BOOK REVIEWS


A new comparative law review worthy of attention is the Bulletin of the Institute of Comparative Law of the National University of Mexico. The Institute, founded in 1940 and presently headed by Lic. Agustín García López, has decided to make the results of its manifold activities accessible to an extended audience. The Bulletin will serve that purpose.

Like other comparative law journals, the Bulletin is composed of doctrinal and bibliographical sections and sections entitled “Legislation” and “Information.” In “Legislation,” the legislative movement abroad is reported under subject headings; important new laws are reproduced in full. The bibliographical section offers book reviews and summaries of articles published in foreign law journals. Activities of other institutes and societies operating in the field are reported under “Information.”


The legislative survey in both issues extends to most Latin American countries and also to Belgium, France, Italy, and Switzerland. Several new laws are reprinted in full. The bibliography includes reviews of books from Latin America, the United States, and France; summaries are offered of law review articles and notes published in the United States.

The Mexican Institute is to be congratulated upon its new venture, the quality of which is guaranteed by its members, prominent Mexican jurists and well-known Spanish scholars residing in Mexico. The Mexi-
can report on Comparative Law for the second conference of UNESCO, held in Mexico in 1947, reproduced in the Bulletin's first issue, says:

"... a country which, like Mexico, is at the cross-roads of the two great legal systems, the Latin and the Anglo-Saxon, is particularly well placed for a comparison of both juridical cultures. With its neighbors to the North it maintains a traffic of such an intensity that, every day, and in all lines of operations and transactions, it is bound to feel stronger the influence of its vast commercial experience; toward the South, regarding the whole of the American Continent, as well as in its relations with the other Continent, Mexico maintains the basic concepts of Latin jurisprudence which are in accordance with its own tradition. Work on a synthesis of both conceptions should be the task for the Mexican school of jurisprudence." Dissemination, through the Bulletin, of information on important developments in Latin American law will be of value, for it fulfills an urgent need. The lack of a journal where such information is collected has put a heavy burden on the individual research worker interested in Latin American law.

The appearance of the Mexican Comparative Law Bulletin and of similar undertakings elsewhere cannot but remind the legal profession here of the lack of an equivalent in the English language. The increased interest in this country in foreign and comparative law, as a consequence of the extended international responsibilities of the United States, makes information for the American lawyer on foreign law developments, written in his own idiom and prepared for his own needs, a necessity. The combined effort of the leading law schools should enable them to surmount the technical and financial problems involved in such a venture.

The new French periodical on Latin American law is published under the auspices of the Institute of Comparative Law of the University of Paris and the French Society of Comparative Legislation. It is designed to furnish information on the legislative movement and legal publications in Latin America. The direction is in the hands of Dr. F. de Sola Canizares, Spanish lawyer connected with the Paris Comparative Law Institute.

Each issue contains a series of short articles by Latin American authors, generally on domestic law topics, information by local lawyers on their domestic legislation and literary production, sketches of prominent Latin American jurists, notes on leading law journals, reports about institutes and conferences, and translations of statutes of special significance. Inter-hemisphere activities, such as the conferences of the Inter-American Bar Association and the sessions of the Inter-American Academy of Comparative and International Law, are covered.

The publication has a sound organic basis. The editor, who has widely travelled in this hemisphere, has succeeded in securing from each country the collaboration of prominent lawyers with experience in comparative law work. Thus the local reports are, with a few exceptions, written to suit foreign readers and the doctrinal articles are on topics of general interest even though they treat local law problems. The quantity as well as the quality of the work is impressive. The publication is an indispensable tool for specialists in Latin-American law.

Technically, the publication needs improvement, especially in the grouping of the materials. An important article in the second issue, for example, State Intervention in Private Rights in Argentina, risks being overlooked in a section headed "Legal and Bibliographical Sources." In-
ter-hemisphere activities are not reported under this heading, but under the name of the country in which the event took place. Use of the information on legislation and literature is made difficult by the absence of a subject index.

It may also be worth considering whether or not legislative and other materials from Puerto Rico should be included. Similarly, it would add to completeness if Latin American law studies originating in this country were listed. A beginning has been made already in calling attention to the excellent Guides to Latin American Law and Literature published by the Library of Congress.

Not the least interesting feature of the new enterprise is that it originates in a country of the old world. France has lately taken an increased interest in legal developments in Latin America, as evidenced by frequent visits of prominent jurists and the organization of Franco-Latin American legal conferences. The traditional interest in France in comparative law and a desire to react against decreasing French influence in Latin America seem to have been moving factors, in addition to the availability in Paris of a lawyer highly qualified for the task. Lawyers with reading knowledge of French will express gratification that French institutions have succeeded in producing an excellent Latin American law journal.

Kurt H. Nadelmann


Here is a book which should be read by all students and practitioners of the law who expect to take part in labor arbitration. That should be a large group, because labor arbitration is becoming an important field for the legal profession. Lawyers are being called upon increasingly not only to advise management and unions with respect to labor arbitration matters but also to present cases before arbitrators and to serve as arbitrators. The American Arbitration Association reports that in labor arbitration cases held under its rules lawyers represented clients in eighty-four per cent of the cases in 1942 and in ninety-six per cent of the cases in 1947.

Maxwell Copelof is not a lawyer but he has been an arbitrator for more than twenty years. During that period he has served successfully in hundreds of labor disputes. From this rich experience he has drawn together in this book his most important cases and has presented them with enlightening comment in a very interesting manner. He has organized the cases into nine categories with the following important titles: (1) cases involving direction of the working force, (2) union rights and prerogatives, (3) discharge and other disciplinary cases, (4) wage disputes arising out of contract, (5) incentive pay disputes arising under contract, (6) contract clauses on "fringe issues," (7) disputes not controlled by contract clauses, (8) arbitrating new contract provisions, and (9) when to mediate. In each category the cases are well chosen to illustrate the major issues which arise in the particular area under discussion.

In each case the general nature and background of the dispute is presented first in a few sentences or several paragraphs depending on

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their complexity. Then the pertinent clauses of the labor agreement are quoted, followed by the arguments of the parties. The decision and the comments of Mr. Copelof are reserved until the end. This method of presentation makes it possible for the reader, by evaluating the facts and arguments presented in each case and arriving at his own decision before reading Copelof’s, to check his ability as an arbitrator against that of one who has been very successful in the field. This reviewer found it an exciting game.

It is to be expected that arbitrators, just as judges, will disagree at times. The reviewer disagrees with Copelof’s decisions with respect to retroactivity in cases involving management’s right of administrative initiative. The right of administrative initiative is the right to make immediate decisions. Copelof argues, and rightly so, that this right should be retained by management in contracts where arbitration is the terminal point of the grievance procedure and that the workers should have the right to appeal management’s decisions only after they have been put into effect.

Peremptory and dictative orders do not usually bring the necessary response and the best results. Workers, nevertheless, must in the first instance obey orders given and if these orders cause or create any unfair working conditions, proceed through the union in an orderly way to bring about the correction of any just grievance.

It has always been the contention of the reviewer, however, that the right of administrative initiative carries with it the responsibility to make full retroactive adjustment when management makes an error in its original decision. Unless this latter principle is followed the workers and the union might find it to their advantage to challenge management’s right of administrative initiative. In view of this, exception is taken to the following decision and others like it where full retroactive adjustment was denied by Copelof.

The request of the union that Mr. S. be compensated for the loss of earnings during the period after he was rejected for this job was denied by the arbitrator. The reason was that the company had acted with obvious sincerity in assigning the job to another operator who the management, albeit erroneously, thought was entitled to the job.

Most of Copelof’s decisions, however, appear to be very reasonable. That they have been considered fair by management and labor is evident. Otherwise he would not have been able to continue as a successful arbitrator over the years.

Copelof does not undertake a thorough analysis of the legal status of labor arbitration. Less than two pages are devoted to this subject. No attempt is made to interpret, compare, and evaluate the varying common and statutory laws in effect in the states or the contradictory decisions which have been rendered by the federal courts on the applicability of the United States Arbitration Act to labor disputes. This is not intended as a criticism of the book but rather as fair warning to anyone who may be searching for an analysis of the law on the subject.

Lawyers will find within this book, however, much food for thought on certain basic legal concepts. For example, what is the nature of the collective bargaining contract? Is it such that management “has the
right to change a policy or practice in the absence of a contract clause limiting its right" or is it such that "the company is bound by past practice and cannot change the terms of employment or working conditions on a unilateral basis?" In other words, does the theory of residual rights, whereby it is contended that management retains all those rights which it has not bargained away specifically, apply to the collective bargaining agreement? Copelof has had to tackle this and a number of other basic legal issues in the decisions which he has rendered.

Perhaps the greatest value of the book to lawyers, however, is the opportunity it provides to become familiar with the procedures, techniques, and principles of the so-called "non-legalistic" school of arbitrators. Copelof is definitely of this school. His chapter entitled "Preparation and Presentation of Cases" will prove worthwhile reading to lawyers who are not well informed with respect to the differences between courtroom procedures and arbitration hearing procedures as practiced by this school of arbitrators. The chapter is an excellent guide to anyone whose job it may be to prepare, present, or hear an ad hoc labor arbitration case.

The "legalistic school" of arbitrators will take issue with Copelof on a number of points. They will disagree with his contention that arbitrators should mediate under certain conditions. In his final chapter, entitled "When to Mediate," Copelof compares mediation by an arbitrator with mediation by a judge and concludes:

Perhaps the judge himself gets the attorneys together in a private session and suggests the desirability of a compromise settlement. There is nothing out of order in such tactics, either in strictly legal proceedings or in arbitration proceedings.

Of course, mediation efforts have to be handled by tact and finesse on the part of all concerned. The arbitrator himself may call a recess and ask the chief spokesmen if they want to try to work out a compromise. If either side objects, it is his duty to proceed with the hearing, and render his decision. If both sides are willing to try to settle the matter, the arbitrator will refrain from participating in any discussion concerning a compromise. He will encourage the parties to endeavor to reach an accord, if possible, but will stay out of such discussions himself, so as not to be put in a position of suggesting a compromise. Or, if they so request, he may sound them out on the acceptability of a compromise solution which he himself suggests. If, however, his solution is unacceptable to either side, it then becomes his duty to resume the hearings and decide the case entirely on the basis of the terms of the submission and the preponderance of the evidence submitted to him.

The successful examples of mediation presented in this chapter lend strong support to Copelof's position and testify to his skill as a mediator.

There will also be objection to Copelof's practice of making recommendations and offering advice to the parties in addition to the formal decision. Consider for example the case in which, after ruling that the company was within its rights under the contract in refusing to rehire a worker, he proceeded to recommend that

the company's interests would best be served, in the long run, if it voluntarily took action in this by giving Mrs. M. an opportunity to work at the plant when an opening was available, and thus put at an
end any possible misunderstanding and misinterpretation of the company's attitude, which the arbitrator is convinced is a genuinely wholesome one.

Thus Copelof has written a book about which there will be considerable controversy. It is, in fact, impossible to deal with the important issues in labor arbitration today without running into competing schools of thought. Copelof's book is a good book because it does deal effectively with many of these important controversial issues. It deserves careful reading, therefore, by management, labor, lawyers, and arbitrators.

Thomas Kennedy†


At the San Francisco organizing meeting for the United Nations in 1945, President Truman stated that he hoped for an international bill of rights "as much a part of international life as our own Bill of Rights is a part of our Constitution." In 1946 the Economic and Social Council set up an eighteen-nation Commission on Human Rights with Mrs. Roosevelt as chairman to draft the bill.¹ A revised declaration of rights was completed in the summer of 1948 and sent to the General Assembly,² which approved it on December 10, 1948, by a 48 to 0 vote, with abstentions by Saudi Arabia, South Africa, and the Soviet bloc of six votes; Honduras and Yemen were recorded as absent. Mr. Vishinsky of Soviet Russia attacked the declaration on the grounds that the provision for freedom of expression permitted expressions of hatred, fascism and war; that it failed to specify that a state had a concrete obligation to insure labor's right to social security; that it failed to provide protection for national minorities; and that it failed to refer to the sovereign rights of states.

This Universal Declaration of Human Rights is the first part of a projected three part International Bill of Rights. The second part will be a convention called a covenant³ embodying in specific detail and in legally binding form the principles set forth in the Declaration. The third part will be a protocol for implementation of the convention, possibly by such measures as the creation of an International Court of Human Rights and an International Commission of Conciliation.

It is of interest that the House of Delegates of the American Bar Association on September 7, 1948, adopted a resolution opposing approval of the Draft Declaration of Human Rights and the Draft Covenant of

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¹ The names of the members of the Commission are set out in 34 A. B. A. J. 984 (1948).
² For the first draft, that of December 17, 1947, see 34 A. B. A. J. 204 (1948). For the second draft, that of June 18, 1948, see 34 A. B. A. J. 910 (1948). For the official views of the United States Government on the first draft, see 34 A. B. A. J. 476 (1948). For the adopted draft, see 34 A. B. A. J. 32 (1949).
³ For the Draft International Covenant of Human Rights of December 17, 1947, see 34 A. B. A. J. 202 (1948), and for the official views of the United States Government on this draft, see 34 A. B. A. J. 476 (1948).
Human Rights, asking deferment of consideration by the General Assembly of the United Nations until its regular 1949 session, favoring submission of the Declaration to Congress before its adoption, and authorizing the American Bar Association to study the drafts in cooperation with the Canadian Bar Association.

President Frank E. Holman of the American Bar Association has recently criticized the proposals on many grounds: that Mrs. Roosevelt, Chairman of the Commission on Human Rights, is not a lawyer, nor are the other two Anglo-American members of the eighteen-member commission; that the proposals are at variance with our fundamental concepts of individual rights and freedoms; that they would impose world-wide socialism on the United States and other nations; that they fail to stress the right of owning private property and of conducting business under a free enterprise system; that they will not contribute to world peace; that they will result in continual and minute interference in the internal affairs of member states; that other than American standards of human rights will be applied; that the proposed Covenant imposes affirmative economic and social duties upon each state, whereas the American Bill of Rights is couched in the negative; that the proposals fail to provide for free participation in government; that the proposed Covenant presupposes the establishment of an International Court of Human Relations; and that the proposals involve supernational supervision of the relationship of a state to its own citizens.


6. Yet the statement of Essential Human Rights, published by the American Law Institute in January, 1946, and the Draft International Bill of Human Rights, prepared by the American Association for the United Nations in 1946, both contained articles setting forth a right to education, a right to work, and a right to social security. See pp. 16-17 of the volume here reviewed.

7. Article 17 of the Universal Declaration was adopted on December 10, 1948, providing, however:

"1. Everyone has the right to own property alone as well as in association with others.

"2. No one shall be arbitrarily deprived of his property."

Professor Lauterpacht included no provision as to property, though the American Law Institute did in its Essential Human Rights, 243 Annals 18 (1946). He explained his omission by asserting that the "character of sanctity and inviolability has now departed from the right of property." Lauterpacht, An International Bill of the Rights of Man 163 (1945).

8. But compare, statement in Book Review, 9 Camb. L. J. 261 (1946): "The Second World War came about because the greater part of mankind took up arms against an enemy not only of all decent government but of the elementary rights of human beings." See also p. 1 of the volume reviewed.

9. But the commentary of the American Law Institute's Essential Human Rights points out that all of the rights require not only abstention but also, in varying degrees, preventive, protective and administrative activity by government, 243 Annals 18 (1946).

10. Article 21 of the Universal Declaration as adopted in December 10, 1948, provides, however, that everyone "has the right to take part in the Government of his country, directly or through freely chosen representatives."

11. In February, 1948, the House of Delegates of the American Bar Association voted against the creation of a new and separate International Court of Human Rights. 34 A. B. A. J. 277, 278 (1948).
The present volume is the third in English to appear on human rights and the United Nations. The first was by Professor Hersh Lauterpacht of Cambridge University in 1945 and the second by Jacob Robinson in 1946. The present volume consists of six lectures delivered under the auspices of the James Stokes Lectureships on Politics at New York University in March and April of 1948 together with an epilogue on freedom of information. The author is Eaton Professor of the Science of Government at Harvard University. The book is so timely and so extremely well written as to warrant a synopsis of its contents.

In the first lecture the author points out that once in the Preamble and six times in the body of the Charter of the United Nations the framers expressed their faith in human rights. The promotion of human rights was one of the primary concerns of the framers of the Charter. The original source of the policies leading to the provisions in the Charter was President Roosevelt's message to Congress on January 6, 1941, concerning the Four Freedoms—freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear. The Atlantic Charter of August, 1941, re-affirmed the last two of these freedoms.

The author believes that the United Nations will have a harder task than Congress in framing a bill of rights for three reasons: (1) the interests of the members of the United Nations are more diverse than those within the United States; (2) the variety of opinion on such matters as capitalism, religion, etc., is even more striking than the variety of interests within the United States; and (3) the different attitudes of the five major powers towards bills of rights in their own systems of government. To translate the idea of a bill of rights into a working rule of law will encounter difficulties of three kinds: (1) the difficulty of agreeing on the content of such a bill; (2) the difficulty of enforcement; and (3) the difficulty of reconciling the obligations of memberships in a particular political community with the requirements of a universal system of human rights.

The second lecture is devoted to the American Bill of Rights, and in the third lecture, it is pointed out that there is a wide gap between the privileges and immunities of citizens, as set forth in state papers, and the actual participation in their enjoyment by various classes of people in the United States. Public opinion polls in 1945 indicated that only 43 per cent favored state laws requiring employers to hire persons qualified for the job regardless of race or color. In 1946 only 64 per cent agreed that in peacetime newspapers should be allowed to criticize our form of government; and only about 21 per cent knew what our Bill of Rights was. The United States Supreme Court as recently as 1947 restricted the privileges and immunities of United States citizenship to a narrow list of civil rights, relating to specific relations with the federal government, such as the right to travel to the national capital. But the author concludes that the Supreme Court has been more successful in enforcing the constitutional provisions as to bills of attainder, ex post facto laws, the obligation of contracts, procedural limitations on governmental power, and due process of law. On the whole, the Supreme Court has made great advances in recent years in the protection of constitutional rights of individuals, both

12. Lauterpacht, op. cit. supra note 7 at 230.
as to acts of Congress and acts of the state governments. But judicial protection is limited in what it can accomplish. Judges can act only on cases brought before them. Local authorities may fail to cooperate with national officers. The debates over the anti-lynching, anti-poll-tax, and fair employment practices bills are illustrative of the complexity of the problem. The state judges are still primarily responsible for the protection of the rights of their citizens, and they often reflect the preponderant opinion among the people in their state rather than the best thinking of the whole body of people. As the author states: "The need for a popular civil-rights campaign in America more than a century and a half after the adoption of the revolutionary declarations and bills of rights is a sobering fact which may well be borne in mind by those who are planning an international bill of rights for the nations of the world." 15

The fourth lecture is entitled "The Privileges and Immunities of Citizens of the United Nations." The author concludes that the American experience suggests that there is a wide difference between the rights of the peoples of particular nations in their own countries and the privileges and immunities of members of the whole body of peoples comprising the United Nations. The American experience indicates that human rights under the United Nations Charter will depend mainly upon the different attitudes of the various peoples within the member states. The American experience also indicates a fundamental ambiguity in the idea of human rights: are they those rights which all groups have in common and respect and observe alike—a realistic view; or are they a body of political, economic, and social ideals—an idealistic view? The United Nations has no such machinery as exists in the United States for the settlement of disputes concerning basic human rights, even though our machinery may move slowly at times. Its status resembles more closely that of the American union under the Articles of Confederation. The nations of the world are seriously divided as to the content of their national bills of rights. The bills of rights of the United States and the state constitutions do not mention a right to work or a right to full employment. Article 118 of the Russian constitution provides that Russian citizens "have the right to guaranteed employment and payment for their work in accordance with its quantity and quality." The preamble of the present French constitution proclaims that everyone has the duty to work and the right to obtain employment and there are guarantees of rest and leisure as well as protection against the hazards of age, sickness, and involuntary unemployment. In Great Britain there is no formal declaration of a right to work. The American bill of rights does not expressly mention freedom of business enterprise, but such a freedom was read into the Federal Bill of Rights by the old Supreme Court and the present court insists on freedom of contract. The Russian constitution provides for the right to education but gives no freedom for religious education. The new French constitution in its preamble confers a right to education, but seems to give no freedom for religious education. The English have not regarded the right to education as a fundamental freedom. The Federal Bill of Rights says nothing about a right to education, but the state constitutions encourage public education. Although all the great powers have provisions as to freedom of speech and press, their concepts are vastly different from the Russian concept. The author concludes that the most controversial articles of the proposed Declaration of Rights of the Commission on Human Rights are those concerning the right to work and the right to own private property.

15. P. 72.
The provision as to the right to education throws no light on the right of religious bodies to establish private school systems. A serious gap in the declaration is the failure to touch upon the privileges and immunities of citizens of the United Nations, regarded as members of a single body of people. The author would withhold judgment on the work of the Commission on Human Rights pending examination of its proposed Covenant.

The fifth lecture deals with the problem of enforcement. It is a fair inference from the language of the Charter that the immunity of member states against interference in their domestic affairs does not authorize them to disregard their obligations to respect the basic human rights of their subjects. But it is a great defect of the Charter that there is no adequate process for enforcing its purposes upon individuals. The Human Rights Commission proposes to overcome the difficulties of enforcement by submitting the Covenant for ratification by the member nations. The proposed Covenant is shorter than the declaration and contains specific limitations upon governmental power, both substantive and procedural. The author concludes that it "reflects the dominant influence of Anglo-American legal concepts." 16 The Covenant could readily be enforced in nations possessing systems of law enforcement like our own. But unhappily there are few countries in which judges can play so important a part in the protection of human rights as in the United States. Russian judges have no security of tenure, being elected by the Supreme and local soviets for terms of only three or five years. American experience indicates that progress toward uniform and high standards will be slow in many nations, unless these rights are brought directly under the protection of international courts of justice set up by the United Nations. The author suggests that there are three ways of enforcing a declaration of human rights: (1) public opinion, (2) an international high commission, 17 and (3) the adoption of a bill of rights dealing with that part of the general field of human rights concerned with the relations between persons in different countries and between such persons and the general international organization itself.

The sixth and final lecture is entitled "Human Rights and the Rights of Nations under the Charter." The author concludes that the United Nations has proceeded promptly and persistently to promote respect for human rights. But he points out that the obstacles to ungrudging agreement upon the contents of a bill of rights and to its successful enforcement are formidable. The sovereignty of the national states will make difficult a redefinition of the relationship of the society in which the individual lives. Americans would resent having an international agency settle the problems raised by discrimination against Negroes and by the activities of such groups as Jehovah's Witnesses. The declaration of human rights should not go beyond giving fresh sanction and wider authority to the original Four Freedoms of President Roosevelt. The world is not ready to add anything like the Fourteenth Amendment to the Charter of the United Nations. The Bill of Rights ought to deal with that part of human rights that is concerned with the relations between persons in different nations and between such persons and the general international organization itself. The author agrees with Roger N. Baldwin that it should cover freedom of international communication by radio, cable, news films, and

travel, the right of aliens coming before national courts to suitable protection, and the right of peoples to have the recognition of governments and states determined upon sound general principles. There can be no agreement between the Western democracies and Soviet Russia on a bill of rights defining the relation of the individual to his own particular state.

The author has good precedent for warning about caution in expansive definitions of human rights. As Jessup states: "The human rights to be defined and protected must be considered not in a vacuum of theory, but in terms of the constitutions and laws and practices of more than seventy states of the world. . . . Throughout its work the Commission on Human Rights will be tossed from substantive problems to the procedures for their enforcement. It would do well to avoid seeking to impose as universal concepts those which are historically local phenomena. . . . The philosopher may aid in drafting the Declaration; the practical statesman will have to devise the procedures.”

The difficulties with respect to an International Bill of Rights may well lead one to accept the correctness of Professor Freeman's statement: "Some, like Justice Owen Roberts, with much logic insist that these rights cannot be achieved until an international government operates on and in favor of individuals.”

Lester B. Orfield


The Social Politics of FEPC is not a study of the reason or wisdom of legislation to prevent racial and religious discrimination in employment. It might better be entitled "How a Pressure Group Works," because the book really undertakes only to discuss the methods utilized to compel a reluctant Congress to enact a federal anti-discrimination law.

The author will disappoint and annoy a great many persons who may pick up the book with the expectation of being informed as to why a federal "fair employment practice commission" should or should not be established. They will find that not one of the burning issues involved receives any attention. Have minorities a "civil right" to force other minorities, or majorities, to associate with them? Does freedom of association include freedom not to associate? Can private business survive the exercise by government of the power to control the employer's selection and retention of employees? Even if state legislatures have authority, under the police power, to enact a state FEPC law (which is doubtful), where, in the Constitution, was the Congress granted any power to enact such a federal law?

Perhaps it is well that Dr. Kesselman left these issues to persons who have given them serious attention. He simply assumes that a demand for anti-discrimination laws is a "humanitarian" movement. The idea that discrimination in the choice of one's associates may be one of the

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most valuable and virtuous qualities apparently never occurs to him. The idea that racial instincts, religious distinctions, and personal likes and dislikes are respectable and should be respected, and are not absolutely good or bad, gets no consideration. The profound importance of state's rights, local self-government and constitutional limitations on both state and federal powers exerts no influence on his thought.

As a result the author presents with complacence, indeed with approval, a shocking picture of government by minority pressures. On the assumption that the cause of anti-discrimination is noble, on the assumption that Congress ought to pass a law (which it has actually been denied the power to pass), Dr. Kesselman can extol pressure group actions which he would denounce as outrageous if taken to achieve what he regarded as an evil result.

For example, FEPC was born in 1941 because a “hard boiled pressure group” threatened the President to disrupt national defense, to injure domestic unity and to disturb international relations by starting a class war with a gigantic “March on Washington” of Negroes to demonstrate against “discrimination.” In this emergency a reluctant President issued an executive order, dictated in large part by those who were willing to take advantage of a time of national danger to advance their special interests. All through the ensuing World War II the FEPC lobbies made strategic gains, just as the Prohibition lobby operated in World War I. In both cases it was claimed that sumptuary, paternalistic legislation would make people better and help win the war. In both cases government power was used to enforce the moralities of zealous, intolerant reformers. In both cases success was obtained by methods which are universally criticised when employed by less self-righteous lobbyists.

Dr. Kesselman reports all the ways and means adopted to coerce members of Congress to support legislation for which they had no enthusiasm. But never once does he answer the question: Why were so many congressmen opposed to such “humanitarian” law making? He does devote a brief chapter to “The Opposition,” but makes it clear that there was little well organized opposition. Indeed he reports that “the demands of the war effort were too great to permit opponents to exert their maximum energies against FEPC.” In other words, the people who gave all their energies to the war had not the time or the will to resist the insistent pressures of those who seemed to be more interested in their “moral crusade” than in the life or death struggle of the nation to survive.

So, all through the war the FEPC pressure groups, as reported approvingly in this book, continued to harass the President and all government agencies and departments with demands for a more militant, more troublesome FEPC. They “coerced the government” into a new executive order, issued May 27, 1943, establishing a more powerful committee and, “for the fiscal year ending June 30, 1944, the Committee’s expenditures jumped to $431,609.”

An interesting example of the practical way to carry on a “moral crusade” is given in connection with the campaign for a permanent FEPC. Representative Norton (Chairman of the House Labor Committee) was going to introduce her own FEPC bill which didn’t entirely please the FEPC lobby. So several Negro leaders in New Jersey telegraphed “Boss” Hague of Jersey City (never regarded as an outstanding supporter of “civil liberties!”) demanding support of the lobby bill by Mrs. Norton. Hague telegraphed the next day that Mrs. Norton had agreed to introduce and support their bill. Of course, if this had been a bill supported
by "big business," Mayor Hague's influence upon a representative would have been regarded as sinister; but in a "humanitarian" cause it was much esteemed.

The most enlightening part of Dr. Kesselman's book is his documentation of the methods whereby one comparatively small organization of Negroes (the Sleeping Car Porters), under clever and forceful leadership, was able to enlist the aid of a large number of religious organizations in advancing legislation which would ultimately do an infinite amount of harm to all concerned. The writer of this review knows from an extensive personal experience with this and similar movements that very few, if any, of the religious organizations which have given aid and comfort to the FEPC lobby ever made any careful study of the effects or legality of the proposed legislation. It has been a common assumption that discrimination is evil and that it can be and ought to be remedied by law.

Even the fact that the earliest and most zealous supporter of FEPC was the Communist party did not arouse much antagonism. It was pointed out that Communists support many worthy reforms and the FEPC lobby was wise enough to discourage close Communist collaboration. (Apparently Dr. Kesselman thinks that this policy was unwise!)

There are now available several careful analyses of FEPC legislation and its effect; and one wonders why Dr. Kesselman stopped his story in 1946, when the present opposition to FEPC was just beginning to rise and when, with the end of the war, people generally had a chance to study domestic political problems again. However, by avoiding all reference to recent congressional committee hearings and other sources of information, the author is enabled to conclude his book with a few sweeping and misleading assertions, two of which are worth quoting:

"In the states having laws with 'teeth' the record has been good."

"The fact that no decision from any state commission had been appealed to the courts at the time of writing is a tribute to their skill in negotiating satisfactory adjustments of complaints at the conference level."

(Or is it a tribute to their wisdom in avoiding a court test of a bad law?)

It is notorious that the "success" of state laws has been achieved largely by non-enforcement; and has been possible because there has been, ever since the war, an unprecedented volume of employment. The attempt to enforce one of these laws, or a compulsory federal law, in a time of unemployment would open a Pandora's box of litigation and law evasion comparable to the products of laws designed to enforce national prohibition.

Dr. Kesselman's book will not enlighten people much about the merits of FEPC legislation. But, he has performed a service in explaining how it is possible for a small number of professional lobbyists to use large organizations of well meaning, misinformed persons to support legislation contrary to their own interests and injurious to the general welfare.

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The outstanding characteristics of this study of the campaign for a Federal FEPC are its frankness and lack of pretense. Dr. Kesselman traces the growth, struggles and maneuvers of the National Council for a Permanent Fair Employment Practices Commission with the objectivity of a military tactician reconstructing a battle to determine why an army failed to take a given objective; the considerations are logistic precision, resources, personnel, strength of opposition and timing. The justice of the cause is incidental and divorced. Although sympathetic to the FEPC principle, the author rarely allows himself the liberty of undocumented conclusion and there is no attempt to "sell" or romanticize FEPC. For those who are interested in the merits of the FEPC case an exhaustive, well-organized bibliography of literature and documents is provided.

The author does not argue or assume the nobility of non-discrimination. Nor does he presume to deny the thesis, entertained by some critics of the FEPC idea, that discrimination on the basis of creed or origin may be a most valuable and virtuous quality. He does not attempt to convince those who still hold that bigotry which results in the denial of employment opportunities and in consequent societal distortions is respectable and should be respected. Indeed, how could he? Instead, Dr. Kesselman presents the moral judgments of church groups and the means by which belief in religious principles has been vitalized. Carefully and expertly sketched are the contributions of each religious group to the campaign for FEPC. Particularly enlightening is the story of the participation of the Federal Council of Churches of Christ in America, representing twenty-five of the principal Protestant denominations. The concern of the leaders of the "majority" church with economic discrimination against minorities is described as wholehearted and deep-rooted.

The forthright assistance of Protestantism, the effective program of the Society of Friends, the active aid of the Catholic church and the endorsement by Jewish religious groups are not cited by the author as proof that the FEPC concept is consistent with national morality; but for those who still doubt the moral soundness of FEPC the combined judgment of the nation's religions should be persuasive.

The methods employed in the persuasion of congressmen by reform groups and by selfish interests are "facts of life" which Dr. Kesselman makes no attempt to conceal or embroider. His bluntness may surprise those who assume that democratic progress should spring full-grown out of a never-never atmosphere from which money-raising, high-pressure

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1. The merits of FEPC are referred to parenthetically at the close of the work in a two-page summary of the progress which has been made in increasing employment opportunity for Negroes since President Roosevelt created the Committee on Fair Employment Practices.

2. The bibliography is divided into "Books," "Periodical Articles," "U. S. Government Releases, Reports, Monographs, etc.," "News Letters, Organizational Periodicals, etc.," "Reports, Manuals and Special Studies," and "Encyclopedia Articles." It is especially rich in writings dealing with historical background of minority group problems in employment, the morality of FEPC and the legal and constitutional implications of state and federal statutes prohibiting discrimination in employment.

3. P. 127 et seq.

4. P. 128.

5. P. 136.

6. P. 139, citing Encyclical of Pope Pius XII, Sertium Laetitiae.

7. P. 165.
lobbying and political “bossism” have been completely filtered. He neither condemns nor esteems the gestative incidents of practical legislative politics; he merely reports the pressures and the influences as he sees them. Thus in outlining the use made of “Boss” Hague to secure Representative Norton’s support for the National Council’s bill, the author appends a luminous reference to the functioning of the “invisible” rulers of our democratic destiny and the power of party-bossism for good and evil.  

Similar objective treatment is accorded the bitter political antagonism which prevented the National Council from collaborating with communist and near-communist supporters of fair employment legislation. Here too, Dr. Kesselman neither denounces nor applauds the refusal of the National Council to make common cause with the extreme leftists. His concern is with appraising the practical drawback of the communist taint, and the drain of the intense ideological warfare upon the energies and resources of the FEPC movement.

The Social Politics of FEPC, which bears the publication date, 1948, takes us up to the report of the President’s Committee on Civil Rights in November of 1947. This volume documents the answers to the prophets of doom by citing state FEPC statutes and city ordinances which were enacted after national experience with a temporary FEPC. The volume may have gone to press before the Democratic, Republican and Progressive parties included a permanent FEPC plank in each of their respective platforms. Too recent for inclusion were the pro-FEPC campaign speeches of Presidential Candidates Truman and Dewey, and the election results which are, at least, some indication of the electorate’s approval of Mr. Truman’s clear-cut stand on civil rights. Dr. Kesselman does not labor the distinction between the crusade for the prohibition

8. P. 221. “Few organized groups are so ignorant of practical politics as to fail to appreciate the role and influence of that “invisible” yet all too visible agency of government: the American political boss. Exceptional indeed is the pressure group which would hesitate to approach the political leaders responsible for the nomination and election of the men and women who sit in our State Legislature. This has been universally recognized as one of the most practical and realistic ways of obtaining results. The “boss” in American politics is thus widely courted by individuals and groups with the noblest, as well as the most ignoble, purposes . . . Belle Zeller, op. cit., p. 238.”

9. "One of the charges which the Council had to fight constantly was that it was a communist organization. Had the Council cooperated closely with the left-wingers it would have appeared to vindicate this viewpoint and would have discouraged many potential supporters from joining hands with the Randolph group." P. 163.

10. "The conflict with the communists and their sympathizers is a familiar story in liberal movements. Those who are not acquainted with the details of the ideological battle may see little reason for the intense antagonism among groups which can agree on so many immediate reforms which they would like accomplished. Differences of opinions as to proper ends and means bulk so large that many reform movements have been irreparably split by them. The leaders of the National Council were old hands at ideological controversy; it was as natural as breathing for them to vigorously oppose any and all communist efforts to share in the FEPC movement. To say that the two groups should have worked together better is to ignore basic motivations beyond easy control; one can merely observe that the FEPC movement suffered because of the conflict." P. 225, and see p. 165.

11. P. 228.

12. Since the experience with the President’s Committee, more than a half-dozen states have enacted FEPC legislation, ranging from laws with strong enforcement powers, as in New York, Massachusetts, Connecticut, and New Jersey, to those giving state officials authority merely to investigate charges of discrimination, as in Indiana and Wisconsin. Minneapolis, Milwaukee, and Chicago now have FEPC ordinances and other cities are giving consideration to adoption of similar provisions. The city of Philadelphia enacted an FEPC ordinance in 1948.  P. 227.
amendment and the FEPC campaign, but even a superficial reader hastily turning the pages of this work could hardly fail to be impressed with the marked difference between the eighteenth amendment and FEPC legislation. The former outdistanced the community will, while the latter converts the basic American philosophy of equality of opportunity from preaching to practice. A reform movement which was enthusiastically supported by Catholic, Jewish and Protestant faiths (and by all the major divisions of Protestantism), by the Republican, Democratic, Progressive, Socialist and Communist parties, by both candidates for the Presidency, by the A. F. of L. and the C. I. O. by an impressive list of civic organizations, and by the “who’s who” of enlightened big business might with some right claim that it was popularly accepted. The allegiance which this reform attracted must be recognized as especially significant since it gained increasing strength in the period of the post-war conservative swing, and was developed with limited financial resources and with only partial access to the means of mass communication.

The study under review points up the dynamics of economic democracy. A few short years ago it was seriously charged that legislation prohibiting discrimination was being foisted upon America; that a handful of selfish, clever zealots had duped well meaning individuals and organizations into supporting a legislative adventure which was actually not in the public interest. Today, we would recognize as an obvious kind of humor the suggestion that the Catholic hierarchy, the Society of Friends, John Foster Dulles, Dean Acheson, Herbert Bayard Swope, Henry Luce, William Green, Bishop Oxnam, Nelson Rockefeller and Beards-
ley Ruml had been stampeded into joining hands in support of an unconstitutional, disaster-laden, "do-good" legislative program.

The time has come for all of us to join the swiftly moving present and to recognize with Senator Ives that:

The record shows clearly that the people can act, if they will, to promote the general welfare and the continuing improvement of the democratic way of life.25

Julian E. Goldberg †


Whether as deputy foreign minister and United Nations representative, or as public prosecutor in the treason trials of the late thirties, or as author of the standard treatise on Soviet constitutional law here translated —Mr. Vyshinsky has delighted his followers and shocked his opponents with his vigorous, uncompromising excoriation of everything "bourgeois" and his equally forthright glorification of everything Soviet. His command of invective is extraordinary. In The Law of the Soviet State it goes in two directions: first, against the law of other states, with their "inhuman, bestial relationship to the exploited masses of the people," and second, against the doctrines of earlier Soviet jurists, particularly against "the rotten theory of the wrecker Pashukanis," with its "putrid vapor . . . whereby our enemies sought to sully the pure source of great and truly scientific thought." On the other hand, no words are exalted enough to do justice to the Soviet state and to its current doctrines. Under the leadership of "the genius Stalin," governed by the great Stalin Constitution, "that genuine charter of the rights of emancipated humanity," the Soviet Union has at last achieved what the best minds of mankind have yearned for: justice, equality, freedom. "For the first time in history the people—the toiling national masses themselves—are the masters of their fate, themselves ruling their state with no exploiters, no landlords, no capitalists."

Whom does Vyshinsky hope to persuade? Apparently not the people in countries outside the Soviet Union. Otherwise this book would have been translated under Soviet auspices when it was written—in 1938—instead of ten years later under the auspices of the Russian Translation Project of the American Council of Learned Societies. Moreover, Vyshinsky is too shrewd to expect non-Soviet readers to stomach his distorted version of the society they live in—the allegation, for example, that in the United States "by reason of the terror occurring at elections only five per cent of the voters of the country vote freely;" the implication that despite certain formal concessions regarding working hours and conditions, the lot of the worker in "bourgeois" countries is substantially no better now than it was when Marx and Engels described the sweatshops of nineteenth century England; and the like. It is of course possible that

25. Foreword to FEPC Reference Manual, National Community Relations Council (1948). Senator Ives was the co-author of the Quinn-Ives Bill of 1946, N. Y. Exec. Law §§125-136, the first state FEPC law.

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Soviet readers, on the other hand, would believe that the law of other states is sheer class-law, an instrument of capitalist exploitation. But would Soviet readers believe the statement that “the Soviet state is a complete stranger to methods of coercive socialization of the private-labor economy”? Would they be impressed by the assertion that the right of the various republics of the USSR freely to withdraw “expresses one of the most important principles of the Lenin-Stalin national policy—the voluntary character of the union . . .”? Would they be convinced by the declaration that “only the Soviet court . . . is truly independent in the authentic and direct sense of the word . . . of all influences and inducements whatsoever in deciding specific court matters”? Would they be persuaded that Soviet socialism has abolished all conflict between the individual and the state—as Vyshinsky continually reiterates? Would it not be as transparent to the Soviet reader as to the American that the gap between legal principle and extra-legal reality, which Vyshinsky exploits to the full in dealing with “bourgeois” law, must also exist to some extent, at least, in the Soviet social order—and that it is fallacious, therefore, to contrast existing injustices and inequalities in other countries with laws proclaiming justice and equality in the Soviet Union?

It is more likely that Vyshinsky does not intend to convince anyone, Soviet or non-Soviet, of the truth of his assertions. In this sense, the book is not propaganda—though to the untutored American reader it will appear as sheer propaganda of the crudest kind. But if it is not propaganda—and not, on the other hand, an earnest quest for truth for its own sake—what is it?

There is a deeper purpose in The Law of the Soviet State which Vyshinsky executes with the skill and subtlety worthy of his stature as a lawyer. That purpose is to lay down a new party line—not as something to be believed in by the masses, primarily, but as something to be accepted and worked with by the leaders. The book is designed not for the masses, particularly, but for professors, judges, officials, administrators—the new Soviet intelligentsia. Its purpose is not to describe the structure and functioning of the Soviet state (although hundreds of pages are devoted to such description, in excruciating detail), but rather to establish the method and the manner in which state and law are henceforth to be talked about and studied in the Soviet Union. The method and manner are relatively new, in 1938, and have not previously been authoritatively defined. It is Vyshinsky’s purpose, therefore, authoritatively to declare the new doctrine in terms adapted to the policy which that new doctrine is designed to serve.

Policy and doctrine together come to this: (a) we are entering on a new phase of the Revolution, in which the key word will be “stability;” (b) to achieve stability we must develop a legal system upon which we can depend, and a sense of legality both among the leaders and in the masses; (c) the earlier Marxist-Leninist doctrines that state and law are by their very nature tools in the hands of an exploiting class, and that therefore with the achievement of a classless society they will “wither away,” must be abandoned, or at least considerably modified; (d) a theory of state and law must be developed which will be applicable to classless socialism (the first stage of communism)—a theory which will put socialist law on its own feet, give it a life of its own, apart from economics and politics in the narrow sense of those words; (e) the new theory must look Marxist-Leninist in order to support the fiction of continuity from 1917 on—a fiction which is related to the need for stability and also to the con-
tinuation of Stalin in power despite the wholesale purge of Old Bolsheviks. Vyshinsky is thus exploring new territory; he is pioneering. A good deal of the invective and distortion is to cover his tracks against the wolves who stand ready to fall upon and devour all who dare to deviate. There must be no apparent deviation; everything must look like mere exegesis on the holy writ of Marx, Lenin and Stalin. This is what makes the book so distasteful to those who believe that human speech is more than ritual. But this distaste should not obscure the fact that behind the revision of the catechism lie very real issues.

These issues rarely appear in the text. Perhaps the closest *The Law of the Soviet State* comes to an open statement of the fundamental problem it was designed to meet is in the following paragraph (p. 78):

> “At present the science of Soviet socialist law lacks the necessary congruity and unity. Hitherto, for example, the development of public law, administrative law, and civil law among us has been parallel and almost without correlation and congruity of any sort. On the other hand, a series of problems (such as that of developing contemporary kolkhozes [collective farms]) still await solution in each of these branches of law—often obtaining no proper answer from any one of them.”

This is near the heart of the matter. Without “congruity and unity” it is difficult both to construct a suitable framework for the regular and orderly implementation of state policy and to inculcate a sense of law and justice in the people as a whole. With each branch of law developing independently to meet the exigencies of the moment, it is impossible to establish basic principles which will serve as a guide for the legislative, administrative, and judicial process as a whole.

In the context of this situation, the test of the merit of Vyshinsky’s work is whether or not it offers a foundation in theory for the elaboration of a workable legal system. In terms of such a test as this, what from some other viewpoint (e.g., that of telling what Soviet law is really like) would appear to be a serious defect may actually be a real virtue. The statement, for example, that “the Soviet state government was socialist from the first days of the great October Socialist Revolution” (p. 355) may confuse the historian who has learned that the Soviet codes promulgated under the N. E. P. (1921-1928) were concessions to the partial restoration of capitalism and were in fact deliberately copied from “bourgeois” codes; but Vyshinsky’s re-statement of history now provides Soviet jurists with a theoretical basis for utilizing and interpreting these N. E. P. codes, which, with amendments, are still in force. Similarly, the failure to devote more than a few innocuous pages to the position of the Communist Party in the state, or to the role of planning, serves Vyshinsky’s purpose of establishing law as an independent pillar of the Soviet social order, with its own requirements and its own qualities. This purpose is not made explicit and is sometimes deliberately concealed, but it is implicit in the denunciation of previous leaders of Soviet law who had denied the separate existence of law as such and had exalted Party and Plan in opposition to Law. Now a foundation in theory is provided for subsequent court decisions requiring contracts between state business enterprises to be fulfilled in certain types of cases even where the terms of the contracts were in violation of authorized plans; and now a theoretical basis is laid for the subsequent exclusion from court proceedings of docu-
ments submitted by public organizations (such as Communist Party organs) which have no direct connection with the case at hand. These practical implications of Vyshinsky’s argument are nowhere mentioned in the book. They are to be read where Soviet eyes are trained to read—between the lines.

Yet the establishment of the doctrine that law under socialism is both possible and necessary, that Soviet law is and always has been socialist, and that socialist law (by definition) expresses the will of the whole Soviet people, hardly seems enough on which to found a workable legal system. Nor does the other half of Vyshinsky’s demonstration—the detailed description of the bare mechanics of Soviet state and law, with scarcely any analysis of the real processes of their operation.

Very likely Vyshinsky could have gone further had he so desired. He apparently considered it his main job to refute, in Marxist terms, the nihilistic theory of law which had previously dominated. The first step was to say, as Vyshinsky does with utter frankness, that alongside “suppression and the use of force,” which “are still essential during the transition period,” it is necessary to have “also” due process of law. Subsequent writings of Vyshinsky and of others have gone further in spelling out the new accent on law and legality. In the long run, however, there are serious difficulties. Marxism, with all its flexibility, is more easily adapted to the development of a system of force than to the development of a system of law. That is the paradox, and the dilemma, which lies at the basis of a book that requires not merely translation but careful and extensive annotation throughout.

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BOOKS RECEIVED


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