appeal to the circuit court provided a less expensive appeal procedure than mandamus action which was possible under the 1850 provision.

Opinions of the attorney General

County officers are entitled to legal fees unless the supervisors in fixing salaries state that salaries shall be in lieu of fees (Op. Atty. Gen. 1917, p. 235); and county supervisors cannot change the compensation of county officers which have already been fixed by general or local statute (Op. Atty. Gen. 1926-1928, p. 753).

Other State Constitutions

All state constitutions make provisions for county control of their financial affairs. At least a dozen states make some specific reference to limitation on counties in the payment of fees, salaries, and other compensation. The 1961 draft of the Model State Constitution makes no reference to this subject matter

Comment

Consideration might be given to having these provisions provided for by general law.

10. Power of Taxation; Limitation

Article VIII: Section 10. The board of supervisors of any county may in any 1 year levy a tax of 1/10 of 1 mill on the assessed valuation of said county for the construction or repair of public buildings or bridges, or may borrow an equal sum for such purposes; and, in

> any county where the assessed valuation is less than 10,000,000 dollars, the board may levy a tax or borrow for such purposes to the amount of 1,000 dollars; but no greater sum shall be raised for such purposes in any county in any 1 year, unless submitted to the electors of the county and approved by a majority of those voting thereon.

Constitutions of 1835 and 1850

No similar provision was contained in the 1835 constitution. The provision in the 1850 constitution (Article X, Section 9) contained almost the exact duplicate of this section except that it stated that any county could borrow or raise by tax one thousand dollars for the purposes mentioned rather than specifying such borrowing and taxation in terms of "one tenth of one mill."

Judicial Interpretation and Opinions of the Attorney General

This provision appears to raise questions as to the kinds of purposes for which such taxes may be used, and also the nature of projects which may be financed from funds other than those raised by the millage. In Rude v. Muskegon County Building Authority, 338 Mich. 363, it was held that where the authority had a debt of $200,000 for acquiring a building for welfare purposes and where the county proposed to payoff the debt by a reasonable rent charge, such financing did not come within the limitations of this section. The substance of this decision was similarly upheld in Op. Atty. Gen. March 17, 1958, No. 2960. With respect to the purposes for which such moneys may be used, boards of supervisors apparently may not levy beyond the 1/10 of one mill tax limit for purposes of creating sinking funds for construction. The content of the provision is intended to limit legislative power to an authorization of taxes levied on the assessed valuation and to limit the purpose of such taxations, as well as of borrowing, to the construction and repair of county buildings (Op. Atty. Gen., August 28, 1951, No. 1436).

Other State Constitutions

Most state constitutions contain provisions which relate to the power of counties to tax and the purpose for which they may tax and incur debts. Some of these constitutional provisions state absolute tax and debt limits; some of them specify the limit of taxes and debts which may be incurred but authorize the legislature to fix the actual limits. Some, like the Model State Constitution, merely authorize the legislature to fix the limits by law.

11. Charitable Institutions

Article VIII: Section 11. Any county in this state, either separately or in conjunction with other counties, may appropriate money for the construction and maintenance or assistance of public and charitable hospitals, sanatoria or other institutions for the treatment of persons suffering from contagious or infectious diseases. Each county may also maintain an infirmary for the care and support of its indigent poor and unfortunate, and all county poor houses shall hereafter be designated and maintained as county infirmaries.

Constitutions of 1835 and 1850

No corresponding provisions were contained in either of the two earlier constitutions.

Constitution of 1908

The rationale for the inclusion of this section in the 1908 constitution was a conviction on the part of the convention that this was in line with modern conditions which demanded the prevention and treatment of contagious diseases as a means of preserving the public health.

Opinions of the Attorney General

Under this provision counties may make appropriations to public hospitals in which contagious diseases are treated even though this may not be the only function of the hospital (Op. Atty. Gen., May 26, 1943, No. 0-779). Non-tax derived funds, if not pledged to some other purpose by the legislature, may be used for a county infirmary (Op. Atty. Gen., April 5, 1957, No. 2931).

Other State Constitutions

Over a dozen state constitutions make some specific mention authorizing counties to provide infirmaries, charitable institutions, asylums, hospitals, poor houses, and penal institutions. Such authorization is either specifically granted in the constitution or authorized to be provided for by general law. Several of the constitutions, like the Michigan constitution, provide for cooperative arrangements among counties. The Model State Constitution is silent on this subject.

Comment

The subject matter of this section could be included in the powers conferred under Section 8.

12. Indebtedness; Limitation

Article VIII: Section 12. No county shall incur any indebtedness which shall increase its total debt beyond 3 per cent of its assessed valuation, except counties having an assessed valuation of 5,000,000 dollars or less, which counties may increase their total debt to 5 per cent of their assessed valuation.

Constitutions of 1835 and 1850

No similar provision was contained in the 1835 constitution. The 1850 constitution as amended (Article IV, Section 49) contained a similar provision though it did not specify that the total debt could not exceed three per cent of the assessed valuation. The 1850 provision, however, contained an additional limitation not found in the present section; viz., that any indebtedness in excess of one-half of one per cent was, in any event, to be authorized by a vote of the electorate.

Constitution of 1908

The original 1908 provision specified that the total debt could not exceed three per cent and deleted the portion the 1850 provision dealing with debt in excess of one-half of one per cent.

This section was amended in 1910. The amendment added that portion of the section which authorized counties of less than five million dollars assessed valuation to increase their debt to five per cent of such valuation.

From time to time some legal questions have arisen as to whether certain specific purposes fall within the limitations of this section but these have not significantly changed the operation of the section.

Other State Constitutions

The majority of state constitutions contain limitations on the amount of county indebtedness. Moreover, the majority of these are tied to some percentage figure of the assessed valuation of the county. Generally these limitations on indebtedness apply to all purposes for which the counties may incur debt. In a number of states, however, the percentage figure may vary depending on the purpose. The Model State Constitution is silent on this subject.

Comment

Inasmuch as there are presently no counties with a state equalized valuation of less than $5 million, consideration might be given to removing this portion of the provision.

13. Removal of County Seat

Article VIII: Section 13. No county seat once established shall be removed until the place to which it is proposed to be removed shall be designated by 2/3 of the board of supervisors of the county, and a majority of the electors voting thereon shall have voted in favor of the proposed location, in such manner as shall be prescribed by law.

Constitutions of 1835 and 1850

The constitution of 1835 contained no similar provision. The constitution of 1850 contained the same provision (Article X, Section 8).

Constitution of 1908

This section was carried over without change from the 1850 constitution and has not been amended. The provisions of this section are sufficiently clear and explicit as to have raised no significant litigation.

Other State Constitutions

The majority of state constitutions prohibit the relocation of county seats except with approval of the local electorate.

Approval by the "majority" or "two-thirds" of the electorate is the most common requirement. A handful of constitutions authorize the legislature to change county seats, but only by following certain extraordinary legislative procedures such as requiring extraordinary majorities in both houses to pass such laws or other special procedures. The Model State Constitution is silent on this matter.

Comment

Tradition has prevailed in providing the guarantees of this section. Most other constitutions contain such a guarantee. Whether this tradition is now sufficiently ingrained as to make a constitutional guarantee unnecessary is a matter for consideration.

14. Navigable Streams; Permission to Bridge or Dam

Article VIII: Section 14. No navigable stream of this state shall be either bridged or dammed without permission granted by the board of supervisors of the county under the provisions of law, which permission shall be subject to such reasonable compensation and other conditions as may seem best suited to safeguard the rights and interests of the county and the municipalities therein. No such law shall preclude the state from improving the navigation of any such stream, nor prejudice the right of individuals to the free navigation thereof.

Constitutions of 1835 and 1850

No provision concerning this subject was contained in the 1835 constitution. The 1850 constitution contained substantially the same provision (Article XVIII, Section 4).

Constitution of 1908

That portion of the section dealing with the requirement for obtaining reasonable conditions and compensation as a means of safeguarding the interests of the counties and other municipalities was not a part of the 1850 version and was added in 1908. This gave the board of supervisors authority to require reasonable compensation in return for the right or franchise granted.

Judicial Interpretation and Opinions of the Attorney General

This section stands as an authorization to counties to maintain navigable streams. The board of supervisors is authorized:

1. To dam streams without the consent of the electors (Op. Atty. Gen., 1916, p. 556).

2. To impose conditions and provisions on the construction of dams such as requiring power companies to construct and maintain roads over them (Op. Atty. Gen., 1916, p. 568).

3. To cause the removal of obstructions in streams if specifically authorized by statute (Op. Atty. Gen., 1930-32, p. 264).

However, it was held with regard to the 1850 provision, and presumably this is still law, that this section did not apply to waters that are part of the state boundary (Ryan v. Brown, 18 Mich. 196) or to streams which had no value as navigable waters (Shepard v. Gates, 50 Mich. 495).

Other State Constitutions

The Michigan constitution appears to be unique in the inclusion of this kind of a provision specifically related to the powers of local government. Generally, the regulation of navigable waters is constitutionally left to the state government, which may or may not divest itself of some of its power by statute. In the absence of such statutes, however, such regulation is exclusively a state function.

15. Townships; Organization and Consolidation

Article VIII: Section 15. The board of supervisors of each organized county may organize and consolidate townships under such restrictions and limitations as shall be prescribed by law.

Constitutions of 1835 and 1850

The constitution of 1835 contained no similar provision. The 1850 constitution (Article X, Section 11) contained a similar provision.

Constitution of 1908

References in the 1850 section relating to highways and bridges were deleted in the 1908 version as it was felt that this subject was already treated in Article VIII, Section 10. In the 1908 version, “consolidate” townships was added, as it was felt that this authorization was needed particularly in the northern counties.

Judicial Interpretation and Opinions of the Attorney General

The provision is specific in granting boards of supervisors the power to consolidate townships and this power cannot be taken away by the legislature (Op. Atty. Gen., 1917, p. 337). On the other hand, general laws which permit disconnection of land from cities and villages under certain circumstances and which may result in a change of boundaries do not violate this provision, as the legislature if also by the constitution empowered to provide by general law for the incorporation of cities and villages. This includes the drawing of boundaries (Tribbett v. Village of Marcellus, 294 Mich. 607; Rood v. City of Lapeert, 294 Mich. 621).

Other State Constitutions

It appears that no other state constitution empowers counties directly to organize or consolidate townships. Generally the power to organize and consolidate townships is left to the legislature which may do so by general law with or without reference to the government of the county.

16. Drainage District Bonds

Article VIII: Section l5a. Any drainage district, established under provision of law, may issue bonds for drainage purposes within such district.

Constitutions of 1835 and 1850

No such provision was included in either the 1835 or 1850 constitution.

Constitution of 1908

This provision was not included in the original 1908 constitution. It is an amendment added pursuant to Joint Resolution 2, 1917, ratified April, 1917.

Judicial Interpretation

Under this section a drainage district is an entity capable of being sued (Royal Oak Drain District Oakland Count Michigan v. Keefe, 87F (2d) 786; a drain district is less of a municipal corporation than a city but exhibits the essential characteristics of a public corporation and is, therefore, an entity capable of being sued (Bloomfield Village Drain District v. Keefe, 119F (2d) 157).

Other State Constitutions

At least a dozen states provide for the creation of drainage districts. Some of these empower such districts to issue bonds, to provide for special assessments, to levy taxes on property or a combination of these methods. All of these provisions are intended to authorize drainage districts to operate as independent fiscal authorities.

Comment

The necessity for this provision might be reviewed.

General Comment to Part A on “Counties”

Delegates to the constitutional convention will have to be exceedingly wary in com-

paring county government in Michigan with county government in other states. It is both easy and fruitful to compare constitutional provisions of the several states and the nation with respect to such matters as the powers, duties, and organization of the executive, legislative, and judicial branches of state government. The model is historically the United States constitution. In dealing with the framework of local government within the states, however, no model exists in the national constitution. The national constitution makes no provision for local governments. It leaves to the states the power to create and deal with local governments. It follows, therefore, that while state constitutions, with variations, follow the national constitutions with respect to the framework of state government and therefore display a degree of uniformity, no such uniformity exists with respect to local government.

Local government organization including county government is in a real sense the creation of each individual state. What has emerged as local government in the states is the product of historical development, tradition, geography, and other factors. To the extent to which these factors vary among the states, the structure of local government varies.

In Michigan, as in the rest of the middle west, the county occupies a middle position in importance. The organization of local government in Michigan ante-dates the constitution of 1835. An ordinance passed by the Congress of the Confederation in 1785 authorized the organization of the western lands into “survey” or “congressional townships” six miles square. The Northwest Ordinance of 1787 authorized the governor of the Northwest Territory, which included Michigan, to create counties and townships and to appoint county and township officials. The organization of counties took place over a period extending from 1815 to 1891. Eighteen counties were organized at or before the time the constitution went into effect. Thirty-nine counties were organized at or before the time the 1850 constitution went into effect.

In 1825 and 1827, respectively, two acts were passed by the legislative council of the territory which effectively fixed the pattern of local government in Michigan. These acts did three things: (1) the township was created as a political unit; (2) the township was made into a unit of representation on the county governing body; and (3) important county and township officials were to be elected. Constitutionally, it was possible for the framers of the 1835, 1850, and 1908 constitutions to ignore the pattern established for the government of the territory. The fact is, however, that not only did they not choose to ignore it but they assumed that this was an irrevocable pattern upon which they created the whole complex of Michigan’s framework of local government. This may explain the absence of provisions relating to county government in the 1835 constitution and it may explain why in the 1850 constitution, as well as in the 1908 constitution, for example, there is no statement which confirms the existence of counties.

The framers of the 1908 constitution did not intend that the basic framework of the 1850 constitution should be changed. Indeed, they made much of the fact that, "In the revised constitution the old framework of government is most carefully preserved" and "no structural changes are proposed." Thus in fact, the provisions governing counties today are the same provisions which have governed the counties of Michigan for over 110 years.

Delegates to the convention now have the opportunity to make some fundamental decisions regarding the character of county government, its powers, its duties, its responsibilities and its relationship to other units of government. The legal framework which currently underlies county government cannot be changed except by explicit language in the constitution to the contrary. In the absence of such language it is accepted and fixed judicial doctrine that counties are creatures of the state. They possess only such powers as are conferred upon them by direct language in the constitution, or by statute. Clearly, in the absence of a direct constitutional grant of power, the counties are wholly subject to legislative discretion. The legislature can create counties and confer power upon them and it can abolish them and curtail their powers at will. The county is a quasi-corporation in that it is primarily an administrative agent of the state. It has corporate entity only insofar as it can be sued in its own name. It is not a wholly public corporation because it does not have powers which it may exercise on its own volition.

What counties in Michigan mayor may not do, except for what is specifically stated in the constitution, is provided for by statute to be found in Part II, Chapters 35 through 46 of Michigan Statutes Annotated (1936). These statutes comprise the general laws governing counties in Michigan. They are comprehensive and explicit. To the extent to which they deal with the details of county organization, administration, powers and duties, any changes in constitutional language and intent must ultimately be reflected in changes in these statutes.

In meeting the needs of county government in a changing society, delegates to the convention should consider the possibility of giving counties home rule powers similar to those granted cities and villages in the 1908 constitution. This would relieve the legislature of the burden of dealing with the details of county government in the same way in which it has relieved the legislature from dealing with the details of city government.

The Michigan constitution provides a basically uniform system of government for all 83 counties in Michigan. In considering what kind of constitutional provision is needed for county government, the delegates to the convention will be faced with several alternatives or combinations of alternatives:

1. Continue the present uniform system of county government.

2. Provide for optional forms of county government.

3. Provide home rule for some or all of Michigan's counties.

Several states provide constitutionally for optional forms of county government. Generally these provisions authorize the legislature to provide optional forms with the option as to which form is to be used being left to the local electorate. Virginia, Montana, New York, North Carolina, North Dakota and Oregon all permit optional law forms of county government, as does the 1961 draft of the Model State Constitution.

A number of states have constitutional home rule for counties, which authorizes the electorate in a county to adopt a county charter. California, Maryland, Ohio, Texas, Missouri, Louisiana, Washington, Florida, Minnesota, New York, Oregon, Alaska, and Hawaii all provide for county home rule for all or certain counties. The 1961 draft of the Model State Constitution also authorizes counties to adopt charters in addition to the provision for optional law forms of organization for counties.

There are several factors which should be considered in relation to county home rule:

1. Should a county home rule provision be restricted to authorizing counties to determine locally the organization of county government?

2. Should a county home rule provision give counties a grant of taxing authority independent of the legislature?

3. Should a county home rule provision give counties the authority to exercise powers and provide services without express statutory authorization?

These questions must be considered in relation to municipal home rule and the possibility of some effective provision for metropolitan area government. For example, if counties are given constitutional authority to provide services, what procedure will be used to reconcile the county's home rule power with the home rule power of cities and villages lying within the county? Questions such as these make the question of what kinds of constitutional provisions should be included for counties one of the more vexatious problems which will confront the convention.

B. TOWNSHIPS

by
Louis L. Friedland, Ph.D.
Department of Political Science, Wayne State University

1. Townships, Corporate Character, Suits

Article VIII: Section 16. Each organized township shall be a body corporate, with such powers and immunities as shall be prescribed by law. All suits and proceedings by or against a township shall be in the name thereof.

Constitutions of 1835 and 1850

The 1835 constitution did not contain a similar provision on townships. However, townships were recognized in the 1835 constitution by several references to township officers.

The 1850 constitution contained a provision identical to that found in the present constitution (Article XI, Section 2).

Constitution of 1908

The 1908 constitution continued without change the 1850 provision and there have been no amendments.

Judicial interpretation

The supreme court has held that the legislature has been authorized to confer upon townships powers concerning local matters by general laws and may impose conditions or limitations upon the right or extent of exercise of powers granted.[3]

Other State Constitutions

Townships are organized units of government in 22 states and there are a total of 17,198 organized townships in the United States. In eight of these states townships are called “towns.” The township form of government is found in the six New England states, three middle Atlantic states (New Jersey, New York, and Pennsylvania), eleven north central states, and to a very limited extent in South Carolina and Washington. In the other 28 states the township either does not exist at all or does not operate as an organized unit of government. Between 1942 and 1957 one state, Iowa, discontinued the township as an organized unit of government.[4]

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[3] City of Highland Park v. Dearborn Township, 285 Mich. 440.

[4] U.S. Bureau of the Census, 1957 Census of Governments, Vol. 1, No. 1 and No. 3.

A majority of the 22 states with organized township governments have references in their constitutions, although many do not have a provision similar to Section 16. The Model State Constitution makes no reference to townships.

Comment

See Comment under Section 18, below, this chapter.

2. Local Legislation

Article VII: Section 17. The legislature may by general law confer upon organized townships such powers of a local, legislative and administrative character, not inconsistent with the provisions of this constitution, as it may deem proper.

Constitutions of 1835 and 1850

The 1835 constitution did not contain a provision similar to this. The 1850 constitution contained a provision authorizing the legislature to confer these powers upon "organized townships, incorporated cities and villages, and upon the boards of supervisors of the several counties" (Article IV, Section 38). There was no requirement that this be done by general law—thus, special local acts were possible.

Constitution of 1908

The 1908 constitution continued this provision of the 1850 constitution as it applied to townships, with two additions. First, the 1908 provision added the requirement that the legislature act by "general law," and second, the wording "not inconsistent with the provisions of this constitution" was added.

Judicial Interpretation

The Michigan supreme court has held in a case involving the issuance of bonds that townships have only such powers as statutes confer, and are subject to no obligations except such as are derived from statutory provisions.[5] The court also held that the township board is of special and limited jurisdiction, having no power or authority by constitutional mandate, but deriving sole authority from the legislature which is authorized but not compelled by the constitution to delegate certain legislative powers to the township board.[6]

[5] Township of Royal Oak v. City of Pleasant Ridge, 295 Mich. 284.

[6] Township of Dearborn v. Dearborn Twp. Clerk, 334 Mich. 673.

Other State Constitutions

A number of states prohibit special or local legislation dealing with townships. For specific provisions see Index Digest, pp. 1085-1088.

Comment

See Comment under Section 18, below, this chapter.

3. Township Officers

Article VIII: Section 18. There shall be elected on the first Monday of April in each odd numbered year for a term of two years in each organized township one supervisor, one township clerk, one commissioner of highways, one township treasurer, and not to exceed four constables, whose powers and duties shall be prescribed by law. Justices of the peace shall be reclassified as shall be prescribed by the legislature to conform with the provisions of this section providing for biennial township elections.

Constitutions of 1835 and 1850

The 1835 constitution did not include a provision specifying township officials or their election. The constitution of 1850 contained a provision similar to the first sentence of the present provision. However, the 1850 constitution provided for annual election of officials and, in addition to the officers now specified, provided for the election of one school inspector and one overseer of highways for each highway district.

Constitution of 1908

The original 1908 provision was substantially similar to the 1850 provision in that it provided for annual election of all the officials enumerated in the 1850 provision except for the school inspector. This section was amended in 1943 to increase the term of office from one year to two. The 1943 amendment also deleted the original provision for "one overseer of highways for each highway district." The last sentence of the present provision relative to the re-classification of justices of the peace was added by the 1943 amendment. There has been no significant judicial interpretation of this provision as amended.

Other State Constitutions

Most of the states which provide constitutionally for townships do not specify as many constitutional officers as Michigan. The two-year term appears to the most common. The Model State Constitution does not provide for townships or their officers.

Comment

The 1957 Census of Governments indicates that the townships (and towns) in the United States range widely in their scope of governmental powers and organization and that most of them perform only a very limited range of services for predominantly rural areas. However, in some states, the Census Bureau notes that townships are vested with broad powers and perform many functions commonly associated with municipalities. The Census of Governments indicates that in some states there has been a transfer of township functions to the county and a diminution in the importance of the township.

In Michigan in recent years the counties in both rural and urban areas have assumed greater responsibilities in the area of local government services, which might appear to suggest a decline in the importance of townships. However, parallel with this, the legislature has tended also in recent years to give townships the authority to perform a wide variety of "municipal" services—that is, services which previously had been provided only by incorporated cities and villages. The trend in Michigan to increasing the powers and functions of townships is in contrast to many states where township powers have been considerably reduced.

There are substantial differences in the functions provided by townships in rural areas as compared with the functions of townships in urban areas in Michigan. The township in rural areas serves primarily as a unit for election administration and for assessment and collection of the property tax. In urban areas the township provides in addition a wide variety of services such as police, fire, refuse collection and disposal, sewage disposal, zoning, etc.

While in recent years the legislature has provided greater flexibility to townships in terms of functions, the organization of townships has remained the same except for the changes embodied in the charter township act of 1947. And, even the charter township must have the officers specified in Article VIII, Section 18. The board in a charter township may appoint a township superintendent, serving at the will of the board, to act as the administrator of township affairs. For the townships in urban areas the charter township act provides some additional flexibility and, of course, townships in urban areas can incorporate as home rule cities or villages to obtain substantial flexibility. Provisions relating to taxation and indebtedness for capital improvements are also more liberal under the charter township act.

There are a number of questions that might be considered by the convention in connection with the constitutional provisions relating to townships:

1. Should reference to the township be omitted from the constitution, leaving full discretion to the legislature?

2. Should the township be eliminated entirely as a unit of government with services in the rural areas to be provided by the county and in the urban areas by incorporated cities or villages?

3. Should the township remain a constitutional unit of government, but with greater flexibility through eliminating the constitutionally specified officers and substituting some type of "home rule" charter provision or through permitting the legislature to develop optional charter plans?

4. Should townships be granted even broader powers so that those located in urban areas can undertake additional responsibilities or should the ability to incorporate as a home rule city or village be considered an adequate solution?

The decision on these questions will be related to the decisions on municipal home rule, county home rule, and metropolitan area provisions.

Consideration might be given to eliminating the requirement in Section 18 for the election of a highway commissioner in view of the assumption of the highway function by the state and county road commissions since 1931. The reference to reclassification of justices of the peace in Section 18 might be covered more appropriately in Article VII, Section 15, which provides for the election of justices.

4. Public Utility Franchises

Article VIII: Section 19. No township shall grant any public utility franchise which is not subject to revocation at the will of the township, unless such proposition shall have first received the affirmative vote of a majority of the electors of such township voting thereon at a regular or special election.

Constitutions of 1835 and 1850

Neither the 1835 nor the 1850 constitution contained a similar provision.

Constitution of 1908

This was a new section in the 1908 constitution. The "Address to the People" by the convention indicated that the purpose of this section was to secure publicity in the granting of franchises by townships and to preserve the rights of townships when granting franchises. This section has not been amended since 1908, nor has there been any significant interpretation by the courts.

Other State Constitutions

No other state has a provision comparable to this section of the Michigan constitution.

Comment

This is one of a number of provisions contained in the constitution relating to public utilities and franchises. A similar provision applies to cities and villages, but the requirement is for a three-fifths vote of the electors (see Article VIII, Section 25).

C. CITIES AND VILLAGES

by

Louis L. Friedland, Ph.D.
Department of Political Science, Wayne State University

1. Incorporation

Article VIII: Section 20. The legislature shall provide by a general law for the incorporation of cities, and by a general law for the incorporation of villages; such general laws shall limit their rate of taxation for municipal purposes, and restrict their powers of borrowing money and contracting debts.

Constitutions of 1835 and 1850

The 1835 constitution contained no provision for the incorporation of cities and villages. In the 1850 constitution, Article XV, Section 13 states that the legislature shall provide for the incorporation and organization of cities and villages, but without reference to the use of the general law process. Special legislation affecting individual cities and villages was therefore possible. The legislature was further empowered to restrict the power of cities and villages to tax, borrow money, contract debt, and loan their credit.

Constitution of 1908

The provisions of the 1908 constitution, Article VIII, Section 20 (as noted), requiring general law for incorporation of cities, and Section 21, empowering each city to frame, adopt and amend its own charter and to pass all ordinances relating to its municipal concerns, subject to the constitution and general laws of the state, were designed to give cities and villages more home rule than they formerly possessed, and almost exclusive rights in conducting their affairs, in harmony with the constitution and general laws.[7]

Judicial Interpretation

Judicial determinations relative to the status of cities and villages have been numerous. Only a few of the more important are presented here. The basic principle depicting their nature is presented in the following statements:

[7] People v. Sell, 310 Mich. 305.

> Cities are municipal corporations deriving their powers from the state, of which they are agencies for carrying on local municipal government.[8]
>
> The present constitution recognizes, as former constitutions have recognized, the general control of the legislature over cities.[9]

While the authority and powers exercised under "home rule" charters will be discussed in, the next section, an important decision to note here is:

> Under this section of the Michigan constitution and the Home Rule Act (Public Acts, 1909, No. 279) providing for freeholder's charters for cities, the system is one of general grant of rights and powers, subject only to certain enumerated restrictions, instead of the former method of granting new enumerated rights and powers definitely specified.[10]

With respect to tax or debt limits, the court has held:

> The legislature, under this section of the state constitution, has plenary power to regulate the amount of municipal indebtedness and the rate of taxation of cities.[11]

Other State Constitutions

Two states, Ohio and West Virginia, have provisions on incorporation similar to Michigan; i.e., the legislature is empowered to provide for incorporation through general law. Several other states so authorize their legislatures and, in addition, permit general laws to be altered, amended, or repealed; e.g., Virginia, California, Utah, Washington, Idaho.

In many states special or local legislation for incorporation is forbidden; e.g., Alabama, Arizona, Florida, Illinois, Iowa, Minnesota, Missouri, Nebraska, New Mexico, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, and Wyoming.

Comment

Home rule in Michigan was made possible in 1908 by the constitutional requirement that the legislature through use of general law provide for the incorporation of

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[8] Streat v. Vermilya, 268 Mich. 1.

[9] City of Kalamazoo v. Titus, 208 Mich. 252.

[10] Gallup v. City of Saginaw, 170 Mich. 195.

[11] Harsha v. Detroit, 261 Mich. 586.

cities and villages. This provision is not "self-executing" in nature as it requires positive action on the part of the legislature to enact the necessary legislation. Whether Michigan's non-self-executing type of home rule should be revised is a moot question. More basic aspects of home rule will be commented on in the next section. In general, Section 20 has been adequate and no substantial changes appear necessary. It may be necessary to reconsider the matter of incorporation of cities and villages if optional forms of metropolitan government are to be provided.

Finally, consideration might be given to the possibility of prohibiting general legislative acts, "which revoke, decrease, or limit any power or immunity possessed by the city at the time of their passage or which add burdens to cities or villages, from becoming effective unless approved by the municipality affected."[12]

2. Charters; Laws; Ordinances

Article VIII: Section 21. Under such general laws, the electors of each city and village shall have power and authority to frame, adopt and amend its charter and to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the Constitution and general laws of this state.

Constitutions of 1835 and 1850

No such provision appears in either the 1835 or the 1850 constitution owing to the absence of any grant of home rule to cities or villages.

Constitution of 1908

The section ratified by the 1908 vote did not include the phrase "to amend an existing charter of the city or village heretofore granted or passed by the legislature for the government of the city or village and... ." This was added by amendment at the November, 1912, election.

Judicial Interpretation

There is a large body of case law dealing with the framing of municipal charters. As the court decisions elaborate at great length on the provisions contained in Section 21, only the basic points are enumerated here.

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[12] Preliminary Report of the Michigan Constitutional Revision Study Commission, Honorable George E. Bushnell, General Chairman, 1942, p. 7, Article VIII.

> In the absence of constitutional provision and restriction, matters of local municipal concern may be determined by the citizens of the municipality.[13]
>
> Among the powers which the cities could assume under this section, and Section 20 of the state constitution and Public Acts 1909, No. 279, as amended are: the right to legislate as to the salaries of its officers, their subordinates and employees;[14] the right to determine what their bonding limit shall be up to a maximum of eight per cent of their real personal property;[15] the right to provide for the retirement of civil servants on pension and the establishment of a pension fund.[16]

Even with respect to court review, the state supreme court has held that:

> The court may not interfere with municipal authorities in the exercise of their discretionary duties, as long as their action is not contrary to law or sound public policy.[17]
>
> Every municipal charter is subject to the constitution and general laws of the state.[18]

Other State Constitutions

The power to frame municipal charters has been granted to political subdivisions generally by 20 states. Four other states grant this power to specified municipalities. There is usually added the provision that such power is subject to the constitution and laws of the state. This power can be either self-executing, as in Ohio, or non-self-executing, which requires state enabling legislation as in Michigan.

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[13] Harper v. City of Saginaw, 270 Mich. 256.

[14] Burton v. Detroit, 190 Mich.

[15] City Commission City of Jackson v. Vedder, 299 Mich. 291.

[16] Bowler v. Nagel, 228 Mich. 434.

[17] Veldman v. City of Grand Rapids, 275 Mich. 100.

[18] City of Hazel Park v. Municipal Finance Commission, 317 Mich. 582.

Comment

It is a well recognized legal concept that municipalities are subordinate units of the state government and, in the absence of specific constitutional limitations, the legislature has plenary power over all local units of government, including cities and villages. The 25-year period immediately preceding the adoption of the constitution of 1908 marked the high point of legislative interference with local affairs in Michigan.

Embodied in Article V, Section 30 (prohibiting special or local acts) and Article VIII, Sections 20 to 25 are the far-reaching "home rule" provisions which in 1908 represented a major step forward and even today are found in only about half of the state constitutions.

The three primary objectives of municipal home rule are:

1. To prevent legislative interference with local government.

2. To enable cities to adopt the kind of government they desire.

3. To provide cities with sufficient powers to meet the increasing needs for local services.[19]

Attempts have been made to classify home rule practices in the various states, but the categories established generally are meaningless apart from the specific provisions appearing in a particular constitution. The Michigan provisions are referred to as non-self-executing, constitutional home rule, as distinguished from self-executing home rule where the constitution actually spells out the procedure for organization and grants specific powers to local units. In the face of long-standing and much used home rule acts passed by the Michigan legislature pursuant to the mandate in Section 20, this distinction has little meaning today. More important are the differences of opinion among proponents of home rule relative to the grant of powers.

This phase of home rule—the autonomy of local units in the exercise of powers and the carrying out of functions relative to local affairs-bears further examination. While a radical change in Michigan's home rule system presumably is unnecessary, there are some improvements which could be made. One of these lies in the area of granting broader fiscal authority and taxing power at the local level. Another is the possibility of a more effective delineation of matters of statewide and local concern. The question of legislative encroachment continues to be vexatious.

The convention may wish to give consideration to the following methods that have been suggested to strengthen municipal home rule—

[19] Rodney L. Mott, "Home Rule For America I s Cities ,II American Municipal Associations, Chicago, 1949, p. 7.

1. The insertion of a requirement that liberal construction of home rule powers be made in all cases not in specific conflict with state law.

2. Providing for exclusive jurisdiction by cities and villages over matters of local governmental structure, personnel and administration.

3. Strengthening the concept of state and local sharing of regulatory functions by saving local powers unless there is specific pre-emption of authority by the state.

3. Power to Acquire and Maintain Parks, Hospitals, Etc.

Article VIII: Section 22. Any city or village may acquire, own, establish and maintain, either within or without its corporate limits, parks, boulevards, cemeteries, hospitals, almshouses and all works which involve the public health or safety.

Constitutions of 1835 and 1850

No such provision is to be found in the two earlier constitutions. Under both the 1835 and 1850 constitutions cities and villages had only such powers as were conferred by the legislature.

Constitution of 1908

This section was first included in the 1908 constitution. It presumably was placed here in accordance with and as a supplement to the home rule power.

Judicial Interpretation

There has been considerable litigation over the exercise of legislative discretion in conferring local powers on the municipalities as it relates to the above objects.

> This provision is not self-executing but depends upon legislative enactment to give it effect.[20]
>
> In conferring local powers the legislature may give extensive capacity to acquire or hold property for local purposes, or it may confine the authority within narrow bounds, and what it thus confers it may enlarge, restrict or take away at pleasure.[21]

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[20] Detroit v. Oakland Circuit Judge, 237 Mich. 446.

[21] People ex rel. Detroit Park Commissioner v. Common Council of Detroit, 28 Mich. 228.

Under this section and Section 23 of the state constitution, a city may acquire and operate a power plant outside its limits for the purpose of supplying itself and its inhabitants with electricity.[22]

Other State Constitutions

Several states in their provisions for general powers to municipalities merely stipulate that the legislature may grant them health and welfare powers (see Missouri constitution, Article IV, Section 37). Or note the Ohio provision that municipalities have the authority to adopt and enforce within their limits local police, sanitary and other similar regulations not in conflict with general laws (Ohio constitution, Article XVIII, Section 3).

A more sweeping general grant is that provided by Massachusetts; namely, a municipality may exercise such powers, privileges, and immunities as are deemed necessary or expedient for the regulation, and government thereof so long as they are not repugnant to the constitution.

Comment

Whether it is necessary to enumerate the array of activities or facilities listed in this section is a debatable question. It may be desirable to reword this section in light of whatever revisions are made with respect to intergovernmental arrangements at the local level, particularly in the metropolitan areas.

4. Public Utilities; Power to Own and Operate

Article VIII: Section 23. Subject to the provisions of this constitution, any city or village may acquire, own and operate, either within or without its corporate limits, public utilities for supplying water, light, heat, power and transportation to the municipality and the inhabitants thereof; and may also sell and deliver heat, power and light without its corporate limits to an amount not to exceed 25 per cent of that furnished by it within the corporate limits, and may also sell and deliver water outside of its corporate limits in such amount as may be determined by the legislative body of the city or village; and may operate transportation lines without the municipality within such limits as may be prescribed by law; Provided, That the right to own or operate transportation facilities shall not extend to any city or village of less than 25,000 inhabitants.

[22] City of Traverse City v. Blair Township, 190 Mich. 313.

Constitutions of 1835 and 1850

No reference to owning or operating a public utility by a city or village appears in either the 1835 or 1850 constitutions.

Constitution of 1908

This provision is new, appearing for the first time in the 1908 constitution. An amendment passed in 1944 deleted the 25 per cent restriction on the sale and distribution of water outside city limits which had been contained in the original 1908 provision.

The power granted municipalities to sell and deliver water, heat, power and light without their corporate limits is designed to prevent the duplication of plants in contiguous localities and to allow the extension of the benefits of such improvement to territory not sufficiently populous to warrant the establishment of such activities as either a public or a private enterprise.

Other State Constitutions

Two states, Arizona and Oklahoma, permit municipal corporations to engage in any business or enterprise which may be engaged in by person, firm, or corporation with respect to ownership and operation of public utilities by franchise. The two most detailed constitutional provisions, similar in nature to that of Michigan, are provided by California and Ohio. California has no limit on the amount of service (i.e., heat, water, power, light) which may be sold outside the seller's (municipal) boundaries. Ohio does place a limit on the amount which can be sold but permits a 50 per cent ratio, whereas the Michigan constitution restricts such sales, except of water, to 25 per cent of the amount used within its boundaries. The Michigan constitution also confers on the legislature the power to determine the extent to which a municipal transportation system may operate outside its corporate limits.

Comment

The courts have construed this section to mean that a city or a village cannot engage in any business but must restrict itself to public utilities per se.

The requirement of a minimum population of 25,000 as a prerequisite for the operation of transportation facilities may be too restrictive under certain circumstances. Smaller cities may be forced in times of emergency to undertake such services for their residents because of a lack of interest by private enterprise.

5. Public Utilities; Bonded Indebtedness

by
Miller, Canfield, Paddock and Stone
Stratton S. Brown

Article VIII: Section 24. When a city or village is authorized to acquire or operate any public utility, it may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law: Provided, That such mortgage bonds, issued beyond the general limit of bonded indebtedness prescribed by law shall not impose any liability upon such city or village, but shall be secured only upon the property and revenues of such public utility, including a franchise stating the terms upon which, in case of foreclosure, the purchaser may operate the same, which franchise shall in no case extend for a longer period than 20 years from the date of the sale of such utility and franchise on foreclosure.

Constitutions of 1835 and 1850

Neither the 1835 nor 1850 constitution contained comparable provisions.

Constitution of 1908

This section was included in the 1908 constitution as a part of the grant of home rule powers to cities and villages. This section has not been amended.

Judicial Interpretation

This section of the state constitution provides that any city or village which is authorized to acquire and operate a public utility may issue mortgage bonds therefor beyond the general limit of bonded indebtedness prescribed by law, provided that the mortgage bonds do not impose any liability upon the city or village, but are secured only upon the property and revenues of the public utility, including a franchise thereon. This constitutional provision has had a most curious history. In Light and Power Company v. Village of Hart, 235 Mich. 682, the supreme court held that this section was self-executing and was not dependent upon enabling legislation or charter provisions. However, in City Commission v. City Attorney, 313 Mich. 644, the supreme court apparently reversed its decision and held that this section was not self-executing and that specific authority for this must be found in the city home rule act and in the local city charter. The city home rule act at the time of this case, and now, contains as a permissive grant of power to cities, the right to issue mortgage revenue bonds, but the charter of the City of Sault Ste. Marie (the city involved in this case) did not contain this power as the city had not written it into its charter. The supreme court, in addition, stated that a general

provision in the city charter to the effect that the city would have all of the powers that a city could have under the provisions of the home rule act was not broad enough to incorporate this power in the city charter. In Gentzler v. Constantine, 320 Mich. 394, the supreme court assumed that this section of the state constitution was not self-executing but used some rather peculiar language, that possibly could be construed as throwing a cloud on the decision in the Sault Ste. Marie case. At least for the present, it must be assumed that the provisions of Article VIII, Section 24, of the state constitution are not self-executing and that it is dependent upon appropriate provisions in the various home rule acts and in the city or village charter. In Light and Power Company v. Village of Hart, supra, the court also states that the legislature may not by law place a limit on the amount of mortgage revenue bonds that can be issued. In Gas and Electric Company v. Dowagiac, 278 Mich. 522, the supreme court held that the question of granting a franchise and issuing mortgage revenue bonds, which must be submitted to the electors, is not a proposition which is restricted to tax-paying electors under the provisions of Article III, Section 4, of the state constitution. In this case the court further construed this section of the constitution as not requiring the exhaustion of the general obligation bonding power of the city before mortgage revenue bonds could be issued.

The supreme court in several cases has held that Section 25 of Article VIII of the constitution must be read together with Section 24. Section 25 of Article VIII of the constitution requires, among other things, a three-fifths vote of the electors of the city or village as a condition precedent to either (a) the acquiring of a public utility, or (b) the granting of a public utility franchise. As a result, in order to issue mortgage revenue bonds under Section 24, it is necessary to submit to the electors the question of granting the franchise for the mortgage revenue bonds to meet the requirements of Article VIII, Section 25, and, if the city or village has not voted to acquire the utility previously, the proposition to acquire also must be submitted to the electors.

Other State Constitutions

A review of the constitutional provisions from other states having constitutional provisions for city and village home rule indicates that only the states of Missouri and Utah have specific authorization for revenue bonds or mortgage revenue bonds for public utilities in their constitutions.

Comment

As a practical matter, mortgage revenue bonds in the recent past have been issued in Michigan only in connection with electric utilities. Water system and improvements thereto have been financed since 1933 under the provisions of the revenue bond act (Act 94, Public Acts of Michigan, 1933, as amended). Moreover, all electric utilities improvements since 1954 have been financed by revenue bonds issued under the provisions of the revenue bond act as a result of the amendment to the

revenue bond act enacted in 1954, which included electric utilities as improvements which can be financed by revenue bonds. The financing of constitutional utilities such as described in Article VIII, Section 23, of the constitution (utilities for supplying water, heat, light, power, and transportation) under the revenue bond act was upheld by the Michigan Supreme court in Young v. Ann Arbor, 267 Mich. 241, and many later cases. The procedures provided by the revenue bond act, which place a lien only on the revenues of the utility and do not involve granting a franchise are much simpler. It is not necessary to have an election to grant a franchise and it is not necessary to execute a trust indenture to secure the bonds. Moreover, the bonds can be issued for a considerably longer period of time (up to 40 years) under the revenue bond act. Mortgage revenue bonds can be issued for not more than 20 years because that is the maximum length of time that the franchise to the bondholder can be granted under the provisions of this section. In view of the foregoing, and in view of the rather checkered history of this constitutional provision in the supreme court, Section 24 of Article VIII serves no useful purpose and consideration should be given to eliminating this provision.

6. Elective Franchise; Taxation; Public Utilities

by
Louis L. Friedland, Ph.D.
Department of Political Science, Wayne State University

Article VIII: Section 25. No city or village shall have power to abridge the right of elective franchise, to loan its credit, nor to assess, levy or collect any tax or assessment for other than a public purpose. Nor shall any city or village acquire any public utility or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless such proposition shall have first received the affirmative vote of three-fifths of the electors of such city or village voting thereon at a regular or special municipal election; and upon such proposition women taxpayers having the qualifications of male electors shall be entitled to vote.

Constitutions of 1835 and 1850

The constitution of 1835 contained no comparable provisions.

In the constitution of 1850 the legislature was authorized to confer on cities and villages such powers of a local, legislative and administrative character as they deemed proper (Article IV, Section 38) and to restrict their powers of taxation, borrowing money, contracting debt and loaning their credit.

Constitution of 1908

The “Address to the People” of the 1907-08 convention states in connection with this section:

> The transfer of the powers of legislation from the state legislature to the people of the municipalities or their representatives necessitated the imposition of certain checks and prohibitions designed to secure conservative action on the part of those to become responsible for the future conduct of such affairs.

The major change resulting from this provision of the 1908 constitution was to take from the state legislature the authority to provide by statute for the matters referred to in this section. This section has not been amended.

Judicial Interpretation and Opinions of the Attorney General

The supreme court has held that a city charter providing for electing city commissioners by the proportional representation system by the "Hare system" of proportional and preferential voting violated this section.[23]

There have been a series of decisions and opinions defining the prohibition of lending credit or taxing for other than a public purpose. The court has pointed out that the term "public purpose" cannot be given a definite meaning that will be applicable under all circumstances.[24]

The courts have held that municipalities cannot exercise power of taxation in aid of private corporations and the attorney general has ruled that municipalities cannot lend their credit in aid of private enterprise.[25]

In regard to "public utilities," the court has held that the term is confined to "public utilities for supplying water, light, heat, power and transportation" and that garbage disposal and sewage treatment systems are not public utilities within the meaning of this section.

The court has pointed out that this section does not give the electors power to grant franchises, but transfers to them the power formerly held by the common council to make a franchise irrevocable. Insofar as revocability of franchises is concerned, this section limits the legislature in authorizing franchises and the municipality in granting franchises.[26]

Other State Constitutions

The portion of this section specifying that "no city or village shall have power to abridge the right of elective franchise" appears to be unique among state constitutions.[27]

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[23] Watt1es v. Upjohn, 211 Mich. 514.

[24] Hays v. City of Kalamazoo, 316 Mich. 443.

[25] See M.S.A., Vol. 1, pp. 394 and 395; 1959 Cumulative Supplement, pp. 163 and 164.

[26] See M.S.A., Vol. 1, pp. 394 and 395; 1959 Cumulative Supplement, pp. 163 and 164.

[27] Index Digest, p. 72.

A number of states generally prohibit levying taxes for other than public purposes. Cities are specifically prohibited from appropriating money or lending credit for any company, association or corporation in a sizeable number of states.

The provision of this section on acquiring public utilities and granting irrevocable franchises seems to be unique among state constitutions.[28]

Comment

The prohibition on abridging the right of elective franchise could be covered either in Article III on the elective franchise, or consideration could be given to leaving this matter to legislative enactment in the home rule act. The prohibition on taxing and lending credit might be covered more appropriately in a general prohibition for all governmental units in the Article X on finance. The provision authorizing women taxpayers to vote is obsolete and could be omitted.

The constitution of 1908 contains several other sections dealing with public utility franchises. Section 19 of this article prohibits townships from granting irrevocable public utility franchises without approval of a simple majority of the voters while Section 25 requires a three-fifths vote for cities and villages. Sections 28 and 29 also relate to public utility franchises. See the Comment section under Article VIII, Section 28 concerning these various provisions.

[28] Index Digest, p. 90-91.

D. GENERAL PROVISIONS

by

Louis L. Friedland, Ph.D.
Department of Political Science, Wayne State University

1. Highways; Powers of Supervisors; County or District Road System; Tax Limitation

Article VIII: Section 26. The legislature may by general law provide for the laying out, construction, improvement and maintenance of highways, bridges and culverts by the state and by the counties and townships thereof and by road districts; and may authorize counties or districts to take charge and control of any highway within their limits for such purposes. The legislature may also by general law prescribe the powers and duties of boards of supervisors in relation to highways, bridges and culverts; may provide for county and district road commissioners to be appointed or elected, with such powers and duties as may be prescribed by law; and may change and abolish the powers and duties of township commissioners and overseers of highways. The legislature may provide by law for submitting the question of adopting the county road system to the electors of the counties, and such road system shall not go into operation in any county until approved by a majority of the electors thereof voting thereon. The tax raised for road purposes by counties shall not exceed in anyone year five dollars upon each one thousand dollars of assessed valuation for the preceding year.

Constitutions of 1835 and 1850

The 1835 constitution had no provision similar to this. The constitution of 1850, as amended in 1893 and 1899, had a provision (Article IV, Section 49) somewhat similar to the present provision through which the state legislature was given much the same authority to authorize county or township commissioners to take charge and control of any highways within their limits. The tax to be raised in anyone year for such purpose could not exceed $2.00 per $1,000 of assessed valuation. Other limitations were placed on indebtedness as well.

Constitution of 1908

The original provision of the 1908 constitution increased the 1850 limit of taxation for road purposes from $2.00 to $3.00 per $1,000 of assessed valuation and added authorization for the legislature to change and abolish the powers and duties of township commissioners and overseers of highways.

The provision was amended to its present form in 1917. The 1917 amendment added to the original 1908 provision authority for the legislature to provide for the performance of these highway functions by the state as well as by counties, townships and road districts. The 1917 amendment also increased the tax limitation from $3.00 to $5.00 per $1,000 of assessed valuation.

Judicial Interpretation

The court has held the legislature has power to make the state highway commissioner's decision final as to the necessity for repairing a highway and that this section confers broad powers on the legislature respecting highways.[29] The legislature has power to delegate to the county boards of supervisors power to appoint county road commissioners.[30]

Opinions of the Attorney General

The attorney general has held that the county road commission is not responsible to the board of supervisors, nor has the board any authority or control over the road commission, except as to appointment, removal and audit of accounts as provided by law.[31] The attorney general has also held that the voters cannot increase the millage for road purposes in excess of the maximum provided for in this section.[32]

Other State Constitutions

California and Missouri appear to be the only states with a provision similar to that contained in the Michigan constitution except for the tax limitation at the end of the section. The Missouri constitution limits the tax to $3.50 per $1,000 of assessed valuation while the California constitution requires approval by a majority of two-thirds of the qualified electors of a district to set up a county road system without stipulating a tax maximum.

Several states authorize the legislature to provide for the formation of road districts, either in specified counties (Alabama), or by general law (Louisiana, Washington).

Comment

The grant of authority to the state legislature contained in Section 26 is plenary and needs little amplification. In order to avoid doubt as to its authority in related vital functions, the word "drains" might be added after "culverts." As the township

[29] Attorney General v. Bruce, 213 Mich. 532.

[30] Matthews v. Montgomery, 275 Mich. 141.

[31] Op. Atty. General, May 23, 1957, No. 2945.

[32] Op. Atty. General, August 13, 1957, No. 3053

no longer functions as a road district the reference to township commissioners and overseers of highways is superfluous. However, deletion of this reference should be made in conjunction with revision of Section 18, so as to remove any reference to the township commissioner of highways.

Consideration might be given to reappraisal of the limitation of $5.00 per $1,000 of assessed valuation for road tax purposes in the light of the use of gas and weight taxes for some of these purposes. Possibly some other type of control could be substituted which would not require the stipulation of a fixed amount imbedded in the constitution.

2. Highways; Vacation; Alteration

Article VIII: Section 27. The legislature shall not vacate nor alter any road laid out by commissioners of highways, or any street, alley or public ground in any city or village or in any recorded town plot.

Constitutions of 1835 and 1850

There was no comparable provision in the 1835 constitution. A provision quite similar to this one appears in the 1850 constitution, Article IV, Section 23. The 1850 provision had an added, limitation preventing the state legislature, by private or special law, from selling or conveying any real estate belonging to any person.

Constitution of 1908

The 1908 provision placed the prohibition against sale of real estate in Article V, Section 31 and added herein “alley or public ground” to the prohibition against vacating or altering any street. Section l7 is in the nature of a provision which should be considered in conjunction with the preceding provision, Section 26. There has been little controversy and court action based on this provision.

Other State Constitutions

At least 25 states have similar provisions forbidding the altering or vacating of roads, streets or alleys laid out by highway commissioners. Few refer to such limitation specifically as recorded in a “town plat.”

Comment

As this section enjoins the legislature from interfering with essentially a matter of local concern, there is little to consider here.

3. Highways, Streets, Etc.; Use by Utilities; Control

Article VIII: Section 28. No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from each city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships.

Constitutions of 1835 and 1850

No such provision appears in either the 1835 or 1850 constitution. The authority granted cities, villages and townships by this section previously was exercised in its entirety by the state legislature.

Constitution of 1908

This provision was new in the 1908 constitution. Professor John A. Fairlie, a delegate to the convention, stated that:

> One of the most important sections in the revised constitution is that reserving to cities, villages, and townships the reasonable control of their streets and public places, and more specifically requiring the consent of the local authorities for the use of the highways or streets for any public utility. ...(This) provision serves to prevent the legislature from granting rights in the public streets of a local district.[33]

This section has not been amended.

Judicial Interpretation

The courts have held that in adopting this provision the people took from the legislature certain powers over municipalities and vested in municipalities reasonable control over their streets.[34] The reasonable control of their streets granted to municipalities may not be taken away by the courts, by individuals, by administrative bodies or by the legislature.[35] The court has also held-that the term “corporation

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[33] John A. Fairlie, The Michigan Constitutional Convention, May, 1908, p. 10.

[34] Red Star Motor Drivers Assn. v. Detroit, 234 Mich. 398.

[35] Highway Motbrbus Co. v. City of Lansing, 238 Mich. 146.

operating a public utility" includes municipal corporations and municipal utilities are therefore subject to the provision of this section.[36] There have been a substantial number of decisions regarding what constitutes "reasonable control" of streets and the use thereof by public utilities.[37]

Other State Constitutions

Municipalities are usually vested with the power to control use of their streets by public utilities. Typical constitutional provisions are found in the constitutions of Arizona (Article XV, Section 3); California (Article XI, Section 19); and Colorado (Article XXV).

Comment

The basic authority of a municipality over the control of its streets, alleys, and other public places is made specific by this section. Such controls are generally considered desirable, except of course, as the exercise of such controls may conflict with a more basic responsibility of the state for the general welfare. It is conceivable that conflicts may arise in connection with provisions for metropolitan agencies, should home rule powers be granted to either counties or newly formed jurisdictions within the framework of a revised constitution. More will be said about this issue in connection with Section 31.

This section contains only a portion of the numerous provisions in Article VIII relating to public utilities which include:

1. A public utility must obtain a franchise from each city, village and township before transacting a local business therein (Section 28).
2. No public utility has the right to use the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township (Section 28).
3. No franchise shall be granted by any municipality for more than 30 years (Section 29).
4. No such public utility franchise shall be granted which cannot be revoked at the will of the city or village (Section 25) or township (Section 19), unless approved by the electors—a simple majority in townships (Section 19) and a three-fifths majority in cities and villages (Section 25).
5. Finally, there are a series of provisions relating to the power of cities and villages and metropolitan districts to own, acquire, operate, and incur indebtedness for public utilities (Sections 23, 24, 25, and 31).

[36] Bay City Plumbing and Heating Co. v. Lind, 235 Mich. 455.

[37] See M.S.A., Vol. 1, pp. 398-402 and 1959 Cumulative Supplement, pp. 166-170.

4. Duration of Franchise

Article VIII: Section 29. No franchise or license shall be granted by any municipality of this state for a longer period than thirty years.

Constitutions of 1835 and 1850

Neither the 1835 nor 1850 constitution contained a similar provision,

Constitution of 1908

This section was new to the 1908 constitution. The purpose of including this provision was "to guard against the grant of franchises beyond the life of one generation, even by a vote of the present inhabitants."[38]

Judicial Interpretation

This section relating to "municipality" does not include counties.[39] This section is not a grant of authority to issue franchises, but rather establishes a time limit on franchises which the legislature may authorize municipalities to grant.[40]

Other State Constitutions

The most common limitation on the granting of public utility franchises found in other state constitutions is that the franchise is not to be exclusive. However, several states also specify time limits: e.g., Kentucky, 20 years; Arizona and Oklahoma, 25 years; and Alabama and Virginia, 30 years.

5. Ports and Port Districts

Article VIII: Section 30. The legislature may provide for the in corporation of ports and port districts, and confer power and authority upon them to engage in work of internal improvements in connection therewith.

Constitutions of 1835 and 1850

No comparable provision appeared in either the 1835 or 1850 constitution.

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[38] John A. Fairlie, The Michigan Constitutional Convention, May, 1908, p. 10.

[39] Wayne County Prosecuting Attorney v. Grosse Ile Bridge Co., 318 Mich. 266.

[40] City of Niles v. Michigan Gas and Electric Co., 273 Mich. 255.

Constitution of 1908

This section was not a part of the original 1908 constitution. It was added by amendment as a new section at the April, 1923, election. There have been no significant court decisions.

Other State Constitutions

Several states provide for the incorporation of ports and port districts and authorize the state legislature to provide by general law for their operation. Louisiana has very detailed provisions in its constitution with respect to organization and financing.

The constitutional provision itself does not appear to have created any problems which may have been encountered by port districts in Michigan. The constitutional grant of authority to the legislature is comprehensive.

In 1945 the voters approved an amendment to Article X, Section 14 relating to the general prohibition against internal improvements. Harbors of refuge and waterways were added to the improvements specified in the amendment, as activities in which the state could engage. Consideration might be given to adding "ports" to the specified improvements. If this were done, this section would appear to be unnecessary.

6. Metropolitan Districts; Incorporation; Purposes; Powers

Article VIII: Section 31. The legislature shall by general law provide for the incorporation by any two or more cities, villages or townships, or any combination or parts of same, of metropolitan districts comprising territory within their limits, for the purpose of acquiring, owning and operating either within or without their limits as may be prescribed by law, parks or public utilities for supplying sewage disposal, drainage, water, light, power or transportation, or any combination thereof, and any such district may sell or purchase, either within or without its limits as may be prescribed by law, sewage disposal or drainage rights, water, light, power or transpiration facilities. Any such districts shall have power to acquire and succeed to any or all of the rights, obligations and property of such cities, villages and townships respecting or connected with such functions or public utilities: Provided, That no city, village or township shall surrender any such rights, obligations or property without the approval thereof by a majority vote of the electors thereof voting on such question. Such general law shall limit the rate of taxation of such districts for their municipal purposes and restrict their powers of borrowing money and contracting debts. Under

> such general law, the electors of each district shall have power and authority to frame, adopt and amend its charter upon the approval thereof by a majority vote of the electors of each city, village and township, voting on such question, and, through its regularly constituted authority, to pass all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of this State.

Constitutions of 1835 and 1850

No provision empowering the creation of metropolitan districts appeared in either the 1835 or 1850 constitution.

Constitution of 1908

The present provision was added by amendment in 1927, having been ratified at the April election. The action made possible by Section 31 is not self executing. The legislature was merely authorized to enact general laws to establish districts as therein mentioned.

Other State Constitutions

Florida, while not providing in its constitution for metropolitan districts as such, does provide for a county home rule charter which may be adopted by the electors of the county. Under such a charter the powers and the functions of any municipal corporation or other governmental unit in the county may be transferred to the board of county commissioners. This is applicable only to Dade County in which the city of Miami is located. (See Article VIII, Section 11).

California permits its counties to provide many municipal functions to incorporated or unincorporated municipalities located within their boundaries. Missouri also has a similar provision for home rule counties. New York's constitution permits transfer of any function of local government to or from cities or counties but requires a majority of all votes cast thereon.

The Model State Constitution provides that "Any county, city or other civil division may agree, except as limited by general law, to share the costs and responsibilities of functions and services with anyone or more other governments."

Comment

In spite of the tremendous proportions of Michigan's metropolitan problems (almost half of Michigan's population in 1960 lives in one metropolitan area), there are only two sections in Michigan's constitution which provide in some way for meeting these problems. Section 2, Article VIII states that:

> . . . when any city has attained a population of 100,000 inhabitants, the legislature may organize it into a separate county without reference to geographical extent, if a majority of the electors of such city and of the remainder of the county in which such city may be situated voting on the question shall each determine in favor of organizing such city into a separate county.

The second provision is Section 31, under consideration here.

No action has been taken by the state legislature based on Section 2. Few and relatively inconsequential districts have been formed as a result of the provisions of Section 31. There is, therefore, in the present constitution, no effective provision for meeting the problems of government in Michigan's metropolitan areas. It appears essential to provide such a provision in the constitution.

There are several approaches which might be considered: expanding county authority and streamlining its organization; federated metropolitan government; stronger and well-defined metropolitan districts; etc. Rather than having any particular approach "frozen" into the constitution, it might be preferable to empower the legislature to provide for metropolitan governments, with the local electorate to have a voice in their framing and adoption.

The matter of municipal home rule has a bearing on the question of metropolitan area government. While Michigan has been reasonably successful with the present home rule system, the relationships between metropolitan area authority and municipal authority must be reassessed.

The financial base for local and area-wide operations must also be examined in order to provide more adequately for the financing of government at these levels.

A basic principle to be observed in fashioning new provisions for a challenging set of new problems brought about by the concentration of population in Michigan's urban centers is that considerable flexibility must be provided by the constitutional provision and the subsequent enactment of legislation permitted thereby. The metropolitan problems in Michigan vary from one area to another and no single pattern may be suitable for all areas. Further, the future patterns and problems of metropolitan growth may require different solutions than are entailed by the present problem.

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CHAPTER IX IMPEACHMENTS AND REMOVALS FROM OFFICE

Section Detail

IX IMPEACHMENTS AND REMOVALS FROM OFFICE

A. IMPEACHMENT PROCEDURE

Article IX: Section 1. The house of representatives shall have the sole power of impeaching civil officers for corrupt conduct in office, or for crimes or misdemeanors; but a majority of the members elected shall be necessary to direct an impeachment.

Section 2. When an impeachment is directed, the house of representatives shall elect from its own body 3 members, whose duty it shall be to prosecute such impeachment. No impeachment shall be tried until the final adjournment of the legislature, when the senate shall proceed to try the same.

Section 3. Every impeachment shall be tried by the senate. When the governor or lieutenant governor is tried, the chief justice of the supreme court shall preside. When an impeachment is directed, the senate shall take an oath or affirmation truly and impartially to try and determine the same according to the evidence. No person shall be convicted without the concurrence of 2/3 of the members elected. Judgment in case of impeachment shall not extend further than removal from office, but the person convicted shall be liable to punishment according to law.

Constitution of 1835 and 1850

The 1835 constitution (Article VIII, Sections 1 and 2) had provisions similar to Sections 1 and 3 of the present constitution, except that the concurrence of only two-thirds of those present was required for conviction rather than two-thirds of those elected as in the 1850 and 1908 provisions. The 1835 constitution did not have a provision like that of Section 2 of the present constitution. The provisions in the constitution of 1850 (Article XII, Sections 1, 2 and 3) were the same as in the present constitution (but Sections 2 and 3 were in reverse order).

Constitution of 1908

These provisions for the basic process of impeachment and trial of civil officers including judges were carried over from the 1850 constitution unchanged except for the reversal in sequence of Sections 2 and 3. These sections are related to Article VI, Section 16 which requires the lieutenant governor to succeed to the governorship when the governor is impeached. By Article VI, Section 9 the governor is prohibited from granting reprieves, commutations and pardons in cases of impeachment.

Statutory Implementation

The 1850 provisions were implemented by legislation in 1872. This legislation is still in effect. The trial must be at the state capital; the senate has the power to compel attendance of members; upon the appearance of the officer impeached to answer the charge, he must receive a copy of the articles and be given a reasonable time to answer them; the managers of the prosecution and the officer impeached are entitled to process to compel the appearance of witnesses and records.[1]

Other State Constitutions

The constitutions of 22 states do not specify the number of votes necessary for impeachment by the house of representatives; some 17 states require a majority of those elected as in Michigan, or a majority of all members for this purpose. Most of the remainder require a vote of two-thirds of the members, all members, or members elected. Oregon is the only state whose constitution does not provide for an impeachment process. The constitutions of approximately one-half of the states require a two-thirds vote of those elected to the senate to convict. Somewhat fewer state constitutions require a two-thirds vote of those present to convict. The Alaska constitution uniquely requires a two-thirds vote of the senate to impeach and two-thirds vote of the house to convict.[2] The Model State Constitution (which provides a unicameral legislature) provides that the legislature may impeach officers of the state by a two-thirds vote of all the members and shall provide by law procedures for the trial and removal of officers so impeached, requiring for a conviction a two-thirds vote of the tribunal trying the impeachment.

The chief justice is required by most state constitutions to preside over the senate when the governor is on trial. In several states, the chief justice is the officer who presides over the senate trial of most impeachments. A more common provision among state constitutions is requirement that the lieutenant governor, or other senate presiding officer, preside over such trials. The constitutions of most states including Michigan restrict the judgment of the court of impeachment to removal from office, but provide that an officer convicted is liable to further punishment according to law. The constitutions of most states, not including Michigan, further disqualify an officer convicted in an impeachment trial from holding future state office.[3]

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[1] M.S.A. 2.191 - 2.206, 6.1083. The statute of 1872 was in preparation for the impeachment trial of a commissioner of the state land office in that year. This officer was acquitted; a judge of probate was tried and removed from office in 1943, by the impeachment process.

[2] Index Digest, pp. 536-539. Missouri and Nebraska provide for the trial of most impeachments by the highest court; in New York the senate and the highest court are combined to form a court of impeachment.

Comment

These provisions on the impeachment process seem to be generally adequate for their purpose. The impeachment process has been used infrequently, but might tend to be a more influential factor, if the term of office for elective executive state officers were lengthened. Unless some change were made in the house of representatives vote required to impeach or in the senate vote required to convict, or unless the trial of impeachments were assigned to the supreme court or to a special court, little or no revision would seem necessary. Consideration might be given to placing the impeachment provisions in the legislative article in the revised constitution.

B. SUSPENSION OF JUDGES AND OTHER OFFICERS DUE TO IMPEACHMENT

Article IX: Section 4. No judicial officer shall exercise his office after an impeachment is directed until he is acquitted.

Section 5. The governor may make a provisional appointment to fill a vacancy occasioned by the suspension of an officer, until he shall be acquitted or until after the election and qualification of a successor.

Constitution of 1835 and 1850

There were no provisions similar to these in the 1835 constitution. The 1850 constitution (Article XII, Sections 4 and 5) originated these provisions

Constitution of 1908

These provisions were carried over unchanged from the 1850 constitution. Section 4 provides for mandatory suspension of a judicial officer when impeached until acquitted. Section 5 allows the governor to fill a vacancy arising from the impeachment of an officer.

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[3] Index Digest, pp. 537-539. The provision of Article VI, Section 16 which requires the lieutenant governor to act as governor, for the remainder of the term or until the disability ceases when the governor is impeached, is common to most state constitutions. Ibid, p. 503.

Statutory Implementation

Statutes pursuant to Section 5 have made the governor's suspension of an officer under impeachment discretionary.[4]

Other State Constitutions

Provisions of this type are not unusual among state constitutions.[5]

Comment

Little or no revision would seem to be necessary in regard to Section 4. Some consideration might be given to placing this provision in the judicial article, or in the legislative article with the impeachment provisions if these were also transferred thereto.

Some consideration might be given, in regard to Section 5, to making mandatory the suspension of officers under impeachment. The governor's power to make a provisional appointment to fill a vacancy caused by such suspension could be provided for in the executive article in connection with a comprehensive section dealing with the governor's power of appointment and removal of officials. (See the discussion of Article VI, Section 10.)

C. REMOVAL OF JUDGES

Article IX: Section 6. For reasonable cause, which shall not be sufficient ground for impeachment, the governor shall remove any judge on a concurrent resolution of two-thirds of the members elected to each house of the legislature; and the cause for which such removal is required shall be stated at length in such resolution.

Constitutions of 1835 and 1850

In the related provision of the 1835 constitution (Article VIII, Section 3), the term "address" was used rather than "concurrent resolution;" and "two-thirds of each branch of the legislature" were necessary rather than "two-thirds of the members

[4] M.S.A., 2.191-2.206.

[5] Index Digest, p. 534.

elected to each house" for removal of judges. The 1850 provision (Article XII, Section 6) was identical in meaning with the present provision.

Constitution of 1908

Although some changes in phraseology were made, this provision has the same meaning and effect as the 1850 provision. Mr. Burton's proposal in the convention of 1907-08 to require removal of a judge by a majority of those elected to each house rather than two-thirds was not accepted by the convention and his subsequent motion to allow removal of judges by the governor for manifest incompetency until the next session of the legislature was also rejected.[6] Under the current provision, the legislature may require removal of any judge by the governor for reasonable cause (insufficient for impeachment).

Other State Constitutions

Approximately one-half of the states have provisions for removal of a judge other than by impeachment. These vary somewhat widely among state constitutions. Twelve states have a procedure similar to the Michigan provision in their constitutions. The legislative vote required in Michigan is the most common requirement among the states having this procedure. In New Jersey, when the supreme court certifies that a superior court judge is incapacitated, the governor appoints a three-member commission. If this commission recommends it, the governor may retire the judge on pension as provided by law (New Jersey Constitution, Article VI, Section VI 5). Some state constitutions provide for removal of judges by the state supreme court.[7] The Model State Constitution provides, in addition to impeachment, for removal for cause of judges of the appellate and superior courts by the supreme court.

Comment

It would probably be advisable in revising, the constitution either to retain the present feature for removal of judges or to provide some other procedure for the same purpose. Impeachment is limited to "corrupt conduct in office, or for crimes or misdemeanors." Occasions would arise that would not fall under those categories, but would be "reasonable cause" for removal—for example, incapacitating mental illness.

A provision such as this is an alternative to the difficult process of impeachment, while at the same time safeguarding the principle of separation of powers by the

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[6] Proceedings and Debates, pp. 288-289, 1335-1336.

[7] Index Digest, pp. 232-233, 296-297.

requirements of a two-thirds vote, reasonable cause, and the involvement in the process of the governor.

D. REMOVAL OF STATE OFFICERS BY THE GOVERNOR

Article IX: Section 7. See VI EXECUTIVE DEPARTMENT, Part C. This section is discussed in connection with the governor's power of appointment.

E. REMOVAL OF LOCAL OFFICERS

Article IX: Section 8. Any officer elected by a county, city, village, township or school district may be removed from office in such manner and for such cause as shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution (Article VIII, Section 4) gave the legislature power to provide by law for the removal of justices of the peace and other county and township officers. The 1850 constitution (Article XII, Section 7) made the same provision "for the removal of any officer elected by a county, township or school district."

Constitution of 1908

The 1908 provision kept the 1850 specification of elected officers, but broadened the language to include those of cities and villages.[8]

Statutory Implementation

In addition to provisions for removal of local officers by local authority through laws and charters, statutes pursuant to this section have given the governor general power to remove the following elected local government officers for cause with notice of specific charges and hearing: county officers including auditors and road commissioners; city officers; justices of the peace and township officers; and village officers.[9] The governor may inquire into charges against such officers himself or he may direct the attorney general or county prosecuting attorney to hold an examination before some circuit court commission or judge of probate.[10]

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[8] Proceedings and Debates, pp. 290, 294, 1141.

[9] M.S.A.. 6.1207, 6.1238, 6.1268, 6.1327, 6.1369, 6.1383.

Other State Constitutions

There is little uniformity among state constitutions on the matter of removal of local government officers. Several state governors are granted power to remove local officers either by constitutional or supplemental statutory authority. Several states provide for removal of local officers by court action.[11] The Model State Constitution does not provide for removal of local officers by state authority.

Comment

Removal of elective local officers "in such manner and for such cause as shall be prescribed by law," as presently provided in Section 8, appears to be reasonably flexible. The legislature by statute has vested power in the governor to remove such officers for cause. Unless removal of local officers by state authority as presently provided for in the constitution (and implemented by statute) were felt to be an inappropriate limitation upon principles of local home rule, there appears to be no need for extensive revision of this section. Consideration might be given to transferring this provision or a revision of it to the local government article of the revised constitution.

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[10] M.S.A., 6.697-6.701.

[11] Index Digest, pp. 69, 151, 741-742.

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CHAPTER X FINANCE AND TAXATION

(over)

Section Detail

X FINANCE AND TAXATION

A. TAXATION – AUTHORITY, STANDARDS AND LIMITATIONS

1. Tax for State Expenses

Article X: Section 2. The legislature shall provide by law for an annual tax sufficient with other resources to pay the estimated expenses of the state government, the interest on any state debt and such deficiency as may occur in the resources.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision. The 1850 constitution (Article XIV, Section 1) contained this same provision and the only change in language in the constitution of 1908 was the addition of "by law" to describe the way the legislature shall provide for an annual tax.

Constitution of 1908

Section 2 has not been amended since the present constitution was adopted.

Judicial Interpretation

Michigan courts have made it clear that Section 2 does not prohibit the state from acquiring monies through sources other than taxation.[1]

Other State Constitutions

Section 2 of the Michigan constitution is similar to provisions in the constitutions of North Dakota, Nevada, South Carolina, South Dakota, Wisconsin, Colorado, Kentucky, Oklahoma, Utah, Arizona, Oregon, Washington and West Virginia. Language of these provisions differs primarily with regard to time and concerns such phrases as "each fiscal year," "fiscal year" and "ensuing fiscal year." Although Michigan mentions "an annual tax," it uses the standard "estimated expenses" to imply that the legislature shall balance anticipated tax revenues with anticipated expenditures.

Seven state constitutions give added substance to requirements such as the Michigan provision that taxes must cover "such deficiency as may occur in the resources" by granting authority to the legislature to levy taxes, in the year following any fiscal

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[1] Black v. Liquor Control Commission, 323 Mich. 290.

year when expenses exceed income, sufficient with other sources of income to pay the deficiency in addition to estimated expenses for that year (Arizona, Oklahoma, Oregon, South Carolina, South Dakota, Oregon and Wisconsin). Two other states make such a levy to cover deficiencies mandatory during the ensuing year (West Virginia) or two years (Nevada).

In contrast to constitutional instruction to the legislature to provide revenues sufficient to cover expenditures (such as Michigan's Section 2) eight state constitutions limit the amount which may be appropriated to the amount of revenue available or anticipated (Colorado, Idaho, Montana, Utah, Nebraska, New Jersey, Oklahoma and Texas). Illinois limits annual appropriations for "ordinary and contingent expenses" to the amount of revenues authorized to be raised during periods for which the appropriation is made.

Other State Constitutions

A provision comparable to Section 2 appeared in the 1948 edition of the Model State Constitution as a part of a larger section relating to the legislative budget procedure. This section has been omitted, however, in the proposed revision of the Model.

> Legislative Budget Procedure. No special appropriation bill shall be passed until the general appropriation bill, as introduced, by the governor and amended by the legislature shall have been enacted, unless the governor shall recommend the passage of an emergency appropriation or appropriations, which shall continue in force only until the general appropriation bill shall become effective. The legislature shall provide for one or more public hearings on the budget, either before a committee or before the entire legislature in committee of the whole. When requested by not less than one-fifth of the members of the legislature it shall be the duty of the governor to appear in person or by a designated representative before the legislature, or before a committee thereof, to answer any inquiries with respect to the budget.
>
> The legislature shall make no appropriation for any fiscal period in excess of the income provided for that period (emphasis supplied). The governor may strike out or reduce items in appropriation bills passed by the legislature, and the procedure in such cases shall be the same as in case of the disapproval of an entire bill by the governor. (Article VII: Section 704)

This section of the 1948 Model State Constitution stands between two other sections relating to the budget and the expenditure of money and must be considered in connection with them as a part of the overall control of finances. Note that Section 705 gives the governor the authority to reduce expenditures when it becomes apparent that revenues are not adequate to meet appropriations.

> The Budget. Three months before the opening of the fiscal year, the governor shall submit to the legislature a budget setting forth a complete plan of proposed expenditures and anticipated income of all departments, offices and agencies of the state for the next ensuing year. For the preparation of the budget the various departments, offices and agencies shall furnish the governor such information, in such form, as he may require. At the time of submitting the budget to the legislature, the governor shall introduce therein a general appropriation bill to authorize all the proposed expenditures set forth in the budget. At the same time he shall introduce in the legislature a bill or bills covering all recommendations in the budget for new or additional revenues or for borrowing by which the proposed expenditures are to be met. (Article VII: Section 703)

The preliminary discussion draft of the new Model contains a provision similar to Section 703 above (Section 6.03).

> Expenditure of Money. No money shall be withdrawn from the treasury except in accordance with appropriations made by law, nor shall any obligation for the payment of money be incurred except as authorized by law. No appropriation shall confer authority to incur an obligation after the termination of the fiscal period to which it relates. The governor shall have authority to reduce expenditures of state departments, offices and agencies under appropriations whenever actual revenues fall below the revenue estimates upon which the appropriations were based and, through allotments or otherwise, to control the rate at which such appropriations are expended during the fiscal year, provided that the legislature may exempt specific appropriations from the exercise of this power by the governor (emphasis supplied). (Article VII: Section 705)

The preliminary discussion draft omits the governor's power to reduce or control the rate of expenditures during the fiscal year.

Comment

The Michigan provision amounts to an instruction to the legislature to use its taxing power to assure the state sufficient revenue to pay its bills. This is an indirect association of the taxing power with the budget process. The Michigan constitution contains no specific section relating to budget procedure and no provisions for a single general appropriation bill. By inference, the legislature is expected (under Section 2) to provide revenues sufficient to satisfy the cumulative totals of whatever appropriations are made. It is significant in this respect that Section 2 uses the word shall instead of may and specifies an annual tax sufficient with other resources to pay the estimated expenses. While other resources clearly include surpluses or balances, they can include borrowed funds only within a ceiling of $250,000 of "debts to meet deficiencies in revenue" (Article X, Section 10).

The absence of any constitutional provision for a general appropriation bill (approximately one-half of the states have such a provision) related to a formalized budget procedure makes the implied relationship between state expenditures and state tax revenues difficult to implement and cumbersome to enforce. Some examples of how other state constitutions have sought to solve this problem are indicated below.

The Oklahoma constitution (Article X, Section 23) provides for official estimate of all resources available to the state (and each state fund) prior to the convening of each session of the legislature and states that "all appropriations made in excess of such estimate shall be null and void." Further provision is made for adjusting such estimates to reflect legislative tax changes and inter-fund transfers and "the amount of such adjusted estimate shall be the maximum amount which can be appropriated for any purpose from any fund for each year." It is further provided that this estimate "shall exceed the average total revenue which accrued to each such fund for the last three preceding fiscal years," to which may be added any unappropriated cash surplus.

The New Jersey constitution (Article VIII, Section II (2)) provides that "...All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year. No general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor."

The California constitution (Article IV, Section 34) provides that the governor shall present at each regular session of the legislature a complete budget of all proposed expenditures and all estimated revenues. If proposed expenditures exceed estimated revenues "the Governor shall recommend the sources from which the additional revenue shall be provided." There is a further provision that "the budget shall be accompanied by an appropriation bill covering the proposed expenditures" and "until the budget bill has been finally enacted, neither house shall place upon final passage any other appropriation bill, except emergency bills recommended by the Governor, or appropriations for salaries, mileage and expenses of the Senate and Assembly."[2]

California (Article IV, Section 34a) also provides that appropriations from the general fund, exclusive of appropriations for the public school system, "shall not exceed by more than 5 percentum the appropriations...for the preceding year unless two-thirds of all the members elected to each house of the legislature vote in favor thereof." Procedures are provided for cutting back appropriations made in excess of

[2] New York constitution is similar, but not identical. California is one of nine states with constitutional restrictions against adopting any appropriations prior to enactment of a general appropriation bill.

this limitation.

The Missouri constitution (Article IV, Section 27) provides that the governor may control the rate of expenditure during the period of appropriation, by allotment or other means, and may reduce expenditures below appropriations whenever actual revenues are less than revenue estimates upon which the appropriations were based.

Property taxes are the "residual" tax source in the American system of taxation and constitutional provisions such as Michigan's Section 2 have their roots in the property tax. The requirement that the legislature shall levy "an annual tax sufficient with other resources" relates, as a last resort, to an annual property tax. In this respect "other resources" include all state tax sources other than the property tax. Although many states, like Michigan, levy no general property taxes for state purposes, they accomplish this by collecting non-property tax revenues sufficient to make application of the "residual" property tax unnecessary.

2. Laws Imposing Taxes

Article X: Section 6. Every law which imposes, continues or revives a tax shall distinctly state the tax, and the objects to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object.

Constitutions of 1835 and 1850

The 1835 constitution contained no similar provision. Section 6 was carried forward from the constitution of 1850 (Article IV, Section 14) without change.

Constitution of 1908

This section has not been amended since the present constitution was adopted

Judicial Interpretation

Michigan courts have ruled that when the object for which a tax is raised is apparent from the statute providing it, a statement in detail on the manner in which it is to be expended is not necessary.[3]

While the courts have been liberal in interpreting this section, they have ruled that the scope of tax laws cannot be extended by implication or forced construction, and language, if dubious, is not to be resolved against the taxpayer.[4]

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[3] Moreton v. Secretary of State, 240 Mich. 584; Detroit Automobile Club v. Secretary of State, Id.; Reading v. Secretary of State, Id.

[4] Waterways Navigation Co. v. Corporation & Securities Commission, 323 Mich. 153.

It has been determined that provisions of the corporation act imposing annual privilege fees and referring to another section of the corporation act for the purpose of computing the privilege tax does not violate the restrictions imposed by Section 6.

Other State Constitutions

Article X, Section 6 of the Michigan constitution is identical with New York's provision (Article III, Section 22).

Comparison with other state constitutions requires a separation of Section 6 into its two parts – 1) the requirement that tax laws must state the object to which the tax is to be applied and 2) the requirement that tax laws must state the tax without reference to other laws.

North Carolina provides that tax laws must state the object to which tax is to be applied (Article V, Section 3, Section 7). Other states requiring that laws distinctly state tax objects are Arizona, Arkansas, Kansas, North Dakota, South Carolina, South Dakota, Washington and Wyoming. States requiring a statement of tax purposes are Ohio, Oregon, Kentucky and Oklahoma. Kentucky and Oklahoma extend this requirement to local ordinances as well as legislative acts.

State constitutions containing the second requirement that tax laws must state the tax without reference to other laws are Arizona, Iowa, and Virginia.

Comment

Selection of the phrase "objects to which it is to be applied" to describe what a law must say about the tax it imposes opens the door to various interpretations. This may be interpreted to describe the purpose for which the tax is to be used, or it may be interpreted to describe the thing that is to be taxed. Past decisions of Michigan courts have accepted it as descriptive of the purpose. Greater clarity of such an interpretation could be assured by following the lead of Ohio, Oregon, Kentucky, and Oklahoma in use of the word "purpose."

Except as it concerns taxation for support of certain services or purposes through dedicated funds, the requirement could be rendered unnecessary by a general provision that taxes may be levied only for a public purpose or for the support of legislative appropriations for such purposes.

The provision of Section 6 that "it shall not be sufficient to refer to any other law to fix such tax or object" is in effect a requirement that each law imposing taxes must be sufficiently explicit to be capable of standing alone. Although this provision is frequently discussed when new tax legislation is adopted, it has been the subject of little litigation in Michigan. Based upon an analysis of opinions developed by New York courts as a result of litigation under the identical provision of the New York constitution, the Michigan attorney general has expressed an "opinion that a tax

imposed on a percentage of the federal income tax required to be reported and paid to the United States under the Internal Revenue Code in effect on May 1, 1959, does not violate Section 6 of Article X of the Michigan Constitution."[5]

The opinion of the attorney general indicated a literal interpretation of the restriction in terms of a reference to any other law. He called attention to the fact that the legislative bill (House Bill 628, 1959) "does not make reference to the federal income tax laws, but instead refers to an extrinsic fact; i.e., the amount of income tax required to be paid or reported to the United States pursuant to the Internal Revenue Code in effect on May 1, 1959."

3. Power of Taxation – Surrender by Contract

Article X: Section 9. The power of taxation shall never be surrendered or suspended by any grant or contract to which the state or any municipal corporation shall be a party.

Constitutions of 1835 and 1850

Section 9 was new material in the 1908 constitution and the earlier constitutions contained no similar provision.

Constitution of 1908

Section 9 has not been amended since the present constitution was adopted.

Other State Constitutions

With slight variation in language, provisions similar to Section 9 appear in the constitutions of more than one-half of all states. Two states (Missouri and Alaska) qualify the same provision by adding exceptions authorized by their constitutions. These exceptions, however, relate to delegation of taxing powers to local governments and are thus exceptions more in form than substance. New York provides an exception for securities issued for public purposes pursuant to law. In a number of states the declaration is made in terms of power to tax corporations and their property.

The Model State Constitution also contains a similar provision with the assumption that it, together with a restriction that no tax shall be levied except for a public purpose, is about all that is necessary for a constitution to say about taxing powers.

> The power of taxation shall never be surrendered, suspended or contracted away. (Article VI, Section 6.01)

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[5] Michigan Attorney General, Opinion Re: Constitutionality of House Bill No. 628 (June 8, 1959) page 17 and page 14.

Comment

In this basic declaration (Section 9) Michigan follows what has become accepted as a good constitutional policy. The power to tax is an inherent power of sovereign states and constitutional statement is sometimes criticized as stating the obvious. The significance of provisions such as in Michigan's Section 9 is not their declaration of power to tax, but rather their reservation of that power to public purposes.

4. Specific Taxes

Article X: Section 4. The legislature may by law impose specific taxes which shall be uniform upon the classes upon which they operate.

Constitutions of 1835 and 1850

The 1835 constitution contained no reference to specific taxes.

The 1850 constitution was amended in 1900 to read as follows:

> "The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations, at its true cash value by a state board of assessors and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporation as are paying specific taxes under the laws in force on November sixth, A.D. nineteen hundred, shall be applied as provided for specific state taxes in section one of this article."[6] (Article 14, Section 10).

Constitution of 1908

This section was the subject of considerable debate in the constitutional convention of 1908 when an amendment was proposed to include a reference to real estate mortgages and to provide that "the legislature may by law impose specific taxes, which shall be uniform, upon real estate mortgages and upon the classes upon which they operate".[7]

The amendment failed of adoption because it was believed to impose restrictions upon the general authority of the legislature to impose specific taxes. It was argued that mortgages could be taxed without the amendment.

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[6] J.R. No. 1 (Ex. Sess. of 1900), ratified at November election of 1900.

[7] Proceedings and Debates (February 19, 1908) pp. 1336-1338.

Section 4 has remained unchanged since the present constitution was adopted.

Judicial Interpretation

Michigan courts have held that the state constitution permits two general methods of taxation, ad valorem and specific, and that a tax on an occupation or privilege, whether called a license, occupation or privilege tax, is a specific tax and not an ad valorem tax on property.[8] Also that a tax which requires no assessment other than listing and classification of subjects to be taxed and which imposes a sum by bead or number or by some standard of weight or measurement is a specific tax.[9] The constitutional rule of uniformity forbidding double taxation has no application to property paying specific taxes.[10]

Other State Constitutions

The term "specific taxes" is used to describe legislative power to tax in only two state constitutions other than Michigan (Arizona and Oklahoma). These states simply provide that the legislature may provide for the levy and collection of specific taxes and rely upon general provisions for uniformity. Kentucky has a similar provision for legislative enactment of "special taxes" by general law only. Illinois and Texas have provisions to the effect that specification of subjects and objects of taxation shall not deprive the legislature of power to tax other subjects or objects consistent with principals of taxation fixed by constitutions.

Without reference to the term "specific taxes," the other 45 state constitutions either contain no comparable reference to taxes other than ad valorem taxes, or they name the kinds, of taxes which may or may not be adopted.

The Model State Constitution contains no similar provision.

Comment

Section 4 is in effect a limitation upon the power of the legislature to impose taxes. As it has been interpreted, the principal limitation has concerned the requirement of uniformity and is not very different from the provision that "All taxes shall be uniform upon the same class of subjects" (Minnesota, New Mexico, Oklahoma, Arizona, Colorado, Delaware, Idaho, Kentucky, Missouri, Montana and Pennsylvania). By classifying a tax as specific, the Michigan legislature may tax almost any subject on a uniform basis according to reasonable classification.

Michigan courts have never ruled directly on the question of whether or not a tax measured by net income would be termed a "specific tax" permitted under Section 4

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[8] C. F. Smith Co. v. Fitzgerald, 270 Mich. 659.

[9] Shivel v. Kent County Treasurer, 295 Mich. 10.

[10] Shapero v. Department of Revenue, 322 Mich. 124.

or a property tax subject to the uniformity rule of Section 3.[11] A recent opinion by the attorney general expressed his belief that "an income tax, either flat rate or graduated," would be a specific tax under Section 4 and that graduated rates "would not otherwise impair its validity."[12]

The Michigan Constitutional Revision Study Commission (Subcommittee on Taxation and Finance, June 27, 1942) included Section 4 together with Section 3 in its recommendation that "...the uniformity clause...could be redrafted to permit the legislature to graduate and classify all types of taxes, both ad valorem and specific, providing, however, for uniformity within classes" (p. 7). The Subcommittee was concerned with the "constitutional uncertainty" associated with distinctions between ad valorem taxes and specific taxes. The Subcommittee stated: "Under the present constitution, in drafting tax measures, there is the constant fear that the tax will be called a property tax, and the legislature rightly refuses to take chances with necessary revenue producing measures" (p. 6).

5. Uniform Rule of Taxation

Article X: Section 3. The legislature shall provide by law a uniform rule of taxation, except on property paying specific taxes, and taxes shall be levied on such property as shall be prescribed by law: Provided, That the legislature shall provide by law a uniform rule of taxation for such property as shall be assessed by a state board of assessors, and the rate of taxation on such property shall be the rate which the state board of assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision. The 1850 constitution (Article XIV, Section II) contained this same provision and the only change in the 1908 constitution was the grammatical substitution of "a" uniform rule for "an" uniform rule.

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[11] In Shivel v. Kent County Treasurer, 259 Mich. 10; 294 N.W. 78 (1940), the Michigan court quoted with approval from Young v. Illinois Athletic Club, 310 Ill. 75, 81; 141 N.E. 369 to the effect that "an income tax is an assessment upon the income of the person and not upon any particular property from which that income is derived."

[12] Michigan Attorney General, Opinion Re: Constitutionality of House Bill No. 628 (June 8, 1959).

Constitution of 1908

A proposal to provide that "the legislature may classify property for the purpose of taxation and shall provide a uniform rule for the taxation of the several classes" was defeated in the constitutional convention of 1908.[13] Section 3 has not been amended since the present constitution was adopted.

Judicial Interpretation

Michigan courts have tended to interpret this requirement liberally. It has held that "presumption of constitutionality applies more strongly to tax statutes than to laws generally, and taxing system will be held invalid only where it clearly violates fundamental law"[14] and that the restriction upon the power of taxation "does not compel adoption of iron rule of equal taxation, nor prevent variety of differences in taxation, or discretion in selection of subjects, or classification for taxation of properties, businesses, trades, callings or occupations."[15]

While the state is committed by constitution and statutes to the basic principles of uniformity in matters pertaining to taxation of property under general tax laws,[16] the rule of uniformity does not extend to property paying specific taxes.[17]

Other State Constitutions

While virtually every state constitution contains some provision relating to uniform taxation of property, there is a wide variation in language and content of these provisions. Some of the differences concern the extent to which property may or may not be classified for taxation.

Property tax classification is a term used to describe property tax procedures whereby properties of different classes are (1) assessed according to different standards or at different percentages of the same standard, or (2) taxed at different rates. Although "unofficial" classification is a common result of failure by local assessors to apply constitutional or statutory standards of uniformity, "official" classification can result only when provided by statutory standards consistent with constitutional provisions permitting (or not prohibiting) such variation among property classes.

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[13] Michigan Constitutional Convention of 1908, Proceedings and Debates, p. 890 (January 21, 1908).

[14] Thoman v. City of Lansing, 315 Mich. 566.

[15] W. S. Butterfield Theatres, Inc. v. Department of Revenue. 353 Mich. 345.

[16] School District No. 9, Pittsfield Township Washtenaw County v. Washtenaw County Board of Supervisors, 314 Mich. 388.

[17] Shivel v. Kent County Treasurer, 295 Mich. 10.

Eleven state constitutions contain direct reference to the power of the legislature to classify property for assessment purposes. These references range from a simple provision that all property be defined and classified by law (Idaho) to a statement that nothing in the constitution shall be construed to prevent valuation of different classes of property by different means or methods (Oklahoma). Missouri lists three classes including (1) real property, (2) tangible personal property and (3) intangible personal property and permits the legislature to provide further classification of personal property (classes 2 & 3). California allows classification of personal property only and Washington accomplishes the same purpose by requiring real estate to constitute one class. Maryland permits the legislature to provide for classification of improvements on land and personal property as it may deem proper. Georgia establishes classification of tangible property and one or more classes of intangible personal property and permits the legislature to adopt different tax rates and methods for different classes. Ohio takes the opposite approach by forbidding classification for purposes of levying taxes at different rates, but permits classification with taxes levied at a uniform rate.

Classification accomplished through maximum tax rate limitations is illustrated by the West Virginia constitutional maximums as follows:

personal property, including intangibles, used in agriculture	$0.50 per $100
property occupied exclusively by owner for residence or farms occupied and cultivated by owner or bona-fide tenants	$1.00 per $100
all other property situated outside of municipalities	$1.50 per $100
all other property situated within municipalities	$2.00 per $100

In states where “official” property tax classification has been applied, it has been used, for the most part, to distinguish between real estate and personal property. This kind of classification has been particularly well developed in Ohio where personal property is assessed at different ratios and it was the basis for new legislation adopted in New Jersey in 1960. The New Jersey constitution requires that all real estate shall be assessed for taxation according to the same standard and says nothing about personal property.

Only three states use a general classification of both real and personal property for assessment purposes. The most notable is Minnesota (adopted in 1913); West Virginia and Montana also use classification, while North Dakota adopted such a system in 1917 and abolished it in 1923. Minnesota has 13 classes of property subject to varying rates of assessment ranging from 5 percent to 50 percent of “full and true value.” This is done under a constitution which contains no reference to classification at all.

The Michigan provision (Section 3) apparently does not permit classification of property within the general property tax itself, but the same purpose can be achieved through the grant of legislative authority to subject classified property to "specific taxes." This exception causes the Michigan provision to be comparable in effect to provisions in more than 20 states requiring uniformity of taxation for property within the same class.

Some state constitutions relate the "uniformity rule" to standards of assessment in terms of value. The Michigan constitution does not specify what the uniform rule must be, but Section 7 fills this void by specifying "all assessments hereinafter authorized shall be on property at its cash value." These two articles together cause the Michigan rule to be comparable with Arkansas, Tennessee, Maine, Idaho, and Utah which provide for uniform taxation of property according to its value.

Inclusion of provision specifying taxation of property assessed by a state board of assessors at the average local property tax rate within the constitutional uniform rule of taxation (Section 3) is peculiar to Michigan. A number of states provide state assessment for utility and other property by constitutional mandate and some of them apply average local property tax rates to such assessments by legislative act. Michigan stands out only in that it makes special reference to uniform state assessments in addition to the general reference to uniform taxation and specifies the average rate.

Constitutional requirements concerning uniform taxation are sometimes looked upon as unnecessary and the Model State Constitution contains no such provision. Such provisions are in the nature of restrictions upon legislative authority in the matter of taxation.

Comment

Section 3 is the basic property tax requirement in Michigan and the one which underlies the entire tax environment. Although it imposes no restrictions upon the power of the legislature to "prescribe by law" what property is taxable and what property is exempt, it does establish the requirement that all taxable property not paying specific taxes shall be subject to a "uniform rule" of taxation. This exception for "property paying specific taxes" is the authorization under which the legislature is enabled to classify property for special treatment, or to adopt other tax measures commonly regarded as non-property taxes. Such specific taxes may be in lieu of property taxes or they may be in addition to them.

These restrictions and requirements are responsible for the development of a legislative tax language designed to draw distinctions between property taxes and specific taxes to meet judicial interpretations of Section 3. In some instances this language appears to draw a distinction without a difference.

The Michigan Constitutional Revision Commission of 1942 (Subcommittee on Taxation and Finance; June 27, 1942) recommended that "...the uniformity clause in the Michigan Constitution as now worded is an unnecessary obstacle to effective tax legislation, and that there would be great advantage to the State if Sections 3 and 4 could be redrafted to permit the legislature to graduate and classify all types of taxes, both ad valorem and specific, providing, however, for uniformity within classes."

6. Assessment of Property of Public Utilities

Article X: Section 5. The legislature may provide by law for the assessment at its true cash value by a state board of assessors, of which the governor shall be ex-officio a member, of the property of corporations and the property, by whomsoever owned, operated or conducted, engaged in the business of transporting passengers and freight, transporting property by express, operating any union station or depot, transmitting messages by telephone or telegraph, loaning cars, operating refrigerator cars, fast freight lines or other car lines and running or operating cars in any manner upon railroads, or engaged in any other public service business; and for the levy and collection of taxes thereon.

Constitutions of 1835 and 1850

The constitution of 1835 contained no comparable provision. Article XIV, Section 10 added to the 1850 constitution by amendment in 1900 provided:

> The state may continue to collect all specific taxes accruing to the treasury under existing laws. The legislature may provide for the collection of specific taxes from corporations. The legislature may provide for the assessment of the property of corporations, at its true cash value by a state board of assessors and for the levying and collection of taxes thereon. All taxes hereafter levied on the property of such classes of corporations as are paying specific taxes under the laws in force on November sixth, A.D. nineteen hundred, shall be applied as provided for specific taxes in section one of this article.

The amendment was adopted after a state assessed tax upon telephone and telegraph lines was held unconstitutional as a property tax in violation of the uniformity rule.[18] This tax had been levied at the average rate for all taxes and the con-

[18] Pingree v. Auditor General, 120 Mich. 95.

stitutional amendment was recommended to make its readoption possible. Governor Pingree asked for the amendment because, "Under our Constitution, as construed by the Supreme Court of Michigan, it is practically impossible to frame a law by which property of railroad, telegraph, telephone and express companies can be taxed upon its true value unless we resort to local taxation."[19]

Constitution of 1908

Section 5 has not been amended since the present constitution was adopted and has been the subject of little litigation.

Other State Constitutions

While state assessment of utility property in general, and railroad property in particular, is common among the states, Michigan stands out in the way its constitution spells out the procedure by which the legislature may provide for such state assessment. The nearest thing to it is a provision of the Georgia constitution to the effect that the legislature may provide different methods and time of returns, assessments, payment and collection of ad valorem taxes on public utilities, but not a greater basis or higher rate than other properties.

The California constitution (Article XIII, Section 14) lists the properties which shall be assessed by the state board of equalization as that owned by (1) railroad companies, street railways, and interurban electric railways, (2) sleeping, dining, drawing, refrigerator, oil, stock, fruit and other car companies operating upon railroads within state, (3) express companies, (4) telegraph and telephone companies, (5) gas or electric companies. Note that this California provision includes gas and electric companies not listed in Michigan's Section 5, but does not contain the Michigan phase "or engaged in any other public service business." In this respect, the Michigan provision is narrower in actual listing of utility property, but apparently broader in legislative authority to extend state assessment than the California provision. The Michigan provision thus is more like the Oklahoma provision relating to all railroad and public service property (Article X, Section 21).

North Dakota has a provision similar to that of California supplemented by an "all other" provision restricted to property "used directly to carry persons, property or messages" (Article XI, Section 179). Although North Dakota includes light, heat or power facilities in its listing of state assessed property, its "all other" provision is thus more narrow than Michigan's.

Comment

Section 5 must be considered in terms of the environment in which its predecessor section originated as an amendment to the 1850 constitution (Article XIV, Section 10). Although it describes a procedure for taxing public service corporations not

[19] Michigan Legislature, House Journal, Extra Session, 1900.

unusual among states, Michigan is apparently unusual among states in that its supreme court ruled at one time (1898) that such a procedure could be followed only if specifically provided by a constitutional exception to the "uniformity" rule of taxation. This presumably accounts for the fact that Michigan has a provision which other states have, for the most part, found unnecessary to include within their constitutions.

Inclusion of the definition "by whomsoever owned" in the definition of utility property clearly indicates that this provision is not limited to corporate-owned property.

Inclusion of "other public service business" within the listing of corporate property for which the legislature may provide for state assessment would seem to cause Michigan's Section 5 to place no obstacle in the way of legislative provision for such assessments of any utility property. In this respect, the only limitation upon legislative authority to provide for state assessment of utility property would seem to relate to the method of assessment rather than to the kinds of utilities. The implication is that Michigan, under its present constitution, could follow the practice of some of the other states in broadening the coverage of state assessed utilities to include gas and electric companies, if the legislature elected to do so.

7. Assessments

Article X: Section 7. All assessments hereafter authorize shall be on property at its cash value.

Constitutions of 1835 and 1850

The 1835 constitution contained no such provision. Section 7 was carried forward from the constitution of 1850 (Article XIV, Section 12) without change.

Constitution of 1908

Section 7 has not been amended since the present constitution was adopted.

Judicial Interpretation

Michigan courts have ruled that requirements of this section that all assessments shall be on property at its cash value relate to assessments upon rate basis for ad valorem taxes and not upon specific taxes imposed by legislative act.[20] Also, that the final authority for determining true cash value of property for purposes of taxation is the state board of equalization;[21] and that cash value means not only property which may be put to valuable uses, but that which has a recognizable pecuniary value inherent in itself and not enhanced or diminished according to the person who owns or uses it.[22]

[20] Shivel v. Kent County Treasurer, 295 Mich. 10.

[21] School District No. 9, Pittsfield Township, Washtenaw County v. Washtenaw County Board of Supervisors, 341, Mich. 388.

[22] Hudson Motor Car Co. v. City of Detroit, 136 F. (2d) 574.

Other State Constitutions

The principal distinction among state constitutions in the matter of assessment standards concerns the choice between fixed constitutional standards and more general provisions that assessments must be according to standards established by legislation and the extent to which classification of property is permitted.

The Michigan provision that property shall be assessed "at its cash value" is more precise than most state constitutional provisions.

It compares with California "at full cash value," Kentucky "at fair cash value," Louisiana "at actual cash value," South Carolina "upon actual value," Virginia "at fair market value."

Assessments at something less than full value are provided in Washington "50% of true and fair value;" Oklahoma, "not over 35% of fair cash value;" South Dakota, "never to exceed actual value;" Texas, "at (not) more than its fair cash market value;" and New York, "shall in no case exceed full value."

Modifications of the inflexibility of assessments "at" a standard are found in constitutions of Mississippi, "according to true value;" Alabama, "exact proportion to value;" Utah, "according to its value in money;" Arkansas, Tennessee and Ohio "according to value;" Idaho and Illinois, "in proportion to value;" Maine "according to just value."

Other states rely upon legislative acts to establish assessment standards within the framework of general constitutional requirements concerning powers of taxation and uniformity. Some of them by constitutional direction such as in the new state of Alaska which prescribes that "standards for appraisal of all property assessed by the State or its political subdivisions shall be prescribed by law."[23]

Others, such as the new state of Hawaii accomplish the same purpose with constitutions which contain no direct reference to assessments.

The New Jersey constitution stands midway between these different approaches with a provision that "property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value...."[24]

Comment

By whatever name it may be called, the traditional standard of value for property assessments relates to market value and the Michigan standard of "cash value" is no exception. In this respect the choice of words to describe value is of no great consequence.

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[23] Alaska State Constitution, Article IX, Section 3.

[24] New Jersey State Constitution, Article VIII, Section 1.

Constitutional provision of the "cash value" standard is in fact a restriction upon the authority of the legislature to provide by law any other standard or provide for the assessment of property at any percentage of value lower than 100 percent. If Michigan wishes to continue this restriction, there is some advantage in retaining the exact language in order to preserve the accumulated body of judicial interpretations. Customary assessment of property at something less than the constitutional (or statutory) standard complicates tax appeal procedure in discrimination cases arising from assessments above the average but lower than the constitutional standard. From this standpoint, there is much to be said in support of changing the constitutional standard to more nearly reflect actual practices or to leave the matter of assessment standards to legislative action.

8. Equalization of Assessments

Article X: Section 8. In the year 1911, every fifth year thereafter and at such other times as the legislature may direct, the legislature shall provide by law for an equalization of assessments by a state board, on all taxable property, except that taxed under laws passed pursuant to sections 4 and 5 of this article.

Constitutions of 1835 and 1850

The 1835 constitution contained no provision for equalization of assessments.

The 1850 constitution was amended in 1900 to contain the same language (Article XIV, Section 13) as Section 8 with the exception that the year 1901 was the starting point and the taxes excepted were then contained in Section 10 of that constitution.

Constitution of 1908

This section was the subject of extended debate in the constitutional convention of 1908 and language from the prior constitution (1850 as amended) was adopted after rejection of a proposal by the committee on taxation and finance that the board should consist of the governor, the attorney general, the auditor general, the commissioner of the state land office and the three members of the board of state tax commissioners coupled with an additional provision that "The Legislature shall by law, in 1909, to take effect not later than 1911, provide and put into operation methods by which property subject to ad valorem assessment shall be assessed at a uniform value." The state board of tax commissioners had declared property valuations were too low and the commissioners were therefore said not to be in a position to act as impartial judges in the matter of property assessments.[25]

Section 8 has not been amended since the present constitution was adopted.

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[25] Michigan Constitutional Convention of 1908, Proceedings and Debates, (Feb. 4, 1908) pp. 1181-1190; (Feb. 5, 1908) pp. 1238-1245.

Judicial Interpretations

This section is an old one and court recognition of practices under it is well established.

Other State Constitutions

Michigan is one of nine states which provide by constitution for state boards or commissions responsible for equalization of assessments (Michigan, California, Colorado, Idaho, Missouri, Montana, Nebraska, Utah and Wyoming). Among these states, Utah and Idaho assign responsibility to the state tax commission and Wyoming simply instructs the legislature to provide by law for a board of equalization. The other five states (including Michigan) indicate the membership or specify the way it is to be appointed.

The New York constitution requires the legislature to provide "for review and equalization of assessments for purposes of taxation" (Article XVI, Section 2) without indicating what provisions shall be made. Similar provisions are in the constitutions of Arizona and Texas. Although New Mexico does not establish a board of equalization by constitution, it has a constitutional provision forbidding members of the state board of equalization from receiving favors from railroads (Article XX, Section 1).

Comment

While property assessment equalization procedures are common among the states, more of them are provided by legislative act than by the constitution. The Michigan provision is in effect an instruction to the legislature to provide for equalization. Except for stating that equalization shall be provided "by a state board," it follows the sound practice of leaving procedure to legislative determination.

The Michigan exclusion of specific taxes from equalization is unusual because the Michigan concept of specific taxes is itself unusual. The Michigan exclusion of property assessed by the state board of assessors is also unusual, but five of the "equalization board" states have a provision for constitutional assignment of responsibility for assessing corporation property to the same boards.

9. 15 Mill Limitation

Prepared in Part
by
Miller, Canfield, Paddock & Stone
Robert E. Hammell

Article X: Section 21. The total amount of taxes assessed against property for all purposes in anyone year shall not exceed one and one-half per cent of the assessed valuation of said property, except taxes levied for the payment of interest and principal on obligations heretofore incurred, which sums shall be separately assessed in all cases: Provided, That this limitation may be increased for a period of not to exceed twenty years at anyone time, to not more than a total of five per cent of the assessed valuation, by a majority vote of the electors of any assessing district, or when provided for by the charter of a municipal corporation: Provided further, That this limitation shall not apply to taxes levied in the year 1932.

Constitutions of 1835 and 1850

There was no similar provision in either the 1835 or 1850 constitutions.

Constitution of 1908

The 1908 constitution as originally adopted did not contain a comparable provision. This provision, popularly known as the fifteen mill amendment, was added to the 1908 constitution by amendment proposed by initiatory petition and adopted at the general election of November 8, 1932. As originally worded, it provided that the limitation specified could be increased for a period of not to exceed five years by a two-thirds vote. An amendment to this section was proposed by initiatory petition and adopted in 1948 to provide for the 20 year increase by simple majority vote.

Previous to the adoption of the 15 mill limit amendment in 1932 there had been no similar limitation in the constitution or in statute.

The Michigan supreme court in commenting on the circumstances leading to the adoption of the 15 mill limit in 1932, has stated:

> The burden of unrestricted property taxation had grown to the point of confiscation. The people were aroused and determined to restrict—permanently—the power of property taxation which then reposed generally in legislative (state and local) hands. Added to their tax

> troubles, the people were enduring a great and widespread economic depression...with homes and farms everywhere threatened by sale for delinquent property taxes and with the legislature failing to take decisive action in the direction of tax limitation, a desperate electorate took matters into its own lawful hands.[26]
>
> Careful study of the amendment leads to these conclusions: clearly the intent was to provide by the fundamental law of the state, which had not theretofore contained such provision, a general limitation upon the exercise of the taxing power of the state. The evil or abuse sought to be remedied was excessive taxation imposed by governmental agencies without the consent of those upon whom the burden was placed.[27]

Judicial Interpretation & Opinions of the Attorney General

The language of Article X, Section 21, has been subjected to frequent interpretation both through court decisions and opinions of the Michigan attorney general. These interpretations have produced the following limitations and clarifications:

Cities and villages are exempt from its provisions. Only the state government, counties, townships and, at least in part, school districts are affected. (School District of the City of Pontiac v. City of Pontiac, 262 Mich. 338; City of Hazel Park v. Municipal Finance Commission, 317 Mich. 582; Hall v. Ira Township, 348 Mich. 402; Bacon v. Kent-Ottawa Metropolitan Water Authority, 354 Mich. 159)

The word “electors” means those electors voting on the proposition to increase millage, rather than all qualified registered electors. (Wilcox v. Board of Commissioners of Sinking Fund of City of Detroit, 262 Mich. 699)

Neither principal nor interest of obligations refunding pre-1932 debt is subject to Article X, Section 21. (Wilcox v. Board of Commissioners of Sinking Fund of City of Detroit, 262 Mich. 699; Chemical Bank & Trust Co. v. County of Oakland, 264 Mich. 673)

The words “assessed valuation” mean local assessed valuation as equalized by the state. (St. Ignace City Treasurer v. Mackinac County Treasurer, 310 Mich. 108; Waterford Township v. Oakland County Tax Allocation Board, 312 Mich. 556; Morley Brothers v. Carrollton Township Supervisor, 312 Mich. 607; School District No. 9, Pittsfield Township, Washtenaw County v. Washtenaw County Board of Supervisors, 341 Mich. 388)

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[26] Black, J., in Bacon v. Kent-Ottawa Authority, 354 Mich. 159.

[27] Quoted by Black, J., Ibid., from School District v. City of Pontiac, 262 Mich. 338, 347, 348.

Local assessors may apply the equalization factor to rates rather than valuations. (Attorney General's Opinion, June 13, 1945)

Use tax is not subject to fifteen mill limitation. (Banner Laundering Co. v. State Board of Tax Administration, 297 Mich. 419)

Special assessments are not subject to fifteen mill limitation. (Graham v. City of Saginaw, 317 Mich. 427)

Certain metropolitan authorities are not municipal corporations within the meaning of the fifteen mill amendment and are therefore subject to its terms (Morse v. Wayne County Supervisors, 355 Mich. 100) while other metropolitan districts are such municipal corporations and are therefore not so subject (Attorney General's Opinion No. 3462, November 19, 1959).

A port commission is subject to the fifteen mill amendment. (Attorney General's Opinion No. 2924, March 15, 1957)

An approving vote by electors of a school district authorizing a bond issue requiring taxation in excess of mills guaranteed to school districts is not equivalent to an approving vote of a millage increase in the amount of the taxes needed. (In re School District No. 6, Paris and Wyoming Townships, Kent County, 284 Mich. 132, but see Article X, Sections 27 and 28, added to the constitution by amendment subsequent to this decision, in effect authorizing such a double approval vote.)

A legislature can effect changes in a municipal charter removing that charter from the provisions of the fifteen mill amendment as well as can the voters of that municipality. (Council of City of Saginaw v. Saginaw Policemen & Firemen Retirement System Trustees, 321 Mich. 641)

A charter township is a municipal corporation within the meaning of that term in the fifteen mill amendment and consequently is not subject to the provisions of that amendment. (Charter Township of Warren v. Municipal Finance Commission, 341 Mich. 607)

Also significant here are the provisions of Sections 27 and 28 of Article X dealing with school district borrowing. These provisions will be considered elsewhere, but their effect is to permit school districts to levy taxes unlimited as to rate or amount, outside of the provisions of the fifteen mill limitation, for payment of specified types of bond issues.

Statutory Implementation

As noted under "Judicial Interpretation," cities and villages are not automatically included under the limitation. In 1949 the legislature amended the general property tax act to prohibit a municipality from including a tax limitation in its charter which would reduce the combined taxing power of the other units in the county to less than fifteen mills.

The legislature has provided by law for a procedure to allocate the fifteen mills among the overlapping taxing jurisdictions in the county which are subject to the limitations. In each county there is a six-member county tax allocation board composed of the county treasurer, the chairman of the board of county auditors if there be such a board, and if not, the chairman of the finance or ways and means committee of the board of supervisors, the county school superintendent, and three other members appointed by the probate judge(s)—a member of a school board, a representative of a city, and a representative of the public at large—a total of six members.

Under certain specified limitations, each unit of government subject to the limitation is entitled to a minimum allocation—the county 3 mills, school districts 4 mills, and townships 1 mill. Community college districts are allocated a minimum of 1/1000 of a mill under certain circumstances and, if the state were to levy a general property tax, its rate would also have to be allocated. The remaining millage is allocated by the county tax allocation board on the basis of "needs" of the respective units.[28]

Other State Constitutions

It is difficult to make valid comparison of Michigan's tax rate limitation and those in other states. Just as judicial decisions have interpreted the meaning of Michigan's provision, so the provisions of other states have been interpreted by their courts. Thus, a comparison of the wording of the various constitutional provisions themselves does not provide a satisfactory comparison of the effect of the limitations in the various states. It is beyond the scope of this paper to attempt a comprehensive comparison, but certain facts should be noted.

Many other states have tax rate limitations generally similar to the fifteen mill amendment. In twenty-six states there is either a statutory or constitutional limitation on the rate of state taxes, and in forty states there is some limitation on the tax rates of political units.[29] Nineteen states, including Michigan, incorporate their tax rate limitations into their constitutions, and two additional states have consti-

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[28] See M.S.A. 7.61ff. for the Property Tax Limitation Act.

[29] Graves, American State Government, 4th edition, D. C. Heath & Co. Boston, 1953, page 531.

tutional provisions authorizing the legislature to set limitations.[30] Only some twelve states have over-all property tax limitations, nine of these, including Michigan, listing these limitations in their constitutions.[31]

The types of limitations vary greatly. The oldest and most widely used type is one setting maximum rates for various funds or purposes. Newer limitations employ percentage amounts of collections in previous years. Other limitations are based on maximum rates per valuation or governmental unit, or maximum dollar amounts per capita, or a stated maximum dollar amount, or a ratio between property tax collections and collections of other taxes.[32]

The millage amounts specified in formulas employing limitations based on that factor vary from five to fifty mills, with the average being approximately twenty-four mills. Most states permit an increase in the maximum amount specified upon proper vote of the electorate of the taxing district, and often with the concurrence of the legislature. There is usually no limitation fixed upon the amount of this permissible increase. Also nearly all states exclude from the effects of their tax rate limitations taxes levied for payment of principal and interest on debt existing previous to the enactment of the limitation, and a large minority of states exclude from those provisions taxes levied for payment of all debt.[33]

Many recent texts and studies in the area advise against the inclusion of tax rate limitations in a state's constitution.[34] The Model State Constitution prepared by the committee on state government of the National Municipal League (5th edition, 1948) and the 1961 revised draft contain no such limitations, and the constitutions of our two newest states, Alaska and Hawaii, also have no such provisions.

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[30] Index Digest of State Constitutions, Legislative Drafting Research Fund, Columbia University, 2nd edition, 1959.

[31] Manual on State Constitutional Provisions, prepared for the constitutional convention of the territory of Hawaii, 1950, by the Legislative Reference Bureau, University of Hawaii; and Graves, supra, page 532.

[32] Graves, supra, page 531.

[33] Manual on State Constitutional Provisions, supra; Graves, supra; Index Digest of State Constitutions, Supra.

[34] Manual on State Constitutional Provisions, supra; Graves, supra; Constitutional Studies, prepared on behalf of the Alaska Statehood Committee for the Alaska Constitutional Convention by the Public Administration Service, November, 1955, Volume 3, Section IX, page 18.

Comment

In the Michigan supreme court decision in the case of Bacon v. Kent-Ottawa Authority (354 Mich. 159) Mr. Justice Black noted that:

> Through and by means of an attritional series of judicial decisions the fifteen mill amendment has been bruised, beaten and backed to the brink of sterile and forceless words. No intervening act of the electorate brought this about.

There are indications in that decision that the process of attrition spoken of above is at an end.

As of today the fifteen mill limitation does not cover cities, villages, the few charter townships, certain metropolitan districts, special assessment districts, and school districts in certain specific financing situations. (See Article X, Sections 27 and 28)

The political entities still subject to the restrictions of the fifteen mill limit are the state itself, counties, the 1,200 odd unchartered townships, school districts (as to operating taxes and short term bond issues) and a few metropolitan authorities. The state does not now levy a general property tax and has none in prospect. Townships can escape the limitation by incorporation as charter townships, but only a handful have done so.

Figures available from the state tax commission show that in 1960 a total of $851 million was levied in property taxes consisting of the following:

(in millions of dollars)

	Regular Taxes	Extra Voted	Debt Service Prior to 1932	Total
Counties	$133.3	$ 12.8		$146.1
Townships	7.6	5.2		12.8
Schools	216.9	217.1	$ .2	434.2
City and Village Taxes	224.1	3.1	30.9	258.1
Total	$581.9	$238.2	$31.1	$851.4

While it is not possible to break down these figures precisely between the levies subject to the millage limitation and those not subject, a rough approximation would be that slightly less than 70% of the total or about $590 million is subject to the provisions of Section 21 (within the fifteen mills and millage extra voted by the people).[35] Thus, while the provisions of Section 21 have been “bruised and beaten”

[35] This includes all county taxes and almost all township and school taxes.

the section has not been completely broken. The limitation still applies to a major portion of the property taxes levied by local units in Michigan.

One of the most significant of the "attritional series of judicial decisions" was the ruling, cited previously, that the limitation applied to state equalized valuations. From 1933 to 1944 the term "assessed value" as used in the amendment was considered to be the local assessed value. In 1944 the court held that "assessed value" meant the local assessment as changed or corrected through the process of county equalization—thus, the limitation applied to the county equalized value. In 1954 in the Pittsfield case, the court held that "assessed value" meant the local assessment as proved or changed and corrected through the statutory process of county and state equalization;—thus, the state equalized value became the base against which the limitation applied.

In terms of 1960 valuations, the potential significance of these changes can be noted. The local assessed valuation or the state in 1960 was $16.6 billion. The county equalized valuation was $20.8 billion, about 25 per cent higher than local assessed. The state equalized value was $24.9 billion, about 20 per cent higher than county equalized values and 50 per cent higher than local assessed value. Thus, the use of state equalized values as the base against which the limitation applies enables the units of government subject to the limitation to increase property taxes they levy by 25 per cent over what they could levy on county equalized values and by 50 per cent over what they could levy on local assessed values. This application of the limitation to state equalized valuations has made available a very significant potential increase in the general property taxes levied by the local units subject to the limitation.

It is of interest to note that in 1932 prior to the fifteen mill limit the total amount of general property taxes levied in Michigan was $217 million at an average state tax rate of $32.79 per $1,000 of state equalized valuation. In 1933 after the millage limitation the total dropped to $159 million and the average state tax rate dropped to $27.39. It is not possible to distinguish between the effects of the millage limitation and the effects of the depression. The average state tax rate fluctuated between 1933 and 1947, but generally hovered around the $27 level. Following 1947 the average state tax rate began a gradual although not regular increase and in 1960 the average rate reached $35 per $1,000 of state equalized valuations.

Possible Areas of Revision. The convention may wish to consider a number of possible alternatives in connection with this section.

It is beyond the scope and purpose of this paper to attempt to provide either solutions to the problems involved or to present the kinds of detailed information that will be needed in finding appropriate solutions to these problems. However, consideration might be given to these questions:

1. Should there be a constitutional limitation on the amount of property taxes levied in Michigan or should this matter be left to the discretion of the legislature? In the absence of a specific constitutional provision the legislature would have the power to prescribe tax rate limitations. It should be noted that there is some controversy as to whether tax rate limits have any real effect on the level of property taxes in a state. Further, there is a question as to whether a low tax rate limit has any more effect on the property tax level than a high limit.[36]

2. If a tax rate limitation is to be included in the constitution then consideration should be given to the following questions:

a) Should the limit apply to all units of government which levy property taxes—cities, villages, townships, school districts, counties, metropolitan districts, the state and any other political unit? If not, which units should be excluded and what, if any, limitations should apply to them?

b) Should the limit cover all purposes for which property taxes might be levied—special assessments, operating millage, debt service, capital outlay millage, etc.? If not, which purposes should be included and which excluded?

c) What should the rate limitation be? This will, of course, depend in part on which units are subject to the limitation.

d) To what base should the limitation be applied—local assessed, county equalized, or state equalized? This question should be reviewed in connection with the constitutional provision on assessment and equalization.

e) If there is to be a millage limitation applying to several overlapping local units, should a provision be included in the constitution for allocating the millage among them?

f) Should there be, as at present, a limit that can be increased by vote of the people up to some stipulated maximum limit? Or, should the limit apply only to the rate that can be set by local governing bodies with no maximum rate specified if approved by vote of the people? Or, should there be only a maximum rate that can be levied by local governing bodies with no provision for a vote of the people?

g) Should the present twenty year time limit be continued; should approval by a simple majority of voters be adequate; should any voter or only property owners be able to vote on the question?

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[36] See the Michigan Tax Study Staff Papers, "The General Property Tax," pp. 230-232.

These questions, as well as others, should be considered in relation to revision of Section 21. There are several of these areas that require further comment.

Units of Government Subject to a Limitation. One problem that can arise as a result of the present system of having only certain units subject to the tax limitation while other overlapping units are not subject to it is a possible uneconomic allocation of functional responsibilities among the various levels of government. For example, counties might be the level of government that could most efficiently and economically provide a certain function, such as public health services. However, as a result of the millage limitation the county may be unable to finance a county-wide health service, leaving this service to be provided by the cities in the county which have the financial resources to do so under their more flexible charter tax rate limitation. This can be even more true in the financing of public improvements such as sewer and water facilities. Such improvements may have to be provided on a less economic piecemeal basis because the county or metropolitan authority lacks the taxing authority to provide the required facility. Even though it may be the same taxpayers who are paying the cost, the decision as to which level of local government will provide a service or a facility must be based in some instances on the question of which of the overlapping units has the more flexible tax rate limitation. Factors such as which unit can provide the service most responsibly, efficiently, and economically may often be ignored because of the problem of millage limitations.

Effect on Capital Financing. In respect to financing capital facilities several other problems stem from the millage limitation. One problem is that restrictions on the governing bodies' ability to levy taxes can often encourage the governing body to resort to other devices to finance improvements. For example, a unit may use "revenue bonds" for facilities which do not in fact produce revenues and that could be more economically financed through full faith and credit bonds. A second problem is that faith and credit bonds issued by the units subject to the millage limitation (except for schools—see Article X, Sections 27 and 28) are limited tax bonds rather than unlimited tax bonds. It is necessary to get voter authorization for the millage required to meet the debt service requirements and this results in what are called limited tax bonds. In contrast, an unlimited tax bond issued by a local unit not subject to the fifteen mill limit can pledge the full faith and credit of the community to paying off the bonds. Limited tax bonds are at a competitive disadvantage with unlimited tax bonds in the bond market, most bond buyers preferring the latter. Finally, the twenty year time limit on extra voted millage necessitates the issuance of shorter term bond issues than might otherwise be desirable under some circumstances.

It is possible to impose tax limits in respect to operating funds and eliminate them for debt service funds. In Michigan the voters have approved two constitutional amendments (Article X, Sections 27 and 28) relating to school districts which achieve this end. Debt service for school bonds is now excluded from the millage limitation. The vote authorizing school bonds automatically authorizes whatever millage is necessary to meet the debt service requirements—hence, unlimited tax bonds. Further, under the provision of Section 28 the twenty year time limit does not apply, thus permitting longer term bond issues. Operating funds remain under the limitation provisions.

B. DEDICATION OF TAX REVENUES FOR SPECIFIC PURPOSES

1. Primary School Interest Fund

Article X: Section 1. All subjects of taxation now contributing to the primary school interest fund under present laws shall continue to contribute to that fund, and all taxes from such subjects shall be first applied in paying the interest upon the primary school, university and other educational funds in the order herein named, after which the surplus of such moneys shall be added to and become a part of the primary school interest fund.

Constitutions of 1835 and 1850

There was no comparable provision in the constitution of 1835. The constitution of 1850 included the following provision as a part of Article XIV, Section 1:

> Specific Taxes; Disposition. Section 1. All specific state taxes, except those received from the mining companies of the upper peninsula, shall be applied in paying the interest upon the primary school, university and other educational funds and the interest and principal of the state debt in the order herein recited, until the extinguishment of the state debt, other than the amounts due to educational funds, when such specific taxes shall be added to, and constitute a part of the primary school interest fund. The legislature shall provide for an annual tax, sufficient with other resources, to pay the estimated expenses of the state government, the interest of the state debt and such deficiency as may occur in the resources.

Constitution of 1908

Section 1 was developed in the 1908 constitution as a way to continue the same tax support for the primary school fund as was provided in the constitution of 1850. It has not been amended since the present constitution was adopted.

A proposal to channel some of the primary school fund money “toward the constructing and maintaining of manual training, domestic science, mechanical, industrial and technical schools” was not accepted after extensive debate in the constitu-

tional convention of 1908.[37] The convention delegates apparently received voluminous mail and other communications indicating strong popular sentiment to retain in the constitution existing provisions relating to the primary school fund and its support.

Judicial Interpretation

Michigan courts have ruled that provisions of the 1850 constitution, providing that all specific taxes should belong to the primary school interest fund, were retained in the constitution of 1908, but only as to the sources of revenue as they existed before its adoption, leaving the state free in dealing with every other source of revenue, every other subject of taxation.[38] The courts have also ruled that "subjects of taxation," as used in the constitution, means something more than corporation, public utility or individual taxpayer who may be made liable for tax by legislative enactment; it connotes the underlying principle on which the tax is designed and imposed.[39]

Apparently the legislature is free to repeal any specific tax dedicated by Section 1 to the primary school interest fund and replace it by another tax measured in a different way upon the same taxpayers without dedicating the new tax.

Other State Constitutions

Although provisions for the support of public schools are common in state constitutions and references to permanent school funds are the rule, constitutional dedication of particular state taxes for this purpose is not so common. The West Virginia dedication of "money and taxes" formerly payable to a permanent fund appears to be the only state other than Michigan with a constitutional provision preserving tax dedications by reference from a prior provision.

Texas provides an "available school fund" with constitutional revenues from 1/4 of revenue from state occupation taxes, a poll tax of $1 on state inhabitants between 21 and 60 years old and 1/4 of the net revenue from the motor fuel tax. Oklahoma provides for payment to a school fund of school taxes upon property of railroads, pipelines, telegraph companies or public service corporations. Missouri specifies no tax, but requires that at least 25 per cent of state revenue, exclusive of interest and

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[37] Constitutional Convention of 1908, Proceedings and Debates, June 29, 1850, pp. 1096-1103.

[38] Union Steam Pump Co. v. Secretary of State, 216 Mich. 261 (Michigan Statutes Annotated 1936) Vol. 1, p. 407.

[39] Western Electric Co. v. Department of Revenue, 312 Mich. 582; also Duluth S. S. & A. R. Co. v. Corporation and Securities Commission, 353 Mich. 636. (Michigan Statutes Annotated, 1959 Cumulative Supplement, Vol. 1, pp. 171, 172).

sinking fund, be applied annually to the support of the free public schools. South Carolina provides similar dedication of revenues from sale or license of alcoholic beverages exceeding that allowed by law to counties and municipal corporations. Utah provides that taxes on income and intangible property be allocated to support the public school system, together with other moneys not to exceed 75 per cent of the minimum school program. Several states prescribe a minimum amount of money without reference to its source (for example, Delaware $100,000, Pennsylvania $1,000,000). Various smaller dedications include fines, escheats, etc. The Model State Constitution contains no provision comparable to Section 1.

In most instances, state constitutional provisions accomplish little more than to establish school funds which are supplemented by legislative appropriation.

Comment

There is more emotion associated with the Michigan constitutional dedication of certain specific taxes to the primary school interest fund than there are tangible benefits derived from it. School support resulting from this provision (Section 1) is a small part of total amount of state support provided for local schools. From the standpoint of effective dedication of state tax revenues for local schools, Section 1 is vastly overshadowed by Section 23 dedicating sales taxes. The taxes dedicated to the primary school interest fund include the inheritance tax, corporation organization fees, foreign insurance companies' tax, and the four ad valorem taxes on railroads, telephone and telegraph, car loaning, and express companies. During the fiscal year 1959-60 these taxes yielded $57 million in revenues.

2. State Sales Tax, Distribution

Article X: Section 23. There shall be returned to local governmental units by the method hereinafter set forth, l/2 cent of a state sales tax levy on each dollar of sales of tangible personal property on the 1946 statutory base (not rate). The state disbursing authority shall remit to counties as a whole on a population basis and payment shall be made to the county treasurer who shall remit to the respective cities, townships and villages within the county on a per capita basis. Population computation shall be based on the last and each succeeding state-wide federal census for purposes of division among counties and upon the same basis or upon any special federal county-wide census, whichever is later, for intra-county division purposes. There shall be excluded from such computation 50 per cent of the total number of persons who are wards, patients or convicts committed to or domiciled in any city institution located outside the boundaries of said city or committed to or domiciled in any county, state or federal tax supported institution, provided such persons were included in said federal census. All remittances provided shall be made on a quarterly basis.

There shall be set aside for the school districts 2 cents of a state sales tax levy on each dollar of sales of tangible personal property on the 1946 statutory base (not rate), to be allocated among said school districts by law. Such taxes so collected shall be deposited in a special school aid fund and be expendable only by legislative appropriations for aid to the school districts and school employees' retirement purposes as shall be provided by law. Said school aid fund shall be separate and distinct from the state general fund.

Prior to any division or allocation of the sales tax, the cost of collection as determined by the department of revenue shall be deducted from total collections and credited to the general fund of the state.

The legislature shall by law appropriate from the school aid fund for such public school employees' retirement systems as shall from time to time be in effect under the laws of this state an amount which shall not be less than 5 per cent nor more than 7-1/2 per cent of the salaries of school district employees participating in the respective retirement systems. Such percentages shall apply only to that portion of salary as may be provided by law. At no time shall the legislature levy a sales tax of more than 4 per cent.

Constitutions of 1835 and 1850

The Michigan constitutions of 1835 and 1850 contained no similar provision. The nearest thing to it was the dedication of specific taxes in the 1850 constitution. (See Section 1 above.)

Constitution of 1908

Section 23 was added to the present constitution by amendment proposed by initiatory petition and adopted at the November election in 1946. A proposal by joint resolution of the 1947 legislature to repeal this section failed of ratification at the November election of 1948. It was amended in 1954 and again in 1960 to its present form.

Commonly referred to as "the sales tax diversion amendment," Section 23, as originally adopted in 1946, required payment to local governments of portions of "total sales tax revenues" as follows:

1/6 to townships, cities and villages on per capita basis
1/6 to school districts on school census basis
44.77 per cent to school districts on basis of formula adopted by the legislature of prior year's sales tax revenue

The amendment adopted in 1954 established a 3 per cent sales tax rate ceiling and provided that the "cost of collection as determined by the department of revenue shall be deducted from total collections." This same amendment provided that the distribution should be as follows:

> 1/2 cent of sales tax on 1946 statutory base to cities, townships and villages on per capita basis
>
> 2 cents of sales tax on 1946 statutory base to school districts on basis of formula adopted by legislature

The amendment of 1954 also provided for exclusion of 50 per cent of persons "who are wards, patients or convicts committed to or domiciled in any city institution located outside the boundaries of said city..." or "in any county, state or federal tax supported institution..." from the census count used as basis for distributing sales tax to cities, townships and villages. It provided that the legislature shall appropriate from school funds for school employees' retirement systems an amount "not less than 5 per cent nor more than 7-1/2 per cent of salaries of school district employees participating in the respective retirement systems."

The amendment of 1960 increased the sales tax rate ceiling from 3 per cent to 4 per cent without changing the portions payable to townships, cities, villages and school districts. This amendment was adopted after the supplemental state use tax on retail sales of 1 per cent, adopted in 1959, had been declared in violation of the 3 per cent sales tax limitation imposed by Section 23.[40] Its purpose was to enable the state to collect revenues from a 1 per cent additional sales tax for its own purposes as a replacement of revenues it had sought from the 1 per cent use tax.

Judicial Interpretation

Section 23 has been the subject of extensive litigation. The amendment of 1954 providing for deduction of cost of collection grew out of a court ruling that for the purpose of determining local shares, "'sales tax levy' must be taken to mean sales tax money collected, ... and there must be excluded from consideration all such items as expenses of collection."[41]

The same decision rendered prior to the 1954 amendment held that direct distributions of 1 cent of sales tax levy to cities, townships, villages and schools included only the sales tax itself without reference to "...refunds, appropriations made therefrom, license fees and penalties arising from enforcement of the law..." but that the percentage (44.77 per cent) which must be appropriated by the legislature "to provide for continuance of annual school grants" applied to "total sales tax revenue" including license fees, interest and penalties.

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[40] Lockwood V. Nims (October 22, 1959).

[41] City of Jackson v. Commissioner of Revenue, 316 Mich. 694.

Michigan courts have ruled that, except for the provision directing annual legislative grants to school districts, Section 23 is self-executing and does not require implementation by legislation.[42] Also, that the legislature cannot establish the state as a school district for purposes of appropriating part of sales tax revenue for support of state institutions or functions assumed directly by the state government.[43]

Opinion of the Attorney General

The reference in the amendment to the "1946 statutory base (not rate)" has led to some question as to whether this restricts the legislature's power to change the base of the tax as prescribed by law. However, the attorney general has ruled sales of food and fuels could be exempted from the sales tax act without violating this provision.[44]

Other State Constitutions

Although various provisions appear in several state constitutions regarding sharing of state taxes with local schools and other local governmental units (see discussion of Section 1), no other state constitution contains detailed apportionments similar to Michigan's Section 23 relative to sales taxes or any other tax of so large a magnitude.

Comment

Section 23 is an example of legislation by constitution. It has the effect of dedicating a large source of state tax revenue in such a way as to influence the entire state financial environment.

Although it assures local governments in general and local schools in particular of substantial non-property tax revenues, it does so in a way which bypasses the kind of legislative determination and review ordinarily associated with legislative responsibility for overall financial planning and adjustment to changing circumstances.

Prior to the adoption of the sales tax diversion amendment in 1946, the sales tax had been the major source of revenue for the state government. In the fiscal year 1945-46 the sales tax constituted almost 87 per cent of general fund-general purpose tax revenues. By fiscal 1960 the state's one-half cent share of the three cent sales tax amounted to less than 18 per cent of general fund-general purpose tax revenues. The one cent increase in the sales tax, effective January 1, 1961, is not dedicated, making a total of one and one-half cent of the four cent sales tax available for general fund-general purpose financing. In fiscal 1961-62 it is estimated that the sales tax will constitute about 40 per cent of general fund-general purpose tax revenues.

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[42] City of Jackson v. Commissioner of Revenue, 316 Mich. 694.

[43] Board of Education of Detroit v. Superintendent of Public Instruction, 319 Mich 436.

[44] Op. Atty. Gen., January 26, 1956, No. 2470.

In July, 1955, a separate school aid fund was created in accordance with the 1954 amendment to Section 23. Under provisions of this amendment two cents of the sales tax were earmarked for aid to local school districts with the thought that such aid would be limited to the revenue yield of this part of the tax together with other revenues of the fund. In the interval since 1954, a dollar-per-pupil formula was developed to distribute aid to the local school districts. The cost of this formula increased more rapidly than annual income of the school fund.

For fiscal 1958, the legislature by law dedicated a one-cent cigarette excise tax and a four per cent liquor excise tax to the school aid fund and in 1958 began also to appropriate a general fund supplement to the school aid fund in order to meet the statutory school aid formula.

In fiscal 1961-62 the excise taxes dedicated to the school aid fund will yield about $28 million and the sales tax about $210 million; it is estimated that a general fund appropriation of $44 million will be required to supplement the sales tax and excise taxes to payout the statutory formula.

Constitutionally restricted state revenues (sales tax primary school interest fund, and gasoline and weight taxes) now account for approximately 50 per cent of total state revenues.

3. Gas and Weight Taxes

by
Miller, Canfield, Paddock and Stone
John H. Nunneley

Article X: Section 22. All taxes imposed directly or indirectly upon gasoline and like fuels sold or used to propel motor-vehicles upon the highways of this state, and on all motor vehicles registered in this state, shall, after the payment of the necessary expenses of collection thereof, be used exclusively for highway purposes, including the payment of public debts incurred therefor, and shall not be diverted nor appropriated to any other purpose; provided, the legislature may provide by law a method of licensing, registering, and transferring motor vehicles and their certificates of title, and licensing and regulating motor vehicle dealers and operators; and may prescribe charges sufficient to pay for the enforcement thereof. The provisions of this section shall not apply to the general sales tax, the use tax, the fees and taxes collected under the auto theft and operators' and chauffeurs' license laws which are used for regulatory purposes; the application fees and mileage fees appropriated to the Michigan public utilities commission by Act

No. 254 of 1933; the franchise or privilege fees payable generally by corporations organized for profit; nor to ad valorem taxes payable generally by manufacturers, refiners, importers, storage companies, and wholesale distributors on gasoline and like fuels held in stock or bond, and by manufacturers and dealers on motor vehicles in stock or bond.

Constitutions of 1835 and 1850

There was no similar provision in the Michigan constitutions of 1835 or 1850.

Constitution of 1908

This provision, sometimes known as the "anti-diversion amendment" was added to the 1908 constitution by amendment proposed by initiatory petition and adopted at the general election of November 8, 1938. It was brought about because of the use of moneys derived from gasoline and weight taxes[45] for other than highway purposes by the state legislature, particularly during the depression years in the early 1930's. It was felt by the sponsors of the amendment that such taxes collected from users of the highways of the state were in a different category than general taxes, and were more in the nature of a privilege tax collected from and paid only by those using highways. Hence, it was argued, the funds collected from such use should be earmarked for the improvement and construction of highways. The voters of Michigan agreed by a substantial majority.

This amendment has become firmly ingrained into the state fiscal picture and no serious attempts have been made by the state legislature to raid said funds. Because of this amendment the construction and necessary renovation and maintenance of highways has continued in Michigan within the limits of funds provided by gasoline and weight taxes irrespective of the financial condition of the state's general funds. This amendment, as will be shown later, is the cornerstone upon which the highway program now under way is based.

Opinions of the Attorney General

Occasionally some minor attempts have been-made to justify use of said funds for purposes claimed to be related to highway purposes, but these attempts have usually met with failure because of adverse opinions of the attorney general. An attempt to appropriate such funds to pay uniformed state police patrolling highways was ruled unconstitutional by the attorney general (Op. Atty. Gen. March 17, 1958, No. 3250). No attempt has resulted in a law which necessitated a Michigan supreme court decision.

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[45] By weight taxes is meant the annual license fees on motor vehicles based upon the weight thereof.

Statutory Implementation

How firmly ingrained into the Michigan fiscal picture this amendment has become can be demonstrated by the following recent history of Michigan highway financing:

1. Such taxes are collected by the state and distributed quarterly to the state highway department, the various county road commissions, and the cities and villages based upon a statutory formula. The current distribution formula is set forth in Act 51, public acts of 1951; as amended, as: state highway department, 47 per cent thereof; the various county road commissions, 35 per cent thereof; and the various incorporated cities and villages, 18 per cent thereof. The sums so distributed are earmarked and can be used under the above amendment and the law solely and only for highway purposes or for payment of debts incurred for such purposes. They constitute the basic funds to enable such units of government to construct, maintain and operate the highways and streets under their respective jurisdictions.[46]

2. The state legislature by amendments to Act 205, public acts of 1941, authorized the issuance of limited access highway bonds secured by contractual pledges of the state highway department, and contracting cities, villages and counties of specified portions of their highway revenues derived from state-collected and returned gasoline and weight taxes. These pledges constitute the total security for such bonds. Under said act the following principal amount of bonds has been issued by the state for the following purposes:

Purpose	Principal Amount
Ford-Lodge Expressway (three series)	$100,000,000
Detroit-Toledo Expressway	20,000,000
Grand Rapids Expressway	10,000,000
Farmington-Brighton Expressway	5,000,000
Fenton-Clio Expressway	10,000,000
Grand Haven-Muskegon Expressway	11,000,000
Detroit-Toledo Expressway-Rockwood North	5,000,000
Midland-Bay City Expressway	17,000,000
Northwestern Expressway	25,000,000
Total	$203,000,000

The balance of principal outstanding as of June 30, 1961, was $165,035,000.00.

3. The state legislature by Act 87, public acts of 1955, as amended, authorized the state highway department to issue bonds secured by pledges of necessary gasoline

[46] During the fiscal year ending June 30, 1960, such taxes were distributed as follows: state highway department $98,657,304.63; county road commissions $73,468,205.58; and incorporated cities and villages $37,783,648.78.

and weight taxes returned to the state highway department pursuant to law.[47] Under said act the state highway department issued bonds in the aggregate principal amount of $25,000,000 for trunk line highway construction. Bonds in the principal amount of $20,840,000 of this issue were outstanding as of June 30, 1961.

4. The state legislature by comprehensive amendments adopted in 1957 to Act 51, public acts of 1951, as amended, greatly expanded the bonding powers of the state highway department, and extended said bonding powers to counties. Such bonds are secured by these constitutionally earmarked gasoline and weight taxes, and such bonds together with outstanding bonds are given a prior lien for their payment against such funds. Under this authorization the state highway department has issued, as of August 1, 1961, a total of $260,000,000 of highway bonds to carry out its highway construction program, receiving, in the case of interstate highways, 90 per cent federal participation in addition, and on other trunk lines 50 per cent participation. This bonding program enabled the state to put up its matching money immediately. Federal aid has been a major factor in supplementing bond moneys in all cases where bonds have been issued by the state. An additional $100,000,000 has been authorized, and $50,000,000 issued, to finance the local share of the new expressway system being constructed in Detroit, and $18,000,000 issued to pay the local share of completion of the Grand Rapids expressway. These bonding provisions are a necessary and integral part of the current major highway program under way in the state.

5. There have been issued, thus, by the state highway department $521,000,000 in principal amount of highway bonds, of which $465,280,000 are outstanding as of June 30, 1961. These bonds in no way involve the credit of the state of Michigan but are payable solely out of pledged amounts of gasoline and weight taxes earmarked by the above amendment for “highway purposes, including the payment of public debts incurred therefor.”

6. In addition to the above bonds which have been issued by the state highway department, bonds of like nature have been and are being issued by incorporated cities and villages of the state for street purposes under the provisions of Act 175, public acts of 1952, as amended, secured primarily by pledges, within statutory limits, of such highway funds returned to them pursuant to law. Said bonds are known as “motor vehicle highway fund bonds” and total many millions of dollars. Also, counties are authorized to issue bonds of like nature under the provisions of Act 51, public acts of 1951, as amended. St. Clair county has issued $2,900,000 of such bonds, and other counties are in the process of issuance. Under Act 143, public acts of 1943, as amended, many counties have issued road notes secured by gasoline and weight tax moneys returned to them.

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[47] The bonding provisions of this law were repealed by the amendments adopted to Act 51, public acts of 1951, as amended, referred to herein. The outstanding bonds and their security were fully preserved in said amendments.

Judicial Interpretation

The Michigan supreme court has sustained this type of bond and the security pledged therefor. The court passed upon legal questions involved at the time of the first issue of Ford-Lodge expressway bonds in 1951, in the case of State Highway Commissioner v. Detroit Controller, 331 Mich. 337, and the following brief quotes from said decision are pertinent:[48]

> Vehicular taxes, almost since their origin, have been earmarked exclusively for highway purposes, PA 1915, No. 302 (CL 1948, § 256.1 et seq. (Stat Ann § 9.1431 et seq.)), PA 1925, No. 2. In 1938, the Constitution of 1908 was amended to include article 10, § 22. This section provides:
>
> > All taxes imposed directly or indirectly upon gasoline and like fuels sold or used to propel motor vehicles upon the highway of this state and on all motor vehicles registered in this State, shall. . . be used exclusively for highway purposes, including the payment of public debts incurred therefor.
>
> Vehicular taxes have often been termed privilege taxes for the use of the State's highways. They are paid only by motor vehicle owners and users, and the moneys derived therefrom are used solely for the benefit of those persons who paid the tax.
>
> * * *
>
> Nor would a constitutional amendment which had the effect of impairing the bondholder's security be valid, for the supreme court has held that an amendment to a State Constitution is passing a law for the purpose of the contracts clause. Railroad Company v. McClure, 77 US (10 Wall) 511 (19 L ed 997); Russell v. Sebastian, 233 US 195 (34 S Ct 517, 58 L ed 912, Ann Cas 1914C 1282). The pledge is irrevocable as any statute or amendment to the Constitution impairing the obligation of the bonds would be invalid insofar as it affected bonds theretofore issued.

In view of these decisions it could certainly be argued with considerable merit that any attempt to do away with the constitutional earmarking of motor vehicle taxes as set forth in Section 22, Article X, of the present constitution would be invalid under the contracts clause of the United States Constitution (Article 1, Section 10) as having the effect of impairing the security of the above specified outstanding bonds.

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[48] See also Nichols v. State Administrative Board, el al, 338 Mich. 617.

Other State Constitutions

Constitutional earmarking of gasoline taxes occurs in 28 states and of motor vehicle taxes, in 27 states. Twenty-six states earmark both taxes, but only two states (California and Florida) earmark only gasoline taxes and only Nebraska earmarks only motor vehicle taxes. It is common to include administrative and collection costs of the tax(es) as an allowable purpose for which the revenues derived therefrom may be used. With but few exceptions these revenues are specifically set aside for roads and highways, bridges, and other purposes incident to the provision of vacilities for and supervision over, vehicular travel on public roads and highways. Arizona uses revenues from motor vehicle taxes for local units. Nebraska uses revenues from the same source for distribution to both the state and to local units, with no requirement as to purpose. Pennsylvania includes the construction and improvement of facilities for air navigation as a legitimate use of motor vehicle tax receipts. Finally, Oregon allows use of revenues from gasoline and motor vehicle taxes for the acquisition, development, use, maintenance, and care of parks, scenic, recreational and historic areas and the publicity thereof. The Model State Constitution does not earmark any taxes.

Comment

While there are many arguments which can and will be advanced against the constitutional earmarking of general tax revenues collected by the state, it is suggested that the revenues derived from gasoline and weight taxes as presently earmarked fall into a different category for the following reasons:

1. Such taxes do not fall within the category of general taxes, but are more in the nature of privilege taxes collected from users of the highways, and thus should be used for highway purposes. Constitutional earmarking is the only sure means by which this purpose can be realized. As stated by the Michigan supreme court in State Highway Commissioner v. Detroit Controller, 331 Mich. 337, at p. 350:

> Vehicular taxes have often been termed privilege taxes for the use of the State's highways. They are paid only by motor vehicle owners and users, and the moneys derived therefrom are used solely for the benefit of those persons who paid the tax.

2. A removal of the present constitutional earmarking may impair the security of presently outstanding bonds in the principal amount of $465,280,000 issued by the state, as well as many additional millions of dollars of bonds issued by cities and villages, and notes and bonds issued by counties, all secured by pledges of gasoline and weight tax revenues. A removal of a very important factor in the security

thereof—the constitutional earmarking of such funds which "shall be used exclusively for highway purposes, including the payment of public debts incurred therefore"—would be dangerous from a legal standpoint in that it may result in court invalidation of such removal of the provision from the new constitution.

The constitutional earmarking is of prime importance to the above type of bond as enhancing their security and making them more saleable at a favorable interest rate. For example, all official statements issued in connection with each bond series issued by the state highway department contain the following statement, or one in similar language:[49]

Constitutional Provisions

> This amendment was popularly known as the 'anti-diversion amendment' proposed by initiative petition and adopted by the electors of the State at the general election of November 8, 1938. It effectively prevents the legislature of the State from diverting these specific tax moneys to any other purpose except highways or the payment of debts incurred for highway purposes. It is a very effective anchor securing the type of highway bonds herein described as these bonds are debts incurred for highway purposes. Thus, the taxes out of which these bonds are payable and which are pledged as a security for payment thereof, are constitutionally earmarked and cannot be used or appropriated by the State legislature for any other purpose. The general fund or general taxes of the State are in no way involved or pledged for the payment of these bonds.

Such attempt, as a practical matter, may also impair the future credit of the state.

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[49] Taken from official statement issued in connection with state trunkline highway bonds, series VI, in the aggregate principal amount of $35,000,000.00, dated August 1, 1961.

C. CONTROL OF STATE FUNDS

1. State Depositories

Article X Section 15. No state money shall be deposited in banks other than those organized under the national or state banking laws. No state money shall be deposited in any bank in excess of 50 per cent of the capital and surplus of such bank. Any bank receiving deposits of state money shall show the amount of state money so deposited as a separate item in all published statements.

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 contained no comparable provision.

Constitution of 1908

Section 15 has not been amended since the present constitution was adopted.

Judicial Interpretation

This section has been the subject of little litigation.

Other State Constitutions

Section 15 is unusual among state constitutional restrictions concerning the deposit of state, money in that it limits such deposits to 50 per cent of the bank's capital and surplus and requires that state deposits must be separately reported in all published statements. Although such restrictions may be imposed by legislative act or by administrative practice in some states, they are not set forth in any other state constitution.

The Michigan restriction of state deposits to national or state banks is provided only in California and New Mexico. Wyoming qualifies a similar restriction with "whenever practicable" and California makes an exception for deposit of monies in banks outside the state for payment of principal or interest of its own bonds at the place where payable. Maryland leaves the choice of depositories to the treasurer with approval of the governor and Missouri adds approval of the state auditor to a similar selection. Montana provides a state depository board consisting of the governor, state auditor and state treasurer. Indiana permits the legislature to invest trust funds "in a bank with branches on unquestionable security." Colorado,

Minnesota and South Carolina do no more than require the legislature to provide by law for safekeeping of state funds. Montana supplements a similar requirement with the provision for national or state banks mentioned above.

The Model State Constitution contains no comparable provision.

Comment

Section 15 is the type of constitutional provision which few states have found necessary and the restrictions imposed by it are in greater detail than any other state has found necessary. At the same time, it is a type of provision which "does no harm" in that it imposes no undue restriction upon the state's financial management. Its provisions are of a nature which might be described as "good law" and may be questioned only on the grounds of the necessity to do in the constitution what could be done by the legislative act.

2. Payments from Treasury

Article X: Section 16. No money shall be paid out of the state treasury except in pursuance of appropriations made by law.

Constitutions of 1835 and 1850

The Michigan constitution of 1835 contained one article which provided essentially the same restrictions provided in Sections 16 and 17 (Article X) of the present constitution:

> No money shall be drawn from the treasury but in consequence of appropriations made by law, and an accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws annually (Article XII, Section 4).

Section 16 of the present Michigan constitution is identical with a provision of the 1850 constitution (Article XIV, Section 5).

Constitution of 1908

Section 16 has not been amended since the present constitution was adopted.

Judicial Interpretation

Michigan courts have ruled that appropriations can be made by constitutional provision as well as by legislative act,[50] but they have also ruled that payments from the general fund of the state cannot be made except in accordance with appropriations by the legislature.[51] In this last ruling, the court determined that it could not direct the legislature to appropriate money from the general fund to cover deficiencies "in mandatory payments provided by constitutional appropriations."

These interpretations make it clear that the legislature has complete control of all state money not clearly designated for a particular purpose or use in a particular way by the constitution.

Other State Constitutions

Michigan is one of 39 states with constitutional provisions that require "appropriations made by law" as a condition for paying money from the state treasury. New Mexico, Maine and North Dakota accomplish the same purpose by requiring an appropriation authorizing payment and New Hampshire requires that payments must be "agreeable to acts of the legislature." The language of these provisions is not identical, but the intent is the same, except that a few states exclude payments of interest on the public debt (New Mexico, Montana, Wyoming). Hawaii provides that provision for control of rate of expenditures of appropriated state moneys shall be made by law. Oklahoma and Missouri also have provisions for allotting appropriations during the fiscal year and keeping them within available revenues.

The Model State Constitution contains essentially the same provision as Michigan's Section 16.

Comment

Section 16 is consistent with what is recognized as good constitutional policy. It requires all expenditures of money to be authorized by the legislature or by the constitution and thus places the state in a position to exercise controls at the point of appropriation.

3. Public Moneys; Statement of Receipts and Expenditures

Article X: Section 17. An accurate statement of the receipts and expenditures of the public moneys shall be attached to and published with the laws passed at every regular session of the legislature.

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[50] Civil Service Commission v. Auditor General, 302 Mich. 673.

[51] Board of Education of Detroit v. Superintendent of Public Instruction, 319 Mich. 436.

Constitutions of 1835 and 1850

Section 17 (as well as Section 16) has its origin in one section of the Michigan constitution of 1835, which provided that:

> No money shall be drawn from the treasury but in consequence of appropriations made by law, and an accurate statement of the receipts and expenditures of the public money shall be attached to and published with the laws annually. (Article XII, Section 4)

Section 17 of the present constitution is identical with Article XVIII, Section 5 of the constitution of 1850.

Constitution of 1908

Section 17 has not been amended since the present constitution was adopted.

Judicial Interpretation

Provisions of Section 17 have been in Michigan constitutions since the state was first organized. Their interpretation is well established and the section has been the subject of little litigation.

Other State Constitutions

Michigan is one of nine states which require by constitution the publication of an accurate statement of receipts and expenditures together with legislative session laws (others are California, Florida, Indiana, Iowa, Maryland, Oregon, South Carolina and Tennessee). Nineteen other states have constitutional provisions for the publication of statements of accounts.

The Model State Constitution contains no provisions comparable to Section 17, but does provide that all state expenditures shall be matters of public record.

Comment

Although all states do not have such a constitutional requirement, it is recognized as good practice to publish accounts of revenues and expenditures and some form of public reporting is practiced in every state.

Although publication is possible without constitutional mandate, it would be difficult to be critical of the provisions contained in Section 17.

4. Accounts of Public Officials

Article X: Section 18. The legislature shall provide by law for the keeping of accounts by all state officials, boards and institutions, and by all

> county officials; and shall also provide for the supervision and audit thereof by competent state authority and for uniform reports of all public accounts to such authority. Such systems of account shall provide for accurate records of all financial and other transactions and for checks upon all receipts and disbursements of all such officials, boards and institutions; and shall be uniform for all similar boards, institutions and county officials. All public accounts and the audit thereof shall be public records and open to inspection.

Constitutions of 1835 and 1850

The Michigan constitutions of 1835 and 1850 contained no provisions comparable to Section 18.

Constitution of 1908

Section 18 has not been amended since the present constitution was adopted.

This section was the subject of extended debate in the constitutional convention of 1907-08. It was forced out of the committee on miscellaneous provisions to the floor of the convention over the objections of the chairman of that committee.[52] Principal support for it developed in recognition of inadequate record keeping by the state and its local governments. It was modeled principally after new systems of state auditing which had been installed in Wyoming and Ohio and the proposal extended to municipalities as well as to the state and counties. Villages and school districts were also brought into the debate. Objections were raised to the effect that such a provision would generate a large and costly bureaucracy of accountants and that it was a proper subject for legislative action rather than for the constitution. This last objection was countered by the argument that the legislature had always had the necessary authority and had not exercised it. An effort to substitute “may” for “shall” was defeated.[53]

Judicial Interpretation

In view of the background of its adoption, it is interesting to note that Section 18 has been the subject of little litigation.

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[52] Michigan Constitutional Convention of 1908, Proceedings and Debates, January 2, 1908, pp. 487, 499, 500.

[53] Ibid., January 15,1908, pp. 771-775, January 29, 1908, p. 1080, February 20, 1908, pp. 1383-1388.

Other State Constitutions

Michigan stands alone among states with its constitutional requirement that the legislature must provide for a system of accounting. Connecticut, Maryland and New York place this function with the comptroller; Missouri places it with the state auditor; and Oklahoma with the state examiner. Michigan and Oklahoma require the legislature to provide for keeping of accounts. Michigan and West Virginia make public accounts public records open for inspection.

Constitutional requirements concerning audits and examinations of state accounts vary primarily in terms of who is made responsible. Michigan, Kentucky and Wisconsin require the legislature to provide for audits. Alaska requires the auditor to conduct post-audits "as prescribed by law" and Vermont simply requires that the treasurer's accounts must be audited annually. Other constitutional provisions for audit require examination by the comptroller (four states), the governor (four states), the grand jury (Colorado), secretary of state (Oregon), state auditor (six states) and state examiner (four states). Governors in nine states are under constitutional requirement to account to legislatures for moneys paid out to them or received. The Delaware treasurer must settle accounts annually with the legislature. Maryland permits the lower house of the legislature to examine records and appoint auditors, and Virginia requires the legislature to appoint a standing auditing committee.

Although state constitutions contain various provisions relating to county finances, Michigan is exceptional in the completeness of its requirement for state audits and uniform reports and availability of public accounts and audits for inspection. The nearest comparable provisions are the Virginia requirement that the legislature shall provide for examination of officers charged with collection and disbursement of public funds, and the Pennsylvania and Idaho requirements that the legislature provide for accountability for all fees collected and public and municipal moneys paid. Washington has a similar provision, but excludes combined city-counties or counties which have adopted home rule charters.

Although the Model State Constitution says nothing about uniform systems of accounts, it requires the legislature to appoint an auditor to conduct post audits as follows:

> Post-audit. The legislature shall appoint an auditor to serve at its pleasure. The auditor shall conduct post-audits as prescribed by law and shall report to the legislature and to the governor.

Comment

Although general requirements for audit are coming more and more to be subjects of basic law, the detailed subject matter of Section 18 is commonly regarded as more legislative than constitutional and its treatment in the various state constitutions is

in no way uniform. It was first introduced into the Michigan Constitution in 1908 as a way to force the legislature to make suitable provision for uniform accounts and audits and must be appraised against this background.

5. Ineligibility of Certain Persons to Public Office

Article X: Section 19. No collector, holder or disburser of public moneys shall have a seat in the legislature, nor be eligible to any office of trust or profit under this state, until he shall have accounted for and paid over, as provided by law, all sums for which he may be liable.

Constitutions of 1835 and 1850

The Michigan constitutions of 1835 and 1850 (Article IV, Section 8 and Article IV, Section 6, respectively) contained sections restricting dual office-holding by legislators in the manner provided in Article V, Section 6 of the present constitution. This restriction was all that was provided in this regard by the 1835 constitution.

The 1850 constitution added the further restrictions (Article IV, Section 18) upon civil appointments and interests in contracts with the state or counties as provided in Article V, Section 7 of the present constitution. The 1850 constitution also added a section (Article IV, Section 30) making a collector, holder or disburser of public moneys ineligible for a seat in the legislature. This section was carried forward into the 1908 constitution as Article, X, Section 19.

Constitution of 1908

Section 19 of the present constitution is identical with Article IV, Section 30 of the 1850 constitution with the single exception of an editorial change substituting or for nor. This section has not been amended since the present constitution was adopted.

Judicial Interpretation

Section 19 is well established in Michigan constitutional law and has been the subject of little litigation.

Other State Constitutions

Michigan is one of twelve states with constitutional provisions that collectors or holders of public moneys are ineligible for membership in the legislature while continuing to be collectors or holders and prior to the time when proper accounting

has been made. (Others are Illinois, Iowa, South Dakota, Tennessee, West Virginia, Ohio, Maryland, Louisiana, Texas, Arkansas and Kentucky.) Mississippi has a similar provision applicable to persons "liable as principal for public moneys unaccounted for" and New Hampshire applies the restriction to "collectors of excise and state and continental taxes." Delaware makes former state treasurers ineligible until financial settlement and discharge of balance due.

Georgia makes a defaulter for public money or any legal taxes required of him ineligible.

Michigan is also one of twelve states which provides by constitution that collectors or holders of public moneys are ineligible for office of trust or profit prior to the time when proper accounting has been made (others are Arkansas, Colorado, Illinois, Iowa, Indiana, Oregon, Louisiana, Maryland, Tennessee, Texas and West Virginia). Mississippi has the same provision for offices of trust or profit as for membership in the legislature. California, Georgia and Nebraska provide ineligibility in case of defaults or fraud. Wisconsin makes any defaulter to the United States or to state or local governments ineligible for an office of trust or profit.

It is notable that although there are some duplications in the two lists of 12 states, there are also some differences between them.

The Model State Constitution contains no provision comparable to Section 19.

Comment

Constitutional provisions such as Michigan's Section 19 have their origin in efforts to assure that legislators and public officials will not be in a position to create policies or circumstances under which they may profit as collectors and holders of public moneys or under which they may combine the functions, of collector or custodian with those of director or spender. In contrast to the more common practice of excluding particular officers or officials, these provisions exclude all collectors, holders or disbursers of public money and thus seek to avoid any question of incompatibility of interest. The lessons of history suggest the wisdom of protecting the integrity of handlers of public money.

D. LIMITATIONS OF STATE INTEREST AND ACTIVITIES

1. Stock, Interest of State in

Article X: Section 13. The state shall not subscribe to, nor be interested in the stock of any company, association or corporation.

Constitutions of 1835 and 1850

The 1835 constitution contained no similar provision.

Section 13 of the present constitution is identical with Article XIV Section 8 of the 1850 constitution except for the substitution of nor for or.

Constitution of 1908

Section 13 has not been amended since the present constitution was adopted.

Judicial Interpretation

Section 13 is an established provision of long standing and has not been the subject of much litigation. Its interpretation has been literal and Michigan courts have ruled that it prohibits state investments in building and loan associations and that the same prohibition applies to investments by school districts which are state agencies.[54] The attorney general has ruled, however, that it does not prohibit insurance of state risks by contract with mutual insurance companies.[55]

Other State Constitutions

Michigan is one of 27 states with constitutional prohibitions against state ownership of stock. Although the precise language of these provisions varies among the states, their general content is surprisingly uniform. It is their purpose to prevent the state from assuming the role of joint owner or joint participant in private activities. Ohio states that the state is “not to be joint owner or stockholder in any company” and four other states (Pennsylvania, Florida, Georgia and South Carolina)

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[54] Michigan Savings & Loan League v. Municipal Finance Commission, 347 Mich. 311.

[55] Opinion of the Attorney General, No. 0-1323, September 28, 1943.

forbid joint ownership in any company, association or corporation. West Virginia has the same restriction without the word corporation. Tennessee adds municipalities to the things in which the state cannot become a stockholder and Virginia forbids interest in company, association or corporation "for purpose of aiding in construction or maintenance of its work." Louisiana says the state shall "not purchase or subscribe to stock of or become part owner in any corporation or association, or for any private enterprise." The Utah restriction includes bonds as well as stocks.

There are some exceptions provided in some of the state provisions. For example, California excepts mutual water company associations or corporations and makes special allowances for irrigation districts. Oregon permits the state to receive donated stock and Nevada excepts corporations formed for educational or charitable purposes. Arizona, Montana and Colorado provide exceptions for stocks coming into state ownership by operation or provision: of law through such things as tax foreclosures, breach of bond, etc.

Comment

The popularity of constitutional restrictions such as Michigan's Section 13 is a direct outgrowth of the unhappy historical experience of many states in seeking to encourage development through public participation in private ventures. The hard-learned lesson of this experience is that governmental functions of regulation and control are incompatible with entrepreneurial functions of self-interest, and especially so under conditions of divided ownership. It is significant, however, that the new state constitutions in Missouri, New Jersey, Alaska and Hawaii contain no such restriction. Its absence permits investment of state funds in corporate stocks, subject to whatever investment controls are provided.

It is not entirely clear whether this provision applies to "public corporations" or only to agencies of the state. For example, can a university own stock in an endowment fund or could a city pension fund own stock under this provision? These are questions which might be clarified.

2. Internal Improvements

Article X: Section 14. The state shall not be a party to, nor be interested in, any work of internal improvement, nor engage in carrying on any such work, except:

1. In the development, improvement and control of or aiding in the development, improvement and control of public roads, harbors of refuge, waterways, airways, airports, landing fields and aeronautical facilities;

2. In the development, improvement and control of or aiding in the development, improvement and control of rivers, streams, lakes and water levels, for purposes of drainage, public health, control of flood waters and soil erosion;

3. In reforestation, protection and improvement of lands in the state of Michigan;

4. In the expenditure of grants to the state of land or other property.

Constitutions of 1835 and 1850

The constitutional history of Michigan in the matter of internal improvements is the story of extreme changes in position. The 1835 constitution contained the following provision:

> Internal improvement shall be encouraged by the government of this state; and it shall be the duty of the legislature, as soon as may be, to make provision by law for ascertaining the proper objects of improvement in relation to roads, canals and navigable waters; and it shall also be their duty to provide by law for an equal, systematic, economical application of the funds which may be appropriated to these objects.[56] (Article XII, Section 3)

As originally adopted, the 1850 constitution provided:

> The state shall not be a party to, or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the state of lands or other property.[57] (Article XIV, Section 9)

After two amendments adopted in 1893 and 1905, this provision of the 1850 constitution read as follows:[58]

> The state shall not be a party to, nor interested in, any work or internal improvement, nor engaged in carrying on any such work, except in the improvement of or aiding in the improvement of the public wagon roads and in the expenditure of grants to the state of land or other

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[56] Michigan Statutes Annotated (1936), Vol. 1, p.147.

[57] Michigan Statutes Annotated (1936), Vol. 1, p.421.

[58] Joint Resolution No. 9, 1893, ratified at spring election of 1893 and Joint Resolution No. 4, 1905, ratified at April election of 1905.

> property: PROVIDED, HOWEVER, That the legislature of the state, by appropriate legislation, may authorize the city of Grand Rapids to issue its bonds for the improvement of Grand river.[59] (Article XIV, Section 9)

Constitution of 1908

The constitution of 1908 contained a revised statement of the section on internal improvements which provoked surprisingly little debate in the convention and was adopted as follows:

> The state shall not be a party to, nor be interested in any work of internal improvement, nor engage in carrying on any such work, except in the improvement of, or aiding in the improvement of the public wagon roads, in the reforestation and protection of lands owned by the state and in the expenditure of grants to the state of land or other property.[60] (Article X, Section 14)

The original version of Section 14 was amended in 1945 and 1946 to reach its present wording as stated previously. The major amendments were in broadening the exceptions to the prohibition against internal improvements

Judicial Interpretation

This provision has been the subject of extensive litigation relating essentially to two basic questions: (1) authority of local governments to engage in public improvements or to be delegated such authority by the state and (2) definition of internal improvements which are permitted and those which are prohibited. Michigan courts have established that the state has no authority to delegate powers it does not have for its own purposes and that local governments, as instrumentalities of the state, can engage in no improvements forbidden to the state.[61] The courts have tended to decide each question concerning definition of public improvements in terms of particular circumstances as presented in each case. It has been determined that a self-liquidating project is not a work of internal improvement within the constitutional prohibition of Section 14.[62] In general, such public facilities as parks, waterworks, sewers and lighting have been found not in violation of the constitutional prohibition.

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[59] Michigan Statutes Annotated (1936), Vol. 1, p. 184.

[60] Michigan Statutes Annotated (1936), Vol. 1, p. 421.

[61] Oakland County Drain Commissioner v. City of Royal Oak, 306 Mich. 124, and other cases, see Michigan Statutes Annotated (1936), Vol. 1, p. 421.

[62] Oakland County Drain Commissioner v. City of Royal Oak, 306 Mich. 124, also Attorney General ex rel. Eaves v. State Bridge Commission, 277 Mich. 373.

Other State Constitutions

Michigan is one of eight states with constitutional limitations upon state participation in internal improvements. Differences among these limitations relate to exceptions. For example, Alabama, Kansas and Virginia exclude public highways from general limitations. Minnesota permits use of the tax on motor vehicles for roads and Wyoming excludes highways, water and irrigation works and airports and related facilities from requirements of a two-thirds vote of the people for any work of internal improvement. In contrast to these states, Kentucky declares that the state shall not construct any railroad or other highway.

In addition to highways, Alabama excludes harbors and seaports under state management and control up to $10,000,000; airports, facilities, and navigable waterways up to $10,000,000; and hospitals and other health facilities. Maryland permits only limited amounts in particular counties. Minnesota and Wyoming make special provision for works where property is granted to the state.

The Model State Constitution contains no comparable restrictions to those contained in Section 14.

Comment

Section 14 is another provision of the Michigan constitution which has its roots in the state's unfortunate experience with excessive involvement in internal improvements during its first years of existence. Its principal function is to keep the state and its subdivisions out of business and to protect the public purse against burdens of ill-advised ventures. In most instances the restriction has been applied in a manner to permit public facilities commonly associated with governmental services and wholly owned by government. Other states have managed with more or less success to accomplish the same purpose without such a prohibition by relying upon such other constitutional restrictions as those relating to stock ownership, appropriations for private purposes, debt and credit restrictions, etc.

3. Railroads; Acquisition and Disposal by State

Article X: Section 20. It shall be competent for the State to acquire, purchase, take, hold and operate any railroad, or railroad property, belonging to any railroad or railway company in this State heretofore organized under a special charter still in force and effect and constituting a contract between the State and said company,

wherein the right to purchase or acquire has been reserved to the State, whenever in the judgment of the Legislature such acquisition or purchasing is necessary to protect and conserve the rights and interests of the State under such charter or contract. Any and all debts or obligations of such company constituting a lien upon such railroad, or railroad property, may be assumed by the State; and such road or property may be leased, sold or disposed of in such manner as may be provided by law.

Constitutions of 1835 and 1850

The Michigan constitutions of 1835 and 1850 contained no provisions comparable with Section 20 of the present constitution.

Constitution of 1908

Section 20 was added to the present constitution by amendment ratified in 1917.[63]

This amendment must be considered against the historical background of railroad development in Michigan. Early efforts by the state to develop railroads resulted in severe financial difficulties and the state proceeded to divest itself of its railroad holdings.[64] The constitution of 1850 closed the door to future internal improvements of a similar character.[65]

Railroad charters were granted with provisions limiting the amount of taxes payable, but reserving rights to the state to buy the railroads. Similar rights to purchase reserved by other states in similar charters became instruments for changing the charters in a way to permit tax changes.[66] Michigan found this instrument ineffective because of its constitutional restrictions upon internal improvements[67]

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[63] Joint Resolution 3, 1917, ratified at April election, 1917.

[64] See Byron M. Cutcheon, Michigan as a Province, Territory and State, Vol. 3 pp. 280-287 (The Publishing Society of Michigan, 1906).

[65] See discussion of Article X, Section 14, above.

[66] See William G. McLoughlin, The Beginning of the Railroad Tax System of New Jersey (The Historical Society of Hudson County, Paper No. 13, January, 1917).

[67] 1850 Constitution, Article XIV, Section 9; 1908 Constitution, Article X, Section 14.

and the United States supreme court had ruled that the charters were contracts which the state must observe. The constitutional amendment to include Section 20 had as its purpose making the right of the state to purchase railroads effective and thus enabling the state to change the railroad tax.

Judicial Interpretation

Section 20 has not been the subject of litigation.

Other State Constitutions

No other state has a constitutional provision comparable with Michigan's Section 20. The Model State Constitution contains no such provision.

Comment

Section 20 is in the Michigan constitution for the sole purpose of overcoming the prohibition against internal improvements (Section 14) as they relate to railroads and thus to make effective the reservation of the state's right to purchase railroads contained in railroad charters. Its purpose is not to accomplish state ownership of railroads, but rather to give the state greater freedom in developing railroad taxation. It is in the nature of a special provision made against the background of special circumstances peculiar to Michigan arising out of other constitutional provisions.

E. STATE CREDIT AND DEBIT

1. Indebtedness; Limitation

Prepared in Part
by
Miller, Canfield; Paddock & Stone
Stratton So Brown

Article X: Section 10. The State may contract debts to meet deficits in revenue, but such debts shall not in the aggregate at any time, exceed 250,000 dollars. The State may also contract debts to repel invasion, suppress insurrection, defend the State or aid the United States in time of war. The money so raised shall be applied to the purposes for which it is raised or to the payment of the debts contracted. The State may borrow not to exceed 50,000,000 dollars for the improvement of highways and pledge its credit, and issue bonds therefor on such terms as shall be provided by law.

Section 11. No scrip, certificate or other evidence of state indebtedness shall be issued, except for such debts as are expressly authorized in this constitution.

Constitutions of 1835 and 1850

Section 10 has its origins in financial difficulties experienced early in Michigan statehood and associated with excessive state borrowing and bad credit management.[68]

The 1835 constitution as originally adopted contained no limitation on borrowing by the state. As a matter of fact, Article XII, Section 3 of the 1835 constitution directed that works of internal improvement should be encouraged, and required the legislature to provide by law funds for such purpose. Pursuant to this constitutional authorization, the legislature authorized the issuance of $5,000,000.00 in

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[68] Henry M. Utley and Bryon M. Cutcheon, Michigan as a Province, Territory, and State, Vol. 3, pp. 109-180 (The Publishing Society of Michigan, 1906).

bonds for canals and railroads. These bonds were negotiated by Governor Mason to the Morris Canal and Banking Company and to the United States Bank of Pennsylvania. The Canal and Banking Company and the Bank defaulted in making payment for the bonds and, in addition, the works of internal improvement contemplated did not materialize in the way originally contemplated. Accordingly, the people became quite antagonistic to works of internal improvement and to the state's financial participation therein. The 1835 constitution was amended in 1843 to require public referendum for the issuing of any debt "on the credit of the state." This amendment did not establish a dollar amount of debt limit, but it contained some of the language of the present Section 10. The entire amendment appears as follows:

> Amendment No. 2: That the constitution of this state be so amended, that every law authorizing the borrowing of money or the issuing of state stocks, whereby a debt shall be created on the credit of the state, shall specify the object for which the money shall be appropriated; and that every such law shall embrace no more than one such object, which shall be simply and specifically stated, and that no such law shall take effect until it shall be submitted to the people at the next general election, and be approved by a majority of the votes cast for and against it at such election; that all money to be raised by the authority of such law be applied to the specific object stated in such law, and to no other purpose, except the payment of such debt thereby created. This provision shall not extend or apply to any law to raise money for defraying the actual expenses of the legislature, the judicial and state officers for suppressing insurrection, repelling invasion, or defending the state in time of war.[69]

There is some legislative confusion associated with the resolution leading to this amendment to the 1835 constitution and some doubt that it was actually agreed to by the legislature of 1843.[70]

The constitution of 1850 dropped the referendum provision and established a $50,000 debt limit. It contained in two sections virtually the same language that was carried forward into Section 10 of the 1908 constitution as originally adopted.

These sections of Article XIV of the 1850 constitution provided:

> Section 3. The state may contract debts to meet deficits in revenue. Such debts shall not in the aggregate at anyone time exceed fifty thou-

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[69] Joint Resolution, approved March 9, 1843, and ratified at November election, 1844.

[70] Michigan Statutes Annotated (1936), Vol. 1, p. 152.

sand dollars. The moneys so raised shall be applied to the purposes for which they were obtained, or to the payment of debts so contracted.

Section 4. The state may contract debts to repel invasion, suppress insurrection, or defend the state in time of war. The money arising from the contracting of such debts shall be applied to the purposes for which it was raised, or to repay such debts.

The 1850 constitution (Article XIV, Section 7) added a provision similar to the present Section 11.

Constitution of 1908

Section 10, Article X of the constitution of 1908, as originally adopted, raised the amount of permissive debt from $50,000 to $250,000 and contained all of the language of the present Section 10 except the last sentence authorizing $50 million of highway bonds. This sentence was added by amendment ratified in 1919.[71] The specific provision in Section 10 with respect to borrowing for highway improvements has been interpreted as being a one-time authorization and, as soon as the $50,000,000.00 was issued, this authority expired.

Section 11 of the 1908 constitution continued the 1850 provision prohibiting issuing evidences of indebtedness, omitting the 1850 provision "except for the redemption of stock previously issued."

Judicial Interpretation

Michigan courts have ruled that the constitutional limitation upon the power of the state to borrow money for bridge purposes applies only upon indebtedness where the credit of the state is pledged, and that revenue bonds issued by the state which are payable only from tolls of the bridge, are not subject to such limitations.[72] This interpretation of the constitutional limitation also extends to bonds which are not general state obligations, but payable from taxes levied for highway purposes upon gasoline and motor vehicles.[73]

Other State Constitutions

A review of other state constitutional provisions indicates that most states have some sort of limitation on the amount of money that the state can borrow. These are either in the form of provisions similar to Michigan, which virtually prohibit borrowing, or are in the form of a provision permitting borrowing after approval of

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[71] Joint Resolution No. 1, 1919, ratified at April election, 1919.

[72] Attorney General v. State Bridge Commission, 277 Mich. 373.

[73] State Highway Commissioner v. Detroit City Controller, 331 Mich. 337.

electors or permitting borrowing up to a fixed amount. In connection with this, it should be noted that some state constitutional provisions, particularly Missouri, California, Oklahoma, Oregon and Utah, in the constitutional provision restricting state borrowing, also restrict borrowing by local communities such as cities, villages, counties and school districts.

Realistic comparison of Michigan constitutional debt provisions with those in other state constitutions requires that Section 10 and Section 11 be considered together. Section 11 prohibits the issuing of any evidence of state indebtedness "except for such debts as are expressly authorized in this constitution" and Section 10 spells out the exceptions. In this combination, the Michigan provisions are similar to those in 17 other states.

In the matter of the exception provided in Michigan for debt to "meet deficits in revenue," a majority of states authorize the incurrence of debt for such purposes. Of the 18 states, including Michigan, which have, a general constitutional prohibition against incurring any debt, eleven have a provision similar to Michigan's exception to meet deficits in revenue. Both the new constitutions of Alaska and Hawaii permit borrowing to meet deficits in revenue.

General debt limits are provided in varying degrees of stringency in a large number of state constitutions and subject to varying exceptions; Some are expressed in dollar amounts and others are expressed in percentages of assessed values (per cent is most common). It is a common practice to establish a limit which may be exceeded only by referendum.

Debt limits associated directly with debts incurred "to meet deficits in revenue" similar to the Michigan $250,000 limit provided in Section 10 vary widely as indicated below:

Nebraska	$ 100,000	
Texas	200,000	
Illinois	250,000	
Georgia, Kentucky	500,000	
Pennsylvania	1,000,000	
Alabama	300,000	
Ohio	750,000	
Arizona	350,000	
New Mexico	200,000	
Iowa	250,000*	
Washington	400,000*	
Maryland	50,000	without levying tax for interest and redemption

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* Exclusive of losses of permanent school or university funds by default.

South Dakota	$ 100,000	including debt for public improvements
Louisiana	2,000,000	1,000,000 total in one fiscal year, and $100,000 for one budget unit
Missouri	1,000,000	for unforeseen emergency in year without referendum
Utah	1 & 1/2	per cent of taxable values-debts for all public purposes
Colorado	3/4	mill on taxable value up to $100,000,000 and $100,000 thereafter. Maximum for one year 1/4 mill.

Authorization for state borrowing to "repel invasion, suppress insurrection and defend the state" without limitations otherwise provided is a common provision of state constitutions. Although the language varies, similar provisions appear in 44 state constitutions. Michigan is unusual in its inclusion of "aid to the United States in time of war" within this provision, but it is generally assumed that such authorization is implied in the "war and insurrection" provisions of other state constitutions.

Special provisions authorizing state debts for highway purposes and restricting their amount appear in the constitutions of nine states other than Michigan. Limitations upon amount of such debt and its use vary. New York permits use of $60 million for highways and parkways from proceeds of bonds sold for "elimination of railroad crossings and grades and incidental improvements" and also permits the legislature to make the state liable for $500 million of a public corporation to construct throughways. Ohio establishes a ceiling of $500 million of revenue bonds secured by taxes upon vehicles and motor fuels, with a further limitation to $125 million in any single year "and none after March 31, 1962." Pennsylvania establishes a ceiling of $100 million upon bonds for highway purposes "irrespective of any debt" and $10 million for self-supporting toll bridges in addition to including a list of improvements for which the state may issue bonds within a $50 million ceiling. California permits $40 million, Minnesota $150 million, and West Virginia $85 million for state highways and $50 million for secondary roads. Oregon sets the ceiling at 4 per cent of aggregate assessed value of property in the state. Louisiana has detailed provisions for financing specified road and bridge projects.

The Model State Constitution provides:

> No debt shall be contracted by or in behalf of this state unless such debt shall be authorized by law for a single project or object distinctly specified therein.

The new states of Alaska and Hawaii have provisions which apparently reflect lessons learned from the accumulated experience of all states. It is notable that these two new constitutions include one "long" provision and one "short" provision:

> Alaska State Debt: No state debt shall be contracted unless authorized by law for capital improvements and ratified by a majority of the qualified voters of the state who vote on the question. The state may, as provided by law and without ratification contract debt for the purposes of repelling invasion, suppressing insurrection, defending the state in war, meeting natural disasters, or redeeming indebtedness outstanding at the time this constitution becomes effective (Article IX, Section 8).

> Hawaii—Debt Limitation: All bonds and other instruments of indebtedness issued by and on behalf of the state or a political subdivision thereof must be authorized by the legislature, and bonds and other instruments of indebtedness of a political subdivision must also be authorized by its governing body.
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> Sixty million dollars is established as the limit of the funded debt of the state at any time outstanding unpaid. Bonds and other instruments of indebtedness in excess of such limit may be issued when authorized by a two-thirds vote of all the members to which each house of the legislature is entitled provided, such excess debt at the time of authorization, would not cause the total of state indebtedness to exceed a sum equal to fifteen per cent of the total of assessed values for tax rate purposes of real property in the state as determined by the last tax assessment rolls pursuant to law.
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> Instruments of indebtedness to meet appropriations for any fiscal period in anticipation of the collection of revenues for such period or to meet casual deficits or failures of revenue, which shall be payable within one year, and bonds or other instruments of indebtedness to suppress insurrection, to repel invasion, to defend the state in war or to meet emergencies caused by disaster or act of God, may be issued by the state under legislative authorization without regard to any debt limit.

A sum equal to ten per cent of the total of the assessed values for tax rate purposes of real property in any political subdivision, as determined by the last tax assessment rolls pursuant to law, is established as the limit of the funded debt of such political subdivision at any time outstanding and unpaid. The aggregate, however, of such debts contracted by any political subdivision during a fiscal year shall not exceed two per cent of the total of such assessed values in such political subdivision.

Instruments of indebtedness to meet appropriations for any fiscal period in anticipation of the collection of revenues for such period or to meet casual deficits or failures of revenue, which shall be payable within one year, may be issued by any political subdivision under authorization of law and of its governing body, without regard to the limits of debt herein-above provided.

All bonds or other instruments of indebtedness for a term exceeding one year shall be in serial form maturing in substantially equal annual installments, the first installment to mature not later than five years from the date of the issue of such series, and the last installment not later than thirty-five years from the date of such issue. Interest and principal payments shall be a first charge on the general revenues of the state or political subdivision, as the case may be.

The provisions of this section shall not be applicable to indebtedness incurred under revenue bond statutes by a public enterprise of the state or political subdivision, or by a public corporation, when the only security for such indebtedness is the revenues of such enterprise or public corporation, or to indebtedness incurred under special improvement statutes when the only security for such indebtedness is the properties benefited or improved or the assessments thereon.

Nothing in this section shall prevent the refunding of any indebtedness at any time (Article VI, Section 3).

Comment

The wide diversity of state constitutional provision in the matter of legislative authority to incur debt suggests that all states are seeking ways to avoid accumulated debts and debt service costs. Extreme variation in the amount of debt limits suggests that each amount was more a produce to conditions at that time of adoption rather than of any reasonable program of capacity. Dedication of revenues, especially highway revenues, for the payment of debts has been a common way to get around restrictions upon “general state debt.” Referendum requirements have been more effective in some states than others as restraining influences. Where the state of Michigan has issued its bonds, a specific amendment to the constitution has been approved by the electors. In this connection, veterans’ bonus bond issues were

authorized by specific amendments adding Sections 20a, 23a and 26 to Article X. The mental health hospital bond issue was authorized by adding Section 24 to Article X. State indebtedness to assist in school construction was specifically added by Sections 27 and 28 of Article X.

It does seem that limiting the amount that may be borrowed to meet deficits to $250,000.00 is somewhat unrealistic. At the time that the 1908 constitution was approved, the obligations of the state in various social areas, particularly welfare, were not particularly large and the sources of revenue were considerably more stable. Revenue produced by present sources (whether sales tax, income tax or various business activity taxes) will vary from time to time, depending upon general business conditions. Further, the obligations of the state will also vary from time to time, depending upon business conditions. Unfortunately, it may well result that times when revenues are down, obligations and requirements of the state may be increased. Accordingly, it would seem desirable to permit the state to borrow money to cover expenses during these times. Perhaps some sort of limitation based on a percentage of the budget could be imposed limiting the maximum amount that could be borrowed. It further might be desirable in connection with this to specifically provide that any borrowing must be repaid over a relatively short period of time. Both Alaska and Hawaii permit borrowing to meet deficits in revenues. In Alaska it must be paid before the end of the next fiscal year, and in Hawaii it must be repaid within one year.

It is further desirable to provide specifically in the constitution for procedures for the state borrowing moneys, upon approval of the electors, for major capital improvement purposes. This would avoid the necessity of amending the constitution every time a specific borrowing is required, thus avoiding cluttering up the constitution with specific borrowing authorities, as is presently done. In any event, any constitutional limitation on state borrowing should specifically be confined to the state itself and should not cover subordinate municipal units.

2. State Credit

by
Miller, Canfield, Paddock & Stone
Stratton S. Brown

Article X: Section 12. The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private.

Constitutions of 1835 and 1850

There is no provision similar to Article X, Section 12, in the 1835 constitution. For reasons noted in the discussion under Sections 10 and 11 of Article X, a provision

similar to Section 12 was included in the 1850 constitution (Article XIV, Section 6).

Constitution of 1908

The 1908 constitution added the words "public or private" to the 1850 provision. The section has not been amended.

Judicial Interpretation

This section is somewhat similar to Article VIII, Section 25, of the state constitution which prohibits cities and villages from loaning their credit, or collecting any tax "for other than a public purpose." The Michigan supreme court and several attorney general's opinions have held that Section 12, Article X, of the Michigan constitution applies not only to the state but to its several political subdivisions such as counties, cities, villages and school districts. (Detroit Art Museum v. Engle, 187 Mich. 432)

This constitutional provision has been interpreted several times by the Michigan supreme court. In Detroit Art Museum v. Engle, supra, the court held that because of this provision the city of Detroit could not appropriate funds to support the Detroit Art Museum even though the title to the land was in the city and the board of directors had some city-appointed members.

In Skutt v. Grand Rapids, 275 Mich. 258, it was held that this provision of the constitution prohibited a scheme whereby the city of Grand Rapids permitted tax delinquents to work off delinquent city taxes by performing labor for the city.

In Youngglass v. Flint, 345 Mich. 456, the supreme court ruled that this provision prohibited the city of Flint from giving land for a federal armory. In Hays v. Kalamazoo, 316 Mich. 443, the Michigan supreme court held that the city of Kalamazoo could pay dues to the Michigan Municipal League because the city was receiving benefits in the form of professional advice from the League.

Other State Constitutions

Most states (approximately 46 including Michigan) have provisions of this type. The restriction on the grant of state credit, however, in contrast to the Michigan provision, is applied only to private persons, associations or corporations in almost all of these states. Sixteen of these states have provisions which specify further exceptions to the general restriction.[74]

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[74] Index Digest, pp. 950-951.

Comment

It is believed that the prohibition in Article X, Section 12, of the state constitution against lending of credit should be clarified with respect to its application to the investment of public funds. This constitutional provision has been variously interpreted by municipal attorneys in permitting investment of public funds only in United States obligations, only in bonds of federal and state agencies or subdivisions, and in some situations in any securities other than corporate stocks, which is specifically prohibited by Article X, Section 13, of the 1908 constitution.

The background of Article X, Section 12, which involved proprietary participation by the state in the construction of railroads and canals, indicates that perhaps the intention and purpose of this constitutional provision is to prohibit the state or its political subdivisions from participating in a proprietary manner or in various enterprises normally carried on by private enterprise. Since 1908, retirement systems and pension funds have become common things with the state and with its political subdivisions. A narrow interpretation of the subject constitutional provision would seriously hamstring prudent investment of public funds. Moreover, it would seem that over a long period of time better management of public funds could be accomplished by legislative regulation of investment rather than a constitutional prohibition. In any event, Article X, Section 12, of the state constitution should be changed in such a way as to make certain that it does not limit the investment of public funds.

3. State Bonds for Loans to School Districts

Prepared in Part
by
Miller, Canfield, Paddock & Stone
Fred M. Thrun

Article X: Section 27. The state may borrow from time to time such amounts as may be required but not to exceed an aggregate of $100,000,000.00, pledge its faith and credit and issue its notes or bonds therefore, for the purpose of making loans to school districts for the payment of principal and interest on school bonds heretofore or hereafter issued for acquiring, constructing, enlarging, improving and equipping school buildings and sites and for the funding or refunding of obligations incurred for 1 or more of the aforesaid purposes.

If the minimum amount necessary to be levied in any calendar year for the payment of principal and interest on the bonds of a

school district issued prior to July 1, 1962, after deducting any funds pledged to and available for the payment thereof, shall exceed 13 mills on each dollar of its assessed valuation as shall loan such school district the amount of such excess, but all loans so made shall not exceed in the aggregate the sum of $100,000,000.00 and shall be, subject to such terms and conditions as shall be prescribed by law. After a school district shall have received such a loan or loans from the state, it shall thereafter levy each year no less than the said 13 mills until the amount loaned has been repaid and any tax collections in an year over and above the minimum requirements for principal and interest shall be used towards the repayment of such loan or loans. The legislature shall prescribe the conditions upon which levies for bond principal and interest shall be included in computing the amount to be loaned by the state under this section, one of which conditions shall be that the maturities on the bonds of any future issue shall conform with statutory requirements, with the last maturity date not less than 25 years from the issuance date on the bonds.

The tax limitation prescribed in section 21 of this article shall not apply to tax levies for any future issue of school district bonds issued prior to July 1, 1962, including refunding bonds and such tax levies shall be without limitation as to rate or amount: Provided, That the bonds of such issue last maturing shall be due in "not less than 25 years" from date of issuance but may be subject to prior redemption in accordance with the provisions thereof.

Section 28. The state, in addition to any other borrowing power, may borrow from time to time such amounts as shall be required, pledge its faith and credit and issue its notes or bonds therefor, for the purpose of making loans to school districts as provided in this section.

If the minimum amount which it would otherwise be necessary for a school district to levy in any year to pay principal and interest on its qualified bonds, including any necessary allowances for estimated tax delinquencies, exceeds 13 mills on each dollar of its assessed valuation as last equalized by the state, or such lower millage as the legislature may prescribe, then the school district may elect to borrow all or any part of the excess from the state. In that event the state shall loan the excess amount to the school district for the payment of principal and interest. If for any reason any school district will be or is unable to pay the principal and

interest on its qualified bonds when due, then the school district shall borrow and the state shall loan to it an amount sufficient to enable the school district to make the payment.

The term “qualified bonds” means general obligation bonds of school districts issued for capital expenditures, including refunding bonds, issued (1) prior to May 4, 1955, (2) on or after May 4, 1955 but prior to July 1, 1962, only if, and to the extent that, such bonds shall have been qualified as provided by law pursuant to section 27 of this article, and (3) on or after July 1, 1962, but prior to July 1, 1972, if such bonds shall be qualified as provided by law pursuant to this section.

After a school district has received loans from the state, each year thereafter it shall levy for debt service, exclusive of levies for nonqualified bonds, not less than 13 mills or such lower millage as the legislature may prescribe, until the amount loaned has been repaid, and any tax collections therefrom in any year over and above the minimum requirements for principal and interest on qualified bonds shall be used towards the repayment of state loans. In any year when such a levy would produce an amount in excess of the requirements and the amount due to the state, the levy may be reduced by the amount of the excess.

Subject to the foregoing provisions, the legislature shall have the power to prescribe and/or limit the procedure, terms and conditions for the qualification of bonds, for obtaining and making state loans, and for the repayment of loans.

The power to tax for the payment of principal and interest on bonds hereafter issued which are the general obligations of any school district, including refunding bonds, and for repayment of any state loans made pursuant to this section, shall be without limitation as to rate or amount.

All rights acquired under section 27 of this article by holders of bonds issued prior to July 1, 1962, shall remain unimpaired.

This section shall take effect on July 1, 1962.

Constitutions of 1835 and 1850

The earlier Michigan constitutions contained no provisions of this type.

Constitution of 1908

These provisions were not a part of the constitution as originally adopted in 1908. They were respectively added by amendment in 1955 and 1960.

1955 Amendment. Section 27 was added to the constitution by an amendment approved by the electors of the state at the general election of April 4, 1955. The provisions of this amendment exempt tax levies for debt charges on future school bonds (issued after 1955 but prior to July 1, 1962) from the provisions of the l5-mill property tax limitation, provided, however, that the last bond in such an issue matured in not less than 25 years. In addition, the amendment permits refunding of outstanding school bonds under the same terms so that they also could be brought out from under the l5-mill limit. These provisions apply to all school districts subject to eligibility requirements prescribed by statute. The school bond loan fund authorized under Section 27 expires July 1, 1962.

1960 Amendment. Section 28 was added to the constitution by an amendment approved by the electors of the state at the November election of 1960. Section 27 of Article X expires as to bonds issued on or after July 1, 1962. Section 28, therefore, is in a sense a continuation of Section 27, but contains some important differences (see Comment, below).

Statutory Implementation

Act 74 of 1955, as amended, prescribes the procedures to be followed by the state for issuing its notes or bonds to provide the funds necessary to be loaned to school districts eligible for loans under the provisions of Section 27 of Article X. The eligibility for such loans was set forth in Act 151 of 1955. The necessity for the latter act is prescribed in Section 27 which states:

> …all loans so made shall not exceed in the aggregate the sum of $100,000,000 and shall be subject to such terms and conditions as shall be prescribed by law.

The statute places the duty of determining “qualification” of any proposed issue of bonds for eligibility for loans from the state in the superintendent of public instruction. The act further denies such eligibility for bonds issued for certain purposes, such as athletic fields and swimming pools.

Act 112 of 1961 provides the procedure for the issuance and sale of bonds and notes of the state to provide the necessary funds to be loaned to eligible school districts under the provisions of Section 28 of Article X.

Act 108 of 1961 prescribes the terms and conditions for qualifying bond issues for eligibility for state loans, and the procedures for obtaining such loans under Section 28.

Judicial Interpretation

Soon after the adoption of Section 27 a test case was presented for decision to the Michigan supreme court because of the refusal of a New York firm of attorneys to furnish its approving opinion as to the validity of a bond issue proposed to be issued in accordance with the provisions of this section. (Graham v. Miller, 348 Mich. 684.) The court, in essence, held that the section was properly presented and adopted by the electors of the state, and that the section was not invalid because of duality of purpose.

Opinions of the Attorney General

The attorney general rendered a comprehensive opinion, dated August 12, 1955, numbered 2236, answering detailed procedural questions presented by the municipal finance commission concerning "unlimited tax" school bonds issued under Section 27.

Other State Constitutions

The constitutions of California and Ohio, in addition to Michigan, authorize state bond issues to provide school sites and buildings. California, like Michigan, makes loans to school districts from bond proceeds. State borrowing in Ohio is authorized for the purpose of acquiring sites and for constructing, equipping or repairing public buildings or structures for classroom facilities which are leased or sold by the state to public school districts that are unable to provide adequate facilities without state assistance.

California's constitution provides that the legislature shall require each district receiving an allocation from the bond fund to repay the loan "on such terms and in such as may be within the ability of the district to pay."

Ohio provides that the bonds are to be payable from state taxes and excises. The proceeds of an excise tax on cigarettes are earmarked to the capital improvements bond retirement fund.[75]

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[75] Index Digest, pp. 955, 958.

Comment

In 1938 the Michigan supreme court upheld the public debt commission in refusing to approve a school bond issue where no increase in the fifteen-mill limitation on taxes had been voted by the electors to provide taxing funds for the payment of principal and interest on the bonds. (In re School District No. 6, Paris and Wyoming Townships, Kent County, 284 Mich. 132.) The requirement to provide an adequate increase in the limitation on taxes was subsequently incorporated in the municipal finance act. (Act 202 of 1943)

Until amended in 1948, the tax limitation provided in Article X, Section 21, could only be increased for a period of five (5) years, and required a 2/3 vote of the qualified electors for approval of any increase. Necessarily, then, school bonds could not have a longer maturity than provided by five (5) years of taxing power. As a result, in general, tax rates for bond issues were necessarily on the average very high and in many cases could not supply the funds necessary for an adequate building program.

To remedy this situation Article X, Section 21, was amended at the general election in November, 1948, to the effect that the limitation on taxes could be increased for a period of twenty (20) years and by a majority vote of the electors.

Although the 1948 amendment did alleviate the situation with respect; to high tax rates for school bond issues in many of the districts of the state, nevertheless, the results were not nearly as good as the sponsors of the amendment had hoped. Purchasers of tax-limited bonds required voted millage increases considerably in excess of the actual requirements at the time of the issuance of the bonds in order to provided adequate safety against declines in valuation or tax collections, and further required that even with a voted increase of twenty (20) years the bond plan required pledged levies sufficient to retire the bonds in approximately fourteen (14) years. Also, in many growing communities where successive bond issues were required to meet the increasing school building needs, the total voted increases for such issues approached and sometimes equaled the total thirty-five (35) mills available. This was largely because the bond issues had to be voted earlier in time than the increases in taxable valuation resulting from increased population and new construction.

Most of the school districts experiencing a rapid growth in population were further penalized as to interest rates by the low ratings given by the bond rating agencies.

Section 28, although in a sense the successor to Section 27, contains important differences resulting from the experience gained under the operation of Section 27. First, it will be noted that there is no limitation on the amount that may be borrowed by the state for the purposes of the section.

Borrowing by school districts from the state loan fund has been considerably less than had been anticipated.[76]

Rating agencies and bond purchasers have objected to the limit of $100,000,000, on the grounds that commitments to qualified bond issues could, in the future, exhaust the fund, even though current borrowings appeared small. The removal of the limit undoubtedly will result in better ratings for qualified bond issues.

Under the provisions of Section 27, bond issues could be qualified for loans only where the last maturity date was not less than twenty-five (25) years from the date of issuance. This provision in Section 27 was included to avoid having relatively short term bonds with high tax rates proposed in order to borrow from the state loan fund. Also, there was the view that the electors of the state were not yet ready to do away with limitation on taxes for relatively short term bond issues. Stated in another way, the provision was to force lower tax rates for school bond issues.

A great many districts continued to issue tax-limited bonds because of the belief that sound financing to meet their particular requirements required bonds with a shorter last maturity than twenty-five (25) years.

No one questions the soundness of such financing in many instances and, therefore, Section 28 leaves the determination of the conditions under which relatively short term bonds may be qualified to the legislature. Act 108 of 1961, referred to above, meets the problem by setting a minimum maturity period for any issue to be qualified in relation of the debt of the district to its taxable valuation.

The act further has liberalized the conditions under which bonds may be qualified by the superintendent of public instruction, and provides for the enforced borrowing by school districts where default appears or is in prospect.

See also the Comment under Article X Section 21 on the 15-mill limitation.

4. Bond Issue Authorizations

Article X: Section 20a. The state shall borrow not to exceed 30,000,000 dollars, pledge its faith and credit and issue its notes or bonds therefor, for the purpose of paying to each person who entered into the military, naval or marine forces of the United States between April sixth, 1917, and November eleventh, 1918, and served honestly and faithfully therein during the late world war and who was a resident in this state at the time of entering such service, the sum of 15 dollars for each month or major fraction thereof, of such service, up to and including August first, 1919.

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[76] As of September 15, 1961, the total amount loaned was $535,500.00 of which $332,323 is outstanding. Figures obtained from the superintendent of public instruction.

Article X: Section 23a. The state shall borrow not to exceed $270,000,000.00, pledge its faith and credit and issue its serial notes or serial bonds therefor, for the purpose of paying to each person, or if deceased to the surviving husband or wife, child or children, or to the surviving dependent mother, father, person standing in loco parentis, brothers and sisters, in the order named, of any person who served in the military, naval, marine or coast guard forces of the United States, including women serving in auxiliary branches thereof, between September 16, 1940, and June 30, 1946, who served honorably and faithfully therein during said period, who was a resident of this state at the time of entering such service and for a period of at least 6 months prior to entering therein, and whose service continued for more than 60 days during said period, the sum of $10.00 for each month, or major fraction thereof, of service during said period in any state of the United States, and the District of Columbia, and the sum of $15.00 for each month, or major fraction thereof, of service during said period outside any state of the United States, and the District of Columbia, but not to exceed a total payment of $500.00 to anyone person: Provided, That there shall be paid to the surviving husband or wife, child or children, or to the surviving dependent mother, father, person standing in loco parentis, brothers and sisters, in the order named, of each person who has heretofore died or who shall thereafter die from service connected—causes incurred between September 16, 1940, and June 30, 1946, a sum equal to the difference between what he has received and the sum of $500.00.

The legislature is authorized and directed to provide for the issuance of serial notes or serial bonds, for the method of and eligibility for payment of the sums herein directed and for the retirement of such notes and bonds as shall be issued hereunder. The legislature is authorized and directed to provide for the borrowing of the money herein provided at the lowest possible cost to the state, and is further authorized and directed to provide by taxation or other means for the retirement of the debt at the earliest possible time. In the event that the cost of the payments herein provided shall be greater than the amount authorized to be borrowed, the legislature is authorized and directed to provide for the payment thereof from the general fund of the state.

Section 25. There shall be paid, from the moneys authorized to be borrowed under the provisions of section 23 of this article for the payment of a bonus with respect to military service, to the surviving husband or wife, child or children, or to the surviving mother or father, or surviving dependent person standing in loco parentis, dependent brothers and dependent sisters, in the order named, of any person who has heretofore died or who shall hereafter die from service connected causes and who served in the military, naval, marine or coast guard forces of the United States, including women serving in auxiliary branches thereof, between June 27, 1950, and the termination of the state of national emergency, which state of national emergency was proclaimed on December 16, 1950, who served honorably and faithfully therein during such period, who was a resident of this state at the time of entering such service and for a period of at least 6 months prior to entering therein, the sum of $500.00: Provided, That the termination of the national emergency for the purpose of this section shall be determined by act of the legislature of this state, and the liability of the state for the purposes herein set forth shall not exceed the total amount that may be borrowed under the provisions of said section 23 of this article.

Section 26. The state shall borrow not to exceed $80,000,000.00, pledge its faith and credit and issue its serial notes or serial bonds therefor, with maturities of not to exceed $1,000,000.00 in each of the years 1956 to 1965, both inclusive, and $13,000,000.00 in each of the years 1966 to 1968, both inclusive, and $14,000,000.00 in each of the years thereafter, for the purpose of paying to each person, or if deceased to the surviving husband or wife, child or children, or to the surviving mother, father, person standing in loco parentis, brothers and sisters, in the order named, of any person who served in the military, naval, marine or coast guard forces of the United States, including women serving in auxiliary branches thereof, between June 27, 1950, and December 31, 1953, who served honorably and faithfully therein during said period, who was a resident of this state at the time of entering such service and for a period of at least 6 months prior to entering therein, and whose service continued for more than 60 days during said period, the sum of $10.00 for each month, or major fraction thereof, of service during said period in any state of the United States, and the District of Columbia, and the sum of $15.00 for each month, or major fraction thereof, of service during said period outside any state of the United States, and the District of Columbia, but not to

exceed a total payment of $500.00 to any one person: Provided, That there shall be paid to the surviving husband or wife, child or children, or to the surviving dependent mother, father, person standing in loco parentis, brothers and sisters, in the order named, of each person who has heretofore died or who shall hereafter die from service connected causes incurred between June 27, 1950, and December 31, 1953, a sum equal to the difference between what he has received and the sum of $500.00: Provided further, That no payment shall be made under the provisions of this section in any case in which payment has been made or shall hereafter be made under the provisions of section 25 of this article, payment both under the provisions of this section and section 25 of this article being expressly prohibited.

The state administrative board is authorized and directed to provide by resolution from time to time for the issuance and sale of serial notes or serial bonds at the lowest possible cost, and the legislature is authorized to provide for the method of and eligibility for payment of the sums herein directed. For the retirement of such notes and bonds as shall be issued hereunder, there is appropriated from the general fund each year during their life a sum equal to the amount of principal and interest payments due and payable in each such year. The powers and duties conferred by this amendment on the state administrative board are self-executing.

Section 24. The state may borrow not to exceed $65,000,000.00 to plan, acquire, construct and equip hospitals for the mentally ill and epileptics, and training schools for mental defectives and the tuberculosis hospitals and issue bonds pledging the full faith and credit of the state, on such terms as shall be provided by law.

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 did not contain these provisions.

Constitution of 1908

These provisions were not included in the constitution of 1908 as originally adopted. They were added by amendment as follows:

Section 20a—Military Service Bonus, World War I—Approved April, 1921.
Section 23a—Military Service Bonus, World War II—Approved November, 1946.
Section 25 –Death Benefit, Korean Period—Approved April, 1951.
Section 26 –Military Service Bonus, Korean Period—Approved November, 1952.
Section 24 –Hospital Building Fund—Approved, November, 1950.

There has been little or no litigation in connection with these sections.

As of June 30, 1960, the bonds issued pursuant to these provisions were as follows:

Section	Purpose	Total Amount of Bonds Issued (in millions)	Amount Outstanding June 30, 1960 (in millions)	Final Maturity
20a	Military Service WWI	$ 30.0	0	1942
23a	Military Service WWII	230.0	65.3	1965
26	Military Service Korea	60.0	55.0	1970
25	Death benefit—Korea—no bonds issued—paid from funds under Section 23a.			
24	Hospital Building Fund	65.0	39.6	1971

Comment

Consideration might be given to deleting these provisions from the constitution. The benefits still payable under them and the interests of the bond holders could be protected by including a “saving clause” in the schedule of a revised constitution—to the effect that nothing in this constitution be construed as in any way impairing the obligation of the state in connection with any benefits conferred by or issue of bonds authorized by the provisions of Article X, Sections 20a, 23a, 24, 25, and 26 of the constitution of 1908 and the obligation of the state in connection with said sections is specifically recognized.

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CHAPTER XI EDUCATION

(over)

Section Detail

XI EDUCATION

A. GENERAL

1. Encouragement of Education

Article XI: Section 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.

Constitutions of 1835 and 1850

The language of this provision is found in the Ordinance of 1787 (Article III, Articles of Compact). However, the provision does not appear in the constitutions of 1835 and 1850.

Constitution of 1908

Section 1 has not been amended since the present constitution was adopted.

Judicial Interpretation

In regard to the relationship of education and local government, the Michigan courts have held that education is a subject for the legislature and is not a part of the local self-government inherent in the township or municipality, except as the legislature may provide otherwise.[1]

Other State Constitutions

Ten other states have provisions of the type set forth in Section 1. The provisions of the Massachusetts and Maine constitutions are somewhat more specific in that they mention certain types of schools and institutions that are to be encouraged. Maine makes it a duty of the legislature to encourage and endow academies, colleges and seminaries, but the legislature must make this endowment conditional on the reservation of the power to alter, limit or restrain the powers of the institutions.[2]

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[1] Attorney General v. Board of Education of Detroit, 154 Mich. 584.

[2] Index Digest, pp. 369-370.

The Model State Constitution provides that the legislature shall provide for a system of free public schools and such other public educational institutions, including public institutions of higher learning, as may be desirable.

The U.S. constitution contains no provision of this type.

Comment

There has been a long line of legislative enactments indicating a settled purpose on the part of the state to encourage education. Such a provision neither grants nor limits the power of the state in this area but rather indicates intent.

B. ELEMENTARY-SECONDARY SCHOOLS

1. Superintendent of Public Instruction

Article XI: Section 2. A superintendent of public instruction shall be elected at the regular election to be held on the first Monday in April, nineteen hundred nine, and every second year thereafter. He shall hold office for a period of two years from the first day of July following his election and until his successor is elected and qualified. He shall have general supervision of public instruction in the state. He shall be a member and secretary of the state board of education. He shall be ex officio a member of all other boards having control of public instruction in any state institution, with the right to speak but not to vote. His duties and compensation shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution (Article X, Section 1) and the 1850 constitution (Article XIII, Section 1) both provided for the office of the superintendent of public instruction.

The constitution of 1835 provided for the appointment of the superintendent by the governor with the consent of the legislature, in joint vote. The constitution of 1850 (Article VIII, Section 1) provided for the election of the superintendent at each general biennial election and Article IX, Section 1 provided for compensation of $1,000 annually.

Constitution of 1908

The constitution of 1908 continued the 1850 provision for election of the superintendent, but provided that he be elected at the April election. Those parts of the present section which provide that the superintendent will be a member and secretary of the state board of education and an ex officio member of all other boards having control of public instruction were added in the constitution of 1908. The provision that the compensation of the superintendent was to be prescribed by law was also added in the constitution of 1908. Section 2 has not been amended since the present constitution was adopted, nor has it presented any serious problem of interpretation.

Statutory Implementation

The statutes provide the superintendent with little real control over primary and secondary education. Such control for the most part has been delegated by the legislature to the local school districts under authority granted by the constitution to the legislature to establish a common or primary school system (Article XI, Section 9).[3]

The superintendent is required to report to the legislature on the general educational conditions of the state including a statement of the operation of the several state institutions and recommendations for the improvement of the general educational system.[4]

The superintendent has executive authority to require school officers to observe the laws relating to schools and to maintain school or educational facilities for the minimum prescribed statutory period. The superintendent may examine and audit the official records and accounts of any school district, require school officers to account for illegally expended funds, appoint a time and place and proper instructors for a state teachers' institute and county institutes,[5] approve the establishment of community colleges,[6] adopt rules and regulations for keeping school census records[7] and institute proceedings on the dissolution of an educational corporation which fails to comply with the law.[8]

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[3] M.S.A. 15.3023, sec. 23; Belles v. Burr, 76 Mich. 1.

[4] M.S.A. 15.5252, sec. 252.

[5] M.S.A. 15.3252, sec. 252.

[6] M.S.A. 15.3792, sec. 792.

[7] M.S.A. 15.3948, sec. 948.

[8] M.S.A. 21.178, sec. 177.

In the way of fiscal duties, the superintendent is required to apportion according to law the primary school interest fund among the townships and cities,[9] submit to the county clerks and treasurers a statement of the townships, school districts, and cities that are entitled to receive library moneys,[10] and act as the sole state agency to apply for and receive federal aid grants to the state for the use of public schools.[11]

In addition the superintendent is assigned a wide range of non-educational legal responsibilities. He is by law or by appointment a member of several boards and commissions. These include: the state administrative board,[12] the board of auditors,[13] the state board of canvassers,[14] the board of escheats,[15] and the municipal finance commission.[16]

Other State Constitutions

All 50 states provide by constitution or statute for a chief school officer called variously, "Superintendent of Public Instruction," "Commissioner of Education," etc. The position of chief school officer is provided for in the constitutions of 36 states and by statute in the remaining 14 states.

Method of Selection Among the 50 states there are three distinct methods of selection of the constitutional and statutory chief school officers. In 23 of the 50 states the position is filled by popular election. In the remaining 27 states, the chief school officer is appointed. The appointment is by the state board of education in 22 states and by the governor in five states.

In the 36 states which provide constitutionally for a chief school officer, 23 provide that he shall be elected, 12 provide that he be appointed (10 by the board of education and 2 by the governor) and one state, Nevada, provides the method of selection be determined by the legislature (which has provided for appointment by the state board of education).

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[9] M.S.A. 15.3258, sec. 250.

[10] M.S.A. 3915., sec. 951.

[11] Except vocational education funds made available under the Smith-Hughes Act and vocational rehabilitation funds. The legislature created a special board of control for vocational education. Under the law the superintendent is an ex officio member of this board and is its executive officer (Act 149, 1919).

[12] M.S.A. 3.261.

[13] M.S.A. 13.451, sec. 1.

[14] M.S.A. 6.470.

[15] M.S.A. 13.451, sec. 1.

[16] M.S.A. 5.3188 (3), sec. 1.

Since 1947 there has been a distinct trend among the 50 states towards appointment rather than election of the chief school officer. Eight states have changed from popular election to appointment and none has changed from appointment to election. Not only are an increasing number of chief school officers being appointed, but there is also a trend toward appointment by a state board of education rather than by the governor.[17]

Term of Office Of the 23 state whose constitutions provide for an elected chief school officer, seven (including Michigan) provide for a two-year term while 15 provide for a four-year term. Oregon does not constitutionally fix the term of office.

Of the 12 states whose constitutions provide for an appointed chief school officer, one provides for a two-year term, three provide for a four-year term, and the remaining eight provide that the chief school officer serve at the pleasure of the appointing authority. In Nevada, where the office is constitutional, the method of selection and term of office are provided by law.

Powers and Duties In the 36 state constitutions which provide for a chief school officer, ten (including Michigan) give the chief school officer supervision or general supervision over public education. Twelve state constitutions provide that the chief school officer's powers shall be as prescribed by law, which allows legislative discretion in providing for the organization of the education authority.

In the remaining fourteen states with a constitutional chief school officer, the state board of education is given supervisory powers over public education and the chief school officer serves as the chief executive or administrative officer of the board of education. In most of these 36 states it is provided that the duties of the chief school officer shall be prescribed by law.

As previously indicated, the constitutions of fourteen states make no mention of the office, nor do they assign responsibility for public education beyond requiring the legislature to establish and maintain a system of public schools. This leaves the responsibility for providing for the organization of the education authority with the legislatures.

Comment

A number of studies have recommended substantial changes in Michigan's constitutional provisions relating to the organization for state supervision of el-

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[17] See The Book of the States, 1960-61, p. 294 and the Index Digest.

ementary-secondary education.[18] The recommendations of these studies have focused on two items: 1) the method of selection of the superintendent of public instruction and 2) the respective roles of the state board of education and the superintendent of public instruction.

The results of these studies suggest that consideration might be given to appointment rather than election of the superintendent of public instruction and strengthening the state board of education by assigning to it the powers and duties now vested in the superintendent, with the superintendent serving as the chief executive-administrative officer of the board. (See also Comment on Section 6, below, relating to the state board of education.)

If the superintendent is to continue to be elected, consideration might be given to extending the term of office to four years. (See Chapter VI, Executive Department.)

And, even though election of the superintendent is continued, consideration might be given to providing that all the powers and duties be prescribed by law, thus giving the legislature discretion in assigning powers and duties.

2. Primary School System

Article XI: Section 9. The legislature shall continue a system of primary schools, whereby every school district in the state shall provide for the education of its pupils without charge for tuition; and all instruction in such schools shall be conducted in the English language. If any school district shall neglect to maintain a school within its borders as prescribed by law for at least 5 months in each year, or, to provide for the education of its pupils in another district or districts for an equal period, it shall be deprived for the ensuing year of its proportion of the primary school interest fund. If any school district shall, on the second Monday in July of any year, have on hand a sufficient amount of money in the primary school interest fund to pay its teachers for

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[18] The Improvement of Public Education in Michigan, July, 1944, Lansing, Michigan, Michigan Public Education Study Commission, p. 159. Ninety-third Report of the Superintendent of Public Instruction, 1933-35. Lansing, Michigan, Department of Public Instruction, p. 14. Ninety-seventh Report of the Superintendent of Pub1ic Instruction, 1944, Lansing, Michigan, Department of Public Instruction, p. 14. The state reorganization (Little Hoover) study of 1951, Michigan's Educational Agencies, Report 17, pp. 13-27.

the next ensuing 2 years as determined from the pay roll of said district for the last school year, and in case of a primary district, all tuition for the next ensuing 2 years, based upon the then enrollment in the seventh and eighth grades in said school district, the children in said district shall not be counted in making the next apportionment of primary school money by the superintendent of public instruction; nor shall such children be counted in making such apportionment until the amount of money in the primary school interest fund in said district shall be insufficient to pay teachers' wages or tuition as herein set forth for the next ensuing 2 years.

Constitutions of 1835 and 1850

Both of the earlier constitutions contained provisions on this subject. The comparable section of the 1835 constitution was relatively brief. It enjoined the legislature to provide for a system of common schools by which a school was to be kept up and supported in each school district at least three months in every year. The 1835 constitution also provided that any district neglecting to keep up such a school might be deprived of its share of the interest of the public fund.[19]

Comparable provisions in the 1850 constitution were in two sections under the education article (Article XIII, Sections 3 and 4). The legislature was enjoined to provide for and establish a system of primary schools within five years after the adoption of the constitution. A school was to be kept without charge for tuition at least three months in each year in every district of the state and instruction in such schools was to be conducted in the English language. The sanction for neglecting to maintain a school as provided was changed from might be deprived to shall be deprived for the ensuing year of its proportion of the income of the primary school fund and funds from taxes for the support of schools.[20]

Constitution of 1908

The provisions of the 1850 constitution were carried over into the present constitution with some changes. A school district was required to maintain a school

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[19] A perpetual fund established with the proceeds from the sale of lands granted by Congress for school purposes.

[20] The 1850 constitution (Article XIV, Section 1) earmarked all revenues from specific taxes, except those received from mining companies, to paying the interest upon the primary school, university and other educational funds.

for five months instead of three and neglect to do so would forfeit its proportion of the "primary school interest fund" instead of the income from that fund and other funds arising from the specific taxes. That is, the forfeiture was limited to the primary school interest fund.

1911 Amendment An amendment passed in 1911 provided that if school districts had sufficient primary school money to pay teachers and tuition for the following two years, they were to be omitted from the succeeding annual distribution of primary school money. This represented the first constitutional mention of a method of distributing primary school fund money.

Statutory Implementation

By statute, the legislature has provided for a system of public instruction and primary schools. The school code of 1955 provides for the classification, organization, regulation and maintenance of schools and school districts.[21] Their rights, powers, and duties are also prescribed by statute. The superintendent of public instruction has been given certain powers and duties relative to the operation and fiscal affairs of local school districts.[22] The state board of education is responsible for the official certification of all elementary and secondary teachers and for schools for the blind and deaf.[23] The state board of control for vocational education has supervisory control over joint federal-state programs of vocational education in secondary schools.[24]

Judicial Interpretation

The provision has given rise to very little litigation. The 1911 amendment, however, did raise some question as to whether it required an annual school census and whether the census was to be the only basis for apportioning primary school interest funds. The supreme court held that the amendment fixed, at

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[21] Act No. 269, Public Acts of 1955, as amended.

[22] See Section 2 of this chapter, The Superintendent of Public Instruction, above.

[23] M.S.A.,15.3001-15.3984.

[24] M.S.A., 15.821-15.830. In 1942, the Governor's Public Education Study Commission recommended the abolition of the board of control and a transfer of its authority to the state board of education. See the Commission's report, "The Improvement of Public Education in Michigan," 1942, Lansing, Michigan Public Education Study Commission, p. 267. The state reorganization (Little Hoover) study of 1951 repeated the recommendation. See Michigan's Educational Agencies, Report 17, p. 29. The abolition of the board of control and transfer of its powers could be accomplished by a statutory amendment.

least impliedly, the census of school-age children as the basis, for distributing such funds. It held unconstitutional a public act which made the assessed valuation the basis for distribution, although only a part of the fund was to be so distributed. The court also held that the provisions of this section clearly anticipate an annual census and it is to be provided for by the legislature.[25]

Opinions of the Attorney General

Should a district not maintain a school within its district and pay no tuition but pay transportation costs for sending its pupils to schools in another district, the attorney general has held that the fact that it has insufficient funds to meet such costs for an ensuing two years does not entitle the district to a proportion of the primary school interest funds. This is on the basis that a district which pays no tuition but shows a balance in the primary school interest fund is not entitled to the distribution in the following year.[26]

Other State Constitutions

The constitutions of 38 states in addition to Michigan contain a provision requiring the legislature to establish and maintain a system of public schools.[27] Thirty of these states provide that they shall be free schools.

Maine makes it a duty of the legislature to require towns to make provision for schools supported and maintained at their own expense. By way of contrast, Alabama provides that nothing in the constitution is to be construed as creating or recognizing any right to education at public expense. The legislature in that state may provide for or authorize the establishment of schools as it may prescribe.

A section of the Mississippi constitution requiring the legislature to establish a system of free common schools was amended by virtue of another section inserted in 1944 authorizing the legislature to abolish the public schools by a majority vote in each house.

Montana, Mississippi, Kansas, and Colorado join Michigan in depriving school

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[25] Board of Education of Detroit v. Auditor General, 242 Mich. 186

[26] Opinion of the Attorney General No. 0-5094, October 11, 1946.

[27] Those states without a similar provision are: Alabama, Colorado, Connecticut, Iowa, Massachusetts, New Hampshire, North Carolina, South Carolina, Tennessee, Vermont, and Wisconsin. Index Digest, pp. 373-374.

districts of school funds for neglecting to maintain a school for a specified number of months in each year. The number varies from three to six months.

Missouri deprives a district of school moneys should it permit teacher wage differentials on race or color basis. Nevada deprives a district of school fund interest moneys should it allow sectarian instruction.

Michigan's provision for a sliding scale arrangement for the distribution of primary school interest fund moneys[28] based on the amount of money on hand compared to teacher payroll and tuition appears to be unique.

Ten states provide that school funds be distributed on the basis of the number of resident school-age children or children between specified ages, usually between five and twenty.[29] Eight states require the legislature to determine the method of allocation.[30] Nebraska and Delaware require simply that school funds be distributed equitably among school districts. New Mexico requires school funds to be apportioned among school districts in the proportion that the number of school-age children in the district bears to the total number of children in the state. A reserve is set up before distribution sufficient to provide for five months' schooling in every district by special help to districts where a full local school tax plus current funds[31] is not sufficient.

Only Missouri among the states with newer and more recently revised constitutions includes a similar provision for the apportionment of school funds.

The Model State Constitution provides:

> The legislature shall provide for the maintenance and support of a system of free public schools, open to all children in the state.

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[28] Contained in 1911 amendment.

[29] Montana, Kansas, Iowa, Louisiana, Minnesota, North Dakota, Oregon: Virginia, Wisconsin and Wyoming. Index Digest, pp. 384-385.

[30] Utah, California, Colorado, Idaho, Kentucky, Missouri, Nevada and South Carolina. Index Digest. pp. 384-385.

[31] Comparable to combined primary school interest fund and school aid fund moneys in Michigan.

Comment

The provision of this section dealing with the maintenance of a system of free primary schools would not likely be a subject of much controversy. However, the portion of this section dealing with the distribution of primary school fund moneys may be subject to considerable discussion. There are five sections of the constitution which deal with aid to local school districts 1) Article XI, Section 9 (this section) insofar as it affects the distribution of primary school interest fund money; 2) Article X, Section 1, which establishes the primary school interest fund, and dedicates certain specific taxes to it; 3) Article XI, Section 11, which establishes the primary school fund; 4) Article XI, Section 12, which dedicates escheats to the primary school fund; and 5) Article X, Section 23, which establishes the school aid fund and dedicates two cents of the state sales tax to the fund. All of these sections are inter-related and Section 9 must be considered in relation to these other provisions.

The inter-relationship of these provisions is discussed in the next section of this chapter, "proceeds of School Land" (see the Comment section).

In respect to the provisions of this article relating to the distribution of primary school interest funds, consideration might be given to allowing the legislature to determine the method of distribution. If the present provision is to be continued, the language might be changed to clarify the method that is to be used in apportioning primary school interest funds.

In view of the several provisions of the constitution relating to state aid for local schools, consideration might be given to consolidating these provisions into one section, or to eliminating them entirely and placing the responsibility in the hands of the legislature (see Comment under next section).

3. Proceeds of School Land

Article XI: Section 11. The proceeds from the sales of all lands that have been or hereafter may be granted by the United States to the state for educational purposes and the proceeds of all lands or other property given by individuals or appropriated by the state for like purposes shall be and remain a perpetual fund, the interest and income of which, together with the rents of all such lands as may remain unsold, shall be inviolably appropriated and annually applied to the specific objects of the original gift, grant or appropriation.

Constitutions of 1835 and 1850

Both of the earlier Michigan constitutions contained similar provisions. Congress in 1785 approved the land grant ordinance for the Northwest Territory which dedicated the sixteenth section of land in each township to public school purposes.[32] Article X, Section 2 of the 1835 constitution provided:

> ... The proceeds of all lands that have been or hereafter may be granted by the United States to this state, for the support of schools, which shall hereafter be sold or disposed of, shall be and remain a perpetual fund; the interest of which, together, with the rents of all such unsold lands, shall be inviolably appropriated to the support of schools throughout the state.

Thus the constitution of 1835 established a permanent fund with the proceeds of the lands granted by Congress and provided for the continuous payment of interest on the fund. This permanent fund is known as the primary school fund.[33]

The language of the present provision was originally inserted in the constitution of 1850 and was carried over unchanged into the 1908 constitution.

Constitution of 1908

This section has not been amended since the present constitution was adopted.

Statutory Implementation

The legislature has provided that the proceeds from the sale of educational lands received into the state treasury and placed to the credit of the several school

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[32] States admitted to the union after 1802 also received two or more sections for the support of higher education. See Edgar W. Knight, Education in the United States, Ginn and Company, New York, 1941, pp. 241-306.

[33] This fund should not be confused with the primary school interest fund (see Article X, Section 1 of the 1908 constitution).

funds "shall be used in defraying the expenses of the state government."[34] The auditor general is by law assigned responsibility for computing and paying the interest on the principal of the educational funds (including the primary school fund) out of the specific taxes.[35]

By law the proceeds from escheated property also go into the primary school fund. For a discussion of escheated funds see Article XI, Section 12.

Judicial Interpretation

There have been no recent problems in the interpretation of this provision.[36]

Other State Constitutions

Thirty-two states in addition to Michigan constitutionally provide for a permanent fund for the support of public schools or for educational purposes. Proceeds of lands granted by the United States for public schools represent a source of the permanent fund in 18 states, which are for the most part mid-west and western states with constitutions dating from 1850 and states which shared in the congressional land grants.[37]

Most of the thirty-two states appear to earmark more than one source of revenue to the permanent fund. Five states, in addition to Michigan, provide that gifts and bequests for educational purposes constitute a source of revenue for the permanent fund. Twenty-three states mention escheated estates as a source of the fund, while others include unclaimed shares and dividends of corporations, fines and forfeitures, and appropriations by the state.

Twenty state constitutions place limitations on the use of the permanent fund. Eleven states specify the fund is to remain inviolate. Seven restrict the use of the funds to school purposes while four provide that the fund may be increased but not diminished.

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[34] M.S.A. 3.721. Consistent with this act the money credited to the primary school fund is in reality commingled with the general fund and is used for general state purposes. The primary school fund is only a bookkeeping memorandum record showing accumulation of a principal within the general fund. (From information supplied by the Department of Public Instruction.)

[35] M.S.A. 3.731. For specific taxes see Article X, Section 1.

[36] Under the similar provision of the 1850 constitution the supreme court ruled that an 1859 act appropriating a portion of the proceeds of swamp lands to the primary school fund did not remove them from 1egislalative control. (People ex re1. Superintendent of Public Instruction v. Auditor General, 12 Mich. 171.) The court also ruled that the 1850 provision did not deprive the legislature of the power of regulating the state policy regarding the primary school lands. (People ex rel. Jones v. Pritchard, 21 Mich. 236.)

[37] Index Digest, pp. 385-387.

Among the states with newer and more recently revised constitutions, Alaska and Hawaii are silent on the matter of a permanent fund, while New Jersey and Missouri provide that the public school fund shall be securely invested and remain a perpetual fund.[38]

Comment

An understanding of this section necessarily requires an explanation of the inter-relationships among the several constitutionally established funds which contribute to the support of the primary school system.

History

The primary school fund was created by the first constitution of the state in 1835 and is the first of several funds established for the support of primary schools. It was established with the proceeds from the sale of lands granted by Congress to the state for educational purposes. It was established as a permanent or perpetual fund which was to remain inviolate and never to be distributed.

Although the fund could not be distributed, the legislature borrowed from the fund and then annually payed interest on the loans.

Apparently to insure that there would be no failure on the part of the state to pay interest on the primary school fund, provision was made in the 1850 constitution for the primary school interest fund and certain specific taxes were earmarked to the payment of interest on the primary school fund through the medium of the primary school interest fund.

Also in 1850 the proceeds from escheated property were dedicated to the support of primary schools.[39] These monies by legislative act have been dedicated specifically to the primary school fund.[40]

These provisions for a primary school fund, a primary school interest fund, and the dedication of escheats were carried over in the 1908 constitution in Article XI, Sections 11 and 12, and Article X, Section 1. For the change see the discussion of each section. In addition to these funds, Article X, Section 23 establishes a school aid fund and provides that two cents of the state sales tax levy be depos-

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[38] Missouri provides that the general assembly may liquidate certificates of indebtedness to the public school fund but all funds derived from the liquidation must be invested in bonds of the United States, the state, or other securities fully guaranteed by the United States of not less than par value. The legislature is also authorized to levy an annual tax to pay the interest accruing on the certificates of indebtedness. Missouri constitution of 1945 (Revised 1960). Article IX, Section 4.

[39] Artic1e XI, Section 12.

[40] M.S.A. 26.1053 (52).

ited in the school aid fund and expended for the aid of school districts and for such school employee's retirement systems as shall be provided by law.[41]

Operation of the School Funds

There are, then, three basic funds created by the constitution: 1) the primary school fund; 2) the primary school interest fund; and 3) the school aid fund. The following is an explanation of the methods by which these funds are administered.[42]

The primary school fund is actually only a bookkeeping memorandum record showing accumulation of a principal amount within the general fund. The amounts received from the sale of school lands and escheats are "credited" to the primary school fund, but the money is actually commingled with the general fund money and used for general state purposes.[43]

The interest paid on the corpus of land sale funds is seven per cent per annum, except in the case of swamp lands where the rate of interest is set by statute at five per cent. This interest is paid from the specific tax revenues of the primary school interest fund. However, the total revenue from the specific taxes earmarked to the primary school interest fund far exceeds each year the amount that is owed in interest on the principal of the primary school fund.

The balance in the primary school fund as of June 30, 1960, (excluding amounts credited to the university and other college funds) amounted to some $16.6 million, including $998,590 in proceeds from the sale of swamp lands. With an accumulated principal of about $16 million, the interest on the primary school fund would amount to less than $1 million a year. In fiscal 1960, however, the specific taxes earmarked to the primary school interest fund yielded $56.9 million, which far exceeds the less than $1 million of interest due on the primary school fund. After deducting a comparatively small amount of the total for other educational purposes, the whole primary school interest fund is available for distribution to local school districts.

The primary school interest fund monies are distributed on the bases of the number of children between the ages of 5 and 19 as indicated by the school census. The amount each district receives per child is determined by dividing the total amount in the fund by the total number of school-age children in the state. The primary interest fund distributions currently account for some 20 per cent of total state aid for schools.

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[41] Added by amendment in 1946 and revised by amendment in,1954. The 1954 amendment provided for the creation of a school aid fund to be effective July 1, 1955. Prior to 1955 school aid monies were appropriated and expended from the general fund of the state. See Michigan State Operations and Local Benefits Budget, 1960, Section Q, p. 1.

[42] Based on reports of the auditor general and information received from the department of public instruction.

[43] Consistent with the provisions of law (see M.S.A. 3.721).

As previously mentioned the constitution (Article X, Section 23) provides that two cents of the sales tax levy be credited to the school aid fund—$216 million in fiscal 1960. The legislature has provided that in addition to this, two cents of the cigarette tax levy and a four per cent liquor excise tax be placed in this fund—$26 million in fiscal 1960. The distribution of school aid fund monies is by a statutory formula which takes into account a number of deductible factors, one of which is the amount of primary school interest fund monies received by the school district. As a practical matter, therefore, the primary school fund monies are an offset against school aid fund monies.

In recent years the statutory formula for distributing these constitutionally and statutorily earmarked funds has required more money than the revenues of the funds produced and the legislature has made supplemental appropriations from the general fund. In 1959-60 the legislature appropriated $21.4 million from the general fund as a supplement to the school aid fund. Thus, in fiscal 1960 there was available from these funds for distribution for primary school purposes the following:

Source	
Constitutional Dedications	
Specific taxes*	$ 57 million
Sales tax	216
Statutory Dedications	
Cigarette tax	19
Liquor excise taxes	7
Supplemental Appropriation From General Fund	21
Total	$320 million

In view of these various provisions dealing with state aid to school districts, consideration might be given to consolidating the provisions of Sections 11 and 12 of Article Xl and Sections 1 and 23 of Article X into a single provision on state aid to schools, with the distribution of the funds to be provided by law. Or, consideration might be given to leaving the whole question of state aid to schools to legislative discretion.

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* For convenience this term includes ad valorem taxes on railroad, telephone and telegraph, car loading, and express companies in addition to inheritance taxes, out-of-state insurance company taxes and corporation organization fees.

4. Escheats

Article XI: Section 12. All lands, the titles to which shall fail from a defect of heirs, shall escheat to the state, and the interest on the clear proceeds from the sales thereof shall be appropriated exclusively to the support of the primary schools.

Constitutions of 1835 and 1850

This provision originated in the constitution of 1850 and was carried over into the present constitution virtually unchanged. The word "title" was changed to "titles" and the word "the" was inserted before the words "primary schools" at the end of the section.

Constitution of 1908

This section has not been amended since the adoption of the present constitution.

Statutory Implementation

In the implementation of this provision the law provides that the proceeds from escheated property go into the primary school fund. The board of escheats has the responsibility by law to administer the funds credited and accruing. The investment of the funds is subject to the supervision and direction of the state administrative board.[44]

Judicial Interpretation

There has been no recent litigation on this section.

Other State Constitutions

Twenty-three other state constitutions contain a provision of this type. In most of these states, the provision is incorporated in sections establishing a permanent school fund.

The constitutions of Alaska, New Jersey, and Hawaii have no provisions of this type, nor does the Model State Constitution.

Comment

See Comment under previous section.

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[44] M.S.A. 26.1053 (52). Under the law escheated funds returned to the state are transferred by the board of escheats to the primary school fund, usually only once annually. The board of escheats determines when and how much is to be so transferred. During 1951-52 no transfers were made, while in the fiscal year 1958-59 $450,000 was transferred to the primary school fund out of total receipts of $862,359. (From information supplied by the department of public instruction.)

C. HIGHER EDUCATION

1. Educational Institutions

Article XI: Section 10. The legislature shall maintain the university, the college of mines, the state agricultural college, the state normal college and such state normal schools and other educational institutions as may be established by law.

Constitutions of 1835 and 1850

Although this section is new in the 1908 constitution, it apparently stems from earlier provisions of the 1835 and 1850 constitutions. The 1835 provision (Article X, Section 2) was as follows:

> The legislature shall encourage, by all suitable means, the promotion of intellectual, scientifical and agricultural improvement.

The 1850 constitution (Article XIII, Section 11) provided:

> The legislature shall encourage the promotion of intellectual, scientific and agricultural improvements; and shall, as soon as practicable, provide for the establishment of an agricultural school.

Constitution of 1908

In the Address to the People the convention of 1907-08 stated that the intent of this section was to make it "mandatory upon the legislature to maintain the educational institutions therein specified."

Other State Constitutions

A number of other state constitutions include similar provisions relative to the establishment of state institutions of higher education.

Twenty-one states provide for the establishment and maintenance of a state university; twelve include provisions for teachers colleges and normal schools; eleven provide for agricultural colleges, which in Arizona and California are part of the state university. Five states require the legislature to establish a school of mines while two others (Nevada and North Carolina) require the provision of a department of mines at the state university. The North Dakota constitution provides for a school of forestry, while New Mexico requires the legislature to support a military institute.

Several constitutions, including those of Vermont, Maine, New Hampshire, Connecticut, Massachusetts, Rhode Island, and New Jersey contain no provision of this type. The newer constitutions of Alaska and Hawaii simply require that the legislature provide for a state university and such other educational institutions as may be deemed desirable.

The Model State Constitution provides that the legislature shall establish organize and support such public institutions of higher learning as may be desirable.

Comment

This section, like Section 1, is not a grant of or restriction on the power of the legislature, but rather expresses the intent of the people that these institutions be supported. Consideration might be given to eliminating this section and combining it with the provision of Section 1 in a general statement of intent.

The table on the following page summarizes the constitutional provisions for Michigan's nine major state-supported colleges and universities. In the pages following the table individual sections of the constitution which relate to these institutions are discussed.

Constitutional Provisions For Michigan's
Nine Major State-Supported Colleges and Universities

Institution	Citation	Governing Board			Powers and Duties
		Name	No. Members	Term of Office	
University of Michigan	Article XI, Sections 3, 4 and 5	Board of Regents	8	8	Regents "shall have the general supervision of the university and the direction and control of all expenditures from the university funds."
Michigan State University	Article XI, Sections 7 and 8	Board of Trustees	6	6	Trustees "shall have the general supervision of Michigan State University, and the direction and control of all Michigan State University funds; and shall perform such other duties as may be prescribed by law."
Wayne State University	Article XI, Section 16	Board of Governors	6	6	Governors "shall have general supervision of Wayne State University and the duties of said board shall be as prescribed by law. The legislature shall be given an annual detailed accounting of all income from whatever source derived and all expenditures by Wayne State University."
Ferris Institute	None				
Board of Education	Article XI, Section 6		4	6[a]	State Board of Education shall have general supervision of the state normal schools, and the duties of said board shall be prescribed by law.
Central Michigan University		State Board of Education			The legislature shall maintain the state normal college and such normal schools and other educational institutions as may be established by law.
Eastern Michigan University		State Board of Education			
Northern Michigan College		State Board of Education			
Western Michigan University		State Board of Education			

Note: Act 120. Public Acts of 1960 established Grand Valley College as a state-supported institution of higher education.

[a] Three members elected for six-year term, Superintendent of Public Instruction who serves as an ex officio member is elected for a two-year term.

2. The University of Michigan

a. Regents and Name

Article XI: Section 3. There shall be a board of regents of the university consisting of eight members, who shall hold the office for eight years. There shall be elected at each regular biennial spring election two members of such board. When a vacancy shall occur in the office of regent it shall be filled by appointment of the governor.

Section 4. The regents of the university and their successors in office shall continue to constitute the body corporate known as "The Regents of the University of Michigan."

Constitutions of 1835 and 1850

The constitution of 1835 contained no provisions of this type.[45]

The constitution of 1835 left the legislature with full power to manage the affairs of the university and to regulate the appointment of the regents.[46]

Provision for a board of regents elected directly by the people originated in the 1850 constitution (Article XIII, Section 6). As originally adopted the 1850 constitution provided for the election of eight regents to serve the same six-year term. The regents were to be elected from separate judicial districts. An amendment in 1862 extended their term to eight years, required election at large and introduced staggered terms. The provision giving corporate status to the university also originated in the 1850 constitution (Article XIII, Section 7) . These provisions were carried over in the 1908 constitution.

Constitution of 1908

Sections 3 and 4 have not been amended since the present constitution was adopted and there has been little litigation. (See Judicial Interpretation under Sections 5 and 6 of this chapter.)

Other State Constitutions

The organization of public higher education as provided by the several state constitutions varies considerably from state to state. Table A shows those states which constitutionally create boards responsible for higher education and the levels of education and types of institutions under the boards.

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[45] The legislature authorized a board of regents by Public Act in 1837.

[46] The University of Michigan, an Encyclopedia Survey, Part I, History and Administration, Ann Arbor, University of Michigan, 1941, p. 121.

The table shows that a tota1 of 25 states (including Michigan) constitutionally create a board or boards responsible for one or more institutions of higher learning in the state. Six of these states provide for a single board which is responsible for governing and coordinating all public higher education in the state. These states are: Georgia, Idaho, Montana, North Dakota, Nevada, and South Dakota.[47]

Oklahoma provides for an over-all board to be responsible for the coordination of all public institutions of higher learning. This board is authorized to set standards, determine courses, recommend budget allocations for the several institutions and allocate legislative appropriations. This board is not responsible for the direct control and operation of any of the state's universities or four-year colleges.[48] The constitution creates three boards for this purpose: one to govern the University of Oklahoma; one to govern the agricultural and mechanical college, a land-grant college, a four-year college and five two-year colleges; and one to govern six four-year colleges. (Three statutory boards govern two state two-year colleges and a four-year college.)

New York, which designates no one institution as the state university, holds the Board of Regents, The University of the State of New York—an administrative board—responsible for all education in the state.[49]

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[47] Rhode Island and Hawaii have a statutory board responsible for all higher education. (In Hawaii the state university is the only institution of higher education in the state.) Seven other states, by provision pf the constitution or state statutes, place all public higher education institutions except 2-year colleges under a single board. These states are: Arizona, Florida, Iowa, Kansas, Mississippi, Oregon and Wyoming. State Boards Responsible for Higher Education, U.S. Department of Health, Education and We1fare, Office of Education, Circular No. 619, Washington, U.S.G.P.O., 1960, pp. 17-25.

[48] While the over-all coordinating board (the State Board of Regents of Oklahoma Colleges) is responsible for the government of six junior colleges, the junior colleges are each directly controlled and operated by separate local boards.

[49] The Board of Regents, The University of the State of New York is constitutionally responsible for the administration, supervision and coordination of 28 institutions which comprise the state university. By statute the Board of Trustees, State University of New York, is responsible under the general supervision of the board of regents, for all public higher education institutions except four New York City colleges. Legally the actions of the board of trustees are subject to approval by the board of regents.

Table A
Constitutionally Created Boards Responsible for
Higher Education and Levels of Education
Under Such Boards

Boards Responsible for Institutions	Institutions Under Each Board Higher Education							Other Educational Responsibilities of Board	
	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
Alabama									
Board of Trustees, U. of A.	1						1		
Board of Trustees, Auburn U.		1					1		
Arizona									
Board of Regents, Universities and State College of Ariz.	1	1			1		0 3		
State Board of Education						2[b]	2	X	X
Arkansas									
Board of Trustees, U. of Ark.		1		1			2		
Board of Trustees, Agricultural, Mech., and Normal College			1				1		
Board of Trustees, Arkansas Agricultural and Mechanical College					1		1		
Board of Trustees, Ark. Poly. Col.					1		1		
Board or Trustees, Ark. St. Col.					1[c]		1		
Board of Trustees, Ark. St. Teach. Col.					1		1		
Board of Trustees, Henderson St. Teach. Col.					1		1		
Board of Trustees, Southern St. Col.					1		1		

See footnotes at end of table.

	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
California									
The Regents of the U. of Calif.	1	1	1	3	2		8		
State Board of Education					14[d]	63[e]	77	X	X
Colorado									
The Regents of the U. of Colorado	1			1			2		
State Board of Education						6[b]	6	X	X
Florida									
State Board of Education of Florida						16[b]	16	X	X
Georgia									
Regents of the U. System of Georgia		1	1	3[a]	7	7	19		
Idaho									
State Bd. of Education & Bd. of Regents, Univ. of Idaho		1[c]			1	2[b]	0	X	X
Louisiana									
Bd. of Supervisors of Louisiana St. Univ. & Ag. & Mech. Col.		1		1	1		0 3		
Louisiana St. Bd. of Education			1		8[a]		9	X	X

	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
Michigan									
The Regents of the Univ. of Mich.	1						1		
Bd. of Trustees, M.S.U.		1					1		
Bd. of Governors of Wayne St. Univ.	1						1		
State Bd. of Education					4	14[b]	18		
Minnesota									
Regents of the Univ. of Minn.		1			1		2		
Mississippi									
Bd. of Trustees of St. Institutions of Higher Learning	1		2	1	5		9		
State Bd. of Education								X	X
Missouri									
The Curators of the Univ. of Mo.		1					1		
State Bd. of Education					1	6[b]	7	X	X
Montana									
State Bd. of Education	1		1		4	2[b]	8	X	X
Nebraska									
The Bd. of Regents of the Univ. of Neb.		1					1		
Bd. of Education of State Normal Schools					4		4		
Bd. of Educational Lands and Funds									
State Board of Education						4[b]	4	X	X
Nevada									
Board of Regents, Univ. of Nev.		1			1		2		

	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
New Mexico									
Regents of the Univ. of N. M.	1						1		
The Regents of the N. M. St. Univ.		1					1		
Bd. of Regents, Eastern N. M. Univ.					1		1		
Bd. of Regents, N. M. Highlands Univ.					1		1		
Bd. of Regents, N. M. Inst. of Mining & Tech.				1		1			
Bd. of Regents, N. M. Western Col.					1		1		
Bd. of Regents, N. M. Military Inst.						1	1		
New York									
Bd. of Regents, The Univ. of the St. of N.Y.					4[f]		4	X	X
North Carolina									
Bd. of Trustees, Univ. of N. Carolina	1		1		1		3		
North Dakota									
State Bd. of Higher Education	1	1			5	4[g]	11		
Oklahoma									
Oklahoma St. Regents for Higher Education					6	6[b]			
Regents of the U. of Oklahoma	1						1		
Bd. of Regents, Ag. & Mech. Col.		1	1		1	5	8		
State Bd. of Regents of Oklahoma Colleges				6		6			
South Dakota									
Bd. of Regents of All Higher Education	1	1			5		7		

	State University	State Univ. & Land-grant Col. Combined	Land-grant Col. Only	Separate Prof. School	Four-year or More Col.	Two-year Col.	Total All Types	Elementary	Secondary
Utah									
Board of Regents, Univ. of Utah	1					1	2		
Bd. of Trustees, Utah St. Univ. of Ag. & Applied Science		1			1	1	3		
State Bd. of Education						2	2	X	X
Virginia									
Bd. of Visitors, Virginia Poly. Inst.			1		1		2		
Bd. of Visitors, Col. of Wm. & Mary in Virginia				1	2		3		
State Bd. of Education			1		2	1	4	X	X
Wyoming									
The Trustees of the Univ. of Wyoming		1					1		

[a] One institution operates a branch.

[b] All institutions controlled by other boards.

[c] Operates a branch.

[d] One institution controlled by another board.

[e] One institution has two campuses.

[f] All four units controlled by another board.

[g] Two controlled by other boards.

Source: State Boards Responsible For Higher Education) U.S. Department of Health, Education and Welfare, Office of Education, Circular No. 619, Washington, U.S.G.P.O., 1960, pp. 203-208, 216-220.

XI Education

New Mexico creates seven institutional boards, each of which is responsible for governing one of five state colleges and two universities. These boards have authority to approve budgets, establish personnel policies, finance current operations, plan and finance physical facilities. New Mexico provides by statute for an overall coordinating board appointed by the governor which is primarily responsible for the coordination of the financial affairs of the state's seven institutions of higher education. The prime concern of this board is to insure that the institutions are adequately financed under an equitable distribution of available funds. The board reviews and may adjust the budgets of the several institutions as they are submitted to the state's budget officer.[50]

The constitutions of Alabama, Michigan, New Mexico, Oklahoma, and Utah create individual boards for more than one major state university. Two institutional boards are provided for in Virginia's constitution to govern institutions other than the state university which is governed by a statutory board. The Arkansas constitution creates eight institutional boards, one of which governs the state university. The remaining seven each govern one of seven state colleges.

Method of Selection In those states where it is constitutionally provided, the prevalent method of selection is appointment by the governor subject to confirmation by the senate. Seven states, including Alaska,[51] Missouri,[52] and Hawaii,[53] provide that the entire board be so selected, while six others[54] require the appointment of a majority of the board membership and ex officio membership for a varying number of other board members.[55]

The U.S. office of education reports that of some 209 state boards responsible for higher education, created by either the state constitution or the state statutes, seventy percent of the board members are appointed, eighteen percent are

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[50] State Boards Responsible for Higher Education, p. 124.

[51] The governor's appointments in Alaska are subject to confirmation by a majority of the members of the legislature' in joint session. (Article VII, Section 3).

[52] Article IX, Section 9(a).

[53] Article IX, Section 5.

[54] Arizona, California, Louisiana, Montana, New Mexico, Wyoming. Index Digest, pp. 405-408.

[55] Index Digest, pp. 405-408.

elected, and some twelve percent serve as ex officio members. Sixty-eight percent of those appointed are appointed by the governor subject to senate confirmation, and another twenty-five percent by the governor alone. By far the most prevalent practice within the elective process is that of election by the legislature. Forty-five percent of those elected are reportedly covered by this practice.[56]

Size of Board The size of constitutionally created boards responsible for the major public university in 16 states ranges from six in Nebraska to 24 in California.[57] The average membership provided for is 10.6. Appointed boards are for the most part larger than elected boards.

The size of board membership for some 209 state boards varies in the extreme Two boards have a membership of three, while the board of trustees of the University of North Carolina has a membership of 102. With this latter board excluded, however, the high membership is 32. The average membership of all such boards is 10.6.[58]

Length of Term Eight of the states which constitutionally provide for board to govern the major public university also prescribe the board members' term of office and, except Alabama, require overlapping terms. These states are: Alabama (12 years), California (16 years), Colorado (6 years), Georgia (7 years), Louisiana (14 years), Michigan (8 years), Nebraska (6 years), and New Mexico (6 years).

The U.S. office of education reports that the average term constitutionally or statutorily provided for 209 state boards is six years.[59]

Corporate Status The constitutional boards responsible for the major public university in eight states (including Michigan) derive authority for corporate status from the state constitution.[60] Such boards in eight other states have no constitutional corporate status,[61] while in thirty-three states they derive corporate authority from the statutes.

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[56] State Boards Responsible for Higher Education, p. 26.

[57] The remaining fourteen states are: Alabama, Alaska, Arizona, Colorado, Georgia, Hawaii, Louisiana, Missouri, Montana, New Mexico, North Dakota, Oklahoma, South Dakota and Wyoming. Index Digest, pp. 405-408.

[58] State Boards Responsible for Higher Education, p. 28.

[59] State Boards Responsible for Higher Education, pp. 29,227-233.

[60] California, Colorado, Georgia, Idaho, Louisiana, Minnesota, and Utah. State Boards, pp. 216,220.

[61] Board of Trustees, University of Connecticut; Iowa State Board of Regents; Kansas State Board of Regents; Montana State Board of Education; Board of Regents, University of Nevada; North Dakota State Board of Higher Education; Oregon State Board of Higher Education; and Board of Regents, University of Texas.

In regard to higher education, the Model State Constitution provides simply (Article X) that "The legislature shall provide in addition to a system of common schools such other educational institutions, including institutions of higher learning, as may be deemed desirable."

Comment

The voters of Michigan elect a total of 24 board members to govern institutions of higher education (eight regents of the university, six trustees of Michigan state university, six governors of Wayne state university and four members of the state board of education).[62]

In a recent study of state boards responsible for higher education conducted by the office of education, U.S. department of health, education, and welfare the authors conclude:

> State-supported colleges and universities are increasingly being viewed as parts of a total State enterprise in higher education rather than as individual, separate, institutions with purposes or programs unrelated to others in the State.[63]

If Michigan desires to move in this direction, some consideration might be given to removing Sections 3 and 4 as well as other provisions establishing individual boards and, in their place, creating a single board responsible for all higher education in the state. As mentioned earlier, six states constitutionally provide for a single state-wide board.

Or, consideration might be given to omitting any constitutional reference to a governing board for the major university, leaving the matter to legislative enactment. The legislature now statutorily provides for the governing boards of the college of mining and technology and Ferris institute.

On the other hand, consideration might be given to leaving Sections 3 and 4 unchanged and providing elsewhere in the constitution for a master coordinating board or leaving the matter to legislative discretion. As mentioned earlier, New Mexico has seven constitutional boards coordinated by a board created by statute.

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[62] Three members are elected directly to the board of education. The fourth member, the superintendent of public instruction, is elected to the office of superintendent and serves as an ex officio member of the board of education.

[63] State Boards Responsible for Higher Education, p. 47. See also Lyman A. Glenny, Autonomy of Public Colleges; The Challenge of Coordination, New York, McGraw-Hill Book Co., Inc., 1959.

b. President and Supervision

Article XI: Section 5. The regents of the university shall, as often as necessary, elect a president of the university. The president of the university and the superintendent of public instruction shall be ex-officio members of the board of regents, with the privilege of speaking but not of voting. The president shall preside at the meetings of the board and be the principal executive officer of the university. The board of regents shall have the general supervision of the university and the direction and control of all expenditures from the university funds.

Constitutions of 1835 and 1850

There was no comparable provision in the constitution of 1835. Previous to 1850 members of the faculty served one year each as president. The governor served as the presiding officer of the board of regents while the internal administration of the university was fully subject to legislative control.[64] This provision originated in the 1850 constitution.

The 1850 provision (Article XIII, Section 8), was as follows:

> The regents of the university shall, at their first annual meeting, or as soon thereafter as may be, elect a president of the university, who shall be ex officio a member of their board, with the privilege of speaking but not voting. He shall preside at the meetings of the regents and be the principal executive officer of the university. The board of regents shall have the general supervision of the university, and the direction and control of all expenditures from the university interest fund.

Constitution of 1908

The 1850 provision was carried over in the constitution of 1908 with the addition of the superintendent of public instruction to the board as an ex officio member. The constitution in 1908 omitted the word “interest” which in the 1850 provision had followed the word “university” and the word “fund” was changed to “funds.”

This section has not been amended since the present constitution was adopted.

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[64] The University of Michigan. An Encyclopedic Survey, Part I, History and Administration, Ann Arbor, University of Michigan, 1941, p. 227.

Statutory Implementation

A series of legislative acts passed since 1851 vested the government of the university in the board of regents; required university branches to be established; required an annual report to the superintendent of public instruction; and authorized the board to perform a number of functions.[65]

In 1867 the legislature passed the first of a series of "mill-tax" laws which provided financial assistance to the university of Michigan and to the agricultural college (now Michigan state university). The laws were permanent in that they regulated the amount of support that was received by the institutions until changed by affirmative action of the legislature.

Under the first of these laws the legislature appropriated to the university of Michigan a sum equal to five cents on each thousand dollars of taxable property in the state. This method of support provided the institutions with an increasing amount of income during a period when the valuation of taxable property in the state was increasing. During the depression years, however, the legislature limited the amount paid to the university and in some cases reduced an original appropriation. At the same time the state tax on real property was abolished and the state began to rely on the sales tax and other sources of income. Thus, in 1935 the earlier form of the mill-tax laws was changed.

New acts passed in 1935[66] provided for the support of the university of Michigan and Michigan State college out of the general funds of the state, but they also provided for an appropriation proportionate to the tax valuation of the state. In 1936 and each fiscal year thereafter, a sum was to be appropriated to the university of Michigan equal to 73 cents on each thousand dollars of taxable property in the state while a sum equal to 24.3 cents on each thousand dollars of taxable property was to be appropriated to Michigan state college. With some changes these laws remained in effect until repealed in 1947.[67] Since then the legislature's support of the university of Michigan and Michigan state university has been on an annual appropriation basis.

Judicial Interpretation

The supreme court has held that under the constitution of 1908 the state board of agriculture (board of trustees of Michigan state university) was put on the same plane with the regents of the university of Michigan.

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[65] M.S.A. 15.901-15.993.

[66] Acts 112 and 113 of 1935.

[67] Act 304 of 1941.

Consequently, this section includes cases relating both to the board of regents of the university of Michigan and to the board of trustees of Michigan state university.

Institutional Nature The courts have held that by the constitution the board is made "the highest form of juristic person known to the law," with authority within the scope of its functions equal to and coordinate with that of the legislature. The courts have held that the board is a separate entity, independent of the state in the management and control of the university and the fact that it is state property does not necessarily bring the board within the purview of the statutes.[68]

On the other hand the courts have held that the board of regents is a department of the state government created to perform state functions. The lands, buildings and equipment under the control of the regents are state property.[69]

Property and Funds Funds appropriated for the use of the university have been held by the supreme court to be under the exclusive direction of its governing board. The court has also held that the board's judgment as to the legality and expediency of expenditures for the use and maintenance of the university is not subordinate to that of the auditor general.[70]

In regard to conditional appropriations the court has held that the legislature may attach any conditions it may deem expedient and wise to appropriations for

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[68] People ex rel. Board of Regents v. Brooks, 224 Mich. 45; Weinberg v. The Regents of the University of Michigan; Attorney General ex rel. Cook v. Burhano, 304 Mich. 108 (1942) ; Board of Regents, University of Michigan v. Auditor General, 167 Mich. 444. In a relatively recent case, the supreme court divided over the question of whether the legislature constitutionally could subject the state board of agriculture to the workmen's compensation act. (Peters v. Michigan State College, 320 Mich. 243) The attorney general from time to time has held invalid statutes which purported to regulate aspects of university activity and on occasion has ruled statutes couched in general form to be inapplicable to the university. For example, Statutes purporting to fix fees (Op. Attorney General 1701, p. 87) and entrance requirements (Op. Attorney General, 1911, p. 215) were held invalid. Acts requiring state agencies to submit reports to the state board of auditors, requiring performance bonds from contractors and requiring annual inventories of state-owned property were said to have no application to the university. (Op. Attorney General, 1920, p. 106; Op. Attorney General, 1921-22, p. 289).

[69] People ex rel. Board of Regents v. Brooks, 224 Mich. 45.

[70] State Board of Agriculture v. The Auditor General, 226 Mich. 417; Bauer v. State Board of Agriculture, 164 Mich. 415; Board of Regents of University of Michigan v. Auditor General, 167 Mich. 444.

the university. Where such conditions have been attached the regents may accept or reject the appropriations as they see fit. Should the regents accept the appropriation, the conditions are binding upon the regents.[71]

The legislature does not have unlimited freedom in the use of this device, however, for the court has said that the legislature can attach only such conditions as it has the power to make. In State Board of Agriculture v. The Auditor General (226 Mich. 417) the court said that the language used in previous decisions "did not mean that a condition could be imposed that would be an invasion of the constitutional rights and powers of the governing board of the college." In this case a condition attached to an appropriation for the support of the agricultural college requiring the funds to be used subject to the general supervision of the state administrative board was held unconstitutional.

Other State Constitutions

Alaska and Hawaii in addition to Michigan provide that the university president shall be appointed by the governing board to serve as its executive officer. Alabama provides that the governor serve as ex officio president. Oklahoma provides for the office of president of the board of regents of Oklahoma colleges,[72] but the office is not provided for in provisions which create the university of Oklahoma governing board. California provides that an acting university president shall serve as an ex officio member of the university board of regents.[73]

Alabama, California, Hawaii, Montana, and Wyoming, in addition to Michigan, make the superintendent of public instruction an ex officio member of the university board. Michigan's provision granting the superintendent and the president the privilege of speaking but not of voting appears to be unique among the states.[74]

The constitutions of Colorado and Idaho contain provisions similar to that of Michigan's that the board of regents shall have "the general supervision of the university and the direction and control of all expenditures from the university funds." In addition, it has been said that the state constitutions of Minnesota and California give the principal state university governing board full control over the internal affairs of the university.[75]

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[71] People ex rel. Regents of the University v. Auditor General, 17 Mich. 161; Weinberg v. The Regents of the University of Michigan, 97 Mich. 246.

[72] Responsible for the government of 6 four-year colleges.

[73] Alaska constitution of 1956, Article VII, Section 3. Hawaii constitution of 1950, Article IX, Section 5. California constitution of 1849, Article IX, Section 9. Oklahoma constitution of 1907, Article XIII, Section 8, a(1,2), b(1,3).

[74] Index Digest, pp. 405-408.

[75] M. M. Chambers, The Campus and the People, The Interstate Printers and Publishers, Danville, Illinois, 1960, p. 45.

Minnesota provides (Article VIII, Section 4):

> The location of the University of Minnesota, as established by existing laws, is hereby confirmed, and said institution is hereby declared to be the University of the State of Minnesota. All the rights, immunities, franchises and endowments heretofore granted or conferred are hereby perpetuated unto the said university; and all lands which may be granted hereafter by Congress, or other donations for said university purposes, shall vest in the institution referred to in this section.

California provides (Article IX, Section 9):

> The University of California shall constitute a public trust, to be administered by the existing corporation known as "the Regents of the University of California," with full powers of organization and government, subject only to such legislative control as may be necessary to insure compliance with the terms of the endowments of the University and the security of its funds...said corporation shall also have all powers necessary or convenient for the effective administration of its trust, including the power to sue and to be sued.

Louisiana provides that the Louisiana state university and agricultural and mechanical college are to be directed, controlled, supervised and managed by a board of supervisors. Missouri provides that the government of the university shall be vested in a board of curators. Nevada, Nebraska, North Carolina, and Wyoming grant the legislature power to provide for the control and management of the state university.

Comment

Under the terms of the present constitutional provisions the board of regents of the university of Michigan and the board of trustees of Michigan state university are charged with the responsibility for general supervision of the respective universities and the direction and control of their funds.[76] These provisions have

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[76] There has been no authoritative interpretation of the language of Article XI, Section 16 which provides for Wayne state university. In the absence of a definitive interpretation of the section, there would appear to be some question as to whether the provisions of the section put Wayne state university on the same constitutional footing with the university of Michigan and Michigan state university. For further comment on the point see the Comment under Wayne state university (Article XI, Section 16) below.

been interpreted to give the boards the responsibility and authority to determine the amount and quality of higher education services that are to be provided by these institutions. But the boards do not have taxing authority to finance such educational services.[77] The constitution gives this authority to the legislature.

Thus, while the boards have the authority and responsibility for determining the amount of higher education services that are to be provided, they lack the authority to levy taxes to pay the cost of such services.

The legislature has the authority to levy taxes to pay the cost of higher education services, but does not have the authority to determine the factors that make up the educational program (and thus the cost) of the universities.[78]

Thus, the constitution creates a division of responsibility and authority between the boards and the legislature for providing higher education services at these two institutions.

If the convention believes that the responsibility and authority for providing higher education services at the universities should, be vested in one body and not split between two bodies, there are two basic alternatives:

1. Give the governing boards (or board) of the universities the authority to levy the taxes necessary to fulfill their responsibility for providing higher educational services. This could be done in several ways—by authorizing the boards to levy certain enumerated taxes or by earmarking certain taxes for their use. Under this alternative the boards (or possibly a single board) would be given by the people complete responsibility and authority for providing higher educational services. But, the legislature would be relieved of its responsibility and authority in this area.

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[77] The board of regents and the board of trustees have the institutional responsibility for making those policy decisions which determine the total cost of operating the university (enrollment, curriculum, faculty, salaries, etc.) and are similarly responsible for determining how much of that total cost is to be financed from "university funds" (fees and charges, gifts, endowment, etc.). The difference is the net tax cost, which is requested annually of the legislature.

[78] Dr. John Dale Russell in his Survey of Higher Education in Michigan makes the following observation: "It is very clear that the Legislature and its committees have no very good way of estimating either the total needs of the State for higher education or the needs of the individual institutions for support. This is not a criticism of the legislature or its committees for they have done remarkably well, considering the limited data and analyses available upon which to make determinations of appropriations and other matters affecting the institutions."

2. A second alternative, if both responsibility and authority for providing higher education are to be vested in one body, would be to give the legislature the constitutional responsibility for determining the higher educational program (which the legislature could vest by law in a university board or president).

On the other hand, the convention may feel that it is undesirable to give either agency complete authority and responsibility. In that event, consideration might be given to keeping the present provisions, or to modifying them by granting the legislature authority and responsibility over all finances of the universities, but leaving with the university boards the authority and responsibility for providing the best possible services within the limits set by the funds made available by the legislature. Consideration might be given to keeping the present provisions, while providing that all funds (state appropriations and university generated funds) be audited by a legislative auditor. This would provide one centralized accounting to the public.

Should consideration be given to providing an overall coordinating board, some modification of the powers of the separate boards might be considered necessary to permit such inter-institutional coordination.

Section 2 of Article XI specifies that the superintendent of public instruction shall be ex officio a member without vote of all boards having control of public instruction in any state institution. Thus, the specified ex officio membership of the superintendent on the board of regents in Section 5 would seem unnecessary.

3. Michigan State University

a. Board of Trustees

Article XI: Section 7. There shall be elected on the first Monday in April, 1909, a board of trustees to consist of 6 members, 2 of whom shall hold the office for l years, 2 for 4 years and 2 for 6 years. At every regular biennial spring election thereafter, there shall be elected 2 members whose term of office shall be 6 years. The members thus elected and their successors in office shall be a body corporate to be known as "The board of trustees of Michigan state university of agriculture and applied science." The board of trustees shall be the successor in interest to all the rights, powers, assets and liabilities of the state board of agriculture.

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 contained no provision of this type. The 1850 constitution directed the legislature to provide for the establishment of an agricultural school (the first of its kind in America) as soon as practicable and authorized the legislature to make the school a branch of the university. Twenty-two sections of salt spring lands were appropriated for the support and maintenance of the school. The legislature established a state agricultural school in 1855 which until 1861 was under the control of the state board of education.[79] From 1861 to 1909 the state board of agriculture, created by the legislature in 1861 (and predecessor of the present board of trustees), was appointed by the governor.[80]

Constitution of 1908

Original Provision In the convention of 1907-08, spirited debate followed a proposal to insert into the constitution provisions for the regulation of the agricultural college which were then in force by statute. The proposal failed of passage on two early votes in the convention. The debate revolved around the question of whether the board should be elected as proposed or appointed by the governor, as was then provided for by statute. Some objected to treating the agricultural college in a manner different from the college of mines, which was also controlled by an appointed board. Others argued that better qualified members would be appointed to the board than could be obtained under the elective process. It was pointed out, however, that the college of mines was a purely technical institution requiring specialists in its management and that under no circumstances should the government of the college of mines be interfered with. The college of agriculture, on the other hand, was not held to be such a technical institution with the same requirements in its management. The elected board, it was argued, would serve to raise the character and dignity of the board. The purpose of the elective proposal, as pointed out by Mr. Barbour, a member of the education committee, was to put the board on a rooting with the board of regents of the university of Michigan. The proposal, providing for an elective board, passed on the third reading.[81]

1959 Amendment In 1959, an amendment to this sections provided for the board of trustees of Michigan state university as the successors to the state board of agriculture.

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[79] Act 130 of 1855.

[80] Act 188 of 1861.

[81] Proceedings and Debates, pp. 1143-1148.

Judicial Interpretation

As previously indicated, the supreme court has held that under the constitution of 1908 the state board of agriculture was put on the same plane with the regents of the university of Michigan.[82]

Other State Constitutions

The constitutions of eighteen states contain provisions relative to an agricultural college or an agricultural and mechanical college. In ten states the agricultural college and the state university are combined—Arizona, California, Georgia, Idaho, Louisiana, Minnesota, Missouri, Nebraska, Nevada and Wyoming.[83]

In Colorado the control and management of the agricultural college are regulated by the legislature.

South Dakota provides that the agricultural college be under the control of five members appointed by the governor and confirmed by the senate.

New Mexico requires the legislature to provide for the control and management of state universities (including the college of agriculture and mechanical arts) by a five-member board of regents appointed by the governor with the consent of the senate.

Oklahoma provides for a board of regents for its agricultural and mechanical college and all other such colleges (it has one other land-grant college). Eight board members are appointed by the governor with the advice and consent of the senate. The president of the state board of agriculture is a ninth member.[84]

Of those states with newer and more recently revised constitutions, Hawaii, Alaska and New Jersey have a combined state university and land-grant college. The first two constitutionally provide for the single institution.[85] New Jersey is silent on the matter. The board of governors of its combined institution, Rutgers,

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[82] Alger v. Michigan Agricultural College, 181 Mich. 559. For references to other decisions bearing on the constitutional status of the board, see previous section on the university of Michigan.

[83] Index Digest, pp. 403-405. Also, see State Boards Responsible for Higher Education, pp. 203-220.

[84] The state board of agriculture consists of five farmers selected according to law to have jurisdiction over matters affecting animal industry and animal quarantine regulation.

[85] See previous section on university of Michigan.

was created by authority of the state statutes. Missouri requires the legislature to maintain a state university which has been classified as a combined state university and land-grant college. The board of control for a second state-designated land-grant institution, Lincoln university, was created by statute.[86]

Comment

Michigan state university and the university of Michigan are treated similarly under the constitution. See Comment under the sections on the university of Michigan for a discussion of these provisions.

b. President; Board Duties

Article XI: Section 8. The board of trustees shall, as often as necessary, elect a president of Michigan state university, who shall be ex-officio a member of the board with the privilege of speaking but not of voting. He shall preside at the meetings of the board and be the principal executive officer of Michigan state university. The board shall have the general supervision of Michigan state university, and the direction and control of all Michigan state university funds; and shall perform such other duties as may be prescribed by law.

Constitutions of 1835 and 1850

There was no provision of this type in the earlier Michigan constitutions.

Constitution of 1908

Original Provision Prior to 1908 the regulation of this institution had been provided for by legislative enactment. Members of the 1907-1908 convention inserted provisions of the statutes then in force into this section and Section 7, putting the institution at or on a par with the university of Michigan with regard to constitutional treatment.[87]

The superintendent of public instruction is an ex officio member of the board of trustees (Article XI, Section 2).

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[86] State Boards Responsible for Higher Education, p. 205.

[87] Proceedings and Debates, p. 1143.

1959 Amendment In 1959 this section was amended to effect a change in the name of the institution from the agricultural college as previously referred to in this section to Michigan state university of agriculture and applied science. The name of the board of control was changed from the state board of agriculture to the board of trustees. Except for these changes the section otherwise remained unchanged.

Statutory Implementation

The legislature has by statute vested the government of the university in the board and set forth the powers and duties of the board as assigned by the constitution.[88]

Judicial Interpretation

The supreme court has held that under the constitution of 1908 the state board of agriculture (board of trustees) was put on the same plane with the regents of the university of Michigan. Neither the legislature nor any state officer or board may interfere with the control and management of these institutions.[89]

Opinions of the Attorney General

In regard to the board's powers, the attorney general has held that powers given to the state board of agriculture and to the legislature are not mutually exclusive except in matters dealing solely with the operations of the university. In matters where general laws and welfare are affected, the attorney general has held that the legislature has the same powers of legislation as over any other portion of the state.[90]

Other State Constitutions

Alabama, Michigan, New Mexico, Oklahoma and Utah constitutionally create a separate board for more than one major state university. See Other State Constitutions under section on university of Michigan (Article XI, Section 5) for discussion of similar provision.

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[88] M.S.A. 15.1121-15.1303 (4).

[89] Alger v. Michigan Agricultural College, 181 Mich. 559. For other cases bearing upon the construction of this section see previous section on the university of Michigan (Article XI, Sections 3 and 4).

[90] Attorney General, Opinion No. 227, Dec. 9, 1955. Legislation purporting to designate the college faculty, its president and his powers were held unconstitutional by the attorney general as an invasion by the legislature of the board's authority. Likewise an attempt by the legislature to exempt certain students from military courses was held unconstitutional by the attorney general as depriving the board of supervision and control conferred by the constitution. (Atty. Gen. Opn. No. 1099, December 8, 1948) See Volume 11, Michigan Statutes Annotated, Powers of Board, p. 182.

Comment

This section is virtually the same as an earlier one treating the university of Michigan. For comment on the provision, see the earlier discussion under the university of Michigan (Article XI, Section 5).

c. Salt Spring Lands

Article XI: Section 13. The legislature shall appropriate all salt spring lands now unappropriated, or the money arising from the sale of the same, where such lands have already been sold, and any funds or lands which may hereafter be granted or appropriated for such purpose, for the support and maintenance of the agricultural college.

Constitutions of 1835 and 1850

Salt spring lands were granted by Congress to the state of Michigan in an act of 1836, which authorized up to 12 salt springs and six sections of land contiguous to each to be used as the legislature prescribed.[91] This meant an original dedication of a maximum of 72 sections or slightly over 46,000 acres of land as salt spring lands.

In actual fact, slightly over 45,300 acres were finally selected by the state and approved by the federal government. Unlike some other grants of lands by the Congress, salt spring lands were not specifically given to the state for the support of education. Their partial dedication for this purpose was permitted by constitutional provision in 1850 and required in 1908.

In the infancy of the state, salt springs were invested with a substantial public interest. Plentiful pulp wood supplies were available for fuel to evaporate the brine to produce crystalline salt for human consumption. Otherwise salt had to be imported from distant areas, such as New York state, at fairly significant prices for those days. Reports of the state geologist and the commissioner of the state land office and legislative resolutions and acts clearly indicate the economic importance attached to salt springs in the early years of statehood.[92] The development of techniques for mining salt directly has obviated the original need for and use of salt springs. In addition, much of the contiguous land granted was not needed for improvement of the springs and was more valuable for agricultural or other purposes.

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[91] See 5 U.S. Statutes-at-Large 59. A section of land is one square mile, or 640 acres.

[92] See especially Geological Reports of Douglas Houghton. 1837-1845, Michigan Historical Commission, 1928, and Land Office Reports, 1843-1861, Michigan.

The constitution of 1835 did not mention salt spring lands specifically. The 1850 constitution said (Article XIII, Section 11)—"The legislature may (emphasis supplied) appropriate the twenty-two sections of salt spring lands now unappropriated, or the money arising from the sale of the same. . . for the support and maintenance of (an agricultural school) . . . ." This section also enjoined the legislature to establish an agricultural school "as soon as practicable." The 22 sections of land were so appropriated by Act 130, 1855, which established what is now Michigan state university.

Constitution of 1908

The 1908 constitution virtually repeated the provisions of 1850 except that the word the legislature "may" was changed to "shall."

Statutory Implementation

As with many other lands granted by the federal government or the state for educational purposes, the lands themselves have been sold and the money used by the state. As provided by statute or the constitution, an amount equivalent to the proceeds of such sales form the corpus of various funds of which a memorandum record is made as a basis for determining the amount of interest to be paid annually to the designated educational function. All salt spring lands have been sold.[93]

The original disposition of the 72 sections is shown below.[94]

Authority	Sections	Disposition
Act 187, 1848 Act 133, 1849 Act 282, 1850	25	Asylums for Deaf, Dumb and Blind, and the Insane.
Act 138, 1849	25	State Normal School (Eastern Michigan University)
Act 130, 1855	22	Agricultural College (Michigan State University)

Eastern Michigan university, the original state normal school, still receives an annual income which was $6,070 in 1960-61 and which is said by officials of that institution to be solely from a fund resulting from the sale of salt spring lands.

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[93] An original federal prohibition against sale or lease of these lands for longer than 10 years was rescinded in 1847.

[94] Twelve of the originally selected sections were found to have been sold by the federal government in error to private individuals. In 1852 Congress granted 12 additional sections to replace the sold lands.

The matter of salt spring lands is now so obscure that it is currently impossible without a tedious and possibly unprofitable review of records to know exactly how much money is annually received by Michigan state university specifically from the sale of this sort of land. From funds resulting from the sale of all types of land that university now receives slightly more than $74,000 annually. These monies are paid out of the primary school interest fund from receipts of the specific taxes in accordance with the provisions of Article X, Section 1 of the constitution.

The act giving lands for asylum uses did not require a perpetual fund to be established and the lands were sold, with the proceeds being used in full for institutional support.

Interest paid on the corpus of land sale funds (including salt spring lands) is seven per cent per annum, except in the case of swamp lands where the rate is set by statute at five per cent. The statute governing interest on funds from the sale of agricultural lands is the only one that can be found setting a seven per cent rate in so many words (Act No. 140, 1863). Apparently the seven per cent rate on other funds stems from a supreme court decision in 1896, Regents v. Auditor General, 109 Mich. 134. A law of 1859 (Act 143) relating to the income from lands reserved to the use of the university of Michigan (not salt spring lands, however) was passed at a time when the usury laws allowed a seven per cent interest rate, which rate had been paid on these funds by the auditor general since 1845.[95] The court ruled that the auditor general must continue the seven per cent rate, since the act of the legislature granting the lands and income therefrom, when passed, implicitly set seven per cent, the rate of interest at that time. With this legal precedent, no further challenge to the seven per cent interest rate, on all except swamp lands, has yet occurred.[96]

Other State Constitutions

A number of state constitutions contain provisions appropriating lands to school purposes or to perpetual funds for school purposes.[97] In most cases such provisions appropriate to school purposes the proceeds of all lands granted by the

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[95] So states the court decision (see 109 Mich.136). However, figures in the annual report of the auditor general for the fiscal year 1900-01 (p. 350, Table No. 247) indicate that less than seven per cent (presumably six per cent) was paid on the university and other educational funds in the one year, 1881, the year in which by Act No. 138 the legal interest rate was reduced from seven to six per cent.

[96] The law providing for the normal school interest fund paid to Eastern Michigan university (see Section 390.412 of the Compiled Laws of 1948) does specifically provide for the payment of interest "at the rate or six per cent per annum." (Act No. 194, 1889) Payment at the rate of seven per cent on this fund appears to be sanctioned only by the custom of more than seventy years' standing.

[97] Nebraska, New Mexico, Wisconsin, Wyoming, North Carolina, Texas, California, Iowa, Kansas, Nevada, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington. (Index Digest, pp. 386-387).

United States. Exceptions to this are university lands granted by Congress to the state for the support of a university. Wisconsin, for example, appropriates the proceeds of such land to a perpetual fund the interest of which is to be used for the support of the university.[98]

North Dakota constitutionally provides for the establishment of specified educational and charitable institutions with federal lands granted for the purpose.[99]

Michigan's provision appropriating salt spring lands, however, appears to be unique.

Comment

The mention of salt spring lands in the state constitution is obsolete and does not need to be continued in any new version. As distinct from this, the question of the corpus of the funds established from the sale of these and other lands and of the disposition of the interest thereon poses a problem.

The constitutional convention appears to have three basic alternatives respecting these funds. It can abolish them and provide for state support of education through regular or other forms of appropriation.[100] It can retain the funds as a nostalgic nod to the past. It can consolidate the funds into a single "fund for educational purposes" with interest to be paid out as the legislature or the constitution may direct.

4. Wayne State University

Article XI: Section 16. There shall be a board of governors of Wayne state university, consisting of 6 members, who shall hold office for 6 years. There shall be elected at each regular biennial spring election 2 members of such board. When a vacancy occurs in the board of governors, it shall be filled by appointment of the governor. The board of governors of Wayne state university and their successors in office shall continue to constitute the body corporate known as "the board of governors of Wayne state university". The board of governors shall, as often as necessary, elect a president of Wayne state university. The president and the superintendent of public instruction shall be ex

[98] Article X, Section 6.

[99] By Act of Congress in 1889; see constitution of North Dakota, Article XIX, Section 215, p. 62.

[100] Specific taxes (see Article X, Section 1) now amount annually to many times the money due from the established interest rate on the primary school, university, and other educational funds.

officio members of the board of governors, with the privilege of speaking but not of voting. The president shall preside at the meetings of the board and be the principal executive officer of Wayne state university. The board of governors of Wayne state university shall have general supervision of Wayne state university and the duties of said board shall be prescribed by law. The legislature shall be given an annual detailed accounting of all income from whatever source derived and all expenditures by Wayne state university.

Constitutions of 1835 and 1850

The earlier constitutions contained no provision of this type.

Constitution of 1908

The original constitution of 1908 did not contain this provision. In 1933, the Detroit board of education united several institutions of higher learning to form Wayne university. The present board of governors of Wayne State university was created by a constitutional amendment in 1959. A prior board had been created by statute[101] in 1956 as a temporary board during the transition from a municipally supported to a state-supported institution.

The section apparently has presented no serious problem of interpretation to date. The section has given rise to no litigation.

The original act of 1956 which provided for the establishment and regulation of the university has continued in force following the 1959 amendment.

Other State Constitutions

For the practice followed in other states providing for state-supported universities see Other State Constitutions under the preceding sections on the university of Michigan and Michigan state university.

Comment

This section gives the board of governors similar powers of general supervision to those granted to the boards controlling the university of Michigan and Michigan State university. The section does not provide, however, for the "direction and control of all expenditures" by the board of governors, similar to the provision of authority for the board of regents of the university of Michigan and the board of trustees of Michigan state university. From the interpretation given this clause

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[101] Public Act 183 of 1956.

by the courts, in the case of the university of Michigan and Michigan state university, it would appear that omission of this provision makes an important difference in the extent to which Wayne state university is free from statutory controls as compared to the university of Michigan and Michigan state university.

It is also provided in this section that the duties of the board of governors of Wayne state university "shall be prescribed by law" while the constitution provides that the board of trustees of Michigan state university "shall perform such other duties as may be prescribed by law." The constitution makes no provision for the legislature to assign duties to the board of regents of the university of Michigan. The provisions of Section 16 relating to the powers and duties of the Wayne state university board of governors are actually the same as those made for the state board of education. The constitution provides that the state board of education "shall have general supervision of the state normal college and the state normal schools, and the duties of said board shall be prescribed by law."

While lacking an authoritative interpretation of the language of this section, there would appear to be some question as to whether the provisions of this section put Wayne state university on the same constitutional footing with the university of Michigan and Michigan state university. However, the statutes applicable to Wayne state university have not attempted to limit the powers of its board of governors and its present status is, in fact, if not by express constitutional provision, on an equal footing with the boards of regents and trustees.

The last clause of this section providing for an "annual detailed accounting of all income" is not contained in sections providing for the university of Michigan and Michigan state university, although another section (Article X, Section 18) requires the legislature to provide for "the keeping of accounts by all state officials, boards and institutions" which accounts and the audit thereof "shall be public records and open to inspection."

Consideration might be given to clarifying the constitutional wording of Section 16 to indicate more clearly the status of Wayne state university in these respects.

Article X, Section 18 provides for the keeping of accounts by state institutions. In view of this provision the requirement for an annual accounting of income in Article XI, Section 16 might be unnecessary.

For additional comment see Comment under the university of Michigan (Article XI, Sections 3, 4 and 5).

5. State Board of Education

Article XI: Section 6. The state board of education shall consist of four members.

> On the first Monday in April, nineteen hundred nine, and at each succeeding biennial spring election, there shall be elected one member of such board who shall hold his office for six years from the first day of July following his election. The state board of education shall have general supervision of the state normal college and the state normal schools, and the duties of said board shall be prescribed by law.

Constitutions of 1835 and 1850

This provision originated in the constitution of 1850 and was carried over into the constitution of 1908.

Constitution of 1908

Section 6 has not been amended since the present constitution was adopted. This section has given rise to very little litigation.

Statutory Implementation

Legislative enactments implementing the provisions of this section provide for the establishment, location and control of the four normal schools, which in 1959 were designated as Eastern Michigan, Western Michigan and Central Michigan Universities and Northern Michigan College.

In addition to responsibilities for the operation of the four schools, the board is responsible for issuing certificates for public school teachers in the state and the supervision of the schools for the blind and deaf. The board is empowered to hear appeals from county boards of education decisions on the transfer of territory between school districts. The board is also required to examine textbooks used in certain specified courses and to set standards for the transportation of pupils by local school districts.[102]

Other State Constitutions

Nineteen states in addition to Michigan constitutionally provide for a state board of education.[103] Colorado, Louisiana, Nebraska, and Utah select board members by popular election. Board members in Georgia, Missouri, and Vir-

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[102] M.S.A. 15.001 through 15.1117.

[103] State boards of education responsible for various levels of education are provided for in 29 additional states—by state statute. Illinois, without a general board, has a specialized board responsible for limited phases of the school program. (The Book of the States, p. 294) (Index Digest, pp. 364-365).

ginia are appointed by the governor with the consent of the senate in the first two states and with the consent of the legislature in Virginia. Florida, Mississippi and Oklahoma have ex officio boards, while five other states provide for both ex officio and appointed membership. Texas, California, and Idaho leave the matter to be provided by law.[104]

Tenure Nine states fix the term of office for board members. Terms range from four years (in South Carolina, Virginia, Michigan) to eight years (in Georgia, Louisiana, Missouri, and North Carolina). The average term provided for in the nine states is 6.3 years.

The size of board membership fixed by thirteen states ranges from three in Mississippi to 15 in Georgia. The average membership of the thirteen boards is eight members.

Powers and Duties Nebraska and Michigan vest the general government of the state normal schools in a state board of education. The Louisiana board is responsible for nine state colleges and for elementary-secondary education. North Carolina grants the board powers of supervision over free public schools.[105] Eleven states provide, as does Michigan, that the duties of the board shall be as provided by law.

Comment

The principal question involved in a consideration of this section is whether the state board of education should continue to have responsibilities for both higher education and elementary-secondary education.

The state board of education is now responsible under the constitution for four institutions of higher education. By statute it is assigned certain general educational responsibilities for elementary-secondary education. In a revision of the constitution, the general educational responsibilities now exercised by the board, plus all of the constitutional authority now vested in the superintendent (see Article XI, Section 2) could be lodged in the state board of education.

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[104] Eight states (including Idaho) make the superintendent of public instruction an ex officio member, five make the governor a member. Other state officers occasionally made ex officio members of the state board include the lieutenant governor, secretary of state, state treasurer, auditor general, and attorney general. Index Digest, pp. 364-365.

[105] As provided by statute or by state constitutions, three states (Idaho Montana, and New York) assign responsibility for all levels of education to a single state-wide board. Eighteen states assign their state boards responsibility for four-year colleges and higher levels of educational institutions in addition to elementary and secondary education. Eleven states place only their two-year colleges under the state board responsible for elementary and secondary education. State Boards Responsible for Higher Education, pp. 203-208.

Should this responsibility for elementary-secondary education be lodged in the state board of education, the constitution might continue to hold the state board responsible for the government of the four institutions of higher education. Or, the four institutions might be placed under separate boards of control or under one centralized board responsible for the government of all four institutions or one board for all institutions of higher education in the state. The matter of providing for the government of these institutions could, of course, be left to the discretion of the legislature. The college of mining and technology and Ferris institute are now governed by separate statutory boards.

Another possible issue in connection with this section is whether the members of the board should continue to be elected or whether they should be appointed by the governor.

As previously indicated, a number of states now provide for appointment by the governor subject to the advice and consent of the senate. Determination of this issue would depend in part on what the future role of the state board of education is to be.

In the interest of making the board broadly representative in providing educational policy, consideration might be given to increasing the size of the board. The average membership on thirteen constitutionally created state boards of education is about eight.

D. OTHER PROVISIONS

1. Township and City Libraries

Article XI Section 14. The legislature shall provide by law for the establishment of at least 1 library in each township and city; and all fines assessed and collected in the several counties, cities and townships for any breach of the penal laws shall be exclusively applied to the support of such libraries.

Constitutions of 1835 and 1850

The constitutions of 1835 and 1850 contained similar provisions. The 1835 provision (Article XI, Section 4) required the legislature to provide for the establishment of one library in each township, while the 1850 provision (Article XIII, Section 12) required the legislature to support city as well as township libraries. It differed from the 1835 provision, also, in that the earlier provision required only that the clear proceeds of penal fines[106] be appropriated, implying that the cost of collecting the fines should be deducted before the moneys were distributed.

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[106] Fines collected for violations of motor vehicle laws, hunting, fishing and game laws.

Following the adoption of the 1850 provision the supreme court ruled that collection expenses could not be deducted from penal fine moneys.[107] Subsequently, however, an amendment was passed in 1881 which allowed for some diversion of the funds by township or school district boards.

Constitution of 1908

The draft provision presented to the convention of 1907-1908 by the committee on education was phrased in the same manner as the provision originally passed in 1850, omitting the clauses added by amendment and again requiring penal fine moneys to be used exclusively for the support of township and city libraries.

Several members of the committee pointed to measures employed by the counties, cities, and townships to divert penal fine moneys from the library fund,[108] and indicated that the clauses had been omitted as a measure aimed at stopping such practices.

On the other hand, others pointed out that to omit the clauses and restrict the use of penal fines would tie the hands of local authorities who were, it was argued, in a better position than the framers of the constitution to discern the needs of their locality.[109] The fear was expressed in the debate that the matter of providing for libraries would go unheeded, which argument seems to have been influential in the convention's decision to restrict penal fines for library purposes.

A proposal to insert in this section a requirement that both penal fines and fines for violations of city ordinances be credited to the library fund was not accepted by the convention, apparently because the proposal did not include an acceptable method for distributing fines from city ordinances.[110]

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[107] People ex rel. Board of Education of Detroit v. Wayne County Treasurer, 8 Mich. 392.

[108] Court costs were being assessed in amounts exceeding the fine imposed for a breach of the penal laws. Revenue from fines had to be credited to the library fund, while revenue derived from court costs could be credited to other funds.

Ordinances were enacted duplicating the penal laws in which case the cities could credit fines collected for violations of the ordinance to the city's general fund. From the Proceedings and Debates, pp. 172-176.

[109] Some city libraries were established with Carnegie Foundation funds and, under the terms of the gift, were supported by tax funds. It was argued that these cities should be allowed some discretion in the use of penal fines. From the Proceedings and Debates, p. 175.

[110] The proposal would have required fines from city ordinances to be distributed throughout the county on a per capita basis while the expense of collecting such fines would be borne by the city in which they were collected. From the Proceedings and Debates, p. 176.

The section has not been amended since the adoption of the present constitution.

Judicial Interpretation

Section 14 has been interpreted to permit the distribution of penal fine moneys to county law libraries[111] while it would not permit the county treasurer to assign all penal fine moneys to the county library board at any time school districts in the county report $20,000 or more in unexpended penal fine moneys.

The supreme court ruled in 1943 that "penal fines" as referred to in this section are those recovered for violation of state laws while fines recovered under parallel city ordinances can be retained by the city.[112]

Statutory Implementation

Enabling legislation authorizes city, county, township, village and school district governing boards to contract for library services, to establish libraries and to cooperate in the establishment of district libraries. Under varying conditions they may also levy an annual tax to provide library services.[113]

Regional libraries are also provided for by law. This extension toward a larger library unit continues to rely on the county as a base for organization. The state librarian is held responsible for planning the establishment of such libraries, while member counties must approve such plans and appropriate sums for the support of the inter-county unit.[114]

A state board for libraries was created in 1937[115] to have powers and duties formerly vested in a state librarian[116] and a board of library commissioners.[117]

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[111] County of Gratiot v. Federspiel, 1945.

[112] Delta County v. City of Gladstone, 1943.

[113] Act 92, 1952; Act 138, 1917; Act 164, 1955; Act 164, 1877; Act 5, 1917; Act 26, 1921; Act 213, 1925; Act 261, 1913; Act 269, 1955.

[114] Act 250, 1931.

[115] Act 106, 1937.

[116] Act 28, 1895. Previous to 1937 this officer was appointed by the governor and had general control and supervision over the state library. In addition, the powers and duties of the board of library commissioners were performed by the state librarian after the board was abolished in 1921.

[117] Created by Act 115, 1899 and abolished in 1921. The board served primarily as an agency to promote better library service in the state.

The act provided for the appointment of a state librarian by the state board which was given general control and supervision over the state library, the exchange medium for documents of the state, serving branches of the state government and other states. The state board is responsible for setting standards for the certification of libraries and librarians, distributing grants to public libraries, controlling the establishment of regional libraries, and developing state-wide school library service.

In 1937 the legislature also provided for a state aid fund supplementing penal fines. The fund is designed to provide an incentive for improving library service in that eligibility for aid is dependent on whether a library conforms to requirements set by the state board to libraries.[118] Thirty percent of the fund is used to provide establishment grants for county and regional libraries and to reimburse the salaries of county or regional librarians up to $4,800 per year. The remaining 70 percent is distributed on a per capita basis to public libraries which have met the standards set by the state board.

Legislation implementing the provision earmarking penal fines was first passed in l837-l838, authorizing the distribution of penal fines to school districts. County law libraries were authorized penal fines distributions in 1921. Legislation passed in 1947 provided for penal fine distributions to the county library and other independent libraries in counties having a county library.

Specific procedures now used for distributing penal fine money were developed in accordance with rulings of the department of public instruction as approved by the attorney general. The present order of distribution[119] calls for the first distribution to be made to the county law library in an amount varying from $750 to $4,000 depending upon the population of the county. The balance of the penal fine moneys is distributed by the county treasurer to county, city and school district libraries on the basis of the number of children in each jurisdiction as certified by the superintendent of public instruction.[120]

Other State Constitutions

Few state constitutions contain provisions similar to those found in this section.[121] The Missouri constitution provides that it shall be a policy of the state to promote the establishment of free public libraries and to accept the obligation of

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[118] Attorney General Opinion, No. 555, August 1, 1947.

[119] Ibid.

[120] Act 269, 1955. See also memorandum, "Michigan State Library Penal Fines," The State Board for Libraries, Lansing, Michigan, July, 1960.

[121] Index Digest, pp. 683-684.

their support by the state, its subdivisions and municipalities as provided by law. The legislature is required to grant aid to libraries in a manner and in amount as provided by law.

Iowa earmarks moneys paid for exemption from military duty and the clear proceeds of penal fines to the support of common schools or the establishment of libraries as the board of education may provide.

New York provides that revenues from certain funds shall be applied to the support of both common schools and libraries.

Comment

There are now some 300 established libraries throughout the state. If consideration is given to removing this section, the matter of providing for the support of these libraries could be left to the discretion of the legislature which, as previously mentioned, now provides state aid to libraries.

Consideration might also be given to replacing this constitutional protection given penal fines with a provision similar to that found in the Missouri constitution which does not earmark specific revenues for library purposes but does recognize in principle the state's obligation to participate in the support of the establishment and maintenance of libraries.

2. Charitable Institutions

Article XI: Section 15. Institutions for the benefit of those inhabitants who are deaf, dumb, blind, feeble minded or insane shall always be fostered and supported.

Constitution of 1835 and 1850

There was no provision of this type in the 1835 constitution. This provision for charitable institutions originated in the 1850 constitution (Article XIII, Section 10) and was carried over in the 1908 constitution.

Constitution of 1908

The present provision differs from that in the 1850 constitution only in that the word "feeble-minded" was added. The provision was considered and accepted by the 1907-08 convention without debate.

This section has not been amended, nor has it given rise to much litigation.

Statutory Implementation

There is a Michigan school for the deaf at Flint and a school for the blind at Lansing, both under the jurisdiction of the state board of education.

The department of mental health is charged with the responsibility for all phases of the state's mental health program performed at the state level.

Other State Constitutions

A number of other state constitutions, most of which were drafted before 1900, authorize their legislatures to provide for various charitable institutions. Institutions are authorized for the mentally handicapped in twenty states; for the blind in twenty-seven; and for the deaf in seventeen.[122]

Newer and more recently revised constitutions authorize the legislature to support a variety of programs which come under the heading of "general welfare."

Comment

As is the case with "encouraging education," this section does not grant power to the state, but rather expresses the intent of the people to support the types of institutions specified. If the provision were eliminated, the state would still be able to support these institutions and programs. The recent trend has been away from specific provisions of this type and to the "promote the general health and welfare" type of provision.

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[122] Index Digest, pp. 526-530.

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CHAPTER XII CORPORATIONS

(over)

Section Detail

XII CORPORATIONS

Dykema, Wheat, Spencer, Goodnow & Trigg
John R. Dykema

1. Creation of Corporations

Article XII: Section 1. Corporations may be formed under general laws, but shall not be created, nor shall any rights, privileges or franchises be conferred upon them, by special act of the legislature. All laws heretofore or hereafter passed by the legislature for the formation of, or conferring rights, privileges or franchises upon corporations and all rights, privileges or franchises conferred by such laws may be amended, altered, repealed, or abrogated.

Constitutions of 1835 and 1850

The 1835 constitution (Article XII, Section 2) provided that the legislature should pass no act of incorporation, unless with the assent of at least two-thirds of each house. It evidently did not forbid the formation of corporations by special acts. This prohibition appeared first in the 1850 constitution (Article XV, Section 1) which forbade the creation of corporations by special acts except for municipal purposes. A reservation of power in the legislature to amend or repeal corporate laws first appeared in the same section of the 1850 constitution as follows: “All laws passed pursuant, to this section may be amended, altered or repealed.”

Constitution of 1908

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

In connection with the elimination of “except for municipal purposes” from the prohibition against forming corporations by special acts, Mr. Townsend chairman of the committee on private corporations, said in the course of the 1907-08 convention, “We know very well that a great portion of the time of our legislature for a number of years past, has been taken up by passing local laws, and it is evident that there has been nothing done by the legislature of Michigan that has brought it so much in disrepute with the people of the state as the passage of local acts.”

The draft provision presented to the legislature was amended by adding the words “of the legislature” after the phrase “by special act.” The purpose of the addition was to remove the inference that municipalities would be forbidden to confer franchises upon public service corporations, and thus to limit the prohibition to the legislature.

Judicial Interpretation

Elimination of even the partial power to create corporations by special acts in the 1908 constitution almost completely eliminated litigation under this provision. In 1942, however, the supreme court was called on to decide the constitutionality of Act 147, P.A. 139, which authorized the electorate of five counties in southeastern Michigan to form the Huron-Clinton Metropolitan Authority, against the claim, among others, that it violated the first clause of Section 1. The court held that the authority was not a corporation in the constitutional sense, but rather a state agency designed to function in a limited sphere in the accomplishment of public purposes for which existing municipal corporations were not suited.[1]

The reservation of power to amend, alter, repeal or abrogate corporation laws and franchises is clearly and comprehensively expressed and has not occasioned any substantial amount of controversy.

There was a substantial body of litigation under the comparable sections of prior constitutions, particularly with relation to special acts of incorporation and the reserved power to amend or repeal.

Statutory Implementation

The legislature has over the years extensively exercised its power to enact general corporation laws, the broadest in scope among which, in its present form, is the Michigan general corporation act, P.A. 327 or 1931, as amended, M.S.A. Section 450.1 et seq. Among others are: the insurance code of 1956, P.A. 218 of 1956, M.S.A. Section 24.1100 et seq.; summer resort associations, P.A. 230 of 1897, M.S.A. Section 21.661 et seq. and P.A. 137 of 1929, M.S.A. Section 21.751, et seq.; railroad, bridge and tunnel companies, P.A. 198 of 1873 as amended, M.S.A. Section 22.201 et seq.; union depot companies, P.A. 244 of 1881 as amended, M.S.A. Section 22.321, et seq.; train railway companies, P.A. 148 of 1855 as amended, M.S.A. Section 22.371 et seq.; street railway companies, P.A. 35 of 1867 as amended, M.S.A. Section 22.421 ; brine pipeline companies, P.A. 182 of 1881 as amended, M.S.A. Section 22. 1271, et seq.; telegraph companies, P.A. 59 of 1851 as amended, M.S.A. Section 22.1361 et. seq.; telephone and messenger service companies, P.A. 129 of 1883 as amended, M.S.A. Section 22.1411 et seq.; canal and harbor companies, P.A. 233 of 1875 as amended, M.S.A. Section 22.1481 et seq.; river improvement companies, P.A. 149 of 1869, M.S.A. Section 22.1511; water power companies, P.A. 232 of 1863, M.S.A. Section 22.1581, and P.A. 39 of 1883, M.S.A. Section 22.1611; power companies in the upper peninsula, P.A. 283 of 1905, M.S.A. Section 22.1651.

Other State Constitutions

It is noted that the preliminary discussion draft, sixth edition, of August 4, 1961, of the Model State Constitution, published by the National Municipal League, New York, contains no provisions whatsoever on the subject of corporations.

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[1] Huron-Clinton Metropolitan Authority v. Boards of Supervisors of Five Counties, 300 Mich. 1.

The constitutions of 39 states provide for the formation of corporations under general laws; constitutions of 36 states forbid the formation of corporations by special acts.

There are a variety of provisions permitting incorporation by special act in special cases: banking corporations (Indiana), cities (Wisconsin), charitable, educational, penal or reformatory corporations under state control (Arkansas, Colorado, Delaware, Idaho, Illinois, Montana, Nebraska, North Carolina, North Dakota, South Carolina, South Dakota), municipal (Minnesota, Nevada), and municipal purposes and cases where the objects of the corporation cannot otherwise be obtained (Maine, Maryland, New York and Wisconsin).

Twenty states specifically reserve power in the legislature to amend alter or repeal corporate charters under general laws; seven states reserve such legislative: power, "provided no injustice is done the incorporators."

Some constitutions set forth other causes for forfeiture of corporate charters: Texas permits the attorney general, for sufficient cause, to seek a judicial forfeiture; Virginia provides that failure to pay a registration fee for two successive years or to make an annual report within ninety days after two such years works a revocation of the charter Arizona, Idaho, Louisiana and Montana provide for forfeiture of corporations which form monopolies or trusts.

Comment

The convention may well believe that the legislature does not require constitutional authority to pass general corporation laws. It may well be, however, that the convention will believe that the public policy against creating corporations by special acts is important enough to have constitutional status; if so, clause 1 of the present section could well be retained as it stands. Clause 2 no doubt originally appeared in response to the Dartmouth College case.[2] Though perhaps no longer necessary, the convention may well believe that it should be retained, if only to avoid any inferences that might arise by reason of its removal.

2. Construction of "Corporation;" Suits

Article XII: Section 2. The term "corporation" as used in this article shall be construed to include all associations and joint stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. All corporations shall have the right to sue and be subject to be sued in all courts in like cases as natural persons.

[2] Trustees of Dartmouth College v. Woodward, 17 U.S. 5.18 (1819).

Constitutions of 1835 and 1850

This provision first appeared, in substantially identical form, in the constitution of 1850, Article XV, Section 11.

Constitution of 1908

The substance of this provision occasioned no debate in the 1907-08 convention. It has not been amended since the adoption of the constitution.

Judicial Interpretation

The first clause of Section 2 has occasioned little litigation.

Sections 7 and 8 of Chapter XIV of P.A. 314 of 1915, as amended, constituting the judicature act, relate to actions by and against corporations. Neither the constitutional clause nor the implementing statute has occasioned substantial litigation.

Other State Constitutions

Eighteen states have a constitutional definition of "corporation" substantially identical to that in Michigan. Oklahoma and Virginia exclude municipal corporations and state-controlled public institutions. North Dakota and South Carolina exclude municipal corporations; Minnesota excludes associations and joint-stock companies with banking privileges; and the Delaware constitution does not apply to religious corporations except as specifically set forth.

Twelve constitutions specifically permit corporations to sue as in the case of natural persons; Kansas provides simply that corporations may sue in their corporate name. Eleven states provide that corporations may be sued as in the case of natural persons; Kansas provides that such suit may be brought in the corporate name. Pennsylvania provides that the statute of limitations as to actions against individuals shall apply to corporations and the California constitution provides that a corporation may be sued in the county where a contract is made or to be performed, where an obligation or a liability arises or breach occurs or where the principal place of business of the defendant is located, subject to power of the court to change the place of trial.

Comment

Though it may be doubted whether the provisions of Section 2 are of sufficient moment to entitle them to constitutional status, and the convention might believe that they are subjects appropriate for legislative or judicial determination, their retention may be thought expedient in order to avoid inferences that might be drawn from their removal.

3. Duration of Franchise; Extension of Corporate Life

Article XII: Section 3. No corporation shall be created for a longer period than thirty years, except for municipal, railroad, insurance, canal or cemetery purposes, or corporations organized without any capital stock for religious, benevolent, social or fraternal purposes; but the legislature may provide by general laws, applicable to any corporations, for one or more extensions of the term of such corporations, while such term is running, not exceeding thirty years for each extension, on the consent of not less than two-thirds of the capital stock of the corporation; and by like general laws for the corporate reorganization for a further period, not exceeding thirty years, of such corporations whose terms have expired by limitation, on the consent of not less than four-fifths of the capital stock.

Constitutions of 1835 and 1850

The subject covered by this section first appeared in Article XV, Section 10, of the constitution of 1850, which excepted from the thirty-year limit only corporations for municipal purposes or for the construction of railroads, plank roads and canals. The vote requirements for extension of corporate charters before and after expiration were identical, except that the legislature was given power to provide for such extension in the case of corporations with no capital stock.

Constitution of 1908

Section 3 has not been amended since the adoption of the constitution.

When this section was considered by the committee of the whole convention, there evidently was no debate whatsoever as to the advisability of carrying over the thirty-year limit to the 1908 constitution. The committee of the whole added cemetery purposes to the classes of corporations excepted from the limit. Insurance companies were excepted from the limit on the ground that there were certain life insurance companies whose policies did not expire within thirty years.

Judicial Interpretation

This section has occasioned almost no litigation since its adoption in 1908; in 1930 the supreme court decided that under a statute permitting extension of corporate charters, a municipal franchise granted to a gas company with no express time limitation is automatically extended by extension of the corporate charter pursuant to the statute.[3]

Statutory Implementation

Sections 60-63 inclusive of the general corporation law, P.A. 327 of 1931 as amended, M.S.A. Sections 21.60-21.63 inclusive, and predecessor acts, have exercised the legislative power to provide for extension of corporate charters.

[3] City of Benton Harbor v. Michigan Fuel and Light Co., 250 Mich. 614.

Other State Constitutions

Other than Michigan, Mississippi is the only state fixing a constitutional limit on the duration of corporate charters (99 years), applicable to private corporations for pecuniary gain. California, Utah and Washington provide that the legislature may not extend an individual franchise or charter, and the California constitution goes on to permit the legislature to provide for extension of existence of any corporation by general laws uniformly applicable to corporations formed for a limited period.

Comment

It may be seriously doubted whether this provision should be retained. It first appeared in the 1850 constitution at a time when corporations generally were the subject of lively public suspicion and distrust. It may be argued that the only practical effect of the provision is to require extensions of the terms of Michigan corporations every thirty years; the state maintains through this section no effective actual control not otherwise available to it. It may be pointed out that probably the only practical effect of the section is to encourage incorporating in other states, so as to avoid the franchise fees payable on the occasion of extension of term. It might also be argued that the reason for excepting, for instance, insurance companies on the grounds that their contracts may run beyond the expiration of their term if not excepted, nowadays applies to corporations of every sort.

4. Liability of Stockholders

Article XII: Section 4. The stockholders of every corporation and joint stock association shall be individually liable for all labor performed for such corporation or association.

Constitution of 1835 and 1850

This provision first made its appearance, in identical form, in the constitution of l850 (Article XV, Section 7).

Constitution of 1908

Section 4 has not been amended since the adoption of the constitution.

There was no debate on this subject in the 1907-08 convention.

Judicial Interpretation

This provision has been strictly construed. It was held as early as 1877 in Hanson v. Donkersley, 37 Mich. 184, that the constitutional provision and the then statute

(How. Stat. Section 4017) did not have the effect of making shareholders primarily liable for labor debts of their corporation, that the constitutional liability is not self-executing, and that statutory provisions implementing it must be fully complied with. The Hanson case held further that the secondary liability of a shareholder for labor debts of the corporation is discharged by a creditor's extending time for payment for his labor and accepting a note.

Statutory Implementation

The legislature has circumscribed the generality of the constitutional language by making the right available against a shareholder only after the return unsatisfied of a judgment against a corporation or an adjudication in bankruptcy, and the court has held that the winding-up of a corporation in receivership without payment for labor provided no rights against the shareholders, Knapp v. Palmer, 324 Mich. 694 (1949).

The legislature early implemented this section, Act 41, Section 17, Laws of Michigan, 1853, and has further provided for its enforcement, in somewhat varying terms, with respect to various classes of corporations as follows:

> Generally, Chapter XX, Section 13, P.A. 314 (1915) (Judicature Act), M.S.A., Section 27.1363.

1. Partnership Association, P.A. 191, 1877 as am.; M.S.A. 20.92.
2. Summer Resort Associations, Section 17, P.A. 230, 1897 as am.; M.S.A 21.677.
3. Canal and Harbor Companies, Section 14, P.A. 233, 1875 as am. M.S.A. 22.1494.
4. Pipeline Companies, Section 10, P.A. 182 of 1881 as am.; M.S.A. 22.1280.
5. Railroad, Bridge, Etc. Companies, Article V, Section 1, P.A. 198, of 1873 as am.; M.S.A. 22.282.
6. River Improvement Companies, Section 26, P.A. 149, of 1869 as am. M.S.A. 22.1536.
7. Street Railway Companies, Section 22, P.A. 35, of 1867 as am.; M.S.A. 22.441.
8. Telegraph Companies, Section 8, P.A. 59, of 1851 as am.; M.S.A. 22.1368.
9. Telephone Companies, Section 7, P.A. 129, of 1883 as am.; M.S.A 22.1416.

10. Train Railway Companies, Section 18, P.A. 148 of 1855 as am.; M.S.A. 22.388.

11. Municipal Water Companies, Section 11, P.A. 113, of 1869 as am.; M.S.A. 22.1691.

12. Water Power Companies, Section 21, P.A. 232, of 1863 as am.; M.S.A, 22.1601.

13. Water Power Companies, Section 15, P.A. 39 of 1883 as am.; M.S.A. 22.1624.

14. Water Power Companies, Section 15, P.A. 202, of 1887 as am.; M.S.A. 22.1645.

15. Water Power Companies, Section 15, P.A. 283 of 1905 as am.; M.S.A. 22.1665.

16. Cooperative Savings Associations, Section 20, P.A. 206, of 1877 as am.; M.S.A. 23.530.

With respect to shareholder contribution generally, see Section 19 R.S. 1946, Ch. 55, M.S.A. 21.253, and Section 30, P.A. 327, of 1931 as am.; M.S.A. 21.30 (General Corporation Act).

Other State Constitutions

Michigan is the only state whose constitution provides for stockholder liability for labor performed. Constitutions of five states (Nebraska, Oregon, South Carolina, Washington and West Virginia) provide positively for stockholder liability up to the amount of stock subscribed and unpaid for, except, in Oregon and West Virginia, bank stockholders; and the constitutions of four states (Alabama, Idaho, Missouri and Ohio) specifically prescribe stockholder liability in excess of the amount of unpaid stock owned. The Nevada constitution provides that incorporators of domestic corporations are not individually liable for debts of the corporation. Indiana, Kansas, New York and North Carolina provide that dues from corporations may be secured by individual liability as may be provided by law.

Comment

It could be argued that this provision, particularly as circumscribed by the legislature and the supreme court, affords no substantial protection to corporate employees with respect to their wages. Evidence of this might be found in the almost total absence of successful litigation against stockholders by employees. If this is so, consideration might be given to omitting it from the constitution. The convention might also take the view that the presence of this section in the Michigan constitution argues in favor of incorporating in other states, where such potential liabilities do not exist.

5. Limitation of Time of Holding Real Estate

Article XII: Section 5. No corporation shall hold any real estate for a longer period than 10 years, except such real estate as shall be actually occupied by such corporation in the exercise of its franchises.

Constitutions of 1835 and 1850

Article XV, Section l2 of the constitution of 1850 saw the appearance of this language, in identical form, except that the phrase "hereafter acquired," appearing in the 1850 constitution after "shall hold any real estate" was dropped in the present constitution.

Constitution of 1908

This section has not been amended since the constitution was adopted.

Section 5 of present Article XII was carried over by the 1908 convention from the 1850 constitution substantially unchanged, over vigorous objection on the part of Mr. Pratt who said, "I cannot see any possible good reason for that provision being inserted in the Constitution." The debates make it clear that the ten-year limitation on the power to hold real estate does not apply to corporations in the real estate business or corporations actually using real estate in the conduct of their own business. Mr. Townsend, the chief proponent of the provision, said, "This provision is here for the purpose of preventing them (corporations) from owning real estate in large tracts, for which they have no use at all in the exercise of their franchises, and which they do not use in their business. I do not think it is of any great importance in the Constitution, but it has been there for all this period of years and was thought to be useful at the time it was placed there. I do not see any reason why it is not still useful." Mr. Pratt pointed out that the general distrust of corporations, which was evident in 1850, had largely disappeared.

Judicial Interpretation

It was held in 1904, under substantially identical language in the 1850 constitution, that this provision can be enforced only at the instance of the public.[4]

In 1948 it was held that a foreign insurance company duly authorized by its state of incorporation to construct, maintain and operate a housing project would "actually occupy" real estate owned by it in Michigan, as landlord and through its agents and employees within the meaning of the constitutional limitation, in the light of a Michigan statute empowering such insurance companies doing business in Michigan to invest their funds "in housing projects including incidental retail and service

[4] Pere Marquette Railroad Co. v. Graham, 136 Mich. 444.

facilities ...if such investment is within the franchise of such insurer under the laws of the State or country under which such insurer organized."[5]

The court thus construed "actually occupied by such corporation in the exercise of its franchise" broadly to encompass occupancy through ownership and managership, if such ownership and managership was authorized by the corporation's charter.

Other State Constitutions

The Louisiana constitution forbids corporations to hold real estate longer than ten years, except for legitimate corporate purposes; and Missouri, Pennsylvania, and South Dakota forbid holding real estate at all except such as is necessary and proper for legitimate business, provided that Missouri permits holding for ten years and such longer period as general law may provide real estate acquired in payment of a debt by foreclosure or otherwise. The Kentucky constitution forbids holding real estate longer than five years except as is necessary and proper for business; and California provides that the holding of large tracts, uncultivated and unimproved, is against the public interest and is to be discouraged by lawful means. The New Mexico constitution provides that corporations in which the majority stock is owned by aliens ineligible to citizenship may not acquire any interest in real estate until otherwise provided by law.

Comment

Two points may be made about this section. First, it could be plausibly argued that the ten-year limitation, as construed by the supreme court, is in fact illusory: since a corporation can exercise no powers whatsoever that are not permitted by its charter and the laws of its state of incorporation, and since "actual" occupancy of real estate is accomplished simply by compliance with such charter and laws, the constitutional limitation is more apparent than real. Second, it may be argued equally plausibly that if the reasons for the limitation had not disappeared by 1908, they probably have today. Consideration might well be given to omitting this restriction from the constitution.

6. Prohibition of Extension of Special Incorporation Acts

Article XII: Section 6. The legislature shall pass no law renewing or extending any special act of incorporation heretofore granted.

Constitutions of 1835 and 1850

Article XV, Section 8 of the constitution of 1850 provided:

[5] John Hancock Life Insurance Co. v. Ford Motor Company, 322 Mich. 209.

> The legislature shall pass no law altering or amending any act of incorporation heretofore granted, without the assent of two-thirds of the members elected to each house; nor shall any such act be renewed or extended. This restriction shall not apply to municipal corporations.

The step-by-step attrition of power in the legislature to create corporations by special act no doubt accounts for the shorter treatment given to this subject in the 1908 constitution as against the 1850 constitution.

Constitution of 1908

This section has not been amended since the adoption of the constitution.

A specific provision with respect to the incorporation and power of cities and villages appears as Article VIII, Sections 20-25 inclusive of the 1908 constitution which, parallel to private corporations, contemplates their incorporation under the aegis of general rather than special laws.

Mr. Burton in the course of the debate moved to retain in this section the following language from the 1850 constitution:

> This restriction shall not apply to municipal corporations.

As originally proposed in the convention, the new language forbade the legislature from "altering and amending" as well as "renewing or extending" special acts of incorporations. It was evident that Mr. Burton's concern was that this would freeze forever the act under which the city of Detroit was incorporated. Removal of the prohibition against altering and amending satisfied the convention that the charter of the city of Detroit and similar charters would not be frozen. Further, the so-called "home rule" provision of the 1908 constitution radically altered the usual methods of forming municipal corporations.

This section has occasioned no litigation, nor, of course, have statutes been passed thereunder.

Other State Constitutions

Some of the notes under Section 1 of Article XII concerning the reserved power to amend incorporation statutes and franchises generally are relevant to special acts. The constitutions of New York, North Carolina and Wisconsin specifically permit legislatures to alter or repeal special corporation acts; the constitution of Iowa grants like permission by a two-thirds vote. The Utah and Washington constitutions forbid the legislature to extend any franchise or charter; and the California constitution does the same, but permits the legislature to provide for extension of the existence of any corporation by general law as uniformly applicable to corporations formed for a limited period.

Comment

It appears that the only corporations presently existing under special acts of incorporation are municipal corporations; it further appears that as recently as 1960 only 19 of 221 cities in Michigan retained their "special act" charters. Furthermore, Article VIII, Section 21 of the constitution as amended now provides that even cities whose charters were formed by special acts may amend their own charters. If the substance of Article VIII, Section 21 should be carried over to a new constitution, the convention might well find that Section 6 of Article XII has become unnecessary.

7. Regulation of Transportation Rates; Discrimination Prohibited

Article XII: Section 7. The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this state, and may pass laws establishing reasonable maximum rates of charges for the transportation of property by express companies in this state, and may delegate such power to fix reasonable maximum rates of charges for the transportation of freight by railroad companies and for the transportation of property by express companies to a commission created by law; and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad.

Constitutions of 1835 and 1850

Article XIX-A, Section 1, of the constitution of 1850 provided:

> The legislature may, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on different railroads in this state, and shall prohibit running contracts between such railroad companies whereby discrimination is made in favor of either of such companies as against other companies owning connecting or intersecting lines of railroad.

The 1908 constitution expanded this provision to include express companies and specifically to authorize delegation of a portion of the rate-fixing power to a commission created by law.

Constitution of 1908

Section 7 has hot been amended since the adoption of the constitution.

Section 7 was originally proposed to the convention in the same form as in the constitution of 1850. There were also presented to the convention a large variety of proposals to authorize the creation of a public utilities commission, which should have power to regulate the services and rates of all public utilities and such other powers as the legislature might prescribe. None of these was adopted. The convention clearly felt that in the absence of such a provision the legislature was without power to delegate rate-fixing powers to a commission. Mr. Sharpe, chairman of the committee on public service corporations, said on this subject: “I want to suggest this one thing, that this is not a matter that can be regulated by legislation. I think the lawyers of the convention will all agree upon the proposition that it is very doubtful whether the legislature has any authority to delegate to a commission the right to regulate the rates. The legislature has given authority under the old constitution to fix rates for transportation companies but not given authority to delegate that power of fixing rates to someone else.” Further, Mr. Barbour said, “It is in the first place conceded that the legislature has no power to organize such a commission or to create such a commission, or to create it in a way so that it will stand, without some provision in the constitution to give it effect.” As noted, the proposals for a public utilities commission were defeated.

An amendment was proposed to amend Section 7 as initially presented, authorizing the legislature to delegate power to fix rates to a commission. It was objected that such delegation, having been rejected in the public utilities commission proposal, could not be considered. It was pointed out in debate that the authority to delegate with respect to railroads was an effort simply to legalize the already existing railroad commission. In fact, Public Act 312 of 1907 established a railroad commission for the express purpose of regulating railroads and the transportation of persons and property, preventing the imposition of unreasonable rates and unjust discrimination and the ensuring of adequate service. It was a detailed and comprehensive regulatory statute, giving the commission power, on complaint and after investigation, to change rates found to be unreasonable or unjustly discriminatory and to make appropriate orders as to service found to be inadequate. At the time of the convention this act had not been judicially tested, and doubts as to its validity were expressed in the course of debate.

Regulatory power over express companies was added in the course of floor debate, again partly for the reason that the railroad commission act of 1907 already include regulation of express company rates and service.

The issue of whether to authorize the legislature to establish a commission to regulate railroad and express company rates and services was warmly and extensively debated.

Note that the section authorizes the legislature to establish maximum rates for transportation of passengers and freight, but permits it to delegate such power to a commission with respect only to freight the proponents of the provision argued that

there was no necessity for administrative determination with respect to passenger fares because they involved comparatively few neceties and distinctions, whereas the freight rate structure was "too intricate, extensive and difficult to be regulated by so large a body as the legislature." There was a substantial minority in the convention in favor of permitting the legislature to give a commission power over both.

There was also substantial objection to delegation of passenger rate control from the delegates from the cities, on the ground that the existence of such power in a commission would imperil the freedom of the cities to control the fares on their street railways.

Statutory Implementation and Judicial Interpretation

Public Act 312 of 1907, establishing a railroad commission, was in 1909, held constitutional against the claim that it purported to give courts power to fix railroad rates.[6]

Act 312 of 1907, establishing a railroad commission, was replaced by Act 300 of 1909, which covered the same subject matter. Thereafter, P.A. 419 of 1919 created a public utilities commission with broad regulatory powers over all public utilities within the state, including railroads. This act was eventually supplanted by P.A. 3 of 1939, which established the present public service commission, whose regulatory powers are set forth in all-inclusive and comprehensive terms. It supplements and, to a large extent, supplants a large number of statutes previously providing for the regulation of union depot companies, train and street railway companies, electric gas and light companies, motor vehicle carriers, carriers by water, etc.

The validity of the predecessor act and the reviewability of the decisions of the commission by the supreme court are discussed in re Consolidated Freight Co., 265 Mich. 340 (1933), holding the statute invalid insofar as it purports to give the supreme court power to review the commission's findings of fact, and valid with respect to the supreme court's power to review the commission's conclusions of law.

The role of the commission in the setting of rates and granting of certificates of convenience and necessity are discussed in several cases, notably, recently, Michigan Bell Telephone Company v. Public Service Commission, 332 Mich. 7 (1952) and Huron Portland Cement Company v. Public Service Commission, 351 Mich. 255 (1958)

Though Section 7 of Article XII of the constitution in terms permits the legislature to establish a commission with respect only to freight and express rates, the establishment by the legislature of a public service commission with vastly broader regulatory powers has evidently not been the source of serious constitutional argument.

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[6] Michigan Central Railroad Co. v. Wayne Circuit Judge, 156 Mich. 459.

Other State Constitutions

The constitutions of Illinois, Nebraska, Utah, Washington, and West Virginia authorize the legislature to establish maximum rates for passengers and freight. The Georgia constitution authorizes the legislature to regulate the charges of public utilities generally. The constitutions of nine states (Arizona, California, Colorado, Louisiana, Nebraska, New Mexico, Oklahoma, South Carolina and Virginia) authorize delegation to an administrative agency of authority over public utility rates generally. The constitutions of 24 states include provisions prohibiting various forms of discrimination, authorizing the legislature to do so, or authorizing the legislature to delegate authority to do so. State constitutions generally contain a wide variety of more or less specific provisions with respect to public utilities. Subjects covered include frequency of directors' meetings, reporting requirements, uniform accounting systems, appeal from public utility commission orders, compensation and qualifications of public utility commissioners, common carrier safety appliances, railroad passes or reduced rates, location of railroad stations, consolidation and merger of public utilities, warehouse storage charges, etc., etc.

Comment

Doubts were expressed in the convention of 1907-08 as to the constitutional validity of the railroad commission act of 1907. These doubts were largely responsible for the inclusion of this section in the 1908 constitution. The constitutional climate soon became so hospitable to exercise of police power by the states, however, that no full-scale testing of the validity of the public utilities commission act, even in the absence of specific constitutional authorization for a general regulatory commission, has been attempted. In the light of current constitutional hospitality to exercise of the police power, particularly with respect to public utilities, consideration may well be given to omitting the subject matter of this section from the constitution.

8. Consolidation of Railroads

Article XII: Section 8. No railroad corporation shall consolidate its stock, property or franchises with any other railroad corporation owning a parallel or competing line; and in no case shall any consolidation take place except upon at least sixty days public notice to all stockholders in such manner as shall be provided by law.

Constitutions of 1835 and 1850

The constitution of 1835 did not have a comparable provision.

Article XIX-A, Section 2 of the constitution of 1850 is identical in substance with Section 8.

Constitution of 1908

This section has not been amended since the adoption of the constitution.

Statutory Implementation

Article II, Section 29 of P.A. 198 of 1873, relating to the incorporation and regulation of railroad, bridge and tunnel companies (M.S.A. Section 22.233, as amended) provides in detail for the consolidation of railroad companies and the effect thereof. There are also statutes with respect to the consolidation of union depot companies with suburban railway companies and the consolidation of street and electric railways.

This section has not generated any substantial amount of litigation.

Other State Constitutions

The constitutions of eleven states (Arkansas, Colorado, Illinois, Kentucky, Montana, North Dakota, Pennsylvania, South Dakota, Texas, Utah and Washington) forbid the consolidation of stock, property or franchises of railroads with parallel or competing lines, and the constitution of West Virginia forbids such consolidation without the consent of the legislature.

The constitutions of four states (Illinois, Missouri, North Dakota and South Dakota) have a provision paralleling the Michigan requirement of sixty days public notice as provided by law in the case of all consolidations.

The constitutions of three states (Mississippi, Missouri and South Carolina) forbid consolidation with railroad corporations of other states if the resulting corporation is a foreign corporation, and the Oklahoma and Texas constitutions forbid consolidations with any foreign corporations.

Comment

The convention may well reach the conclusion that the subject matter of this section is one for legislative consideration, and need not be included in the constitution.

9. Banking and Trust Company Laws

Article XII: Section 9. No general law providing for the incorporation of trust companies or corporations for banking purposes, or regulating the business thereof, shall be adopted, amended or repealed except by a vote of two-thirds of the members of each house of the legislature. Such laws shall not authorize the issue of bank notes or paper credit to circulate as money.

Constitutions of 1835 and 1850

Article XV, Section 2 of the constitution of 1850 provided:

> No general banking law shall have effect until the same shall, after its passage, be submitted to a vote of the electors of the state at a general election and be approved by a majority of the votes cast thereon at such election.

Section 1 of the same Article XV permitted the legislature, by a vote of two-thirds of the members elected to each house, to create a single bank with branches, by a special act, and Section 3 provided:

> The officers and stockholders of every corporation or association for banking purposes, issuing bank notes or paper credits to circulate as money, shall be individually liable for all debts contracted during the term of their being officers or stockholders of such corporation or association, equally and ratably to the extent of their respective shares of stock in any such corporation or association.

Sections 4, 5 and 6 of Article XV of the 1850 constitution respectively provided for the registry of bills or notes issued or circulated as money provided for priority of bill-holders of banks as against other creditors in the event of insolvency, and forbade the suspension of specie payments by any person, association or corporation. Elimination of the power to authorize the issuance of bank notes or paper credit to circulate as money has evidently made these provisions unnecessary.

Constitution of 1908

Section 9 has not been amended.

In the 1907-08 debates there was extensive discussion of these sections. Debate centered on the question of whether banks or trust companies should be specifically forbidden to issue bank notes or paper credit to circulate as money; if they were to be so forbidden, the provisions of Sections 3, 4, 5 and 6 of Article XV of the 1850 constitution would be unnecessary. The convention vacillated somewhat during the debates; eventually the power to issue bank notes or paper credit to circulate as money was forbidden, the other sections became unnecessary and were removed. The prohibition of issuance of money by state banks was stated to be “justified by experience in the state and throughout the country and well authenticated public sentiment on the question.”

The 1908 constitution substituted the two-thirds legislative requirement for the referendum provision that had previously existed. It was pointed out in the debates that the general banking law in existence in 1908 was submitted to the people in accordance with the 1850 constitution, and it provided for its own amendment by two-thirds vote of the legislature. There apparently was some doubt as to the consti-

tutionality of that provision in the light of the referendum requirement of the 1850 constitution; incorporation of the two-thirds vote requirement in the 1908 constitution was intended to remove that doubt. Delegate George W. Moore, chairman of the banking committee, said, "I do not think a banking law should be amended lightly, and I think the provision in the general law is a good one, and it should be cleared up in this manner, that is the reason for the proposal." Further, Mr. H. M. Campbell said, "The reason... is simply to provide all the safeguards possible around the passing of acts creating financial corporations whose operations might and do affect the public generally."

Objection to the substitution of a two-thirds legislative vote for a referendum was made on the ground that, in the words of delegate James H. Hall, "It looks to me as though it was unjust to the small towns and the people, and in favor of the large banking corporations," and it was moved to strike out the two-thirds requirement. His motion was defeated, 54 to 13.

Statutory Implementation

Since at least 1887, the legislature has prescribed rules under this section. The incorporation and regulation of banks and trust companies are now comprehensively regulated in the Michigan financial institutions act, P.A. 341 of 1937 as amended, M.S.A, Section 23.711 et seq. There are other statutes in related fields, relating to the formation or regulation, or both, of:

Credit unions, P.A. 285 of 1925, M.S.A. Section 123.481 et seq.

Cooperative savings associations, P.A. 206 of 1877, M.S.A., Section 23.511 et seq.

Building and loan and saving and loan associations, P.A. 1887, M.S.A., Section 23.541 et seq.

There has evidently been little or no litigation under this section.

Other State Constitutions

The banking commissioner is a constitutional officer in Louisiana, and Oklahoma, and the constitution of Virginia specifically authorizes the legislature to create a division or bureau of banking.

The circulation of paper money by state banks is constitutionally forbidden in Arkansas, California, Nevada, Oregon and Washington.

Fifteen state constitutions specifically authorize the passage of a general banking law. The Minnesota constitution requires a two-thirds vote of the legislature for

adoption of a general banking law and the Wisconsin constitution requires a two-thirds vote of all members elected to each house. The Iowa, Illinois, Kansas and Ohio constitutions require banking laws to be approved by a majority of all votes cast at a general election after passage by the legislature.

10. Provisions Omitted in the 1908 Constitution

Aside from the sections of Article XV of the 1850 constitution discussed above in connection with Section 9 of Article XII of the 1908 constitution, certain other provisions relating to corporations in the 1850 constitution did not survive. They are:

Section 16 of Article XV provided that previous notice of any application for an alteration of the charter of any corporation shall be given in such manner as may be prescribed by law. This provision, evidently referring to the alteration of charters of corporations formed by special acts, People ex rel. Ellis v. Calder, 153 Mich. 724, outlawed by Section 1 of Article XII in the 1908 constitution, was of course no longer necessary.

Article XIX, Section 9 of the 1850 constitution provided for legislative modification of charters of mining corporations in the Upper Peninsula. Referring to corporations organized under special acts, this section also had no place in the 1908 constitution.

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CHAPTER XIII EMINENT DOMAIN

Section Detail

XIII EMINENT DOMAIN

by
Legal Division, Wayne County Road Commission*

Article XIII: Section 1. Private property shall not be taken by the public nor by any corporation for public use, without the necessity therefor being first determined and just compensation therefor being first made or secured in such manner as shall be prescribed by law.

Constitution of 1835 and 1850

In the 1835 constitution (Article l, Section 19) the only prerequisite to the taking of property for public use was that just compensation be paid therefor. The requirement that just compensation be "first made or secured" originated in the 1850 constitution (Article XV, Section 9 and Article XV, Section 15). The requirement that necessity be first determined; did not appear in either the 1835 or 1850 constitutions.

Constitution of 1908

The prohibition against taking private property "without the necessity therefor being first determined" was a significant change in the Michigan constitutional provision. Section 1 has not been amended since the adoption of the present constitution.

Judicial Interpretation

This section has given rise to voluminous litigation, the majority of which concerns the interpretation of such words as "public use," "necessity" and "just compensation." One notable decision is that of Hendershott vs. Rogers, 237 Mich. 338, in which the court held, after a lengthy discussion of the history of this section and Section 2 following, that the determination of necessity was thereby made a judicial question, even though prior to the adoption of the section, it had been a legislative

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* This material was prepared by Daniel J. Horgan, Jr., James N. Garber, John P. Cushman, and John C. Jacoby, all of whom are attorneys on the staff of the Wayne County Road Commission.

question—that is, the condemning authority determined the necessity for the improvement and the taking.

Other State Constitutions

The vast majority of other state constitutions as well as the Constitution of the United States include a section granting a general power of eminent domain which allows the taking of private property for public use. Those states whose constitutions do not include such a section apparently rely on the inherent right of the state to exercise the power of eminent domain, which right was recognized by common law. It should be noted that while these states do not have a general grant of eminent domain power, they do have sections in their constitutions pertaining to specific delegations of the power and the procedures involved therein.

All states, without exception, recognize that just compensation must be made for the private property which is to be taken. They do, however, differ as to the procedures to be used in the determination of that compensation and the time of payment of such compensation, in relation to the passage of title. The states also differ as to what type of things must be compensated for; for example, some states including Michigan limit compensation only to payment for the land actually acquired; others, either by express language in the constitution or by judicial interpretation, require that compensation must also be made for any damage which is a consequence of the use to which the private property so taken is to be put. With the exception of Wisconsin, Michigan is the only state in which the determination of necessity is required to be made by a body or group other than the condemning authority itself, as more particularly discussed under Section 2, below.

Comment

Except where it has been noted above, this section of the constitution is similar both in language and intent to those of other states.

* * *

Article XIII: Section 2. When private property is taken for the use or benefit of the public, the necessity for using such property and the just compensation to be made therefor, except when to be made by the state, shall be ascertained by a jury of 12 freeholders residing in the vicinity of such property, or by not less than 3 commissioners appointed by a court of record, as shall be prescribed by law: Provided, That the foregoing provision shall not be construed to apply to the action of commissioners of highways or road commissioners in the official discharge of their duties.

Constitutions of 1835 and 1850

The 1835 constitution did not contain any requirement similar to this section. The section originated in the 1850 constitution (Article XVIII, Section 2) and was carried in toto into the present document.

Constitution of 1908

Section 2 has not been amended since the adoption of the present constitution.

Judicial Interpretation

There bas been much litigation relative to the interpretation of this section, a large part of which dealt with the qualifications, duties and functions of the jury or commission. One judicial decision of note, which has been followed in all condemnation cases to date, holds that the jury members are the triers of both the law and the fact. This, of course, is a substantial divergence from the normal courtroom situation, in which the jury is the trier of the facts only. The rationale behind this interpretation is that the jury, as contemplated by this section of the constitution, is a jury of special inquest in which all of the power of the tribunal is vested. In re Widening of Bagley Avenue 248 Mich. 1 and in re Board of Education, City of Grand Rapids 249 Mich. 550.

Other State Constitutions

Approximately one-half of the constitutions of other states contain a section similar to Michigan's Section 2, relating to the procedure by which private property is acquired for a public use. These states, in addition, require a judicial determination of compensation. Some few also specifically empower the jury or commissioners, as the case may be, to determine whether or not the use to which the property is to be applied is public or private in nature.

Comment

The delegates may desire to consider the possibility of deleting the words "the necessity for using such property and." The deletion of these words would have the effect of making the determination of necessity a legislative or administrative question rather than a judicial question as is presently the case when the state condemns property. This would once again put Michigan in line with all the other states, except Wisconsin, as pointed out above.

* * *

Article XIII: Section 3. Private roads may be opened in the manner prescribed by law; but in every case the necessity for the road and the amount of all damages to be sustained by the opening thereof shall be first determined by a jury of 6 freeholders or by not less than 3 commissioners, and such amount, together with the expense of proceedings, shall be paid by the person or persons to be benefited.

Constitutions of 1835 and 1850

There was no section in the 1835 constitution which provided for the acquisition of property through eminent domain for the opening of a private road. This provision originated with the 1850 constitution (Article XVIII, Section 14) and with slight change was carried into the present constitution—the change being that the commissioner system was authorized in the 1908 provision.

Constitution of 1908

This section has not been amended since the adoption of the present constitution.

Judicial Interpretation

There is but one Michigan case which has arisen under this section, Leighton v. The Elysium Hunting and Fishing Club, 318 Mich. 146. In actuality this case interprets a statute (Section 9, 281 et seq. M.S.A.) which is the legislation designed to implement the authority contained in this Section 3. The case was decided on the basis of the facts involved and did not really delve deeply into areas of constitutional or statutory interpretation.

Other State Constitutions

Approximately one-half of the other state constitutions have sections similar in nature to Section 3. The language of these sections is surprisingly similar to that used in the instant case. There are, of course, some differences in the method of procedure. These differences however, are superficial rather than basic.

Comment

In view of the similarity of this language with that of other states and in view of the fact that it has been present in the Michigan constitution for well over 100 years, there would undoubtedly be some reluctance to make a change of language at this time, and little benefit to be derived therefrom.

* * *

Article XIII: Section 4. The regents of the university of Michigan shall have power to take private property for the use of the university, in the manner prescribed by law.

Constitutions of 1835 and 1850

This section originated with the 1908 constitution and consequently does not appear in either of the prior constitutions.

Constitution of 1908

This section has not been amended since the adoption of the present constitution.

Judicial Interpretation

There is but one case which has interpreted this section, People for use of Regents of University of Michigan vs. Brooks, 224 Mich. 45. In actuality this case interpreted enabling act (Section 8.1 et seq. M.S.A.) contemplated by this section and held that any proceeding to condemn land for the use of the board of regents must be brought in the name of the state and that although the property was held subject to the exclusive control and management of the board of regents, title was to vest in the state.

Other State Constitutions

The present section is unique in that it empowers a specific university to acquire property by virtue of eminent domain. However, the nature of the section is by no means unique in that a majority of the other states have seen fit to delegate eminent domain power to specific boards or groups.

Comment

The delegates may desire to consider the possibility of deleting this section since the regents of the University of Michigan as well as those of the other state colleges and universities do not require a specific delegation of eminent domain power. The taking of property for educational purposes has been judicially interpreted to be a taking for a public use. Therefore, such colleges and universities would fall well within the authority granted by Article XIII, Section 1. However, if this section is to be retained, the delegates may wish to investigate the possibility of expanding it to include the other state colleges and universities. This is especially true in view of the fact Section 8.1 et seq. M.S.A, presently allows the use of the eminent domain power by other colleges and universities.

* * *

Article XIII: Section 5. In exercising the powers of eminent domain and in taking the fee of land and property that is needed for the acquiring, opening and widening of boulevards, streets and alleys, municipalities shall not be limited to the acquisition of the land to be covered by the proposed improvement, but may take such other land and property adjacent to the proposed improvement as may be appropriate to secure the greatest degree of public advantage from such improvement. After so much of the land and property has been appropriated for any such needed public purpose, the remainder may be sold or leased with or without such restrictions as may be appropriate to the improvement made. Bonds may be issued to supply the funds to pay in whole or in part for the property so appropriated, but such bonds shall be a lien only on the property so acquired and they shall not be included in any limitation of the bonded indebtedness of such municipality.

Constitutions of 1835 and 1850

This section does not appear in either the 1835 or 1850 constitution.

Constitution of 1908

This section originated as a constitutional amendment to the 1908 constitution, pursuant to joint resolution of the legislature, and was ratified at the November election of 1928.

This section has not been amended since its original adoption.

Judicial Interpretation

There is but one case which has interpreted this section, Emmons vs. Detroit, 261 Mich. 455, which held that under this section a municipality is not limited to the acquisition of land actually necessary for a proposed improvement but may take any other land which may be appropriate in order to secure the greatest degree of public advantage from the improvement.

Other State Constitutions

Approximately one-half of the other state constitutions have similar provisions allowing the acquisition of property in excess of that actually needed for the proposed public use and further allow the resale of this property at some future time. The bonding provision of this section is also a part of those constitutions having a similar provision.

Comment

This section is seemingly entirely in line with a great number of other states insofar as it pertains. The question will undoubtedly be raised as to the desirability of expanding this section and specifically granting this power in the constitution to other levels of government, such as those county and state authorities having the eminent domain power (which at the present time rely on statutory law for excess condemnation).

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CHAPTER XIV EXEMPTIONS

Section Detail

XIV EXEMPTIONS

Prepared in Part by
Lawyers Title Insurance Corporation
John G. Heal

1. Personal Property Exemptions

Article XIV: Section 1. The personal property of every resident of this state, to consist of such property only as shall be designated by law, shall be exempted to the amount of not less than five hundred dollars from sale on execution or other final process of any court.

Constitutions of 1835 and 1850

The 1835 constitution did not have a provision of this type. The 1850 constitution (Article XVI, Section 1) originated this provision. The 1850 provision was the same as the present provision, except that a comma was placed where the period now stands and an additional explanatory and limiting clause followed it—"issued for the collection of any debt contracted after the adoption of this constitution."

Constitution of 1908

In the convention of 1907-08, the last clause of the 1850 provision, quoted above, was eliminated. Mr. Burton urged that it be removed because "there are judgments that are not issued for debt" to which the exemption should also apply.[1] Except for this change, the provision was otherwise carried over from the 1850 constitution. It has not been amended.

Statutory Implementation

Detailed statutes deal with the definition of personal property under the constitutional exemption and the processes relating to this matter.[2]

Judicial Interpretation

Many judicial opinions deal with this provision and statutory details pursuant thereto. This provision and statutes under it are intended to prevent a debtor from being made completely destitute and unable to recover from the loss of all property and means of livelihood.[3]

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[1] Proceedings and Debates, p. 177.

[2] M.S.A. 27.1543-27.1556.

[3] One of the basic cases in this area is Rosenthal v. Scott, 41 Mich. 632. See also cases cited under M.S.A. 27.1543-27.1556.

Other State Constitutions

The constitutions of 10 states, including Michigan, provide a specific amount of exemption of personal property alone or in conjunction with the homestead exemption. Under nine other state constitutions this matter is to be determined by law.[4]

Comment

If the $500 exemption specified in 1908 was a prudent and reasonable amount, its relative loss in purchasing power over the years might indicate that it is now not fully adequate. Monetary stability may be no greater in the future than it has been in the past. If a provision of this type is to be retained, greater flexibility might be gained by specifying an amount in the constitution which may be changed by law, by leaving the amount to be determined by law, or, if the matter is considered of sufficient import, by leaving the amount to be determined or changed by extraordinary vote of the legislature.

2. Homestead Exemptions

Article XIV: Section 2. Every homestead of not exceeding 40 acres of land and the dwelling house thereon and the appurtenances to be selected by the owner thereof and not included in any town plat, city or village; or instead thereof, at the option of the owner, any lot in any city, village or recorded town plat, or such parts of lots as shall be equal thereto, and the dwelling house thereon and its appurtenances, owned and occupied by any resident of the state, not exceeding in value $2,500.00 shall be exempt from forced sale on execution or any other final process from a court. Such exemption shall not extend to any mortgage thereon lawfully obtained, but such mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of his wife to the same: Provided, That, notwithstanding anything in this section to the contrary, such mortgage or other alienation of such land shall be valid without the signature of said wife, after 25 years unless within said 25 years from the date of the recording thereof in the office of the register of deeds of the county or counties wherein the property is located, there is filed in said office notice of claim of the invalidity of such mortgage or alienation under this section, excepting that in case of every mortgage or alienation recorded prior to January 1, 1920, said notice of claim may be filed prior to January 1, 1950.

[4] Index Digest, pp. 475-477.

Constitutions of 1835 and 1850

The 1835 constitution had no provision of this type. The 1850 constitution (Article XVI, Section 2) originated this provision providing for a $1,500 homestead exemption.

Constitution of 1908

This provision was carried over from the 1850 constitution with only minor change of phraseology and punctuation.

Amendment in 1943. An amendment proposed by the legislature and adopted, in April, 1943, by a vote of 169,736 to 126,164 changed Section 2 to its present form. The value of the homestead exemption was raised from $1,500 to $2,500. The words starting with "Provided, That" to the end of the provision were added by the same amendment in order to validate mortgages or other alienations not having the wife's signature if not contested within 25 years.

Judicial Interpretation

Many supreme court decisions have dealt with the subject matter of Section 2. This provision, however, is clearly expressed and most of these judicial opinions merely restate its application to particular instances. Alienation of a homestead by a married owner is invalid without the wife's signature. In order to determine if the value of the homestead exceeds the constitutional exemption, the amount of mortgage encumbrance on the homestead must be deducted.[5]

Other State Constitutions

The constitutions of approximately one-half of the states have provisions similar to Section 2. In several of these the amount of the exemption is to be determined bylaw. The amount set varies from $1,000 to $5,000 in those provisions which specify an amount. The Michigan provision in its protection of the interest of the owner's wife is not unusual among state constitutions.[6]

Comment

The increase in the amount of homestead exemption from $1,500 to $2,500 by amendment in 1943 reflects the difficulty inherent in fixing a particular amount of money for this or other purposes in the constitution. In view of the historical lack of any long-range monetary stability, consideration might be given, if a provision of this type is retained, to fixing an amount in the constitution which may be changed by law or perhaps by a law requiring an extraordinary vote for passage.

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[5] Ter Keurst v. Zinkewicz, 253 Mich. 383; Bartold v. Lewandowska, 304 Mich. 450.

[6] Index Digest, pp. 474-476, 480-481.

3. Exemption of Decedent's Homestead During Minority of Children

Article XIV: Section 3. The homestead of a family, after the death of the owner thereof, shall be exempt from the payment of his debts in all cases during the minority of his children.

Constitutions of 1835 and 1850

The 1835 constitution had no provision of this type. The 1850 constitution (Article XVI, Section 3) originated the substance of the present provision. As set forth in the 1850 provision, the homestead was exempt from the payment of the owner's debts "contracted after the adoption of this constitution."

Constitution of 1908

This provision was carried over from the 1850 constitution, but the words "contracted after the adoption of this constitution" relating to the owner's debts were deleted. This provision has not been amended. The binding force of this provision has been restated in opinions of the state supreme court.[7]

Other State Constitutions

The constitutions of approximately nine states including Michigan have similar provisions.[8]

Comment

If this provision is retained, it would appear to present little difficulty or need for revision. This provision might be combined with Article XIV, Section 4, if the substance of both provisions is retained.

4. Homestead Exemption; Death Without Surviving Children

Article XIV: Section 4. If the owner of a homestead die, leaving a widow but no children, such homestead shall be exempt, and the rents and profits thereof shall accrue to her benefit during the time of her widowhood, unless she be the owner of a homestead in her own right.

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[7] Sowers v. Robinson, 43 Mich. 502; Kraft v. Kraft, 102 Mich. 439.

[8] Index Digest, pp. 474-47.

Constitutions of 1835 and 1850

This provision originated in the 1850 constitution and was carried over into the present constitution virtually unchanged.

Constitution of 1908

In the convention of 1907-08 one change was made in the phraseology of the section. The words “the same” appeared after the word “children” in the 1850 section and were replaced by the words “such homestead” in the revised constitution of 1908. This section has not been amended since the adoption of the present constitution and it has presented no serious problem of interpretation.

Other State Constitutions

The constitutions of Alabama, Arkansas and North Carolina contain a provision of this type. Texas provides that the property descend and vest in the same manner as other real property unless surviving widow (or children) elect to occupy property as homestead.

Comment

Should the section be retained, some consideration might be given to combining the subject matter of Sections 3 and 4 into a single section of the revised constitution.

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CHAPTER XV MILITIA

Section Detail

XV MILITIA

By

Philip C. Pack
Brigadier General (Retired)
Former Judge Advocate General of Michigan

Article XV: Section 2. The legislature shall provide by law for organizing, equipping and disciplining the militia in such manner as it shall deem expedient, not incompatible with the laws of the United States.

Constitutions of 1835 and 1850

The constitution of 1835 provided in Section 1 of Article IX that "The Legislature shall provide by law for organizing and disciplining the militia in such manner as they shall deem expedient, not incompatible with the constitution and laws of the United States." The 1835 document further provided under Section 2, Article IX, that "The Legislature shall provide for the efficient discipline of the officers, commissioned and non-commissioned, and musicians, and may provide by law for the organization and discipline of volunteer companies."

The constitution of 1850, Article XVII, Section 2 contained a section almost identical to Section 1, Article IX of the 1835 document, but added "equipping" to organizing and disciplining, and deleted the reference to incompatibility with the U.S. Constitution. The 1850 constitution did not contain the provisions of Article IX, Section 2 of the 1835 document.

Constitution of 1908

The 1850 provision was carried over to the constitution of 1908 except for the change "they" (the legislature) to "it." This provision has not been amended.

Statutory Implementation

With respect to the provision for disciplining the militia, it has long been held that the militia, when not in federal service, is not responsive to the Federal Uniform Code of Military Justice. So as to provide for such discipline, the State of Michigan has enacted its own code of military justice.[1]

[1] Public Act No. 291 (1951); M.S.A. 4.686 (1) et seq.

Other State Constitutions

The constitutions of nearly half of the states contain militia provisions which are almost identical with those found in Michigan's present constitution.[2]

The older state constitutions, for the most part, contain very similar provisions, and some attempt to go into such detail as to leave the legislature virtually hamstrung in the field. While some uniformity exists as between the basic militia clauses in the various state constitutions, subsidiary provisions show such wide diversity that comparisons are very difficult, if not impossible. Furthermore, as many such provisions have been vitiated by the Congress since 1903, no useful purpose would be served in attempting a generalized comparison.

However, two of the newer state constitutions provide interesting study.[3] The new constitution of Georgia gives to the legislature the authority to say how the militia shall be officered, trained, armed, equipped and of whom it shall consist; how it shall be organized and how it shall be paid. Most of such authority the Congress has now arrogated to itself.

On the other hand, the new constitution of Missouri provides that "the General Assembly shall provide for the organization, equipment, regulations and functions of an adequate militia and shall conform the same as nearly as practicable to the regulations for the government of the armed forces of the United States." Here, in effect, the constitution of that state says to the legislature: "You may go as far as Uncle Sam will let you."

The Model State Constitution contains no militia article recommended for inclusion in a state constitution.

Comment

Under its paramount power as enunciated in the militia clauses of the Constitution of the United States, the Congress has enacted four laws, among others, which have virtually abolished the militia as a state military force and entirely changed the "state militia" concept.[4] The four significant federal laws are as follows:

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[2] Arizona, Colorado, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Mississippi, Montana, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Washington and Wyoming.

[3] Georgia (1945) and Missouri (1945).

[4] Article 1, Section 8, Clauses 15 and 16, Constitution of the U.S. (For an exhaustive treatise on the subject of the "militia clauses", see 54 Harvard Law Review, pp. 181-220.)

The Dick Act of Jan. 21, 1903, which provided that the militia of the states must conform to the organization of the regular army, be equipped at federal expense and be trained by instructors of the regular army.

The National Defense Act of 1916, which made the organized militia a part of the armed forces of the United States and which prohibited the states from maintaining troops save to the extent Congress might permit. It also provided, inter alia, that while the states might continue to appoint officers as permitted by the United States Constitution, officers so appointed might receive no federal status or pay until recognized, upon examination, as possessing requisite physical, mental, moral and professional qualifications.

The Army Reorganization Act of 1920, which established "The National Guard of the United States" and which provided that officers would be commissioned therein by the President of the United States, as well as initially by the various governors.

The Universal Military Training and Service Act of 1951, which, as a practical matter, divested the governors of the power to draft into military service men in the 18-26 age group and vested this power in the president. In requiring also that men released from military training, after being drafted by the president, continue as trainees in a reserve military component for as many as eight years more, the law thus left in an inchoate, unorganized state militia only those men of about 35 and older.

As a result, it may be concluded that, to all practical intents and purposes, the United States has taken over the organized militia (national guard) both by law[5] and subsidization[6] and has placed such an inclusive priority label upon the unorganized, inchoate militia by law[7] as to leave the states virtually without any manpower pool potentially responsive to state military draft.

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[5] The four laws, cited above, should be considered in the light of the long-settled supremacy of the United States to legislate in this field. In one of his most famous opinions on this federal supremacy, John Marshall said: "The States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This, we think, is the unavoidable consequence of that supremacy which the Constitution has declared." (Also in point: McCulloch v. Maryland, 4 Wheat. 316 (1819); Houston v. Moore, 18 N.S., 5 Wheat., 5 L.Ed. 19 and Dunne v. People, 94 Ill. 120.)

[6] As to the extent to which the United States now subsidizes the Michigan national guard, a memorandum report of the United States property and fiscal officer for Michigan, dated 2 June 1961, discloses two interesting items: (1) that the United States has provided military arms, equipment, vehicles and aircraft for the use of the Michigan national guard of the value of $108,700,000 and (2) the United States meets an annual payroll for the Michigan national guard amounting to $10,700,000.

[7] Universal Military Training and Service Act of 1951.

Article XV: Section 1. The militia shall be composed of all able-bodied male citizens between the ages of 18 and 45 years, except such as are exempted by the laws of the United States or of this state; but all such citizens of any religious denomination who, from scruples or conscience, may be averse to bearing arms, shall be excused therefrom upon such conditions as shall be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution did not contain a provision similar to this nor did the 1850 constitution as originally adopted. A provision almost identical to the present Section 1 was added in 1870 by amendment to the 1850 constitution.

Constitution of 1908

The 1908 constitution carried over the 1870 amendment in its entirety with changes in punctuation and with the omission of the word "whatever" from the 1850 phrase "of any religious discrimination whatever."

Other State Constitutions

The constitutions of three states use the same language but impose various age restrictions.[8] The constitutions of a few states are silent on the subject and those of the remaining states leave the composition thereof to the judgment and discretion of the legislature.[9] All states limit the militia to males, but two states, including Michigan, have attempted, administratively or by statute, to permit enrollment of females.[10]

The Model State Constitution contains no militia article recommended for inclusion in a state constitution.

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[8] Age Limits: Kansas, 21-45; North Carolina, 21-40; Oklahoma, 17-70.

[9] Alabama, California, Georgia, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, Pennsylvania, Tennessee, Texas, Vermont and Wisconsin.

[10] Rhode Island: By Statute (P.L. of R.I., Ch. 3742, Par. 1). Michigan: In reliance on an Opinion of the Attorney General (Advisory Op., Atty. Gen. to Adj. Gen., dated 18 June 1957, No. 3029).

While the courts (as in State ex rel. McGaughey v. Grayson, 163 S.W. 2d., 335) have defined the militia very broadly thus: "The terms 'militia' and 'militiaman' comprehend every temporary citizen soldier who, in time of war or emergency, forsakes his civilian pursuits to enter, for the time-being, the active military service of his country and are not restricted to the National Guard" (emphasis supplied), none have yet gone so far as to interpret the term "male" as also including female.

Article XV: Section 3. Officers of the militia shall be elected or appointed and be commissioned in such manner as may be prescribed by law.

Constitutions of 1835 and 1850

The 1835 constitution provided that "officers shall be elected or appointed in such manner as the legislature shall from time to time direct, and shall be commissioned by the governor." The 1850 instrument provided that "officers of the militia shall be elected or appointed and be commissioned in such manner as may be provided by law."

Constitution of 1908

The constitution of 1908 carried over, verbatim, the 1850 provision and there have been no amendments.

Other State Constitutions

The older state constitutions contain provisions similar to this section and many still provide for the election of officers, an ancient idea when personal popularity rather than military efficiency was thought to be an important consideration. The election of officers has long since been discarded in practice. A few states still permit the governor to appoint non-military individuals as "colonels" in the state militia, but this practice has, fortunately, abated with time.[11]

The Model State Constitution again is silent.

Comment

From the preceding discussion of Article XV, Section 2, it is apparent that, while under the militia clauses of the Constitution of the United States[12] the governors may (indeed, must) initially appoint officers of the militia, the United States has restricted appointees to fully qualified persons by denying unqualified persons federal recognition or payor status in the national guard of the United States. The convention may wish to give consideration to a constitutional prohibition against the appointment of officers in its organized militia who cannot gain and hold federal recognition, as such, by the United States. An implementing provision to this end might read: "Officers of the militia shall be appointed solely on the basis of mental, moral, physical and personal qualification as the same are, or may be, required by the United States." Such a provision would provide recognition of the fact that the organized militia of Michigan is now, and for many years has been, a highly trained instrument for the public safety and national security.

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[11] E.g., Kentucky and Wisconsin.

[12] Art. I, Sec. 8, Clauses 15 and 16, Constitution of the United States.

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CHAPTER XVI MISCELLANEOUS PROVISIONS

(over)

Section Detail

XVI MISCELLANEOUS PROVISIONS

1. Terms of Public Officers; Commencement

Article XVI: Section 1. The terms of office of all elective state officers and of all judges of courts of record shall begin on the first day of January next succeeding their election, except as otherwise prescribed in this constitution. The terms of office of all county officers shall begin on the first day of January next succeeding their election, except as otherwise prescribed by law.

Constitutions of 1835 and 1850

There was no comparable provision under the 1835 constitution. The governor and lieutenant governor were to hold office until the first Monday in January (Article XII, Section 10), but there was no specified date for any other officers. In the 1850 constitution, Sections 1 and 2, of Article VIII provided that the secretary of state, superintendent of public instruction, state treasurer, commissioner of the land office, auditor general, and attorney general were to hold office for a two-year term commencing on the first day of January. The schedule, Sections 8 and 9, provided the same day for county officers and for judicial officers.

Constitution of 1908

The only state officials whose terms as set forth in the constitution begin on a day other than January 1, are the superintendent of public instruction and the members of the state board of education whose terms commence on July 1 following their election (Article XI, Sections 2 and 7). The term of the state highway commissioner, not a constitutional officer however, also begins by law on July 1.

Judicial Interpretation

The courts have held that in the absence of any (express or implied) statutory prohibition a public officer holds office until his successor is elected and qualified.[1] A ruling of the attorney general excepted the office of state highway commissioner from this provision since it is not a constitutional office.[2]

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[1] Messenger v. Feagan, 106 Mich. 654.

[2] Opinion of the Attorney General, March 5,1958, No. 3204.

Statutory Implementation

The legislature has provided by statute that the regular terms of office of the county officers elected at the general election shall commence on January 1 next succeeding their election, but those elected to fill vacancies at the general election or at a special election may qualify and begin their terms of office immediately after being notified of their election.[3]

Other State Constitutions

Only 19 states have constitutional provisions setting a day upon which terms of public officers commence. Thirteen of these set a given day; only three of these (including Michigan) use January 1.[4] Four states use the first Monday in January; no other single date is used in more than one state. The Model State Constitution provides that the terms of office for both the governor and legislators shall begin on December 1, following their election.[5] The federal constitution sets January 20, as the beginning of the terms of office for the president and vice president and January 3 for senators and representatives.

Comment

If changes are made in the elective offices, time of election, length of term, etc., alterations will be necessary here. One problem that has arisen in relation to this section is in connection with state officers and judges of courts of record who are elected at the biennial spring election. The time lag between election in April and the "swearing in" in January can work a hardship on the "official-elect" and leaves a "lame-duck" in office for eight months after he has been replaced by the voters. This problem could be solved by eliminating the biennial spring election, or by providing that all officers elected at the spring election take office on July 1.

[3] Michigan Statutes Annotated 5.1087.

[4] Index Digest, pp. 845-6.

[5] Model State Constitution, Article III, Section 302 and Article V Section 500.

2. Oath of Office

Article XVI: Section 2. Members of the legislature and all officers, executive and judicial, except such officers as may by law be exempted, shall, before they enter on the duties of their respective offices, take and subscribe the following oath or affirmation: "I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office _____ of according to the best of my ability." No other oath, declaration or test shall be required as a qualification for any office or public trust.

Constitutions of 1835 and 1850

This provision originated in the 1835 constitution (Article XII, Section 1). It originally excepted "such inferior officers" as might be exempted by statute. In the 1850 constitution (Article XVIII, Section 1) the word "inferior" was dropped.

Constitution of 1908

The present Section 2 was carried over from the l850 constitution with only inconsequential change.

Statutory Implementation

Consistent with the constitutional provision, the statutes provide: "The word 'oath' shall be construed to include the word 'affirmation,' in all cases where by law an affirmation may be substituted for an oath; and in like cases the word 'sworn' shall be construed to include the word 'affirmed.'" (M.S.A., 2.212, Section 3 (11)) The statutes also require that every person employed by or in the service of the state or any governmental agency thereof take and subscribe to this oath (or affirmation). (M.S.A. 3.855) Failure or neglect to take the oath constitutes cause enough for an office to become vacant (M.S.A., 6.693, Section 3 (7)).

Judicial Interpretation

Various court decisions have defined and applied the provision. The courts invalidated a law requiring the filing of an affidavit of party affiliation before names could be printed on a ballot, holding that, under this section, no other oath, declara-

tion or test could be required as a qualification for any office.[6] It has been judicially determined that this form of oath does not require an appeal to the Deity.[7] In a recent decision, the United States supreme court declared unconstitutional a Maryland constitutional provision requiring as a qualification for public office statement of belief in the existence of God.[8] This ruling will no doubt invalidate any such similar requirement included in present or future state constitutions or laws.

Opinions of the Attorney General

In a recent opinion, the attorney general felt that the taking of an oath was one of the factors in deciding that the delegates to a constitutional convention are state officers.[9] He referred to a 1907 court case involving a state legislator suing for a writ of mandamus to have his name placed on the ballot as a candidate for delegate. The court determined (1) that convention delegates are state officers and (2) that state legislators are thus ineligible to become delegates.[10]

Other State Constitutions

It is difficult to generalize about other state constitutions because of the very wide diversity of provisions. About a third of the states require their particular oath for all officers; included in this group are Alaska and Hawaii, with the most recent state constitutions.[11] The Model State Constitution makes explicit the fact that all officers must take the oath; it requires it of "All officers of the state—legislative, executive and judicial—and of all the civil divisions thereof... ."[12] The next largest group of states (including approximately seven states) requires an oath for all executive officers except those exempted by law.[13] The other states demand the oath from numerous combinations of officers. A total of 11 states require that no other oath or test be required for office.[14]

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[6] It might be pointed out that the delegates to the 1850 convention took no oath; there was a debate on the question in the 1867 convention and the delegates voted to take an oath. Opinion of the Attorney General, No. 3605, May 3,1961, pp. 4-5.

[7] People v. Mankin, 225 Mich. 246, 253.

[8] Torcaso v. Watkins, US, 6 L ed 2d 982, 81 S ct (No. 373), decided June 19, 1961.

[9] Opinion of the Attorney General, No. 3605, May 3, 1961, pp. 4-7.

[10] Fyfe v. Kent County Clerk, 149 Mich. 349.

[11] Index Digest, pp. 826-7.

[12] Model State Constitution, Article XII, Section 1202.

[13] Index Digest, pp. 826-7.

[14] Ibid., p. 828.

Comment

This provision has apparently sufficed in its present form. It is not in conflict with the United States supreme court decision mentioned above.

3. Extra Compensation; Increase or Decrease of Salaries

Article XVI: Section 3. Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract entered into. Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment.

Constitutions of 1835 and 1850

There was no comparable provision in the constitution of 1835. In the 1850 constitution, Section 21 of Article IV prohibited the legislature from granting or authorizing extra compensation to any public officer, agent or contractor after the service was rendered or the contract entered into. Section 20 of the Schedule prohibited an increase in the salaries or compensation of all persons holding office under the then current (1835) constitution until superseded by their successors elected or appointed under the new constitution. In addition, it forbade thereafter an increase or decrease in the compensation of any public officer during the term for which he was elected or appointed.

Constitution of 1908

The constitution of 1908 included the two provisions of the 1850 constitution, but made two additions: First, it prohibited the legislature and all municipal authorities from granting or authorizing extra compensation after the service had been rendered or the contract entered into; and second, it excluded circuit judges from the restriction against increases in compensation for the incumbent. The latter was done to make the section consistent with Section 12 of Article VII, which provides that each circuit judge, in addition to his salary from the state, "may receive from any county in which he regularly holds court such additional salary as may be determined from time to time by the board of supervisors of the county." There was a great deal of debate on this exemption of circuit judges from the general rule during the 1907-08 convention, put this view prevailed.

Judicial Interpretation

In 1907 the legislature increased the salary of the members of the Wayne County board of auditors. The matter was taken to court, the plaintiff holding that, under

Section 20 of the Schedule of the 1850 constitution, the salaries of the incumbents could not be increased. The supreme court held that since the provision in question was placed in the Schedule, it was not meant to be a permanent part of the laws and was thus not applicable.[15] The raise was thus held valid. It was to prevent the recurrence of such events that this section was made an integral part of the constitution.

A plethora of decisions and opinions of the attorney general have defined and applied this section. In 1956 a ruling by the attorney general declared that Michigan state government employees already retired were prohibited by this section from receiving increases in their pensions.[16] This opinion was overruled in 1957. The attorney general then decided that an act providing an increased minimum pension for retired employees having completed at least 15 years of service was constitutional.[17]

Other State Constitutions

Four constitutions other than Michigan's (Colorado, Montana, Pennsylvania and Wyoming) prohibit extra compensation after election or appointment. Delaware forbids only a decrease and Oklahoma prohibits any change unless the law is passed prior to election or appointment. About half the state constitutions have provisions prohibiting or restricting change in compensation during the term for which the official is elected or appointed.[18]

The U.S. constitution contains such a provision regarding the president; Section 1(7) of Article II requires that his compensation "shall neither be increased nor diminished during the Period for which he shall have been elected." Section 1 of Article III forbids diminishing the compensation of federal judges during their continuance in office.

Comment

Constitutional restrictions against increasing or decreasing salaries and other emoluments, including fees, of public officers after their election or appointment are adopted for the two-fold purpose of protecting the public by restraining those in public office from using their positions and official influence to obtain added compensation and also to secure the individual officer in his rightful emoluments against any unfriendly power which might seek to reduce or abolish them.[19]

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[15] Joseph L. Hudson v. Attorney General, 150 Mich. 67.

[16] Opinion of the Attorney General, July 13, 1956, No. 2472.

[17] Opinion of the Attorney General, December 4, 1957, No. 3126.

[18] Index Digest, p. 815.

[19] Michigan Statutes Annotated, 1959 Cumulative Supplement to Vol. 1, p: 214.

While this provision has admirable purposes and has generally seemed to be adequate, it has created problems, particularly as applied to judges. Justices elected to the supreme court can receive no increase in compensation for an eight-year period. In a time of inflation, this can work a serious hardship. Further, when the judges' terms of office are staggered, as they now are, the situation arises wherein the various judges receive different salaries. Thus, the most recently elected justice receives $25,500, while the remaining justices receive $18,500. This situation is not equitable and is not conducive to high morale.

Thought might be given to prohibiting all decreases in compensation during the term of the incumbent and prohibiting all increases to those directly responsible for the setting of pay scales; i.e., to the legislators and the governor, for the term for which they are elected. An alternative might be to exclude from the provision all officers, employees, etc. serving constitutional or statutory terms of over two years.

Article XVI: Section. 4.

This section relating to tie votes is discussed in Chapter III on Elective Franchise.

4. Vacancies in Office; Continuity of Government; Emergencies

Article XVI: Section 5. The legislature may provide by law the cases in which any office shall be deemed vacant and the manner of filling vacancies, where no provision is made in this constitution.

The legislature, in addition to and not in derogation of the power heretofore conferred in section 5 of this article XVI, in order to insure continuity of state and local governmental operations in periods of emergency only resulting from disasters occurring in this state caused by enemy attack on the United States shall have the power to such extent as the legislature deems advisable (1) to provide by legislative enactment for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt by legislative enactment such other legislation as may be necessary and proper for insuring the continuity of governmental

> operations. Notwithstanding the power conferred by this amendment elections shall always be called as soon as possible to fill any elective vacancies in any office temporarily occupied by operation of any legislation enacted pursuant to the provisions of this paragraph.

Constitutions of 1835 and 1850

There was no such provision in the constitution of 1835. As discussed previously in the executive article, the nature of the executive branch under the 1835 constitution was entirely different from that to which we are accustomed today. The chief subordinates in the executive branch were appointed by the governor rather than elected, as is true today. This obviated the need for provision for succession in office.

Section 11 of Article XII read:

> When a vacancy shall happen, occasioned by the death, resignation, or removal from office of any person holding office under this state, the successor thereto shall hold his office for the period which his successor had to serve, and no longer, unless again chosen or re-appointed.

This section clearly left the matter of succession in the governor's hands.

The first paragraph of the present provision originated in the constitution of 1850, though not in these exact words. The 1850 constitution provided for the election of the secretary of state, superintendent of public instruction, state treasurer, commissioner of the land office, auditor general and the attorney general (Article VIII, Section 1). The governor was to fill all vacancies by appointment, by and with the consent of the senate, if in session. This particular provision gave the legislature the power to determine when vacancies actually existed and to provide for succession to offices for which no specific constitutional provision was made.

Constitution of 1908

The wording is the same as in the 1850 constitution except for changes made for the purpose of improving the phraseology. There were no debates on the provision.

Amendment Since 1908. At the April, 1959, election, the electorate approved an amendment to this section of the 1908 constitution. The amendment is comprised of the second paragraph of the section as it now stands. The purpose of this amend-

ment was to give the legislature power to provide for continuity of state and local governmental operations in periods of emergency only caused by enemy attack.

Statutory Implementation

Public Act 40 of 1954 defines the instances in which an office would be deemed vacant (M.S.A. 6.693). Public Act 116 of 1954 sets forth in detail how vacancies in certain offices (i.e., those for which no specific constitutional provision is made) shall be ascertained and how these vacancies shall be filled. The 1959 amendment was implemented by Public Act 203 of 1959 (M.S.A. 5.5000 (1) et seq.). The act authorizes the passage of local ordinances or resolutions providing for emergency interim successors to local political subdivision offices, except for judicial and civil service offices. Officers included were to designate five emergency interim successors and specify the order of succession. It is interesting to note that the temporary successors are to receive no compensation beyond actual expenses (Act 203,1959, Section 9).

Other State Constitutions

About two-fifths of the state constitutions provide that vacancies may be filled as directed by law except where there are specific constitutional provisions. Apparently no other states have detailed emergency provisions such as that found in this section of the Michigan constitution.

Comment

There is probably no reason why this provision need be changed. It is an emergency provision and, hopefully, the latter paragraph will never be needed.

5. Laws, Records, and Proceedings; Use of English Language

Article XVI: Section 6. The laws, public records and the written judicial and legislative proceedings of the state shall be conducted, promulgated and preserved in the English language.

Constitutions of 1835 and 1850

The 1835 constitution had no comparable provision. This provision appeared originally in the constitution of 1850 (Article XVIII, Section 6).

Constitution of 1908

The section emerged from the convention of 1907-08 unchanged and seems not to have been debated.

Other State Constitutions

A provision such as this found only in a very few other state constitutions; California, Nebraska and Illinois require official publications to be in English.[20] Such a provision is found neither in the Model State Constitution nor in any of the newer state constitutions; similarly there is no mention made of it anywhere in the federal constitution.

Comment

There appears to be little, if any, controversy on this section. Consideration might be given to the question of whether this provision is still necessary.

6. Courts of Conciliation

Article XVI: Section 7. The legislature may establish courts of conciliation with such powers and duties as shall be prescribed by law.

Constitutions of 1835 and 1850

This provision is not found in the 1835 constitution, but is present in identical language in the 1850 constitution.

Constitution of 1908

This section has not been amended.

Statutory Development and Judicial Interpretation

The legislature established a court of conciliation and arbitration as a court of record and limited its jurisdiction to labor disputes. The constitutionality of this court was upheld although the jurisdiction established by the legislature was limited to one type of situation.

Subsequently the state labor mediation board was created to handle labor disputes. Today, Michigan has no courts of conciliation.

Other State Constitutions

The legislature is authorized by constitutional provision to provide for deciding differences by arbitration in the states of Colorado, Kentucky, South Carolina,

[20] Index Digest, p. 856.

Texas and Louisiana. In four other states arbitration courts are authorized with such powers and duties as may be prescribed by law, but the constitution provides that judgments are not binding unless the parties voluntarily submit their differences and agree to abide by the judgment. These states are Indiana, North Dakota, Ohio and Wisconsin. The constitution of Wyoming authorizes the legislature to establish courts of arbitration for labor disputes and provides that appeals may be taken from the compulsory board's decisions to the highest cost.

7. Estates of Married Women

Prepared in Part by
The Lawyers Title Insurance Corporation
John G. Heal

Article XVI: Section 8. The real and personal estate of every woman, acquired before marriage, and all property to which she may afterwards become entitled by gift, grant, inheritance or devise shall be and remain the estate and property of such woman, and shall not be liable for the debts, obligations or engagements of her husband, and may be devised or bequeathed by her as if she were unmarried.

Constitutions of 1835 and 1850

There was no provision of this type in the constitution of 1835; this provision originated in the 1850 constitution (Article XVI, Section 1)

Constitution of 1908

Only a few minor changes in phraseology were made in this section by the 1907-08 convention. The convention rejected a proposal to exclude from the provision property acquired after marriage that was held in joint ownership with others.

In the convention debates, several reasons were given as to why this proposal to exclude jointly owned property was unnecessary:

1. In the first place, all real property held jointly by husband and wife is held as tenants in entirety and is survivorship property.
2. In the second place, she cannot be a partner with her husband and, therefore, her property could not be involved with his in that form.
3. In the third place, if she does engage in a partnership business, her property is amenable to the claims of creditors exactly the same as though she were single.[21]

[21] Proceedings and Debates, p. 497.

Statutory Implementation

This provision was written into, law by Act 168 of l855.[22] The statute followed the wording of the constitutional provision very closely, but expanded the powers of married women over the disposition of their property; it could be "contracted, sold, transferred, mortgaged, conveyed, devised or bequeathed by her in the same manner and with the like effect as if she were unmarried."

Judicial Interpretation

Literally scores of cases have applied the law in specific instances.[23]

Other State Constitutions

Fourteen state constitutions have provisions safeguarding the property rights of women and two others provide that laws shall be passed on the subject. None of the newer state constitutions is included in this group. The Model State Constitution contains no similar provision.

Comment

At common law a married woman had very limited rights with respect to her property. Section 8 of Article 16 is the provision which, to a large extent, has changed the common law so that property which the married woman owns at time of marriage and property which she thereafter acquired is her property to deal with as she may see fit. It is no longer subject to the debts, obligations and engagements of the husband, as was formerly the case. This section of the constitution is one of the basic factors of our modern law relating to married women. Statutes have, been enacted further extending the married woman's rights as set forth in Michigan Statutes Annotated 26.161 et seq. A tremendous volume of judicial law interpreting the constitution and statutes with respect to married women is to be found in our books. Nevertheless, married women are in certain respects still inhibited by some of the old common law restrictions and attitudes. Many people feel that all such common law restrictions and attitudes should be eliminated so that a married woman in every respect would have the same rights and the same duties as she would have if she were unmarried or as her husband has.

[22] M.S.A., 26.161-26.164.

[23] For some of the particular decisions, see the editor's note on the law, M.S.A., Vol. 18, pp. 590-618.

8. Property Rights of Aliens

Prepared in Part by
The Lawyers Title Insurance Corporation
John G. Heal

Article XVI: Section 9. Aliens, who are or who may hereafter become bona fide residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens.

Constitutions of 1835 and 1850

This provision originated in the constitution of 1850 (Article XVIII, Section 13).

Constitution of 1908

The 1908 constitution made only minor changes in phraseology in the 1850 provision. There was a great deal of discussion in the convention about altering the provision to safe-guard property owned by aliens who were not covered in the provision (e.g., residents of Canada who owned substantial property in Detroit).[24] Most of the discussion dealt with 1) whether the legislature has the power to protect the property rights of non-resident aliens under this provision; 2) whether this legislative discretion should be taken away; 3) whether non-resident aliens should be given all the protection of citizens and of resident aliens; 4) whether this should be dealt with in the constitution or by statute; and 5) what the relation of such a provision (whether constitutional or statutory) was to federal treaties. After much debate it was decided that the 1850 provision was adequate.

Other State Constitutions

Twenty other state constitutions have provisions dealing with property rights of aliens. These provisions deal with: acquisition (two states), disposition (only West Virginia) and possession (eight states, including Michigan), inheritance (nine states, including Michigan), taxation (Wyoming) and tenure (West Virginia). Several states restrict rights of non-resident aliens. Other constitutions leave the regulation to the legislature. None of the newer constitutions or the Model State Constitution deal with the subject.

Comment

Section 9 of Article XVI deals with the property rights of aliens and sets forth that

[24] Proceedings and Debates, pp. 98-99,113-116.

aliens who are bona fide residents of Michigan shall have the same property rights as native born citizens.

State law bearing upon the rights of aliens has, in many respects, been modified by federal law. Such modifications generally relate to enemy aliens in time of war and property rights of citizens of countries deemed to be involved in an emergency faced by the United States.

Generally, the provisions of this section of the constitution would seem to be desirable. Insofar as modifications may be needed from time to time, it would seem that the requirements should be met by the United States government.

9. Agricultural Land Leases

Article XVI: Section 10. No lease or grant of agricultural land for agricultural purposes for a longer period than 12 years, reserving any rent or service of any kind, shall be valid.

Constitutions of 1835 and 1850

The 1835 constitution had no comparable provision. This provision originated in the 1850 constitution. It included the word "hereafter" following the word "grant."

Constitution of 1908

Two minor changes were made in the 1908 convention. The word "hereafter" was omitted at the suggestion of the committee on arrangement and phraseology. The phrase "for agricultural purposes" was inserted to clarify which lands were included, since some agricultural lands were used for mining.

The debates of the 1907-08 convention suggest that there was some question as to the necessity of this entire section. They indicate the purpose of this provision to be the following:

> It was a clause in the old constitution and was for the purpose of prohibiting the leasing of farm lands for a period longer than twelve years; in some cases the leases might be made for ninety-nine years and thus cut off the heirs, ... , long leases being detrimental to the land owners.[25]

Judicial Interpretation

In dealing with the above distinction, the court said, "A lease of agricultural land for a

[25] Proceedings and Debates, II, p. 1264.

term of 50 years for mining and removing ore was not within the prohibition....[26]

Other State Constitutions

A similar provision is included only in the constitutions of Minnesota (with a 2l-year limit), Iowa (20-year limit) and Wisconsin (15-year limit).[27]

Comment

Consideration might be given to deleting this provision, leaving the matter to legislative regulation.

10. Liquor Control

Article XVI: Section 11. The legislature may by law establish a liquor control commission, who, subject to statutory limitations, shall exercise complete control of the alcoholic beverage traffic within this state, including the retail sales thereof; and the legislature may also provide for an excise tax on such sales: Providing, however, that neither the legislature nor such commission may authorize the manufacture or sale of alcoholic beverages in any county in which the electors thereof, by a majority vote, shall prohibit the same.

Constitutions of 1835 and 1850

Neither of the preceding constitutions had any provisions pertaining to liquor or alcoholic beverages.

Constitution of 1908

The constitution as adopted in 1908 had no provisions pertaining to liquor. In 1916 an amendment was proposed by the initiative procedure and ratified which prohibited the manufacture and sale of alcoholic liquors except for medicinal, mechanical, chemical, scientific or sacramental purposes. The present language was also proposed by initiative petition and was ratified at the November election in 1932.

[26] DeGrasse v. Verona Mining Co., 185 Mich. 514, quoted in M.S.A., I, pp. 470-471.

[27] Index Digest, p. 5.

Legislative Implementation and Judicial Interpretation

The language of the constitutional provision is sufficiently broad to permit the legislature to set up a state monopoly system, an open state system, (i.e. one in which private licensees engage in the wholesale and retail trade), or to establish a system with a mixture of the features of the two.

The legislature pursuant to Section 11 established a three-member liquor control commission. It made the commission responsible for the operation of a system of state stores which sell both at wholesale and retail. The state maintains a monopoly as a wholesale vendor but permits retail sales through licensed outlets known as specially designated distributors, and by Class C license holders for sale of liquor by the glass. In addition to the responsibility for operating the distribution system, the commission is charged with enforcement of the state liquor laws and of its own regulations.

The courts have upheld broad authority for the liquor control commission. The courts held that this provision of the constitution was limited only by the express provisions of the legislative act creating the liquor control commission. In a case challenging the state's right to monopoly operation on the wholesale vending, the court held that in the absence of other limitations, the words "complete control" carry with them the power for the state to engage in the business of buying, selling and storing liquor.

The legislature has also created a board of hearing examiners to hold hearings on cases of licensees charged with violations of the liquor control act. The court found that the creation of this hearing board did not violate the constitutional provision of complete control over alcoholic beverage traffic being placed in the liquor control commission since the commission retains complete power to accept or reject the examiner's findings and to revoke or issue licenses as the commission determines.

The constitutional provision establishes the right of any county to prohibit the manufacture or sale of alcoholic beverages within its boundaries. The legislature has extended this right to municipal units as well as the counties. The court, in a local option case, held that a county-wide Sunday closing vote prevailed over the previous rejection of Sunday closing by the village electors of a village within the county. The courts have upheld the authority of the legislature to permit sale of liquor by the glass in private clubs within political jurisdictions that have either refused or failed to authorize such sale by the glass in public restaurants.

The court had occasion to decide the interrelationship of the constitutional provision for state civil service and the constitutional provision for the liquor control commission. The case arose when the liquor control commission abolished the position of executive director which was within the classified civil service of the state. The court

held that the two amendments should be considered together and, in case of conflict, the civil service amendment which was adopted later was controlling. The specific holding was that the commission did not have the power to abolish the position of executive director without the prior approval of the civil service commission.

Other State Constitutions

Approximately one-fourth of the states make some provision in their constitutions pertaining to liquor control. The other three-fourths of the states provide for the subject entirely by legislation.

Most of the constitutional provisions are grants of permissive authority to the legislature. For example, Florida's constitution provides that the legislature may authorize the manufacture and sale of liquor by individuals and firms, or by the state, its subdivisions, or by any governmental commission or agency created for that purpose. South Carolina's constitution provides that the legislature may license or prohibit the manufacture and retail sale of liquor, or it may prohibit such activities by private individuals and firms and authorize the state, county or municipal officers to purchase and retail liquor under statutory regulations. And it further provides that the income derived from the regulation of liquor traffic shall be dedicated to public schools. Texas specifically authorizes monopoly operation as one of the alternate ways of controlling the sale of liquor.

The constitutions of nine state require the legislature to provide for local option; in addition to Michigan, the other states are Delaware, Florida, Kentucky, Maryland, Oregon, Texas, Virginia, and West Virginia. The constitution of South Carolina provides that the legislature may not delegate to municipal corporations the power to issue licenses to sell liquor.

Comment

The legislature would have inherent power to provide for liquor control without specific constitutional provision.

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CHAPTER XVII AMENDMENT AND REVISION

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XVII AMENDMENT AND REVISION

A. AMENDMENT PROCEDURE

1. Amendment Proposed by Legislature

Article XVII: Section 1. Any amendment or amendments to this constitution may be proposed in the senate or house of representatives. If the same shall be agreed to by two-thirds of the members elected to each house, such amendment or amendments shall be entered on the journals, respectively, with the yeas and nays taken thereon; and the same shall be submitted to the electors at the next spring or autumn election thereafter, as the legislature shall direct; and, if a majority of electors qualified to vote for members of the legislature voting thereon shall ratify and approve such amendments, the same shall become part of the constitution.

Constitutions of 1835 and 1850

According to the 1835 provision (Article XIII, Section 1) an amendment or amendments could be proposed in either house of the legislature. If agreed to by a majority of the members elected to each house, it was to be referred to the next legislature, and published for three months previous to the time of electing the new legislature. If the proposal were agreed to by two-thirds of the members elected to each house of the newly elected legislature, submission to the people was required in a manner and at a time prescribed by the legislature. If the people by a "majority of the electors qualified to vote for members of the legislature voting thereon" approved and ratified the proposal or proposals, they would "become part of the constitution."

The provision on amendment in the 1850 constitution (as amended in 1876—Article XX, Section 1), was identical in meaning and effect with the provision of the 1908 constitution.

Constitution of 1908

This provision was carried over from the 1850 constitution as amended unchanged.

Judicial Interpretation

Under this provision, the legislature may control the manner of submitting a proposed amendment to a vote of the people, and is not bound by any statutorily pre-

scribed process.[1] Proposed constitutional amendments must be submitted at regular general elections either spring or fall and not at a special election.[2] A 1913 amendment to Article XVII, Section 2 required that every amendment was to take effect 30 days after the election at which it was approved. This applies to those proposed by the legislature as well as to those initiated by petition.[3]

There is no limit to the subject matter of a constitutional amendment. One amendment may encompass more than one subject.[4] In regard to interpretation of a constitutional amendment, court decisions have held that it must be construed with the whole constitution; that it should be interpreted in the light of conditions at the time of its adoption with attention given to the purpose for which it was adopted; and that if two amendments conflict, they must be construed together and the one adopted more recently will be given preference.[5]

Opinions of the Attorney General

The legislature may propose a constitutional amendment during a special session without regard to the scope of the governor's call or messages according to an opinion of the attorney general of 1948. An attorney general's opinion of 1913 held that proposed amendments were made by joint resolution and were not subject to the gubernatorial veto. An attorney general's opinion of 1948 held that the legislature could rescind by an extraordinary vote (presumably two-thirds of the members elected to each house) a proposed constitutional amendment before it had been submitted to a vote of the people.

Other State Constitutions

In 48 states the legislature may propose constitutional amendments to be voted on by the electorate. In Delaware, however, if two-thirds of all members of each house in two successive legislatures vote to adopt a proposed amendment, it becomes a part of the constitution, and no provision is made for its submission to the electorate. In New Hampshire, the legislature has no authority to make or propose amendments, since this must be done by a constitutional convention.

In 35 states, the action of one legislature is sufficient to submit proposed amendments to a vote of the people. In nine of these, only a simple majority of both houses is required. In one of these (Minnesota) the vote required is only a majority

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[1] Barnett v. Secretary of State, 285 Mich. 494.

[2] Chase v. Board of Election Commissioners of Wayne County, 151 Mich. 407.

[3] Hamilton V. Secretary of State, 204 Mich. 439.

[4] Graham v. Miller, 348 Mich. 684

[5] People ex rel. Attorney General v. Burch, 84 Mich. 408; Civil Service Commission v. Auditor General, 302 Mich. 673; Kunzig v. Liquor Control Commission, 327 Mich. 474.

of those present, while in the other eight a majority of those elected to both houses is required. In one of the eight states, New Mexico, approval of three-fourths of the members elected is required for proposals to amend the elective franchise article and that on education.

Seven states require a three-fifths vote in one legislature to propose an amendment. In one of these states (North Carolina) the requirement is three-fifths of those present, while in the remaining six states (including Nebraska with a unicameral legislature) three-fifths of those elected is required, but in one of these, Florida, a vote of three-quarters of those elected is required for submission at a special election. New Jersey might be considered an eighth state in the group requiring a three-fifths vote, since one legislature may submit an amendment if the vote is three-fifths of all members of each house. If the vote is less than three-fifths, but a majority of all members, it can be submitted if the legislature has a similar majority vote for it in the next legislative year.

A two-thirds vote of each house is required in 18 states, or a majority of those states in which proposed amendments may be submitted by action of one legislature. In four of these, a vote of two-thirds of those present is required (but Mississippi requires this action to be taken three times on three separate days). In two of these 18 states, it must be a two-thirds vote of all members, while in the remaining 14 (including Michigan), the vote necessary is that of two-thirds of those elected to each house.

Thirteen states require two legislatures to vote for submission of an amendment, not including New Jersey under its alternate procedure noted above. All of these appear to require that the action be taken by two separate legislatures, not the same legislature meeting in two sessions. In one of these 13 (Hawaii), only a majority of those present in each house in two legislatures is required for submission. Nine of these states require a majority of those elected in two legislatures—in one of these states (Massachusetts), the vote is taken in joint session. In Connecticut, merely a majority vote in the lower house is required in the first legislature, but two-thirds of each house is required in the second legislature. Tennessee requires a simple majority of those elected to each house in the first legislature, but two-thirds of those elected to each house in the second legislature. Vermont requires a two-thirds vote of the senate and a majority of the lower house in the first legislature, but only a majority of each house in the second legislature for submission of an amendment.[6]

Vote Required on Submission to Electorate. In 48 of the 50 states, amendments proposed by the legislature are submitted to a vote of the electorate for approval. In

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[6] Index Digest, pp. 10-15; Manual on State Constitutional Provisions, pp. 315-317, 324-326; Book of the States, 1960-61, p. 13.

39 states (including Michigan), a majority of the electors voting on the amendment or question is sufficient for approval. In two of these states (Nebraska and Hawaii), the majority of those voting on the amendment must equal 35 per cent of those voting at the election.[7] In another of these 39 states (New Mexico) there is the exception that proposed amendments affecting the elective franchise or education articles require not only the extraordinary legislative vote mentioned above, but also three-quarters of those voting on the question throughout the state and two-thirds of such vote in each county.

Rhode Island is the only state to require more than a majority vote of those voting on the question or at the election when an amendment is submitted to the electors. However, since this requirement is three-fifths of those voting on the amendment, it may often be more easily attained than would a majority of those voting at the election. Seven states have the more difficult requirement of a majority of those voting at the election to approve an amendment. The Illinois constitution provides for alternative requirements in the vote of the electorate on an amendment. This vote must be either a majority of those voting at the election or two-thirds of those voting on the amendment.

In Delaware, amendments are not submitted to a referendum vote, but are adopted by action of two legislatures. The New Hampshire constitution provides that amendments can be proposed only by a constitutional convention and not by the legislature.[8]

Other Features. Many constitutions require that each amendment be voted on separately if more than one is proposed.[9] A few states have limits on the number of amendments to be submitted at one time or the frequency with which the same amendment can be proposed or submitted.[10]

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[7] This acts as a safeguard against adoption of an amendment by a small percentage of participants but is not as stringent as requiring an absolute majority of those voting at the election. In the states having this requirement, those who vote at the election, but do not vote on the amendment, are in effect counted as voting, "No" on the amendment.

[8] Index Digest, pp. 13-16; Manual on State Constitutional Provisions, pp. 319-320,337-338 (Alabama, North Carolina and Texas provisions misstated); The Book of the States, 1960-61, p. 13 (Alabama, Arkansas, New Jersey and Michigan provisions misstated). In view of the many state constitutions that appear to lack basic flexibility, provisions which make amendment or general revision overly difficult intensify the problems resulting from inflexibility.

[9] However, this appears to be the rule in all states (including Michigan) whose constitutions do not specify this detail. In Michigan an amendment can encompass more than one subject.

[10] Index Digest, pp. 10-17; Manual on State Constitutional Provisions, pp. 315-320, 330, 331; Book of the States, 1960-61, p.15. Restrictions on the number and frequency of amendments have caused problems in some of the few states having such provisions, and are not recommended by constitutional specialists.

The Model State Constitution provides that the legislature may propose amendments if by a vote of a majority of all the members. For approval a majority of those voting on the question is required at an election held not less than two months after it has been agreed to by the legislature.

Article V of the U.S. Constitution requires approval of a proposed amendment by two-thirds of both houses of Congress and ratification by three-fourths of the states by the legislatures or conventions as indicated by the Congress. There is also an alternate method of federal amendment. Upon application by the legislatures of two-thirds of the states, the Congress shall call a convention for proposing amendments to be ratified by three-fourths of the states in the same manner.

Comment

In view of the inter-relationship between this section and the one following it (Section 2) which provides for amendments to be proposed by initiative petition, these two sections will be commented upon jointly. See Comment under Section 2 following.

2. Amendment Proposed By Initiative

Article XVII: Section 2. Amendments may also be proposed to this constitution by petition of the qualified and registered electors of this state. Every such petition shall include the full text of the amendment so proposed, and be signed by qualified and registered electors of the state equal in number to not less than 10 per centum of the total vote cast for all candidates for governor at the last preceding general election, at which a governor was elected. Petitions of qualified and registered electors proposing an amendment to this constitution shall be filed with the secretary of state or such other person or persons hereafter authorized by law to receive same at least four months before the election at which such proposed amendment is to be voted upon. The legislature may prescribe penalties for causing or aiding and abetting in causing any fictitious or forged name to be affixed to any petition, or for knowingly causing petitions bearing fictitious or forged names to be circulated. Upon receipt of said petition the secretary of state or other person or persons hereafter authorized by law shall canvas the same to ascertain if such petition has been signed by the requisite number of qualified and registered electors, and may, in determining the validity thereof, cause any doubtful signatures to be checked

against the registration records by the clerk of any political subdivision in which said petitions were circulated, for properly determining the authenticity of such signatures. If the secretary of state or other person or persons hereafter authorized by law to receive and canvass same determines the petition is legal and in proper form and has been signed by the required number of qualified and registered electors, the proposed amendment shall be submitted to the electors at the next regular election at which any state officer is to be elected. An official declaration of the sufficiency or insufficiency of the petition shall be made by the secretary of state or such other person or persons as shall hereafter be authorized at least two months prior to such election. Any constitutional amendment initiated by the people as herein provided, shall take effect and become a part of the constitution if the same shall be approved by the number of qualified electors required in section one hereof for the approval of amendments proposed by the legislature, and not otherwise. Every amendment shall take effect 30 days after the election at which it is approved. The secretary of state or such other person or persons as may be hereafter authorized by law shall submit all proposed amendments to the constitution initiated by the people for adoption or rejection in compliance herewith. The petition shall consist of sheets in such form and having printed or written at the top thereof such heading as shall be designated or prescribed by the secretary of state, or such other person or persons hereafter authorized by law to receive, canvass and check the same. Such petition shall be signed by qualified and registered electors in person only with the residence address of such persons, showing street names and also residence numbers in cities and villages having street numbers, and the date of signing the same. To each of such petitions, which may consist of one or more sheets, shall be attached the affidavit of the qualified and registered elector circulating the same, who shall be required to identify himself by affixing his address below his signature, stating that each signature thereto was signed in the presence of such qualified and registered elector and is the genuine signature of the person signing the same, and that to the best knowledge and belief of the affiant each person signing the petition was at the time of signing a qualified and registered elector.

Constitutions of 1835 and 1850

There was no provision of this type in the earlier constitutions.

Constitution of 1908

The longest and most spirited debate in the convention of 1907-08 revolved around the Proposal for the initiative process as an additional amendment procedure.[11] A proposal for a direct initiative on amendments was accepted in the convention but later a substitute measure was adopted by a vote of 49 to 47 whereby the initiative became indirect to the extent that the initiated proposal for amendment was to be submitted to the legislature in which a majority of those elected to both houses in joint session could veto the initiated proposal or offer by the same vote an alternative proposal to be submitted with the one initiated for a choice by the electorate or rejection of both.[12]

This was the origin of the provision for the initiative on constitutional amendments. Under the original provision, the number of petitioners for a proposed amendment was required to "exceed twenty per cent of ...the total number of electors" who voted for secretary of state at the last election. The petitions were to be signed at the regular places of election and registration with the officials thereof required to verify the signatures, as well as the fact that the signers were registered electors. No amendment to change this section by the initiatory process was permitted. In the vote of the electorate upon submission of an amendment, a majority of those voting thereon was sufficient, but a minimum of one-third of the highest number of votes for any office at the election was required.

1913 Amendment. In 1913, an amendment to this section was proposed by the legislature and adopted by the people. This made a substantial change in the provision whereby the initiative or proposed amendments became direct. That part of the original provision was eliminated whereby initiated proposed amendments were required to be submitted to the legislature for possible veto or submission of an alternative. Also eliminated was the prohibition against change of this section itself by the initiative method and the minimum vote of the electorate formerly required for approval. The number of petitioners required for the initiative was reduced to ten percent of the "legal voters" to be computed on the basis of the total number of votes cast for governor at the preceding election.

A new requirement, that the petitions be filed with the secretary of state four

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[11] Proceedings and Debates, pp. 546-687.

[12] Proceedings and Debates, pp. 680-687, 960-965.

months before the election, was added in this amendment, as was the requirement that the secretary of state canvass the petition for signatures by the "requisite number of qualified electors." It was also specified that: "Every amendment shall take effect thirty days after the election" at which it was approved.[13] Additional requirements were included in the amended version pertaining to signatures on petitions and affidavits of those circulating the petitions.

1941 Amendment. The amendment of this section proposed by the legislature and adopted in 1941, put the provision in its present form. It did not change the provision as radically as did the 1913 amendment. There was some rearrangement of the language, and the provision was made more specific as to the form of the petition, and in requiring the electors signing the petitions to be registered and to indicate their addresses. Provision for further checking the signatures on the petitions was also made. Discretion was given to the law-making process to assign the functions of the secretary of state in regard to such petitions to another "person or persons." A further feature required by the 1941 amendment was that an "official declaration of the sufficiency or insufficiency of the petition" be made "at least two months prior" to the election.

Statutory Implementation

By statute, the duties assigned by this provision to the "secretary of state or such other person or persons" have been given to a board composed of the board of state canvassers and the attorney general.[14] Various details relating to the initiatory process for constitutional amendments have been set forth in statutes.[15]

Judicial Interpretation

Various opinions of the supreme court (and of attorneys general) have interpreted this section in its present and previous forms. These opinions seem not to have expanded or contracted the meaning of this section or caused it to deviate substantially by interpretation beyond the usual sense of its language. The initiative procedure, as set forth in the section, is sufficiently explicit that it needs no statutory implementation of a substantive nature, and statutory conditions or additional procedures in relation to the initiatory process are not binding.[16]

Other State Constitutions

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[13] This language was interpreted, as mentioned above, to apply to all amendments whether submitted by initiative petition or by the legislature.

[14] M.S.A., 6.1474.

[15] M.S.A., 6.1471-6.1484.

Number of Signatures Required - Direct Initiative. Of the 11 state constitutions having provision for the direct initiative for proposals of constitutional amendment, the North Dakota constitution requires that the petitions be signed by 20,000 electors. This is the only state having an absolute number required. Three of these 11 states require the number of petition signers to be eight percent of the votes cast in the last general election—Colorado uses the standard of votes cast for secretary of state; California uses those cast for governor; and in Missouri the requirement is eight percent of the votes cast for governor in each of two-thirds of the state's congressional districts. Five states of these eleven (including Michigan) require the number of electors signing petitions to be ten percent of the vote in the last pertinent election in order to initiate an amendment. Of these five, Oregon requires a number of electors "not more than" ten percent of all votes for supreme court justice—probably the easiest requirement to meet of these five states. Four states require the number of signers to be ten percent of the vote for governor. In Michigan, this is the only requirement, while the other three states have additional stipulations. In Arkansas, this number must include five percent of the vote for governor in 15 counties (Arkansas has some 80 counties). In Nebraska, this number must equal five percent of the vote for governor in two-fifths of the state's counties. In Ohio, the number of signers must include five percent of the vote for governor in one-half of the state's counties. In two states of the 11, the number of petition signers for initiating an amendment proposal must be 15 percent of the vote in the last election. Arizona requires the number to be 15 percent of the vote for governor, while in Oklahoma it must be 15 percent of the highest number of votes cast for any state office.[17]

Number of Signatures Required - "Indirect Initiative." The constitutions of two states Massachusetts and Nevada provide for proposed amendments by an initiatory process which is indirect to the extent that the proposal is submitted first to the legislature which may accept or reject the proposal of amendment. However, in Nevada, if the initiated proposal is rejected, the proposal is submitted to the electorate regardless of this disapproval, although the legislature may also submit an alternative proposal to the electorate for a choice between them or rejection of both.

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[16] Hamilton v. Secretary of State, 221 Mich. 541; Opinion of the Attorney General, March 22,1950, No. 1151; City of Jackson v. Commissioner of Revenue, 316 Mich. 694. In regard to the initiative for both constitutional amendments and statutes to 1940, see J. K. Pollock, The Initiative and Referendum in Michigan (Univ. of Michigan, 1940).

[17] Index Digest, pp. 556-558 (Colorado provision not included); Manual on State Constitutional Provisions, pp. 317-318, 327 (percentage of voters required in Oregon misstated); Book of the States, 1960-61, p. 14 (percentage of voters required in Ohio misstated); pertinent constitutional provisions.

This type of provision is somewhat similar to the original form of the Michigan provision—1908-1913, before amendment, although the Michigan legislature could then kill the initiated proposal by a joint majority vote. The complicated Massachusetts provision is also similar to the original Michigan provision in that the legislature may veto the proposal; however, this veto is not highly restrictive, since in order to be submitted to the electorate, the initiated proposal must receive the vote in joint session of only one-fourth of those elected to both houses in two successive legislatures. The Massachusetts legislature may also submit alternative proposals.

The number required to sign petitions in order to initiate a proposal of amendment in Nevada is 10 percent of the total vote at the last general election including 10 percent of that vote in 75 percent of the state's counties; while in Massachusetts the number required is only three percent of the last vote for governor, but no one county may contribute more than one-quarter of the required number of signatures.[18]

Vote Required on Submission to Electors. All of the 13 states having an initiatory process for amendments (11 direct, two indirect) require approval by a majority of those voting on the amendment, except Oklahoma where the requirement is a majority of those voting at the election. However, Massachusetts requires for approval of initiated proposals a majority voting on the amendment equal to at least 30 percent of those voting at the election; Nebraska has a similar stipulation, but the majority must be a minimum of 35 percent of those voting at the election. Arkansas, although requiring a majority voting at the election to ratify a legislative proposal of amendment, reduces the requirement to a majority voting on the amendment for initiated proposals.[19]

Other Features Regarding Initiated Proposals. Seven states, including Michigan, of the 13 having an initiatory process for proposals of amendment have no limit on the subject matter or frequency of amendments so proposed. All of the others, with the possible exception of Massachusetts, have limitations, but these are not particularly restrictive. Even the restrictions on the use of the initiative for amendments in

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[18] Index Digest, pp. 558 (Ohio included as having indirect initiative on amendments, but provision seems to apply only to laws; see Ohio Constitution Article II, Section 1 a, b, g); Manual on State Constitutional Provisions, p. 327 (number of signers listed for Mass. not now applicable); Book of the States, 1960-61, p. 14; and pertinent constitutional provisions.

[19] Index Digest, pp. 556-558; Book of the States 1960-61 p. 14 (Mich. requirement misstated).

Massachusetts—relating to changes in the bill of rights, courts, particular local governments, and specific appropriations—are probably not far-reaching in practice.[20] The Michigan provision seems to be the most comprehensive and specific with regard to requirements concerning circulation of petitions, examination of them and the declaration of sufficiency. The requirement of filing the petitions four months before the election is the most common requirement in regard to this matter among the 13 states.[21]

The Model State Constitution provides for amendments to be proposed by initiative petition (somewhat indirect). The number of signers as a percentage of the preceding vote for governor is not specified. If the legislature fails to approve it in the usual manner, the proposal is submitted to the voters at an election not less than two months after the end of the legislative session. The legislature is permitted to provide by law procedure for withdrawal of a petition by its sponsors prior to its submission to the people.

The Model requires approval of initiated proposals of amendment by a majority of those voting on the amendment. In case of conflict in amendments (proposed in any manner) adopted at the same election, the one receiving the highest number of affirmative votes "shall prevail to the extent of such conflict." The U.S. constitution has no provision of this type.

Comment

Of the 125 constitutional amendments that have been proposed in Michigan since 1908, 69 have been adopted. Almost two-thirds (59) of the 90 proposed by the legislature have been adopted, while less than one-third (10) of the 35 initiated by petition have been adopted. However, most of the ten initiated amendment proposals ratified by the voters have been unusually important: prohibition, 1916; establishment of the liquor control commission, 1932; property tax limitation, 1932 and 1948; earmarking gas and weight taxes for highways, 1938; nonpartisan election of

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[20] Manual on State Constitutional Provisions, pp. 317-318, 327; Index Digest, pp. 556-558.

[21] Manual on State Constitutional Provisions, p. 327; Index Digest, pp. 556-557. For some of the more recent material relating to state constitutional amendment and revision—the subject matter of all four sections of Article XVII of the Michigan constitution—see A.L. Sturm, Methods of State Constitutional Reform (Univ. of Michigan, 1954); Sturm, "Constitutional Amendment and Revision," Major Constitutional Issues in West Virginia (West Virginia, University, 1961); John P. Keith, Methods of Constitutional Revision (University of Texas, 1949); w. Brooke Graves, Editor, Major Problems in State Constitutional Revision (Public Administration Service, 1960, particularly chapters 2-7.

judges, 1939; state civil service, 1940; legislative reapportionment, 1952; earmarking of sales tax, 1946; and the change in ground rules for a constitutional convention, 1960.

In view of Michigan's expanding population and a trend toward greater participation in elections, some might favor a reduction in the required number of initiative petition signers as a percentage of votes cast in the previous election in order to facilitate the use of the initiative.[22] However, contrary to this view, others believe that the initiatory process should be reserved for extraordinary occasions—the electorate's last resort, and that the initiative in Michigan has already been used too frequently for substantial constitutional changes. If there is a need to facilitate the submission of constitutional amendments to the voter, some might argue that it would be preferable to make it easier for the legislature to submit amendments by reducing the extraordinary majority requirement of two-thirds of the members elected to each house to some smaller number. And, it is argued, legislative proposals of amendment tend to be more carefully drafted and considered in relation to the remainder of the constitution.

The detailed procedure spelled out in Section 2 is self-executing and forestalls possible statutory obstruction of the initiatory procedure. The vote requirement in Michigan for approval or ratification by the voters of amendments proposed by either legislative or initiatory action is found in most states. Some might favor the further requirement that the majority voting on the question must be at least 30 or 35 percent of those voting at the election in order to forestall adoption of amendments by too small a minority of the electorate.[23]

The time for voting on proposed amendments is the same in Sections 1 and 2 although expressed differently—at the next spring or fall election (Section 1), and at the next regular election for any state officer (Section 2 for initiated proposals). If

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[22] If the governor were given a four-year term and elected at the "off-year" election, the difficulty of meeting the petition signature requirement would not be alternately intensified following presidential elections with enlarged voter participation.

[23] The Georgia constitution (Article XIII, Section 1) under certain conditions requires the vote by the electorate only in the affected locality or localities rather than state-wide for constitutional amendments pertaining only to specific local governments. This feature has been suggested for inclusion in the Pennsylvania constitution.

the spring election is eliminated in the revised constitution, some consideration might be given to providing for submission to the electorate of amendment proposals (perhaps in event of emergency) more frequently than every two years.[24]

3. Publication and Statement on Ballot of Proposed Constitutional Amendments

Article XVII: Section 3. All proposed amendments to the constitution and other questions to be submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated thereby, and a copy thereof shall be posted in each polling place. The purpose of any such proposed amendment or question shall be designated on the ballots for submission to the electors in not more than 100 words, exclusive of caption. Such designation and caption shall be prepared by the secretary of state or by such other authority as shall be hereafter designated by law within 10 days after the filing of any proposal and shall consist of a true and impartial statement of the purpose of the amendment or question in such language as shall create no prejudice for or against such proposal.

Constitutions of 1835 and 1850

The constitution of 1835 in the provision (Article XIII, Section 1) dealing with amendment by proposal of two separate legislatures required publication of the proposed amendment for three months previous to the election of the succeeding legislature.[25] The 1850 constitution had no provision relating to the publication of proposed amendments or any of the subject matter of this present provision.

Constitution of 1908

The original form of this section as it came from the hands of the convention was as follows:

> Section 3. All proposed amendments to the constitution submitted to the electors shall be published in full, with any existing provisions of the constitution which would be altered or abrogated

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[24] Some states provide for submission of amendment proposals at special elections or when prescribed by the legislature.

[25] See above—discussion of Article XVII, Section 1.

> thereby, and a copy thereof shall be posted at each registration and election place. Proposed amendments shall also be printed in full on a ballot or ballots separate from the ballot containing the names of nominees for public office.

Amendment of 1918. An amendment adopted in 1918 required that proposed amendments "together with any other special questions to be submitted" at the election be printed in full on a single ballot separate from that containing the names of "candidates or nominees." The chief purpose of this amendment was to require that questions to be voted on would be on a single separate ballot rather than "on a ballot or ballots" as originally required.

Amendment of 1941. The present form of this section is the result of an amendment proposed by the legislature and adopted in the April, 1941, election. Article XVII, Section 2 was concurrently altered by this same amendment. The amendment to Section 3 discarded the requirement that proposed amendments be printed in full on the ballot. The caption and designation of the proposed amendment's purpose in "not more than 100 words" replaced the former requirement.

The procedure required in this section applies to amendments proposed by the legislature as well as to those proposed by the initiatory process.

Statutory Implementation

The preparation of the caption and designation of the proposed amendment's purpose has been assigned by statute to the "director of elections with the approval of the state board of canvassers."[26]

Judicial Interpretation

Section 3 requires that "any existing provisions" of the constitution that would be "altered or abrogated" by the proposed amendment must be published in full with the proposed amendment. This has been interpreted to mean that if a specific provision would be amended or replaced by the proposal it must be published, but that it is not necessary to publish other existing provisions which will remain opera-

[26] M.S.A., 6.1474.

tive even though they may be modified by, or need to be construed with, the proposed new provision.[27]

Other State Constitutions

Most state constitutions have provisions requiring notice or publication of proposed amendments to the constitution before their submission to the electorate. Many require such publication in newspapers. The requirement in the Michigan provision that proposed amendments be published with any existing provisions which would be "altered or abrogated thereby" appears to be unique among state constitutions.[28]

The Model State Constitution provides that a proposal of amendment shall be submitted by a "ballot title" descriptive but not argumentative or prejudicial, "prepared by the legal department of the state, subject to review by the courts." The U.S. constitution has no provision of this type.

Comment

Although the requirement that existing constitutional provisions, which would be "altered or abrogated" by a proposal of amendment, be published with the proposal is unique among state constitutions, it appears to have merit. The electorate is given thereby a greater opportunity to understand more fully the impact and ramifications of the proposed amendment.

B. CONSTITUTIONAL CONVENTION —GENERAL REVISION AND/OR AMENDMENT

Article XVII: Section 4. At the biennial spring election to be held in the year 1961, in each sixteenth year thereafter and at such times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors qualified to vote for members of the legislature. In case a majority of the electors voting on the question shall decide in favor of a convention for such purpose, at an election to be held not later than 4 months after the proposal shall have been certified as approved, the electors of each house of representatives district as then organized shall elect 1 delegate for each state repre-

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[27] School District of Pontiac v. City of Pontiac, 262 Mich. 338; City of Jackson v. Commissioner of Revenue, 316 Mich. 694; Graham v. Miller, 348 Mich. 684.

[28] Index Digest, pp. 11-12, 557; Manual on State Constitutional Provisions, pp. 319-320, 332-333.

sentative to which the district is entitled and the electors of each senatorial district as then organized shall elect 1 delegate for each state senator to which the district is entitled. The delegates so elected shall convene at the capital city on the first Tuesday in October next succeeding such election, and shall continue their sessions until the business of the convention shall be completed. A majority of the delegates elected shall constitute a quorum for the transaction of business. The convention shall choose its own officers, determine the rules of its proceedings and judge of the qualifications, elections and returns of its members. In case of a vacancy by death, resignation or otherwise, of any delegate, such vacancy shall be filled by appointment by the governor of a qualified resident of the same district. The convention shall have power to appoint such officers, employees and assistants as it may deem necessary and to fix their compensation, and to provide for the printing and distribution of its documents, journals and proceedings. Each delegate shall receive for his services the sum of 1,000 dollars and the same mileage as shall then be payable to members of the legislature, but such compensation may be increased by law. No proposed constitution or amendment adopted by such convention shall be submitted to the electors for approval as hereinafter provided unless by the assent of a majority of all the delegates elected to the convention, the yeas and nays being entered on the journal. Any proposed constitution or amendments adopted by such convention shall be submitted to the qualified electors in the manner provided by such convention on the first Monday in April following the final adjournment of the convention; but, in case an interval of at least 90 days shall not intervene between such final adjournment and the date of such election, then it shall be submitted at the next general election. Upon the approval of such constitution or amendments by a majority of the qualified electors voting thereon such constitution or amendments shall take effect on the first day of January following the approval thereof.

Constitutions of 1835 and 1850

Article XIII, Section 2 of the 1835 constitution provided the following procedure for the calling of a constitutional convention. If two-thirds of each house of the legislature thought it "necessary to revise or change this entire constitution," the question was to be submitted to the electors at the next election for legislators. If a majority of the electors voting at the election were in favor of it, the legislature was required at its next session to "provide by law for calling a convention, to be holden within six months" after passage of the law. The convention was to have a "number of members not less than that of both branches of the legislature."

The 1850 constitution (Article XX, Section 2) originated the requirement of submitting the question of general constitutional revision by convention to the electorate every 16 years and at other times as provided by law. Approval by a majority of the electors voting at the election was required for calling a convention (as in the 1835 provision and the original form of the 1908 provision), in which event the legislature at its next session was required to provide by law "for the election of such delegates to such convention."[29] In 1866 the people voted on the question of calling a convention. Although the vote for the proposal fell short of the required majority of those voting at the election (even though the vote was three to one in favor) the legislature interpreted this as having been an effective call and made provision for a convention.[30] The proposed constitution resulting from this convention was rejected by the voters, by a vote of 110,582 to 71,733 in 1868.[31]

Constitution of 1908

Before its recent amendment, the original form of Section 4 required submission to the electors of the question of general revision in 1926 and in "each sixteenth year

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[29] The last sentence of this 1850 provision seems to have been somewhat out of context in this section concerned with "general revision," except that this revision could have been in the form of amendments. The last sentence (probably referring also to the preceding section) read: "All the amendments shall take effect at the commencement of the year after their adoption."

[30] The legislators used a Wisconsin court decision as a precedent.

[31] In 1873, creation of a. constitutional revision commission was authorized by the legislature, the governor appointing two members from each of the nine congressional districts. This commission's revision was submitted in amendment form, but was rejected by a vote of 124,034 to 39,285 in 1874. C. R. Tharp, "Michigan State Constitutional Revision Procedures," Michigan Governmental Digest (No. 3, Univ. of Michigan, September, 1948), p. 2.

thereafter." Approval by a majority of the electors voting at the election was required in order to call a convention, in which event three delegates were to be elected from each senatorial district at the "next biennial spring election." These delegates were required to "convene at the state capitol" on the first Tuesday in September following the election.

The constitutional convention of 1907-08 in the part of its address to the people relating to this section indicated that the detail in the section was intended to enhance the independent power of a convention and restrict legislative control or interference with it. The section was "designed to place beyond question the power such a convention shall exercise." Because "grave doubt" had arisen during the convention as to whether it had power under the 1850 constitution "to submit a complete instrument and also at the same time, separate amendments," this section was "designed to provide a method for submitting special questions. . . about which there might be great conflict of opinion to a vote of the electors, separate and apart from the instrument" or main body of the constitution.[32]

Under the original 1908 provision requiring a majority of those voting at the election, the question of calling a convention was submitted to the electorate four times, (three by the automatic provision and one by law in 1948). It failed to carry each time. On the last two of the four occasions, a majority of those voting on the question favored the proposal, but it failed to carry by a majority of those voting at the election:

"Yes" Vote Required For Approval

Year	For Approval	"Yes" Vote	"No" Vote
1926*	315,377	119,491	285,252
1942*	613,387	408,188	468,506
1948 (by law)	1,056,561	855,451	799,198
1958*	1,170,915	821,282	608,365

*By constitutional mandate

Amendment of 1960. As a result of successive failure to achieve the vote required to call a convention under the original 1908 provision, civic organizations, early in 1960, undertook the task of changing this provision by initiating a proposed amendment by petition. The proposed amendment was adopted at the November, 1960,

[32] Proceedings and Debates, pp. 1442-1443. The intent of the convention so clearly spelled out is still valid for the present form of this section since the limited though important changes made by amendment in 1960 do not affect its general intent as specified in the address to the people.

election. This amendment reduced the vote required for the call from a majority voting at the election to a majority changed from three for each senatorial district to one for each senator and representative. The only other change made by the amendment, except for those chronological in nature, was that the delegates were to convene "at the capital city" rather than "at the state capitol."

By constitutional mandate under the new amendment, the question of calling a constitutional convention was submitted in the April, 1961, election in which the "yes" vote carried. The constitutional convention will convene in Lansing, October 3, 1961.

Statutory Implementation

Statutes relating to this section passed prior to adoption of the 1960 constitutional amendment have been amended since its adoption, largely to make them conform with the new constitutional amendment.[33]

Judicial Interpretation and Opinions of the Attorney General

Since the constitutional convention to be held in 1961 will be the first under the constitution of 1908, there has previously been no need for interpretation of constitutional provisions which appear to make some state officials ineligible to election as convention delegates, such as Article V, Sections 6 and 7 and Article VII, Section 9 which explicitly prohibit legislators and circuit judges from being delegates. Under the 1850 constitution with similar provisions, legislators were interpreted as not eligible to be delegates.[34] Circuit and probate judges were also held to be ineligible.[35] An opinion of the attorney general, No. 3605, May 3,1961, held that:

> Members of the legislature are ineligible as delegates to constitutional convention during the term for which elected. Circuit judges are ineligible for the term for which elected and one year thereafter. The sheriff is ineligible unless he resigns his office. No other officers are ineligible.

Ten states (including Michigan) have constitutional provisions requiring the question of calling a constitutional convention to be submitted to the electorate at set

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[33] M.S.A. 6.1181-6.1190; 3.640.

[34] Fyfe v. Kent County Clerk, 149 Mich. 349; Opinion of the Attorney General, 1907.

[35] Opinions of the Attorney General, 1907—ineligibility of probate judges is not as explicit in either the constitution of 1850 or that of 1908.

intervals. In New Hampshire the interval is seven years; in Iowa, Alaska, and Hawaii 10 years; in Michigan 16 years; and in the remainder (Maryland, Missouri, New York, Ohio, and Oklahoma) 20 years. Most state constitutions, including these 10, provide explicitly that the question of calling a convention may be submitted to the electorate as provided by law or by an extraordinary vote of the legislature.[36]

Eighteen states (including Michigan) have constitutional provisions for the question to be submitted by law or by a majority (usually of those elected) of each house of the legislature.[37] In one state (Nebraska), a three-fifths vote of those elected to the unicameral legislature is necessary to submit the question to the voters. Twenty states have constitutional provisions whereby a two-thirds vote (usually of those elected or the equivalent) of each house of the legislature is necessary for submission of the question of calling a convention to the electorate.[38]

Required Vote of Electorate on Submission of Question. Of the 40 states having constitutional provisions for submission of the question of calling a convention to the voters (or where this is done in practice despite the absence of such provision in three of these states), 27 (now including Michigan) require a majority of those voting on the question to call a convention.[39] Thirteen states require a majority of those voting at the election to call a convention.[40]

Number and Qualifications of Delegates and other Provisions. The number of convention delegates is specified by constitutional provision in 14 states (including Michigan). Five other states specify a minimum number of delegates equal to the number in the lower house or both houses of the legislature, while two states provide a maxi-

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[36] Eleven states have no constitutional procedure for calling a convention, but action of the legislature has been widely interpreted as authoritative to accomplish this purpose in such states.

[37] In one of these (Kentucky) the majority vote in each house must be attained in two successive legislatures.

[38] Index Digest, pp. 17-18; Manual on State Constitutional Provisions, pp. 328-329. Book of the States 1960-61, p. 15. Discrepancies and incomplete coverage checked against state constitutional provisions.

[39] Index Digest, p. 19; Book of the States 1960-61, p. 15 - Idaho, Kansas and Nevada provisions misstated. In one of these (Kentucky) this majority must equal one-fourth of those voting in the last general election; in Nebraska it must be at least 35 percent of those voting at the election.

[40] Loc. cit. This does not include West Virginia where the question is submitted at a special election – therefore classified with those states requiring a majority voting on the question.

mum number. The Georgia provision requires convention representation to be based as nearly as practicable on population. Approximately one-half of the states have no specific provision relating to the number of convention delegates.[41] Nine states provide qualifications for convention delegates – in most cases the same as for senators or all legislators. At least six states (including Michigan) make the convention the judge of its delegates' qualifications. Most other state constitutions are not as largely self-executing or as specific and detailed with regard to such matters as compensation of delegates, the time of their election, or the organization and powers of the convention, although a few states such as Missouri and New York also have somewhat detailed provisions. Most state constitutions indicate that a constitutional convention may revise and/or amend the constitution.[42]

Vote Required on Submission of Convention's Work. In almost one-half of the states there are no constitutional provisions regarding submission to the voters of a convention's work of revision or amendment. This is usually provided for, in practice, by law. In a few states approval by the voters is constitutionally required, but the size of the vote is not specified. Fifteen states have provisions whereby the work of a convention must be approved by a majority of those voting on the proposal,[43] while seven states have provisions requiring approval by a majority of those voting at the election. Minnesota requires approval by three-fifths of those voting on the question, and New Hampshire approval by two-thirds of those voting on the question. Rhode Island requires approval by three-fifths of those voting at the election.[44]

Model State Constitution and U.S. Constitution

The Model State Constitution provides that the question of calling a convention may be submitted to the electorate by a majority vote of all members of the legislature. If the question has not been submitted within any period of 15 years, the secretary of the legislature shall submit it at the general election "in the fifteenth year following the last submission." The legislature is required to provide for a

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[41] Index Digest, p., 21; Manual of State Constitutional Provisions, pp. 318-319; 328-329.

[42] Index Digest, pp. 19-22; Manual on State Constitutional Provisions, p 319: 328-329. The Michigan provision leaves no doubt concerning the plenary powers of a constitutional convention. In some other states controversy has arisen with respect to legislative power to control or limit the subject matter of a convention's deliberation. "Limited Conventions" have been held in some states. The New Jersey convention of 1947 was limited only to the extent that reapportionment of the legislature could not be considered. A. L. Sturm, Major Constitutional Issues in West Virginia, pp. 132-133.

[43] Hawaii, one of these, requires that this majority be at least 35 percent of the total vote at the election.

[44] Index Digest, pp. 22-23; Book of the States 1960-61, p. 15.

"preparatory commission" before the vote on the question. The commission collects "information on constitutional questions to assist the voters." If the convention is authorized, this commission will continue "for the assistance of the delegates." A majority of those voting on the question is required to call the convention. If the convention is authorized, the delegates shall be chosen "at the next regular election not less than three months thereafter," unless the legislature provides by law for the election of delegates at the same time that the question is submitted. One delegate shall be elected from each existing legislative district. Further detailed provisions relate to the organization and procedure of the convention. This provision was intended to be comprehensively self-executing.

The Model's provision is similar to (but goes somewhat beyond) the Michigan provision in that the work of the convention shall be submitted to the voters "either as a whole or in such parts and with such alternatives as the convention may determine."

In the U.S. Constitution (Article V), a convention "for proposing Amendments" shall be called by the Congress upon application of the legislatures of two-thirds of the states. Amendments proposed by such a convention would also require ratification by three-fourths of the states (by the legislatures or conventions as indicated by the Congress).[45]

Comment

This provision has been recently amended and is largely self-executing. Some may feel that a revised constitution should be safeguarded from future tampering by restrictive provisions on general revision or amendment. Others, however, may argue that a constitutional revision which establishes a basic governmental structure with lasting qualities of flexibility and adaptability is likely to survive as a venerated instrument without overly rigid restrictions intended to make alteration difficult.

The constitutional convention is the most widely used means for general revision of state constitutions. A convention's revision is likely to command more popular support than the proposals of a constitutional revision commission. General revision has been attempted in several states by a single amendment. General constitutional revision in Georgia (1945) was accomplished in this manner.[46]

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[45] No federal convention for such purpose has ever been authorized since the adoption of the federal constitution 1787.

[46] The constitution proposed in Michigan in 1874 was framed by a revision commission and offered as a single amendment, but was rejected by the voters.

Constitutional conventions of the 1920's and 1930's (such as those in Missouri and New York), fearful that individual controversial provisions would defeat acceptance at the polls of their revision proposals as a whole, offered them for acceptance part by part. Many of these parts were rejected. The constitutions framed in the 1940's and 1950's such as those in Missouri, New Jersey, Hawaii, and Alaska were proposed as a single unit and adopted as such.

Since the various parts of a general constitutional revision are inter-related, problems and confusion could result from some parts of a revision being accepted and others rejected. If any parts of a constitutional revision, expected to be controversial, were to be submitted for approval separate from the main body of the proposed revision, it might be well to limit the number of these. It is clear that a constitutional convention in Michigan has power to submit its proposed revision in whole or in parts. It might be interpreted (in view of the very wide discretion allowed it under Section 4) as having power to submit its revision in whole and in parts at the same election – the vote on the-parts having effect only if the vote for the whole failed to carry.[47]

The present statute requires the constitutional convention to frame and publish 25,000 copies of an address to the people explaining any changes that may be made in the constitution and the reasons for such changes. This would appear not to be binding upon the convention in view of its independent and plenary power. However, the convention might well decide to write and publish an address of this kind in view of the success of this device in 1908, and its obvious value of throwing light upon the delegates' intentions in framing the various provisions for those who will be called upon for future interpretation of the document.

[47] It might possibly be interpreted as having authority to submit the whole revision at one election, and if the vote for it failed to carry, to submit the revision in parts at a succeeding election.

This index is based on the index prepared by the Legislative Service Bureau for the Constitution of the State of Michigan, compiled and published under the supervision of the Secretary of State, 1961.