

CONSTITUTIONAL ASPECTS OF STATE-LOCAL RELATIONSHIPS - I MUNICIPAL AND COUNTY HOME RULE FOR MICHIGAN

by
Arthur W. Bromage



CITIZENS RESEARCH COUNCIL OF MICHIGAN

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LANSING 23, MICHIGAN

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MUNICIPAL AND COUNTY HOME RULE FOR MICHIGAN

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I INTRODUCTION

Local governments are essentially creatures of their respective states in the Union. Without state constitutional requirements and restrictions as to local government, a state legislature might proceed to create, consolidate, or abolish local civil divisions. But such a condition of plenary power of the legislature over local units rarely is found in American state constitutions. The history of constitution-making has favored constitutional status for specific types of local units with limitations on legislative intervention in local affairs. Although local units may be creatures of the state, they are usually granted constitutional protections which control legislative action.

One of the most common restrictions pertaining to legislative action is to forbid special acts. Approximately three-fourths of the state constitutions, including that of Michigan, carry prohibitions against special act legislation. One type of prohibition is against special acts in particular subject matters or in particular situations which can be dealt with legislatively by general laws. Michigan's constitution (Article V, Section 30) stipulates that the legislature shall pass no local or special act where a general act can be made applicable, and this is a judicial question. Another approach is to list subjects or units which may not be dealt with by special acts, such as incorporation of cities and villages, the affairs of counties, townships, or school districts. Faced with a long record of special acts dealing with specific subjects and situations in local units, state constitution-makers have resorted to numerous prohibitions on legislative action.

Other limitations on legislative action arise from specifications as to county officers and their election, thus establishing a constitutional form of county government. Among the states, rigidity is found in state constitutional prescriptions about the county governing body (board, commission, or court) and its composition. Most state constitutions, in addition, require the direct election in every county of a group of enumerated administrative and judicial officers. The listing varies from a few to as many as ten or more officers. About one-half of the state constitutions include so much detail relating to county officers that they, in effect, establish a constitutional form. The Michigan constitution falls in this category. It can be said to outline a constitutional form of government both for counties and townships. To break such inflexibility, some thirteen states, beginning with California in 1911, have now provided in their

constitutions that county home rule charters may be drafted by all or some counties.

The discretion of state legislatures in dealing with local units was further limited by the development of municipal home rule. Twenty-five states have written this into their constitutions, starting with the Missouri amendment of 1875. Constitutional home rule for municipalities seeks generally to give them an opportunity to frame, adopt and amend their own charters. The intent is that city charters are no longer to be handed down by legislatures as special acts or general laws. Michigan joined the home rule movement for cities and villages in its Constitution of 1908.

Cities especially have resisted attempts to set back the constitutional clock by means of untrammelled legislative supremacy over local units of government. Systems of representation in state legislatures favoring the rural (sparsely settled) areas over urban agglomerations of population have motivated the cities in this attitude. But it is also a fact that constitutional fixation of county and township government builds up a situation in which many local officers have reason to oppose changes.

While all this has been transpiring in state constitutional systems, other factors have altered the circumstances of local governments. The recent needs of local units for state-collected, locally-shared revenues to supplement local property taxes have created a new kind of fiscal dependency. This fiscal dependency extends upward from the state to the national government, Federal grants in aid in such fields of administration as welfare, public health, highways, urban renewal, public housing, airports and community facilities, have engendered federal-state-local and federal-local inter-relationships. So the local administrator is no longer an island within the sea of governments but is bridged to state and federal bureaucracies by means of grants in aid and administrative relationships.

The metropolitan-urban growth engulfing many local units now was not anticipated when most state constitutional articles on local government were written. Approximately three out of five Americans live in slightly more than 200 metropolitan areas. Core cities, satellite cities, villages, and urbanized townships have grown up within counties and clusters of counties, both intra-state and interstate. The constitutional provisions calling for specific types of local units antedate the metropolitan phenomenon. Many cities and villages are no longer independent corporations surrounded by open rural countryside. They control a limited land area in a sprawling metropolitan region of incorporated places and unincorporated territory. The actual conditions are no less revolutionizing than the federal-state-local interrela-

tionships have been. Yet, most states, in their constitutions, are not fully equipped to cope with the metropolitan problem.

It does not follow, as the solution for local government, that Michigan is ready to sweep away most of its fundamental law in favor of legislative supremacy at the state level. Whether this might or might not be desirable, the real issue is how much revision of the local government article in the present constitution will be accepted by local officials and citizens. Any new proposal will be scrutinized as to how far it deviates from the familiar pattern of counties, townships, cities and villages.

II THE PATTERN OF LOCAL GOVERNMENT

A. Component Units

Michigan's existing constitution represents recognition of an intricate system of counties, townships, cities and villages, inter-related to one another. Any changes in this constitutional system must be considered in the light of the entire structure of local units. Knowledge of these inter-relationships and their origin as part of American governmental history is essential to calculate the effects of projected revisions.

Local governments in the United States fit into four basic categories:

- (1) the incorporated city, village, or borough
- (2) the county
- (3) the town or township
- (4) the special district, including the school district.

The individual finds himself at one and the same time under several local jurisdictions.

He may in Michigan live in a city, in a school district and county; or he may live in a village, township, school district, and county; or he may live in a township, school district, and county. The units overlap one another in territory and population: the village is within a township; the village, the township, and the city are within a county. Interlarded among these units are the school districts and special districts.

For Michigan, the 1957 Census of Governments listed 83 counties, 498 municipalities (cities and villages), 1,262 townships, 3,214 school districts, and 102 special districts deemed to be independent units of local government. (U. S.

Bureau of the Census, Local Government Structure, Washington D.C., 1957; Vol. I, No. 3, pp. 42-43.)

It is within the province of a constitutional convention to suggest drastic alterations in the local government article. Constitutional status is now granted to counties, townships, cities and villages. Cities and villages, moreover, have a guarantee of home rule which permits them to frame, adopt, and amend local charters. The Michigan constitution is characteristic of many state constitutions in possessing detailed provisions about particular units.

B. Developments Under the 1908 Constitution

Under the constitution of 1908 and the general laws of the state, the local government pattern remained true to a traditional type. The plan written in 1908 continued the existence of counties and townships with voluntary incorporation as cities and villages made available to the more densely settled areas. The major change was to authorize home rule for cities and villages. By 1960, Michigan had 219 cities and 291 villages. Of these, 186 cities and 51 villages had framed and adopted home rule charters.

The inter-relationships of counties, townships, cities and villages are a product of the constitution and general laws. Whenever and wherever an area is incorporated as a village, it stays within the township. The villagers participate in township affairs and pay any township taxes in addition to having their own village government. Incorporation as a city, however, lifts an area out of the township. City dwellers participate in county elections and pay county taxes as do villagers, but do not participate in township affairs. The constitution authorizes the legislature to organize any city of more than 100,000 population as a separate county by referendum vote in the city and in the balance of the county. Michigan has no city-counties, all cities continuing to be within counties.

The minimal statutory standards for incorporation are reflected in the number of cities (114) and villages (286) below 5,000 population. For many years the home rule act required 2,000 population and a density of 500 per square mile for city incorporation. An amendment of 1931 permitted fifth-class city incorporation at 750 to 2,000 population with the same density required, but authorized villages in this range to reincorporate as cities regardless of any density factor. It is not surprising that the number of cities under 5,000 exceeds cities over 5,000 by a ratio of 114 to 105.

In 1960, only five villages out of 291 exceeded 5,000 population. One of these, Inkster, had approximately 39,000. The others (Beverly Hills, Fenton, Novi, and Rochester) all ranged from 5,000 to 10,000. This left 286 villages of less than 5,000 population; of these approximately 200 were under 1,000 inhabitants. General law villages and home rule villages may be incorporated with a minimum population of 250 and 150 persons respectively, with certain limitations either as to area or density. There is no constitutional or statutory requirement that a village must become a city when it experiences a rapid growth in population.

Now more than 500 urban communities in Michigan exercise local self-government. Urban services have been compartmentalized into these city and village governments. To meet intergovernmental needs, joint action has led to the setting up of some service authorities and intergovernmental contracts, permitting the preservation of independence and separatism. The large number of cities and villages below 5,000 in population (400) underscores the demand of urban clusters for separate incorporation.

Growth of the small municipal corporations has not been related to constitutional provisions. The legislature sets minimum standards of population and density for incorporation. Statutes also control the annexation of territory to cities and villages.

Villages in Michigan are organized primarily to establish regulatory ordinances and to provide services such as fire and police protection, public works and utilities. Certain local duties required by state law are not demanded of the village but are performed by the embracing township.

A city, however, must provide certain state required services. Such duties include assessing property and collecting taxes for county and school purposes. The city also becomes solely responsible for registration of voters and for conduct of all election within its boundaries. It must maintain a local court system either through a fee-paid or salaried justice of the peace or a municipal judge.

The city's greater independence in exercising both local regulations and functions and state-imposed duties in one integrated unit accounts for the number of small cities created during recent decades in Michigan. Villages have sought incorporation as cities, partly in order to achieve a separation from township jurisdiction. A city sends its own representatives to the county board of supervisors under a formula prescribed by state law. The constitution

(Article VIII, Section 7) directs that cities be represented on county boards and that each organized township have one member. Villages have no direct representation on the county board, but are indirectly represented by the township supervisor who is a member of the board.

C. Comparisons with Other States

Michigan in its local governmental pattern is similar to certain northeastern and north central states which have township governments as well as counties, plus villages and cities, school districts, and other special districts. Its special classification is that of a township-supervisor state, meaning that township supervisors serve on county boards as in New York, Illinois and Wisconsin. Townships also appear, without serving as units of representation on county boards, in such states as New Jersey, Pennsylvania, Ohio, Indiana, Minnesota and North Dakota.

Michigan differs from the New England states where the town is more significant in the functions it performs than the county. Connecticut has recently abolished counties. Rhode Island uses counties only as geographic subdivisions for judicial administration in the state. By way of contrast, Michigan counties cover functions ranging from police, health, welfare and highways to judicial administration.

Michigan is unlike states of the South and Far West where township government is non-existent or almost so. Such states are described as having the county system, the county being the basic local unit except for incorporated places.

Local government articles in state constitutions, it is often argued today, should be less specific. The fact is, in many states, the articles are extremely specific. For example, the Michigan constitution not only speaks of counties and townships but also directs that certain of their administrative officers be directly elected. Cities and villages have a constitutional but non-self-executing type of municipal home rule.

D. Possible Alternatives

The drastic alternative to the present constitutional language in Michigan would be to reduce the local government specifications to a minimum. The legislature might merely be empowered to establish local government through counties, cities, and other civil divisions.

Any such broad constitutional dispensation might need reservations. An argument can be made for a reservation that the legislature deal with local civil divisions by general laws,

including general laws applicable to classified groups of local units. Beyond this, some specification that the legislature make optional charters available to cities and counties by local referendum would be desirable. Further "protection" to local units would follow from a constitutional reservation that cities and counties be invested with authority to draft home rule charters and exercise powers not prohibited to them by the state legislature.

The kind of article, sometimes set up as a "model," which emphasizes a return to state legislative supremacy may have theoretical merit in constitution-making. Whether, in the light of indigenous traditions and experience, Michigan would accept such a model is not answerable on purely theoretical considerations.

The proposal of a completely new stipulation about local government is within the competence of the constitutional convention. A few paragraphs, expressed in simple language, could serve to change the existing constitutional details to a general statement of basic principles. Such a change would largely abandon constitutional specifications. Resistance would be inevitable from numerous local governments now enjoying constitutional status.

For the convention, a course of action more pragmatic would be to revise what already exists. The revisionary approach implies that certain natural developments in the state's governmental history would be preserved. Counties and townships would retain constitutional status. Cities and villages would retain home rule. Recognizing the long standing interests behind Michigan's constitutional pattern of local government, modification in that pattern seems more acceptable.

The convention, if it chooses to proceed along the lines of limited change, will wish to keep intact the traditions that have grown up, while at the same time making the traditions more functional by technical improvements. The premise is that the constitutional system of local government is so ingrained in Michigan that upsetting it in favor of state legislative supremacy would arouse self-defeating antagonisms.

III MUNICIPAL HOME RULE

A. The 1908 System

The constitution of 1908 directed the legislature to provide by general law for the incorporation of cities and villages. The difference was that the municipalities, instead of having their charters handed down to them, were to be allowed to de-

sign their own. Michigan municipalities (i. e., cities and villages) were governed only under special charters or general laws before 1908. The general village act of 1895 was one example of this older arrangement.

Under the constitution of 1908 the electors of each city and village were authorized to frame, adopt, and amend their own charters. A city or village was empowered to enact through its regularly constituted authority all laws and ordinances relating to its municipal concerns, subject to the constitution and general laws of the state. Authority to acquire, own, establish and maintain parks, boulevards, cemeteries, hospitals and alms houses was extended to cities and villages, as well as for all works involving the public health or safety. Within certain constitutional restrictions, they were given the right to engage in supplying water, light, heat, power and transportation.

What the new system of 1908 comprised was constitutional home rule. It meant that cities were no longer to be controlled by special charters handed down to them by the state. They were to design their own charters. This kind of home rule is called constitutional home rule because it is set up in the constitution. It is also called non-self-executing because it requires legislative implementation; that is, it requires implementation by home rule act.

Under Michigan's home rule system, powers of cities and villages are derived from the constitution, from the home rule acts, and from other general laws making powers available to municipal corporations. As the system actually came into practice in Michigan, the legislature first passed in 1909 one home rule act for cities and one for villages. These acts spelled out home rule procedures and powers in detail. The act for cities, now many times amended, is not limited to mandatory and prohibited matters but deals also with a detailed assortment of permissive powers.

B. Urban Experience

After being in effect for more than 50 years, home rule had resulted by 1960 in the adoption of 186 city and 51 village charters. Its impact upon local government has been extensive, partly because of the particular time at which it was introduced. Urbanization was developing fast in the first decades of this century. At the same juncture, new types of municipal government were being improvised. The developing Michigan municipalities were free, because of home rule, to try them.

The number and size of Michigan municipalities today is indicative of the strategic time at which home rule was adopted for the state. Its cities are concentrated in the lower half of the Lower Peninsula, with a metropolitan orientation to the southeastern section. In the northern half of the Lower Peninsula and in the Upper Peninsula, the small city and village are the rule. The 1960 census indicated that Detroit had more than 1,670,000 inhabitants. Next came Flint and Grand Rapids with approximately 197,000 each. Dearborn with some 112,000 was closely followed by Lansing, 108,000. Twelve cities were between 50,000 and 100,000: Ann Arbor, Bay City, Jackson, Kalamazoo, Lincoln Park, Livonia, Pontiac, Roseville, Royal Oak, Saginaw, St. Clair Shores, and Warren. In the class from 25,000 to 50,000 were 19 cities and one home rule village (Inkster). In the range from 10,000 to 25,000 were 35 cities. In the 5,000 to 10,000 group there were 34 cities, three home rule villages (Beverly Hills, Novi, and Rochester) and one village governed under general law (Fenton).

Cities and Villages: Population Class, 1960

<u>Population</u>	<u>Number of Cities</u>	<u>Number of Villages</u>
Over 1,670,000	1	
197,000	2	
108,000 - 112,000	2	
50,000 - 100,000	12	
25,000 - 50,000	19	1
10,000 - 25,000	35	
5,000 - 10,000	34	4
Less than 5,000	<u>114</u>	<u>286</u>
Total	219	291

In 1960, among Michigan's total number of cities--219--five were still governed under special act charters passed by the legislature many decades ago. Fourteen had special act charters in which the legislature had followed by statutory reference most of the provisions of the fourth-class city law (1895). Fourteen other cities operated with the fourth-class city law serving as a uniform charter; it is a mayor-council form which was made applicable to cities of 3,000 to 10,000 in 1895. So, 33 cities had not yet exercised their home rule

powers and continued with legislative special acts or general law forms.

The other 186 cities had, in 1960, home rule charters drafted by locally elected charter commissions and adopted by local referendums. Among these cities, various forms of municipal government had been chosen. The International City Manager's Association in its official list of council-manager cities (1960) included 115 for Michigan. Among the remaining 71 home rule cities variations of the mayor-council system predominated, although an example of commission government in a large city existed in Highland Park.

Of the 291 villages in Michigan, 51 had home rule charters by 1960 and 240 were continuing under the general law (1895) pertaining to villages. Under that act, all existing villages in Michigan were reincorporated and standards were set for future incorporations. The general law village, still the most common, has a weak-mayor council form of government.

Of 51 home rule villages (1960) the overwhelming majority use a president and council form of government similar to that prescribed in the general village law. The home rule village act requires that every village so incorporated provide for the election of a president, clerk, and legislative body, and for the election or appointment of such other officers and boards as may be essential. Of the 51 home rule village charters, only seven were classified in 1960 by the International City Manager's Association as of the council-manager type.

What has been accomplished by constitutional home rule in Michigan? Some 237 communities (cities and villages) had by 1960 framed and adopted charters which were ratified by the local voters. Experimentation has produced divergent and individually adapted forms of government: for example, Detroit, the strong mayor type; Highland Park, the commission; Kalamazoo, the council-manager; Ann Arbor, the council-administrator. Some cities have had more than one charter; Battle Creek, for instance, adopted a commission form (1913) and shifted to council-manager (1960). Most of the 51 village home rule charters establish a mayor-council system; seven provide for village managers.

Significant variation has developed in the course of building structures for the local democratic process. The values of municipal home rule lie in local responsibility, local action, and local experimentation.

C. Fiscal Problems

Cities and villages have found results of their constitutional and statutory empowerments reasonably satisfactory with one

major exception--their taxing powers. This is the Achilles heel of home rule for municipalities in Michigan.

The 1908 constitution, in its application to cities and villages, directed the legislature to limit their rate of taxation for municipal purposes and to restrict their powers of borrowing money and contracting debts. The legislature has prescribed a top limit of 20 mills (\$20 per \$1000 of valuation) for annual property tax levies. City and village home rule charters, for example, may fix a lower but not a higher limit. Through subsequent constitutional earmarkings, cities and villages now share in the sales tax. Their revenue systems are dependent primarily on the property tax, on state-collected, locally shared revenues, and on service charges. Fortunately, judicial precedent has determined that city and village charter tax limits are over and above the basic fifteen mill limit shared by counties, townships and school districts.

A potential power which cities possess in the non-property tax field is lodged in language in the home rule act permitting them to levy "excises." But no one really knows, and the supreme court of Michigan has yet to determine precisely what this word means in law for municipal purposes. Can it be said to authorize a variety of non-property taxes, including a local income tax? This is an important question and so far it is unanswered.

Michigan municipal home rule has been conducive to flexibility in organization and in most functions. But fiscal home rule, in the sense of power to levy diversified taxes, is not yet indubitably established. This issue could be resolved by: (1) further legislative definition; (2) judicial interpretation; or (3) new constitutional language authorizing cities and villages to levy non-property taxes. Constitutional revision directly aimed at giving municipalities self-executing power to levy non-property taxes would, however, delimit existing legislative power to allocate new tax sources among units of local government.

The problem of constitutional vs. statutory allocation of new tax sources, such as non-property taxes, is complicated by existing constitutional specifications. The property tax is already limited for counties, townships and school districts by the constitutional fifteen mill tax limit, except for special millages affirmed by the voters. City and villages property tax levies, in addition to the basic fifteen mills are governed by law. For example, home rule cities and villages may not in their charters provide for more than a twenty mill levy. Some relief for counties, townships and school districts could be gained by raising the basic fifteen mill limit

to a twenty mill limit. But constitutional and statutory changes in property tax limits will certainly meet substantial resistance. The sales tax revenues are allocated constitutionally, with 2 cents going to school districts and 1/2 cent to cities, villages and townships. This leaves to the state 1-1/2 cents out of the four cent sales tax.

When state and local units seek new revenues, the issue of non-property taxes, especially the income tax, comes to the fore. A constitutional assignment of one or more non-property taxes to cities and villages is a possibility. But their needs cannot be isolated from those of the counties, townships, school districts, and the state itself. Any new revenue sources may be constitutionally earmarked for particular units of local government or left to legislative discretion, as is presently the case. In the realm of state-local relations this is the most critical issue which faces the convention and the citizens of Michigan. Retention of legislative discretion means that the legislature may make new levies for itself, share or not share them with the local units, or authorize local units to levy one or more non-property taxes.

D. Diversified Plans

Michigan faces a decision about retaining its present plan of home rule for cities and villages. If substantially retained as it is, it can be specifically strengthened. The obvious alternative is to replace Michigan's underlying doctrine of non-self-executing home rule with a set-up patterned after other states.

Between 1875 and 1960 some twenty-five states adopted municipal home rule of one kind or another. The table which follows demonstrates its rise.

<u>States with Constitutional Home Rule</u>				
Missouri	1875	(1945)	Arizona	1912
California	1879		Nebraska	1912
Washington	1889		Ohio	1912
Minnesota	1896		Texas	1912
Colorado	1902		Maryland	1915 (1954)
Oregon	1906		Pennsylvania	1922
Michigan	1908		New York	1923
Oklahoma	1908		Nevada	1924

States with Constitutional Home Rule (cont.)

Wisconsin	1924	Tennessee	1953
Utah	1932	Alaska	1959
West Virginia	1936	Hawaii	1959
Rhode Island	1951	Kansas	1960
Louisiana	1952		

Michigan could, for example, follow the example of the Ohio constitution in which municipal home rule is self-executing both as to municipal powers and procedure. The municipalities are authorized to exercise all powers of local self-government and to adopt and enforce local police, sanitary and other regulations not in conflict with general laws. The benefits of Ohio's constitutional grant of substantive powers are available to non-charter cities and may even be exercised by ordinance. The Ohio system is an unusual one. It is self-executing and does not require legislative implementation. Unlike most home rule provisions, the exercise of powers need not wait upon the adoption of a charter.

If Michigan had no home rule system in force, it would be logical to adapt a system from another state or from one of the model plans presently available. There is no shortage of operational and theoretical models. An existing system that has proved workable is not, however, to be put aside lightly. Among the models that are best known are those developed by the National Municipal League and the American Municipal Association.

In 1948, the fifth edition of the National Municipal League's Model State Constitution called for a self-executing system restrictive of legislative intervention. Home rule is defined in broad terms as the power to pass laws and ordinances relating to local officers, property, and government, with specific and lengthy enumeration of municipal powers. The state legislature can only enact laws of state-wide concern, uniformly applicable to cities. The conflict between local powers and laws of statewide interest is left to judicial determination.

The Model State Constitution in its 1948 form may be regarded as a theoretical version of earlier home rule doctrines of a self-executing variety. It has been criticized in recent years as setting up an imperium in imperio, a realm within a realm. This is said to burden the courts with decision-making as to what is municipal power under a home rule charter and what is a matter of state-wide interest to be controlled by state legislation. Such a model is designed to prevent the

legislature from intervening in municipal affairs. In other words, the discretion of the legislature is curbed except in laws dealing with state-wide concerns,

In the last decade, new theories of home rule have been advanced. The most prominent new doctrine was drafted as a model by Dean Jefferson B. Fordham and published in 1953 by the American Municipal Association under the title: Model Constitutional Provisions for Municipal Home Rule. Founded on a broad devolution of powers to cities, it provides for almost complete legislative supremacy to delimit the exercise of these powers.

The legislature by positive enactment is allowed to restrict home rule cities both as to matters of state-wide concern and as to local affairs. Although adoption of a home rule charter would automatically make available to a city a broad range of powers, no home rule power, except in such matters as organization and personnel, is to be beyond legislative control. A home-rule imperium was deemed unwise, because of the increasing difficulty in drawing a line between municipal affairs and state-wide concerns.

Home rule has long been advocated as a system for energizing local initiative, preventing legislative meddling, and saving legislators' time. Any home rule system which gets municipal charter-making out of legislative halls scores an advance over special act charters and uniform general laws applicable to cities. Michigan's on-going system has achieved that basic objective. Voters not only elect their city and village charter commissions, but also accept or reject the charters which they propose. The citizen has a direct control over local charter-making. When charters are made in state legislative halls, the local citizen possesses only an indirect control through his local state representative and senator.

E. Optional Charters

In the absence of home rule, and sometimes concurrently with it, there is another means to municipal flexibility. Optional charters are able to counteract the rigidity of general laws or the vagaries of special act charters. Michigan, unlike some other states, has never had an optional charter system for municipalities. It went directly, in 1908, from special acts and general laws for cities and villages to home rule.

Optional law charters developed first in the field of municipal corporations. Iowa, as early as 1907, enacted an optional commission form charter which became the basis of the well known Des Moines plan (1908). Since municipal corporations were not encumbered by a constitutional form, as were counties in many

states, enactment of optional charters for cities has been a frequent state practice. Under optional laws a choice from among various forms of city government is permitted to most cities in approximately one-third of the states. Still other states allow options to limited classes of cities. Included among these are: Idaho, Iowa, Kansas, Massachusetts, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, South Dakota, Virginia and Wisconsin.

Optional charter laws pertaining to cities have generally been sustained in the courts against any constitutional challenge concerning improper delegation of state legislative powers to municipal voters at a referendum. Even where state constitutional prohibitions against special acts exist, such statutes have been usually upheld against legal arguments that optional charters constitute special or local laws regulating city affairs. Optional charter laws have also existed concurrently with municipal home rule systems as in Nebraska, New York, Ohio and Wisconsin.

A comprehensive series of options was enacted by New Jersey in 1950, and this action has been described as achieving many of the objectives of home rule. Although home rule as such did not appear in the revised New Jersey constitution of 1947, constitutional flexibility permitted the continuance and revision of optional plans. Three complete alternatives were provided: mayor-council, council-manager, and small municipality plan. The legislation permitted many sub-options pertaining to: size of councils; election at large or by wards; partisan or nonpartisan balloting.

There is a special constitutional problem in Michigan relative to the development of optional laws. The present constitution directs the legislature to set up general laws under which cities and villages may frame, adopt and amend their own charters. Whether this specification rules out the possibility of state-enacted optional charters in Michigan is a question for constitutional lawyers. If an optional charter system is desired in addition to home rule charters, then the safest course for the constitutional convention is to make positive reference to such a legislative power in the new constitution.

With retention of the existing home rule system, state-enacted optional charters do not appear necessary for the sake of flexibility. In fact, such a development might be opposed by municipal officers as unnecessary, since any city or village may draft its own form of government in Michigan.

F. Possible Alternatives

So many Michigan cities and villages have an investment in their existing home rule charters that switching to an entirely new system, whether from another state or from a model, would precipitate intense reaction from local officials and citizens.

Comparatively speaking, the state has a long record of municipal home rule, and a record of extensive application. From the aspect of day-to-day operation, a workable system in hand is not to be put lightly aside for other plans, however model in nature. Revising rather than rejecting the local government article of the Michigan constitution is the likeliest course to follow in view of the home rule record. When it comes to the ultimate adoption of any revised constitution in Michigan, the treatment accorded city and village government will be critical.

IV COUNTY HOME RULE

A. Uniformity of Existing System

A relatively uniform governmental structure in Michigan's 83 counties has resulted from the constitutional requirements as to county government. It is one of many states which have a constitutional and statutory form of county government with legislative determination of county powers. Direct election, biennially, of a sheriff, clerk, treasurer, register of deeds and a prosecuting attorney is provided for. A county board consisting of supervisors is set up--one from each organized township, and such city representation as may be prescribed by law. The essential elements in Michigan counties are everywhere the same: fairly large county boards; representation of townships and cities on the county board; no over-all executive; and a long ballot for the election of administrative officers. In terms of general organization, government for rural, urban and metropolitan counties is basically the same. Michigan, however, is not alone in this uniform approach to county organization.

Specifications as to county officers and their election so encumber some state constitutions that legislatures cannot significantly modify the "constitutional form." The persistence of rigidity is seen in constitutional prescriptions about the county governing body (board, commission or court) and its composition. Most state constitutions, in addition, require the election in every county of a group of administrative and judicial officers. The listing varies from three or four officers to as many as ten or more. Offices so established constitutionally may not be abolished, consolidated, or made ap-

pointive without constitutional change. About one-half of the state constitutions still include so much detail relating to county officers that they may be said to establish a constitutional form.

B. Flexibility Through Home Rule

Four successive attempts in Michigan to establish county home rule by constitutional amendment have failed. Two of the proposed amendments (1934 and 1936) were state-wide in application; two (1942 and 1944) were limited to Wayne County alone. All of these amendments, except that of 1936, were submitted to the voters by constitutional initiative. So a contrast prevails; Michigan, with more than fifty years of successful experimentation in municipal home rule, has a record of more than 25 years of futility as to county home rule.

County home rule was proposed initially in Michigan to bring about structural reorganization; to reduce the size of county boards; to clear the way for county executives, such as elected county presidents or appointed managers; and to make possible the appointment rather than the election of certain constitutional officers: sheriff, clerk, treasurer, register of deeds. The four campaigns for county home rule were urged and supported in large measure by citizen groups.

Not many years ago, county home rule was considered to be a rare device among the states. This is no longer so. Thirteen states have provided for county home rule in their constitutions. Sometimes constitutional county home rule is restricted to the more populous counties. The thirteen states are: California, 1911; Maryland, 1915; Ohio, 1933 and 1957; Texas (counties over 62,000), 1933; Missouri (counties over 85,000), 1945; Louisiana (for East Baton Rouge Parish only), 1946 and (for Jefferson Parish only), 1956; Washington, 1948; Florida (for Dade County only), 1956; Minnesota, New York and Oregon, 1958; Alaska (for boroughs), 1959; and Hawaii, 1959.

The results in actual adoption of charters are not impressive, except in California. In that state, ten out of a total of 57 counties have put home rule into effect: Los Angeles and San Bernardino (1913); Butte and Tehama (1917); Alameda (1927); Fresno, Sacramento, San Diego, and San Mateo (1933); and Santa Clara (1951). Since the powers of general law counties in California are almost as extensive as those of home rule counties, the gains in home rule counties are largely in modernization of administrative organization.

Other examples of county home rule charters are to be found in: Maryland (Montgomery and Baltimore); Missouri (St. Louis County); Louisiana (East Baton Rouge Parish and Jefferson Par-

ish); Florida (Dade County); and New York (Erie County). In Louisiana, a regional government exists for Baton Rouge and East Baton Rouge Parish; in Florida, the Dade County plan is often described as a metropolitan federation.

Elsewhere, county home rule movements have often been unproductive. Ohio failed to achieve any home rule charter under its 1933 amendment and has yet to adopt one under that of 1957. The county home rule amendment in Texas has long been defunct. In Washington, King County (Seattle) failed to adopt a home rule charter. So it is a mixed record, with California out in front.

Michigan, if the objective is primarily the reorganization of county administrative structure, could achieve home rule by relatively simple constitutional language. The legislature could be directed to provide for home rule by general laws under which counties could frame, adopt and amend charters. The powers of counties, under such a system would remain subject to legislative definition.

C. Problems of Home Rule Power

One of the key questions concerns a self-executing grant of home rule powers for counties in Michigan or any other state. California (1911) was first to develop county home rule, but after 50 years the constitutional power doctrine is still not completely settled. Although charter counties may endow themselves with some development of functions, these additions must not conflict with general state laws concerning activities which counties perform as administrative subdivisions of the state. "Furthermore," according to observers there, "although the exact extent of charter county functions has not been determined by the courts, it is apparently much more restricted than that of charter cities in the state." (Crouch, W.W., McHenry, D.E., Bollens, J.C., and Scott, Stanley, California Government and Politics, 2d ad., 1960, p. 232.)

When Ohio in 1957 amended its constitution, it permitted any county by home rule charter to exercise concurrent municipal powers and to change its form of government by a simple, county-wide majority vote. However, in case of conflict between county exercise of municipal powers and municipal or township exercise of power, the latter prevails under the constitutional doctrine. Such a home rule charter was rejected by the voters of Lucas County (Toledo) in 1959.

The 1957 amendment of Ohio also provides for the exclusive exercise of municipal powers by a county. However, in a county over 500,000 population any provision for exclusive exercise of a municipal power subjects the charter to a requirement of

a three-way majority of those voting thereon--in the county; in the largest municipality; and in the county area outside such municipality. In 1959, the voters of Cuyahoga County defeated a metropolitan charter providing for exclusive exercise of certain municipal powers. Both Cleveland and the county area outside the central city voted against the charter. For exclusive exercise of municipal powers in counties of less than 500,000 still a fourth majority is required--a majority vote in each of a majority of the combined total of municipalities and townships. In Ohio, then, counties have been authorized to exercise exclusive municipal powers but the so-called "hurdle" majorities have proved an obstacle.

Dade County, Florida, presents a different story. There, in 1956, a state constitutional amendment authorized the setting up of a home rule charter to provide a method by which "any and all of the functions or powers of any municipal corporation or other governmental unit in Dade County may be transferred to the Board of County Commissioners of Dade County." (Florida, Constitution, Article VIII, Section 11; par. 4). Under this amendment, the Metropolitan Charter Board prepared a federated charter which was adopted in a county-wide vote (1957).

In Dade County, the federative practice of vesting certain powers in an upper-tier council (Board of County Commissioners) and leaving local matters to the municipalities was followed. In addition to exercising broad powers in legislation and administration, the commissioners can undertake many functions including air, water, rail, and bus terminals; expressways; underground water, sewerage, and drainage systems; housing and slum clearance; park and recreational facilities; uniform fire and police protection. Through its ordinance power, the Board of County Commissioners can regulate zoning and building codes, although higher standards may be set by the constituent units. (Dade County Charter (1957), Article I)

Authority to exercise all powers related to local affairs not inconsistent with the charter is assured to each municipality in Dade County. Each may provide higher standards of zoning, service, and regulation than those established by the county commissioners. Each municipality is authorized to adopt, amend or revoke a charter for its own government in a manner specified by the county charter.

From the examples of California, Ohio and Florida it appears that settling upon a constitutional power doctrine for home rule counties is not an easy task. The basic issue in Michigan is whether county home rule should relate solely to structural reorganization or include also a constitutional power doctrine.

D. The Michigan Dilemma

For Michigan to establish in its constitution a self-executing realm of powers over county affairs raises a number of complex questions. Competition between counties and cities in the exercise of powers might well be engendered. Moreover, in Michigan the Detroit metropolitan area is spread over more than one county. Some form of multi-county federation may ultimately prove necessary.

One immediate constitutional approach in Michigan is to have a relatively simple county home rule provision, leaving county powers to be determined by law. On the other hand, any new constitutional provisions should also make clear beyond doubt the power of the legislature to authorize the development of federated, multi-county metropolitan governments.

Any county home rule provision in Michigan which gave self-executing constitutional powers to counties to engage in a wide range of services would be relatively meaningless, unless modifications were made in the tax structure or in the earmarking of the sales tax. Without sharing, for instance, in the sales tax, without some increase in the fifteen mill limit on the property tax (now shared by counties, townships and school districts), or without authority to levy non-property taxes, counties would not be in a position to exercise effectively constitutional home rule powers of a substantive nature.

A logical antecedent of any resolution of the county home rule power question is a solution to the issues of taxation and earmarking. For example, in the field of non-property taxes, the convention must first decide whether to leave to the legislature (as is presently the case) the determination of the units which may make such levies. If the convention decides upon a constitutional allocation between local units of such non-property taxes as those on income and admissions, various choices are open. The constitutional choices center around questions as to: (1) whether such power shall be vested in counties or in municipalities and (2) whether all local units, including school districts and townships, may levy one or more non-property taxes.

A realistic approach must associate governmental power with taxation. More services, or services over greater land areas, are impossible without more taxes, special assessments, and/or service charges. When the time comes to create multi-county federated governments, this tax issue must also be faced. This does not necessarily call, however, for constitutional allocation of tax sources to local governments.

Without a power doctrine, a county home rule provision could be relatively simple. It could follow in large measure the pattern of Michigan municipal home rule. The essential features would be as follows:

- (1) It should direct the legislature to provide by general law for county home rule.
- (2) Under such a general law, counties should be permitted to frame, adopt and amend charters.
- (3) The powers of counties should remain, as they are today, defined by law.
- (4) Any home rule amendment, if it is to permit any major administrative reorganization, must allow adjustments in the composition of boards of supervisors, the development of county executives, and the appointment of various administrative officers whose election is now prescribed by the constitution.

Short of these minimum specifications, county home rule might not be worth the major effort it entails.

If county home rule is to be limited to structural reorganization, the alternative is raised of proceeding by state enacted optional county charters, subject to local referendum. By making optional charters available, provided the new constitution permitted such flexibility, the legislature could allow some choice in county organization.

E. Optional Charters

In various states, to achieve flexibility in county organization, reliance has been placed on the power of the legislature to enact optional charters. Such charters may be adopted in local referendums. Michigan's county home rule amendment (defeated in 1934) proposed that the legislature have power to write optional charters. Individual counties were also to be allowed to write particular home rule charters.

The state enacted optional charter system is an alternative to home rule charter-making by individual counties. In other states, broad state constitutional articles on local government or specific amendments have been the source of legislative power to enact optional county charters

Virginia's voters in 1928 by constitutional amendment authorized the general assembly to enact optional county forms and to deviate from constitutional provisions calling for the direct election of various administrative officers. The Vir-

ginia optional plans ensuing from this constitutional flexibility are the county executive form and the county manager system, the two plans being distinguished by the range of appointive authority vested in the county's chief administrative officer. Counties such as Albemarle, Arlington, and Henrico operate under optional law forms.

Other states which provide optional forms for counties are Montana, New York, North Carolina, North Dakota and Oregon.

In Montana, the legislative assembly, utilizing a constitutional amendment of 1922, in 1931 enacted an optional county manager law which Petroleum county adopted.

New York, by constitutional amendment of 1935, required the legislature to provide alternative forms of county government. Laws of 1935, 1936 and 1937 permitted numerous options, and Monroe county adopted a county manager plan in 1936. In 1952, New York revised the options into four basic forms: county president, county manager, county director, and county administrator.

North Carolina, acting under a broad constitutional provision (1876), passed an optional act in 1927. It permitted the appointment of county managers, a plan which Guilford and Durham counties accepted within a few years.

In North Dakota, a constitutional amendment of 1940 led to an optional county manager act in 1941.

Similarly, an Oregon optional manager law for counties followed from a state constitutional amendment of 1944.

As in the case of home rule, counties have been relatively slow to exploit opportunities offered in optional law systems.

F. Possible Alternatives

The constitutional convention in Michigan could overcome the constitutional rigidity in county organization by authorizing the legislature to provide optional forms for all counties or merely for more populous counties. In lieu of county home rule such an approach could be undertaken, or alternatively it could be accomplished concurrently with home rule. If both county home rule and optional law plans are authorized, the greatest degree of flexibility is assured.

The first priority is for a non-self-executing type of county home rule, leaving the power doctrine to legislative supremacy. The second priority is constitutional authorization to the legislature to make available optional law forms of county organization, subject to referendum in individual counties.

V COURSES OF ACTION OPEN

A. For Cities and Villages

What appears so far is that Michigan cities and villages have made extensive use of the home rule principle under the constitution of 1908 and the home rule acts. By 1960, some 186 cities and 51 villages had adopted home rule charters. As to powers the system has been reasonably satisfactory, except in the realm of authority to tax, especially as to non-property taxes. By giving home rule cities and villages self-executing power to levy one or more non-property taxes, their capacity to provide services could be strengthened. This, however, would be a serious limitation upon the discretion of the legislature.

Technical improvements can be made in the home rule system. As matters now stand, the legislature can by general law (or by amendments to the home rule acts) interfere with municipal structure, organization and personnel administration, for example. In recent years, the legislature has chosen to avoid interference, but this has not always been so, nor may it always remain true. Most legislative sessions witness the introduction of bills to set state standards pertaining to conditions of municipal employment. One way to guard against such potential legislative interference is a constitutional guarantee to home rule cities and villages of exclusive jurisdiction as to all matters of structure, organization and personnel.

Several courses of action open to the convention are now identifiable:

1. The home rule system for cities and villages established by the constitution of 1908 can be retained. Because it has proved durable and workable, the Michigan plan cannot be lightly abandoned for a new system adapted from that of another state or from some model plan.
2. From the point of view of some cities and villages, the greatest need is for authority to levy non-property taxes, such as a local income tax. This can be achieved by: (a) legislative clarification; (b) judicial interpretation; or (c) a self-executing power grant to cities and villages, which involves a hard choice. It would breach the discretion of the legislature to assign new tax sources to local units. Admittedly, there are sound reasons for leaving the allocation of new tax sources to the discretion of the state legislature.

3. To prevent legislative limitation of home rule by general laws, the constitution can be revised to give cities and villages exclusive jurisdiction over matters pertaining to their structure, organization and personnel administration.
4. As a protection, the existing constitutional prohibition against local or special acts, where a general law can be made applicable, can be continued.
5. By new constitutional language, the power of the legislature to provide a system of state enacted optional charters, subject to local adoption, can be assured. However, if the present system of home rule is retained, a state system of optional charters for cities and villages is unnecessary. Home rule gives greater freedom to cities and villages in designing their own charters.

These five courses of action may be taken in whole or in part but the key one is the retention of the home rule system.

B. For Counties

The Michigan constitution presently sets up a form of county government, thereby producing rigidity in organization among 83 units. This rigidity can be overcome by a simple home rule amendment generally parallel to the existing system of municipal home rule.

To grant counties a self-executing sphere of power might induce conflict between units of government. The powers of counties can, when necessary, be expanded by legislative action. The hard fact is that, with expansion in powers, expansion of county revenues (in one way or another) will prove necessary.

Experience in other states gives no assurance that many counties will adopt home rule charters. Therefore, the Michigan constitution can otherwise provide for flexibility by authorizing the legislature to enact optional county charters. This flexibility will require a freeing of optional charters from the constitutional prescription of a form of county government. Such optional charters are appropriately subject to adoption by local referendum.

Constitutional language can be added to clarify the power of the legislature to authorize multi-county federated governments.

Some of the courses of action open to the convention are now apparent. They are not mutually self-exclusive nor all-inclusive.

1. To promote flexibility in county organization, revision of the constitution can include a county home rule provision, non-self-executing in character, leaving the determination of county powers to legislative discretion. Any plan of home rule can permit governmental reorganization in specific counties by locally designed and locally adopted charters.
2. If the convention sees fit to grant self-executing powers to counties, this will be relatively meaningless unless (a) the power of counties to levy property taxes is increased; (b) authority is granted to them to levy non-property taxes by constitution or statute; or (c) counties receive a greater share in state collected taxes.
3. Concurrently with or as an alternative to home rule, the constitution can authorize the legislature to enact optional charters for counties, subject to adoption by local subject to adoption by local referendum. Counties not adopting either a home rule or optional charter could continue to operate under the present constitutional structure of county government.
4. The new constitution can clarify the power of the legislature to authorize multi-county, federated metropolitan governments, substate and supralocal.

To offer some form of home rule to counties would be a logical extension of principles long applied to cities and villages in Michigan.

APPENDIX
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