Michigan Law Review

Volume 51 | Issue 6

1953

CONSTITUTIONAL LAW-DUE PROCESS-VAGUE AND INDEFINITE STATUTE

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CONSTITUTIONAL LAW—DUE PROCESS—VAGUE AND INDEFINITE STATUTE*—The Food, Drug, and Cosmetic Act[1] by section 301(f)[2] prohibits a factory operator from refusing to permit entry and inspection as provided by section 704.[3] Violation of section 301(f) is made a misdemeanor by section 303(a).[4] Section 704 authorizes persons "duly designated by the Administrator, after first making request and obtaining permission of the . . . operator" of the factory, "to enter" and "to inspect" at "reasonable times."[5] Defendant was convicted by the district court for violating section 301(f), having refused permission to authorized persons to enter and inspect at a reasonable time.[6] The court of appeals reversed, on the ground that section 301(f) was violated only if the factory operator refuses to allow entry and inspection after previously granting permission.[7] On appeal, *held,* affirmed. The relevant sections may be read as they were by the court of appeals, or they may be read as making it a misdemeanor to refuse permission on request to enter and inspect. However section 301(f) is read, it does not give fair warning that failure to give permission is a crime. The court will not sanction making the denial or permission an offense, when the act on its face gives that right to the factory operator. *United States v. Cardiff,* 344 U.S. 174, 73 S.Ct. 189 (1952).

This is a clear instance of the application of the void for vagueness doctrine as a criterion of procedural due process, although the doctrine was developed and originally invoked only as an aid to interpretation.[8] A frequently cited[9] formulation of this doctrine is, "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. . . . And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."[10] This test, however, must be considered in light of Holmes' earlier pronouncement that a statute is not too indefinite merely because a man must "estimate

* For a different interpretation and analysis of the *Cardiff* case, see companion note in this issue at p. 941.—Ed.

1 52 Stat. L. 1040 (1938), 21 U.S.C. (1946).

2 52 Stat. L. 1042, §301(f) (1938), 21 U.S.C. (1946) §331(f).

3 52 Stat. L. 1057, §704 (1938), 21 U.S.C. (1946) §374.

4 52 Stat. L. 1043, §303(a) (1938), 21 U.S.C. (1946) §333.

5 Note 3 supra.

6 United States v. Cardiff, (D.C. Wash. 1951) 95 F. Supp. 206.

7 Cardiff v. United States, (9th Cir. 1952) 194 F. (2d) 686.

8 Dictum in two early cases mentions vagueness. The Enterprise, 1 Paine (C.C.) 32 (1810); United States v. Sharp, 1 Pet. (C.C.) 118 (1815). For the historical development of the doctrine see, Aigler, "Legislation in Vague Terms," 21 MICH. L. REV. 831, esp. at 836-842 (1923); also an excellent note, 23 IND. L.J. 272 (1948).

9 E.g., Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618 (1939); Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703 (1951).

10 Connally v. General Construction Co., 269 U.S. 385 at 391, 46 S.Ct. 126 (1926), annotated 70 L.Ed. 322.

rightly, that is, as the jury subsequently estimates."[11] Consequently, the court has not automatically invalidated as vague, statutes prohibiting "unreasonable waste of natural gas,"[12] "dangerous rate of speed,"[13] "unreasonably low price,"[14] nor those allowing "reasonable variations,"[15] "ordinary fees,"[16] etc.[17] Such statutes may be valid despite the existence of borderline cases, if they give the man of common intelligence "fair warning" but still do not violate the separation of powers requirement by delegating legislative functions to the courts.[18] In the principal case the court of appeals seems to rest on the latter test[19] and quotes from Brandeis: "Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive."[20] However, the Supreme Court rests on the failure to satisfy the notice requirement and cites four cases[21] in support of that view, but interestingly, none of these is concerned with the kind of indefiniteness attributed to the statutory language here involved. The statutory issue in the first two cited cases turns upon whether a certain activity or object falls within the described class;[22] in the latter two cases the defendant was compelled to "estimate" as to whether his conduct fell within the domain of that prohibited.[23] Thus in these four cases, as in the great majority of cases presented to the Court where a statute is attacked for indefiniteness, the evil lay in what may be called the continuing uncertainty of the classification. That is, even after the Court decided whether the activity or object in question falls within the purview of the statute, further defendants will still have to "estimate" as to whether their slightly different conduct falls within the language of the enactment. Put more generally this means that even after one or perhaps many decisions on the indefinite language, the classification remains open, i.e., the determinable remains indeterminate.[24] It is quite to the contrary in

[11] Nash v. United States, 229 U.S. 373 at 377, 33 S.Ct. 780 (1912).

[12] Bandini Co. v. Superior Court of California, 284 U.S. 8, 52 S.Ct. 103 (1931).

[13] Miller v. Oregon, 273 U.S. 657, 47 S.Ct. 344 (1927).

[14] F. & A. Ice Cream Co. v. Arden Farms Co., (D.C. Cal. 1951) 98 F. Supp. 180.

[15] United States v. Shreveport Grain and Elevator Co., 287 U.S. 77, 53 S.Ct. 42 (1932).

[16] Kay v. United States, 303 U.S. 1, 58 S.Ct. 468 (1938).

[17] See Annotation, 83 L.Ed. 893 (1938).

[18] United States v. L. Cohen Grocery Co., 255 U.S. 81 at 92, 41 S.Ct. 298 (1921); United States v. Reese, 92 U.S. 214 at 221 (1875); Herndon v. Lowry, 301 U.S. 242 at 261-263, 57 S.Ct. 732 (1937).

[19] Note 7 supra at 689.

[20] United States v. Weitzel, 246 U.S. 533 at 543, 38 S.Ct. 381 (1918).

[21] McBoyle v. United States, 283 U.S. 25, 51 S.Ct. 340 (1931); United States v. L. Cohen Grocery Co., supra note 18; Herndon v. Lowry, supra note 18; United States v. Weitzel, supra note 20.

[22] United States v. Weitzel, supra note 20; McBoyle v. United States, supra note 21.

[23] In United States v. L. Cohen Grocery Co., supra note 18, the statute prohibited "any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." Herndon v. Lowry, supra note 18.

[24] For the use of this distinction in statutory problems see, Radin, "Statutory Interpretation," 43 HARV. L. REV. 863 esp. 868 ff. (1930).

the principal case. Here, there are competing interpretations of the same language, but if the Court once decided which interpretation was the one intended by the legislature the ambiguity would be resolved, i.e., the determinable would be determinate. In light of this important distinction, the significance of the legislation involved,[25] its remedial character,[26] the availability of extrinsic evidence[27] for determining the legislative intent,[28] and the existence of a well established executive interpretation,[29] it is suggested that perhaps the Court unnecessarily found the language so indefinite as to be unconstitutional. Although a statute entailing penal consequences was before it,[30] the Court too quickly passed to the constitutional question without adequate consideration being given to the interpretative one, quite contrary to the well established and usual policy.[31] Also, it is worth noting that as a practical matter the defendant in the principal case probably had actual notice as to what conduct was intended to be prohibited, unlike most criminal statute cases where the defendant is charged with constructive notice. The seeming anomaly created by making the refusal of permission a misdemeanor had long been known,[32] and in an industry as highly organized and informed as that here involved, it is unlikely that the defendant was unaware of the long standing interpretation and practice of the administration in regard to factory inspection.

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[25] Petitioner in the instant case indicates that about 80% of the violations of the act are discovered through factory inspection. After the decision in this case C. W. Crawford, Commissioner of Food and Drugs stated that he was "apprehensive that if inspection authority can not be promptly restored much of the progress made during the 14 years since the law was enacted . . . will be lost." 8 FOOD, DRUG, COSMETIC L.J. 63 (1953).

[26] There is authority, both ancient and in the Supreme Court, for seeking the legislative intent rather than invoking the rule of strict construction for a statute which, though penal, is primarily for the public good. Platt v. Sheriffs of London, 1 Plowden 35 (1551); the statute here involved is so considered in United States v. Dotterweich, 320 U.S. 277, 64 S.Ct. 134 (1943).

[27] It no longer requires heavy documentation to assert that the court will look at extrinsic evidence. United States v. C.I.O., 335 U.S. 106 at 116, 68 S.Ct. 1349 (1948).

[28] In this act which took five years and a day to pass, there is no dearth of evidence from which the Court might have determined the congressional purpose. As to the likelihood of petitioner's interpretation, see 79 CONG. REC. 12665 (1935); H. REP. 2139, p. 12 ff. (1938).

[29] The executive interpretation had been consistently applied for 14 years. See supra note 28; also, ADMINISTRATIVE PROCEDURE AND PRACTICE IN THE DEPARTMENT OF AGRICULTURE UNDER THE FEDERAL FOOD, DRUG, AND COSMETIC ACT OF 1938, pp. 242-248. The Court has indicated on numerous occasions that executive interpretations of long standing are to be given great weight. Dismuke v. United States, 297 U.S. 167 at 174, 56 S.Ct. 400 (1936).

[30] Though a penal statute was before the Court, consideration could have been given to the extrinsic evidence. When interpreting the clearly penal Federal Kidnaping Act, the court looked at the legislative history as well as Senate and House Reports. Gooch v. United States, 297 U.S. 124, 56 S.Ct. 395 (1936).

[31] Alabama State Federation of Labor v. McAdory, 325 U.S. 450 at 461 and citations therein, 65 S.Ct. 1384 (1945).

[32] Austin, "The Federal Food Legislation of 1938 and the Food Industry," 6 LAW & CONTEM. PROB. 129 at 142 (1939); TOULMIN, LAW ON FOODS, DRUGS AND COSMETICS 718 (1942).