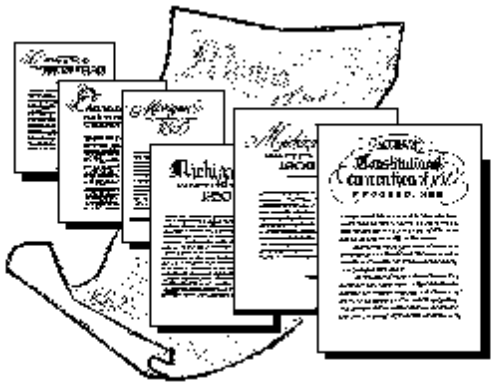
A Comparative Analysis of the Michigan Constitution

Volumes I

Articles I – VII



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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Volumes I & II

Articles I – XVII

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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.

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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
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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.

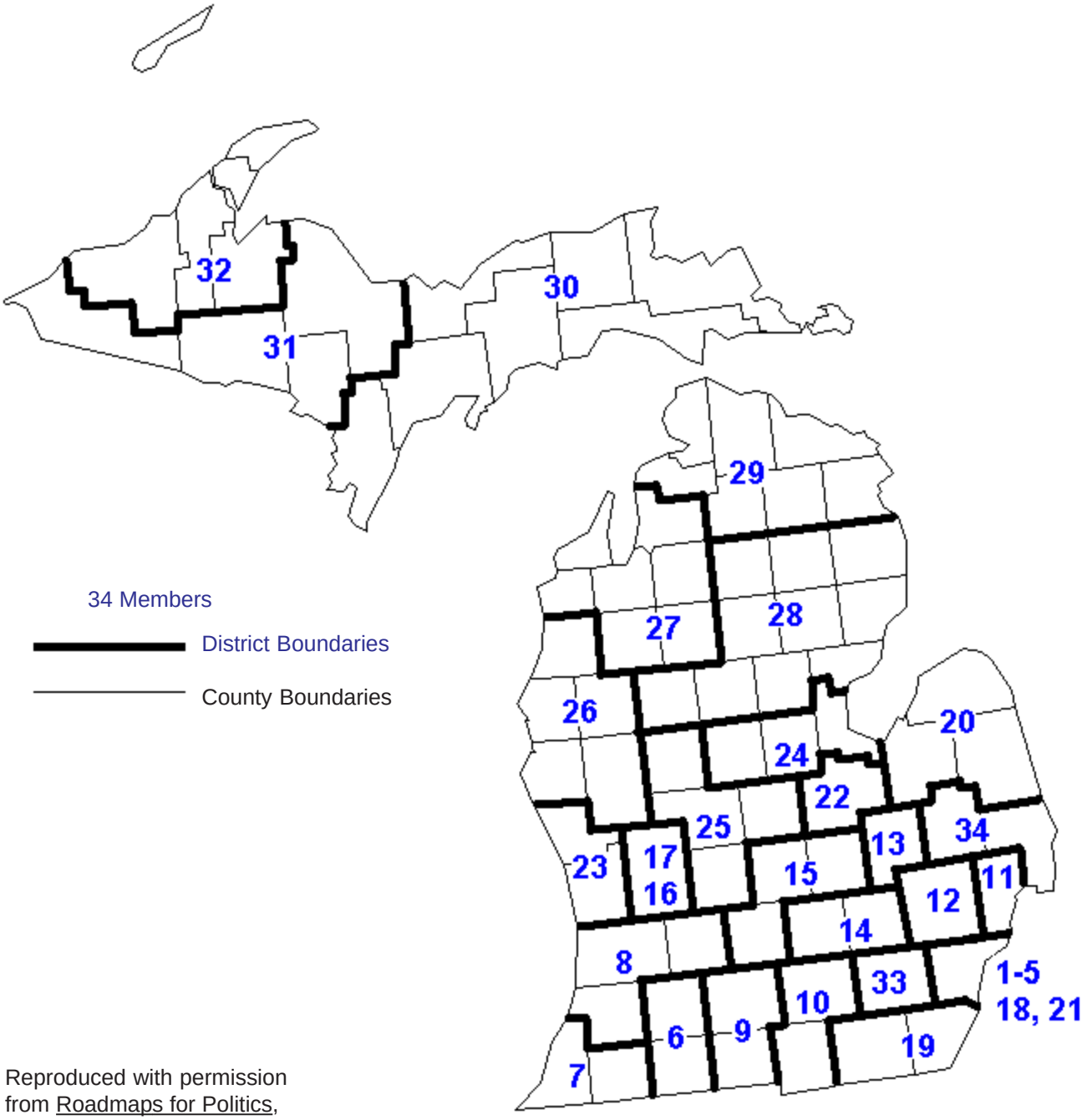
5. The 1908 provision prohibited the division of counties in forming senatorial districts unless the county was equitably entitled to two or more senators. The 1952 amendment provided that any county entitled to two or more senators should be divided by the board of supervisors in the year 1953 into 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.

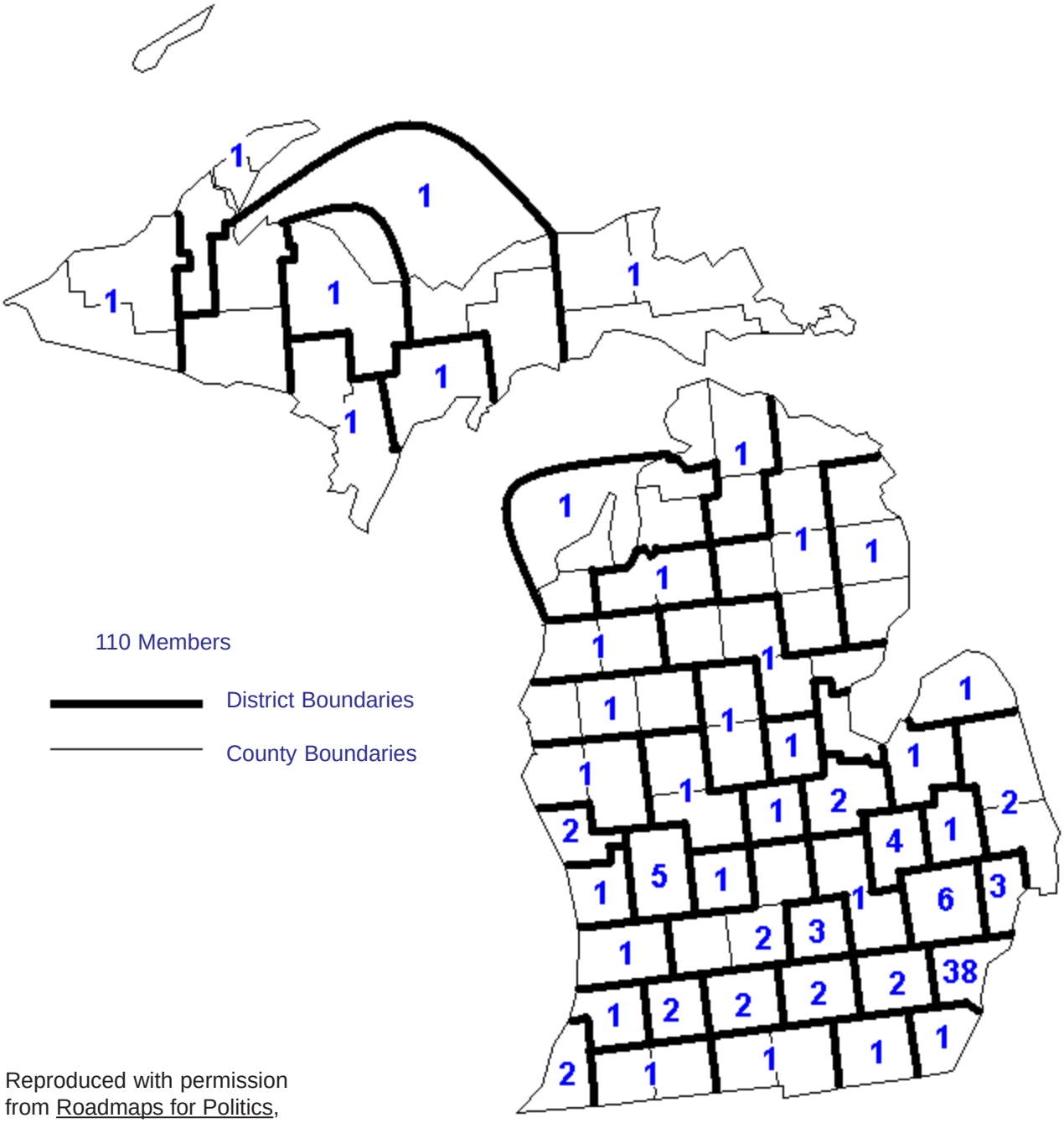
[22] City of Lansing v. Ingham County Clerk, 308 Mich. 560.

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
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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

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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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