JUDICIAL DECISIONS ON PUBLIC LAW

ROBERT E. CUSHMAN

University of Minnesota

Compulsory Labor—Constitutionality of State Statute Punishing as Vagrants All Able-bodied Men Not Engaged in Useful Work Regardless of Financial Ability for Self-Support. Ex-parte Hudgins (West Virginia, May 20, 1920, 103 S. E. 327). In 1917 a statute was enacted by the West Virginia legislature punishing as a vagrant every able-bodied male resident of the state between the ages of sixteen and sixty, except students during school term, who should fail to engage for thirty-six hours per week in some lawful and recognized labor or business. This obligation to work was imposed regardless of the financial ability of any person to support himself and his dependents without it. Punishment was provided for the vagrancy thus defined in the form of a fine and imprisonment at hard labor to be performed on the public roads. The statute was to continue in force until six months after the termination of the war with Germany. The prisoner in this case was honorably discharged from the army in 1919 after a year of service overseas and was arrested for violation of the statute in April, 1920. The court held the act to be an arbitrary and unjustifiable interference with personal liberty and therefore a denial of due process of law. The purposes for which the restraints upon personal liberty set up in the act are imposed are not purposes which are generally comprehended within the police power of the state. It could not be justified as a general statute to protect the state against vagrancy because it applied to persons in no danger of becoming public charges and was limited in duration to the period of the war and six months thereafter. It could not be justified as a war measure because the state as such has no general war power and this act does not relate to anything concerning which the state may properly exercise its military authority. Finally it is held to be clearly within the spirit if not the letter of the Thirteenth Amendment and the legislation enacted for the enforcement thereof.

Constitutionality of Statute as Determined by Reasonableness—Clause Authorizing Legislature to Enact Wholesome and Reasonable Laws Construed as Limitation upon Legislative Power. Hodge v. City of Manchester (New Hampshire, June 1, 1920, 111 Atl. 385). The facts in this case are of little interest. They raise the question of the validity of a state providing that lands dedicated for highway purposes shall be discharged from public servitude if not used for public travel within twenty years of such dedication. The court examines the question of constitutionality in the light of the provision of the constitution of New Hampshire (pt. 2, art. 5) which provides that "full power and authority are hereby given . . . . to the said general court . . . . to make, ordain, and establish all manner of wholesome and reasonable . . . . laws . . . . so as the same be not repugnant . . . . to this Constitution." The court clearly regards this clause of the constitution as a restriction upon the legislative power of the legislature, but declares that the test as to whether or not that limitation has been violated "is to inquire whether all fair-minded men must agree that enacting this chapter was an unreasonable exercise of legislative power." The application of this test to the statute in question results in upholding its validity.

It would seem from this case that the courts of New Hampshire are endowed with power to invalidate legislation on the grounds of unreasonableness even though it does not violate any specific constitutional provision. While the test set up by the court for determining reasonableness is a strict one, it is, nevertheless, of judicial origin and subject to judicial revision. The case is interesting in that the court did not raise the question of reasonableness under the due process clause of the state constitution (pt. 1, art. 15) as would be done in most jurisdictions, but chose rather to construe a clause conferring the power to pass reasonable laws as judicially enforceable prohibition against the passing of unreasonable laws. The doctrine of the case is discussed at greater length in the earlier case of Carter v. Craig (90 Atl. 598), decided in 1914.

Court of Industrial Relations—Constitutionality of Statute Creating. State v. Howat (Kansas, July 19, 1920, 191 Pac. 585). By act of January 24, 1920, a court of industrial relations was created in Kansas. This court is composed of three members appointed by the governor and is empowered to investigate with the aid of compulsory process any industrial controversy which in its judgment threatens to imperil

or destroy the efficiency or continuity of service of a wide range of industries declared by the statute to be affected with a public interest. These industries include the production and distribution of food, clothing, and fuel as well as the recognized types of public utilities and common carriers. The court is authorized after its investigation to issue orders to end the controversy and these orders which may extend to the regulation of wages, hours of labor, and general working conditions are binding upon the parties unless set aside as unreasonable by the supreme court of the state, to which an appeal can be made.

The defendants in the present case were imprisoned for contempt for refusing to obey an order of the district court to give evidence before the court of industrial relations which had called them as witnesses. They set up in defense the invalidity of the statute upon numerous grounds. The court held that the most important and interesting questions regarding the constitutionality of the act could not be raised by the defendants since they could attack the validity of only those sections which could affect their rights in the present litigation. These sections were held to be separable from the rest of the act and therefore unaffected by any possible invalidity of other portions of it. The parts concerning the defendants were all upheld. The power of the district court to order the defendants to testify before the court of industrial relations was sustained on the ground that the new tribunal was not itself a judicial body and upon the authority of Interstate Commerce Commission v. Brimson (154 U. S. 447) could be authorized to rely upon the regular courts for aid. The claim that the guarantee in the state constitution against self-incrimination was infringed by the act was rejected on the ground that the defendants had not as yet been asked to answer any questions and that such objection was prematurely raised. The power of the governor to act as the sole judge of the existence of an emergency authorizing the calling of an extra session of the legislature was upheld against the contention that the session which passed the statute was unlawfully called. The title of the act was declared not defective. With practically no argument the statute was held not to be invalid on the ground of merging legislative, executive, and judicial powers in the court of industrial relations. The industrial court was declared to be distinguishable in this respect from the Kansas court of visitation created by act of 1898 and held unconstitutional because of such comingling of powers. See Western Union Telegraph Co. v. Myatt (98 Fed. 335); State v. Johnson (61 Kans. 803). The court does not make clear, however, what the distinction is. Finally, it

is denied that the powers conferred upon the industrial court are in conflict with congressional statutes applicable to the same subject matter, although it is recognized that such statutes form limitations which the court of industrial relations must keep in mind in the exercise of its powers. It will be seen from this analysis that the important question whether the industrial court act is a legitimate exercise of the police power of the state in the light of the Fourteenth Amendment remains to be decided.

Declaratory Judgments—Power of Legislature to Impose Non-Judicial Duties on the Courts. Anway v. Grand Rapids Ry. Co. (Michigan, September 30, 1920, 179 N. W. 350). By a statute passed in 1919 any court of record in Michigan was authorized to render declaratory judgments. The act provided that "the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not, including the determination, at the instance of any one claiming to be interested under a deed, will, or other written instrument, of any question of construction arising under the instrument and a declaration of the rights of the parties interested." The policy of the act was, in the words of its author, to provide a system of "remedial law" which would require the courts "to offer remedies in advance of the happening or even of the threat of any wrongful act, and to authoritatively advise parties as to what their legal rights may be in the circumstances in which they find themselves." In the present case the plaintiff asks the court to advise him whether the defendant company by whom he is employed as a conductor may lawfully permit him to work more than six days in any consecutive seven days in view of the provisions of a statute regulating that matter. A majority of the court held that the statute requiring it to render declaratory judgments was unconstitutional as conferring non-judicial power upon the court. After a most elaborate examination of the cases in which attempts have been made to require courts to render advisory opinions or to render decisions which were not to be binding upon the parties the court concludes that a proceeding seeking a declaratory judgment, if not strictly a "moot case," at least has all the objectionable characteristics of a "moot case" and imposes on the court a duty which is non-judicial. A vigorous dissenting opinion takes the position that the duty imposed by the act is judicial in character.

Elections—Absent Voting—Power of State to Authorize Absent Voting for State and Federal Officers. In re Opinion of The Justices (New Hampshire, March 16, 1921, 113 Atl. 293). The opinion of the court is here asked upon the question of the validity of a proposed statute authorizing absent voting for state officers, members of both houses of Congress, and presidential electors. The court discusses these various points separately and reaches different conclusions in connection with the different classes of officers. Relying upon the authority of an advisory opinion given upon the same question in 1863, the court declared that absent voting for state officers is forbidden by the constitution of New Hampshire, which is construed to require the actual presence of every voter at the polls or meeting at which the election is held. The legislature, however, may allow absent voting for presidential electors, inasmuch as the Constitution of the United States specifically provides that such electors shall be chosen in each state "as the Legislature thereof may direct." In the case of elections for members of the two houses of Congress the case is not so clear. The court frankly states that whether absent voting may be allowed in such elections is a question which must in the last analysis be finally determined by the houses of Congress themselves in passing upon the qualifications of their members. But even though this is true the court does not feel itself precluded from expressing its views upon the matter. The conclusion reached is that there is such doubt as to the validity of absent voting in congressional elections that the court is "unable to advise the Legislature that the proposed legislation would be valid." This conclusion rests primarily upon the fact that the "qualifications" of those voting for members of Congress must be the same as those of electors of the lower house of the state legislature. Presence at the polls may be regarded as a qualification for voting in a state election and absent voting would thereby be ruled out. It is also suggested that the absent voter who marks his ballot and sends it in before the day of election does not vote on the day of election but before that time, and this constitutes a possible violation of the requirement of the congressional statute fixing a uniform date throughout the country for the holding of congressional elections.

Elections—Constitutionality of Primary Election Law Requiring of Candidate Affidavit That He Will Support Party. Harrington v. Vaughn (Michigan, August 12, 1920, 179 N. W. 283). By a statute enacted in 1919 it is provided that the name of no candidate shall be printed upon

any primary election ballot unless such candidate files an affidavit stating that "he is a member of a political party, naming it, and that he will support the principles of that political party of which he is a member, if nominated and elected; that he is not, and will not become a candidate for the same or any other office on any other party ticket at said primary election." While admitting that this statute was undoubtedly enacted for the purpose of protecting the purity of elections; the court held that it was in violation of the clause of the constitution prescribing an official oath and declaring that "No other oath, declaration or test shall be required as a qualification for any office or public trust." The court, in passing, makes this interesting comment: "It may be well to inquire in what way it will be practicable for a judicial officer to discharge the duties of his office according to the principles of the political party with which he is affiliated. Is it not one's duty as a judicial officer, when litigation is before him, to know no political party, but to conduct the litigation without taking into consideration partisan politics?"

Judicial Review of Legislation—Requirement of Concurrence of Extraordinary Majority of Court to Declare a Statute Void. Daly v. Beery (North Dakota, April 20, 1920, 178 N. W. 104); Barker v. City of Akron (Ohio, April 2, 1918, 121 N. E. 646). These cases are of interest only in showing the operation of the North Dakota and Ohio constitutional provisions that statutes may not be invalidated by a court unless a specified majority of the members concur in the decision. The North Dakota supreme court is composed of five members and four members must concur in order to declare a statute void. In the present case one judge was disqualified and did not sit. The other four were evenly divided in their opinions as to the constitutionality of the statute before the court. Since under these circumstances it would obviously be impossible to secure the concurrence of four judges in holding the statute invalid it was not felt to be necessary to call in a district judge to sit in place of the disqualified judge. The statute was upheld. The Ohio rule is that six members of the present court of seven must concur to hold an act void in case the statute has been upheld by the court of appeals. The statute in this case had been upheld by the lower court. Four judges of the supreme court regarded it as unconstitutional while three believed it valid. It was therefore sustained.

Police Power—Constitutionality of Statute Regulating Rents and Protecting Tenants in Certain Cases from Eviction. People v. La Fetra (New York Court of Appeals, March 8, 1921, 130 N. E. 601). This case raises the question of the constitutionality of the New York housing laws passed in 1920. For the purpose of meeting in part the housing emergency, these laws provided that the rights of landlords to evict their tenants should be wholly suspended until November 1, 1922, provided the tenants were unobjectionable and paid a "reasonable rent." The presumption seems to be created by the act that any rent in excess of that charged during the preceding year is unreasonable and oppressive. The court upheld the validity of this law in a vigorous and interesting opinion.

In the first place, the statute does not deprive the landlord of his property without due process of law, since it is a legitimate exercise of the police power of the state. "The police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process." It is declared that a great public need does exist to justify the drastic restriction of private rights involved. The distressing character of the housing crisis in the City of New York is reviewed. "It is with this condition," declares the court, "and not with economic theory, that the state has to deal in this emergency." It goes on to say that "although emergency cannot become the source of power, and although the Constitution cannot be suspended in any complication of peace or war, an emergency may afford a reason for putting forth a latent governmental power already enjoyed but not previously exercised." It is said to be no objection to such an exercise of the police power that it is without precedent, since changing social and economic conditions call for changes in the laws which govern them.

In the second place, the act is declared not to be in violation of the guarantee of the equal protection of the laws. Would-be tenants out of possession are not discriminated against unduly by the protection afforded to those who are in possession. The law cannot provide homes for all and the classification thus established is not arbitrary. Nor are the landlords singled out for the restrictions of the statute subjected to arbitrary discrimination. "One class of landlords is selected for regulation because one class conspicuously offends." In the third place, the contention that the law works the impairment of the obligation of contracts is disposed of along conventional lines by

alluding to the well-established doctrine that the contract clause of the United States Constitution does not and cannot act as a limitation upon the legitimate exercise of the police power of the state. In conclusion, the court suggests an interesting standard by which to determine whether a business may be regarded as affected with a public interest and subject to regulation by the state. It says: "The conclusion is, in the light of present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression . . . .; that the business of renting homes in the city of New York is now such an instrument and has therefore become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us."

It should be noted that the statute involved in this case has been upheld by the United Supreme Court (Brown Holding Co. v. Feldman, 65 L. Ed. 539, April 18, 1921), but the opinion written by Mr. Justice Holmes in that case is very brief and does not attempt to deal with many of the points raised in the case here commented upon.

Police Power—Segregation of Commercial and Industrial Buildings from Residences—Restrictions upon Construction or Use of Buildings in Designated Zones. In re Opinion of the Justices (Massachusetts, May 20, 1920, 127 N. E. 525). Article 60 of the amendments to the constitution of Massachusetts provides that "the General Court shall have power to limit buildings according to their use or construction, to specified districts of cities and towns." Under the authority thus conferred the legislature drafted a bill authorizing towns and cities to pass ordinances establishing zones within which buildings used for commercial and industrial purposes shall be confined and forbidding their erection in zones set apart for residential purposes. Similar zones may also be established for the purpose of segregating tenement houses and provision is made for regulating the construction and use of buildings in districts established in towns and cities. All these provisions are to be carried out "in such manner as will best promote the health, safety, convenience, and welfare of the inhabitants, will lessen the danger from fire, will tend to improve and beautify the city or town, will harmonize with its natural development, etc." The court was asked to give its opinion as to the validity of such a statute, and replied that

it is free from constitutional objection. After a brief review of cases in which municipal zoning regulations for various purposes have been upheld the court concludes that the statute in question is within the broad conception of the police power created by the amendment.

The statute is held not to be void by reason of its obvious purpose to make possible the enhancement of the beauty of restricted sections of the municipalities. This esthetic purpose is held to be a subordinate one and not the primary object of the statute. It is interesting to note that the court still stands firm on the orthodox doctrine that the police power may not be used for esthetic purposes. It says: "Enhancement of the artistic attractiveness of the city or town can be considered in exercising the power conferred by the proposed act only when the dominant aim in respect to the establishment of districts based on use and construction of buildings has primary regard to other factors lawfully within the scope of the police power; and then it can be considered not as the main purpose to be attained, but only as subservient to another or other main ends recognized as sufficient under Amendment 60 and the general principles governing the exercise of the police power." The various classifications permitted by the statute are not so unreasonable as to work any denial of the equal protection of the law. Nor is the act in violation of the due process clause of the Fourteenth Amendment. After a careful review of a long list of federal authorities the court concludes that it is not on its face in violation of any of the principles thus far announced by the Supreme Court in its interpretation of due process of law, and points out that it is impossible to say that the proposed zoning regulations will not promote the general welfare and safety by lessening dangers incident to fire, disorder, traffic congestion, contagion and other evils caused or promoted by crowded conditions in towns and cities.

Proportional Representation—Constitutionality of the Hare System. Wattles v. Upjohn (Michigan, September 30, 1920). In 1918 the city of Kalamazoo adopted a home rule charter in which was embodied the Hare or "single transferrable vote" system of proportional representation as the method of selecting the city commission. This case holds that method of conducting an election to be in violation of the state constitution. The opinion of the court is interesting and informing. It contains considerable data relating to the history of proportional representation. It points out the fact that the principle of proportional representation is embodied in several different schemes or sets

of rules regarding the relative merits of which there is wide difference of opinion. In fact a good deal of space is occupied in showing that although the plan is by no means new its followers have not made rapid progress in securing the widespread acceptance of it. It seems very clear that the court itself does not approve of proportional representation on grounds of general policy. The Kalamazoo charter provisions are held to be in violation of the constitutional provision denying to cities and villages the right to abridge the right of elective franchise. A plan of voting under which the elector is allowed to cast a single first choice vote and then indicate successive choices for as many other candidates as he pleases is held to violate the constitutionally guaranteed right to vote for a candidate for each office to be filled and to have votes so cast be of equal weight with the votes cast by every other elector. In its view that the constitution guarantees to each voter a vote of equal weight for each office to be filled the court is supported by authority of cases invalidating provisions for preferential and cumulative voting. See State v. Constantine (42 Oh. St. 437), Maynard v. Board of Canvassers (84 Mich. 228), Brown v. Smallwood (130 Minn. 492).

Recall of Judicial Decisions Invalid under Federal and State Constitutions. People v. Western Union Telegraph Co. (Colorado, April 4, 1921, 198 Pac. 146); People v. Max (Colorado, April 4, 1921, 198 Pac. 150). These cases are of considerable interest since Colorado is the only state which has adopted the system of recall of judicial decisions and these are the first cases in which the constitutionality of that system has been called in question. The provisions in the constitution of Colorado relating to the recall of decisions went into operation in January, 1913. The essential features of the plan are as follows: First, no court in the state except the supreme court has power to declare any state or municipal law void as in violation of either state or federal constitution; second, no decision of the supreme court invalidating a state or municipal law under federal or state constitutions shall go into effect until sixty days after the date on which it is rendered; third, during this sixty-day period five per cent of the voters of the state may file a petition the effect of which is to require that the law thus invalidated shall be submitted to a vote of the people at a general or special election; fourth, if the law thus submitted is approved by a majority of those voting thereon "it shall be and become the law of this state notwithstanding the decision of the Supreme Court."

The Western Union Telegraph Company case arose primarily on the question whether the state district court could be forbidden to declare a state law void as violating the Constitution of the United States. The defendants were charged with violating the "Anti-Coercion Act" by discharging an employee on the ground of trade union membership. A statute similar in character had been held void by the United States Supreme Court in Coppage v. Kansas, 236 U. S. 1, and the trial court declared the Colorado act invalid. On writ of error the supreme court held that no provision of the state constitution could take away from any state judge the right and duty imposed by Article VI of the Constitution of the United States to enforce the constitution, laws, and treaties of the United States as the supreme law of the land, "anything in the constitution or laws of the state to the contrary notwithstanding." Any other holding would recognize the right of the people of the state of Colorado to nullify the provisions of the federal Constitution. The court also held that its own decision sustaining the trial court and declaring the "Anti-Coercion Act" void must go into effect immediately and that the provisions of the state constitution subjecting that decision to a sixty day delay and to possible reversal by popular vote were void and without effect. The people of the state of Colorado are wholly without authority to amend the Constitution of the United States by giving effect to state laws which are in conflict with its provisions, nor can they suspend the operation of the federal Constitution for a period of sixty days.

In the Max case a somewhat similar set of facts was presented, but the state law in question was declared void by the trial court as in violation of the state constitution instead of the federal Constitution. The supreme court held here that the provisions relating to the recall of decisions based on the federal Constitution were inseparable from those relating to the recall of decisions invalidating acts under the state constitution. Since the sections were indivisible the decision in the Western Union Telegraph case would control here. But the court went further and held that the sections providing for the recall of decisions were in violation of due process of law. The general effect of the provisions is to prevent the courts from giving due consideration to what may be a vital part of a man's defense, clearly a denial of due process. The court sums up its views on this point in striking language. "If an unconstitutional statute, creating a crime unknown to the common law, may be passed by the legislature; if a citizen may be put upon trial thereunder; if the trial court may be prohibited from hearing his plea

that the statute violates the constitutional guarantees of his state; if, when this court has so held, that statute may be re-enacted by a bare majorty of those voting thereon and the severest penalties be thereupon inflicted; then law has become a phantom and justice a dream, and the constitutional guarantees of the sacredness of life, liberty and property, "a tale told by an idiot, full of sound and fury, signifying nothing." The conclusion of the court is that the whole scheme for the recall of judicial decisions is null and void and that decisions of the state courts holding statutes unconstitutional must go into effect immediately and must stand upon exactly the same footing as any other decisions of the court.

Trade Unions—Membership in Union as Ground for Discharge of Firemen by Municipal Commission. McNatt v. Lawther (Texas, Court of Civil Appeals, June 9, 1920, 223 S. W. 503); San Antonio Fire Fighters' Local Union No. 84 v. Bell (same, June 19, 1920, 223 S. W. 506). In the first of these cases the plaintiffs, who were seeking by mandamus their reinstatement as firemen in the city of Dallas, joined a local union affiliated with the American Federation of Labor. They were ordered by the mayor and commissioners of the city to withdraw from the union and upon refusal were suspended and later discharged. The charter of Dallas provided that policemen and firemen should hold their positions during good behavior and should be removed only for such causes as in the opinion of the commissioners rendered them unfit for service and after notice, the filing of charges, and a hearing. The commissioners filed charges of insubordination and an attempt to stir up strife and trouble in the fire department by bringing it under the control of the American Federation of Labor. The court held that they had power to revise the decision of the commissioners in respect to removals only when that power had been exercised in an arbitrary and capricious manner. After citing the Boston police strike the court said that it could not say as a matter of law that the conclusion of the commissioners that membership in a trade union unfitted a fireman for effective service did not rest upon reasonable grounds. The state statute making it lawful for any person to join a labor union was declared to afford no protection against discharge on the ground of membership in such union.

In the second case the same result is reached and couched in somewhat stronger language. Here the plaintiffs were seeking to enjoin the discharge of their members from the fire department of San Antonio

on the ground of membership in a trade union. The city had the right to determine that such membership rendered its appointees inefficient and untrustworthy and the courts could not reverse such a decision. In the absence of statute the city was declared to have the same right to remove its employees as a private employer.

FOREIGN GOVERNMENTS AND POLITICS

EDITED BY FREDERIC A. OGG

University of Wisconsin

Recent Articles in Foreign Periodicals. The following brief survey notes a few of the more important and more interesting articles on foreign governments and constitutions which have appeared during the past year or two in leading European journals. It includes discussions of governmental organization, structure, process and procedure only, omitting as far as possible what has been written concerning political issues, party fortunes, or questions of public policy.

Most of the material noted is from British publications and deals with the United Kingdom or its dependencies. Of the discussions dealing with Great Britain one of the most able is an article by J. A. R. Marriott on "Parliament and Finance" in the *Edinburgh Review* for January, 1920, analyzing the reports of the parliamentary select committee on national expenditure. In addition to considering important failings in method and procedure in the existing manner of financial control, which require no fundamental readjustment, but rather changes in detail and a strengthening and extension of the present system, the writer contends (1) that the treasury must cease to be a spending department, (2) that cabinet solidarity must be restored and departmental isolation ended; and (3) that in order that the Commons may really control finance and that independent action and criticism may be made possible, every motion for change in the government's estimates should not be treated as a question of confidence.

The *Nineteenth Century* for July, 1920, contains an article by Walford D. Greene entitled "An Omnicompetent Prime Minister." In it he discusses the centralization of executive power in the hands of the prime minister. Mr. Greene shows that the cabinet is becoming increasingly independent of Parliament, while the premier is already authoritative and independent within the cabinet—conditions accentuated by the war and Lloyd George, but manifest long before them. Great Britain seems to be traveling fast in the direction of presidential government.