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Book Reviews

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BOOK REVIEWS

THE CONSTITUTION AND CIVIL RIGHTS. By Milton R. Konvitz. ^oNew York: Columbia University Press. 1947. Pp. x, 254. \$3.00.

Perhaps it is odd to begin a review by quoting a dedication. But in this case I may be excused because I was so much impressed with the present author's dedication. It reads:

"For my father and my brother Benzion. You as a lump of salt have been thrown into water and have become into water and cannot be taken out again: and, whenever taste the water, it is salt."

The moral conviction and sincerity which run through this book have a deep well-spring here.

As a former teacher of Jurisprudence at Columbia University, Professor Konvitz knew very well, as he says in his preface, that

"Freedom comes only from the law; but not all law gives freedom."

That sentence is another way of stating the basic problem of a philosophy of law, of jurisprudence itself, on condition that the word "law" is not used *univocally*.

Konvitz treats of the relationship between the Constitution and such civil rights as the rights of persons to employment, to accommodations in hotels, restaurants, common carriers and other places of public accommodation and resort.

In the last paragraph of his preface, the author himself summarizes well the basic conclusions of his study; though I do not think he was quite successful in elucidating the "badges of slavery":

"In many of our states there are laws which compel people to wear the badges of slavery; but the Supreme Court, deciding cases on the issue of States' rights, has held such laws to be constitutional. Government by law . . . must be substituted for government by caprice and unlimited discretion. But the law itself must also be free from caprice. The desired result will not be achieved if the states are left to their own devices. It can be achieved only through effective congressional legislative, national in scope, and rooted in the soil from which have come the Declaration of Independence, the Bill of Rights, the Fourteenth Amendment. It can be achieved only through the Supreme Court overruling earlier precedents which were decided on the basis of states' rights instead of human rights and the rights of citizens in a free community. There should be no place in the Constitution for a distinction between citizens as first class and second class."

To arrive at this conclusion, Professor Konvitz, in the first place (after a brief summary of federal legislation during the years 1866 to 1877) makes an acute analysis of the famous Civil Rights cases decided in 1883. I think that every law school student reading those cases for the first time is left wondering as to their rationale. Even a number of re-readings of these cases leaves one with the "ashes-in-the-mouth" reaction of overly clever dialectics. Professor Konvitz's analysis of these cases, together with his underlining of the good dissenting opinion by Mr. Justice Harlan, makes good reading.

A real contribution is made by the discussion of 18 U. S. C. § 51¹ and the cases based upon it, especially the *Screws* case,² which by a 6 to 3 vote saves the consti-

1. REV. STAT. § 5508 (1870), 18 U. S. C. § 51 (1940).

2. *Screws v. United States*, 325 U. S. 91 (1945).

tutionality of Section 52,³ and by implication, Section 51⁴ of the U. S. Code. As Professor Konvitz puts it, the case preserves “. . . a link between the Federal government and the protection of the Negro against deprivation of his life, liberty, and property without due process of law by state officials acting under state law or acting contrary to state law, and against deprivation of his rights or privileges under the Constitution or federal law by two or more private persons acting together in a conspiracy.”⁵

The author properly ventures the opinion that the decision in the *Screws* case provides a basis for Federal anti-lynching legislation.

The point of departure for discussion of the very difficult subject of federal legislation against discrimination in employment is the bill⁶ which Mrs. Norton offered in the 79th Congress.

“It seems ironical that under our Constitution, as construed by the Supreme Court, the evil of discrimination in employment can be reached only under the guise of regulation of interstate commerce. It is through a back door that the new concept, the new ‘immunity’ of the right to work at gainful employment, will be received into the Constitution.”⁷

Consideration of the state statutes prohibiting or restricting discrimination starts with the case of *Railway Mail Association v. Corsi*.⁸ This reviewer may be allowed a peculiar satisfaction with that decision. It arose out of, and vindicated, a formal letter of legal opinion prepared by this reviewer while he was Deputy Industrial Commissioner and Counsel in the New York State Department of Labor some years ago. Nor is there anything in the treatment which Konvitz gives to state statutes compelling or allowing segregation or discrimination which could arouse the resentment of men of good will.

The appendices, occupying the last 95 pages of the book, include complete or partial quotations from actual or proposed federal or state laws on the subject of discrimination. For example, on page 148, there appears a “Model State Civil Rights Bill” as proposed by the American Civil Liberties Union. The proposal seems to carry legislation of this type beyond what would be constitutional and reasonable in the matter of private or parochial schools.

The object of laws against discrimination should be to proscribe discriminations based upon malice, uncharity, injustice or other irrational motives or purposes. Some discriminations are reasonable. They involve no infringement upon the great moral mandate to be just and charitable. Legislation which seeks to reduce all cultural strains to one level or which is predicated upon some assumed lowest common denominator of religious belief is self-defeating. Our society is a pluralist society. Regimented unity will not abolish the rational foundation for such pluralism. It can be as artificial and as brittle as the unity which the Nazis and the Communists have paraded. A willingness to recognize the legitimate scope of human differences and of systems of personal choice is not always violative of justice or charity. I see no reason why, for example, the Jewish Theological Seminary should be stigmatized for admitting only Jews or why a school run by a religious organization should

3. REV. STAT. § 5510 (1870), 18 U. S. C. § 52 (1940).

4. REV. STAT. § 5508 (1870), 18 U. S. C. § 51 (1940).

5. P. 61.

6. H. R. REP. NO. 2232, 79th Cong., 1st Sess. 187 (1945).

7. P. 96.

8. 326 U. S. 88 (1945).

be *required by law* to welcome those of another faith. The only sound basis for unity is the one which so genuinely respects freedom of religion as to permit religionists to maintain their spiritual integrity as an organized, organic and "different" group within the larger but not omniscient national whole. On the social plane there must be agreement on the basic natural law verities or there can be no unity or peace, with or without legislation. It is only an uneasy compromise which eventually complicates chaos to try the tyrannical expedient of laws to dissolve religious pluralism into a coerced unity on the religious plane.

"When Poland or Germany or Spain denies basic freedom to a group of its own citizens, the citizens of other nations cannot stand by, out of respect for the principle of national self-determination . . ."

Such language also only finds a fair target in Soviet Russia. It is implicit with a recognition that we should be free to differ theologically within the unity of a single political and constitutional system. If we agree to disagree on *theological* grounds, the freedom to do this is part of the panoply of genuine *political* liberty. The common good should always be big enough to include those who, while they respect highly the things that are Caesar's, are still more respectful of God's things. Among the true worshippers of God, no matter what their theological discriminations, there will be none whom we need fear politically as the purveyors of the uncharity, hatred or unreason which significantly endangers the common weal. And religious discriminations do not all imply malice or social evils.

GODFREY P. SCHMIDT†

LABOR UNIONS AND MUNICIPAL EMPLOYEE LAW. By Charles S. Rhyne. Washington, D. C.: National Institute of Municipal Law Officers, 1946. Pp. 583. \$10.00.

This book examines in many of its aspects the problem of the municipal employees *vis-a-vis* the labor union movement. Most of the volume (426 pages) is given over to an appendix of quotations of court decisions, court orders, attorney generals' opinions, opinions of administrative boards or tribunals, opinions of corporation counsels or city attorneys, briefs, ordinances and similar materials bearing upon the subject of the unionization of municipal employees in its various ramifications.

The text outside of the appendix occupies only 156 pages. In the first four parts: the author summarizes court decisions on the right of municipal employees to organize and join labor unions; on the power of municipalities to contract with labor unions representing municipal employees especially with regard to strikes and picketing; etc. Reference is made to state constitutional provisions and state statutes upon the subject. A few authorities from Federal, Canadian and British jurisdictions are cited and the opinions of attorney generals in fifteen states summarized. The experience of fifty-nine cities or municipalities is briefly related; and there is a *precis* of the opinions of city attorneys, city ordinances, resolutions and contracts. Part V presents a summary of the chief subjects and points covered by the formal opinions of state attorney generals and city attorneys in this connection. Part VI is devoted to a series of summary references to policies of Federal officers or agencies such as the President, the Attorney Gen-

9. P. 105.

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eral, T. V. A., Inland Waterways Corporation, Alaska Railroads, and S. E. C. Finally, Part VII is devoted to the opinions of Joseph A. Padway, General Counsel for the A. F. of L., Lee Pressman, General Counsel for the C. I. O., the National Civil Service Reform League, and a series of nine general authorities whose books or articles are cited.

The author lists twelve conclusions (Part VIII) which represent what he believes to be the majority view. Minority viewpoints are, however, stated. Nowhere does the author submit these twelve conclusions to critical analysis and appraisal.

In general, the book is a careful and painstaking review of existing laws, opinions, and experience upon a subject which will unquestionably evoke mixed reactions and applications as the years go on. No well-rounded discussion of the philosophy of trade unionism in relation to governmental employees is to be found here. At best, this book provides merely the point of departure for such a philosophy. I find nothing in the book which improves upon Judge Brandeis' basic generalization: "In a free country everyone, be he an employer or an employee, be he in the public or in private service, should have an opportunity to combine with any other persons or persons for the purpose of improving his condition. The right to combine is absolute; but the action of a combination must necessarily be confined to such action as is lawful, and should be confined to such action as is reasonable."¹

I cannot *quite* agree with the first conclusion set down by Mr. Rhyne: "Municipal employes may organize their own union or affiliate with other unions except in those instances where, *from the nature of their employment, union membership may be prohibited or limited as incompatible with the public duties* which particular city employes must perform."² What can possibly be the nature of employment in governmental service which prohibits mere organization or affiliation with unions which have no policy of strike against government? In what cases can public duties be incompatible with the exercise of free association (as long as that right is not conjoined with the unreasonable assertion of the right to strike against the public)? I can well understand why labor unions among governmental employees would have to be restricted in their right to collective bargaining, or even in their right to picket. But I cannot understand why under our free institutions men should be precluded from the natural law right of free association simply because they are governmental employees.

The majority view that ". . . *any* contract between a municipality and a labor union covering terms and conditions of employment of public employees is void as a delegation of public power to a private group . . ."³ seems to me to be broader than it should be. There is no substitute for considering each agreement of this kind separately on the basis of its own specific terms, as the minority advocates. The administrator in government service sometimes has discretion, within at least a limited area, to formulate employment policies involving alternatives within the frame of civil service laws or equivalent rules or ordinances. I see no reason why contracts between a municipality and a labor union (within this narrow area, and to select one of several available alternatives) should be prohibited.

But I agree with the majority rule that "collective bargaining" in the ordinary sense is out of the question where governmental administrators take the place of employers. The powers of employers are very different from those of governmental officials. Labor union representatives or other citizens should always be ac-

1. MASON, BRANDEIS (1946) 150.

2. P. 150 (*italics added*).

3. P. 151 (*italics added*).

corded the reasonable right to sit down to discuss matters with municipal administrators. But that right presupposes a reasonable recognition of the manner in which the administrator's discretion is bound by existing laws or ordinances. Such laws and ordinances should always, in my opinion, take precedence over the kind of discretion which can be regularized or memorialized by a collective bargaining agreement between a union and, say, a commissioner. In that respect municipal employees have the same right as any other member of the public to bring pressure upon the duly authorized governmental legislators. To substitute self-help in place of persuasion in such cases is merely another way of repudiating law and order.

President Roosevelt (who could not, I think, be regarded as unfriendly to labor) recognized this in his statement: "The process of collective bargaining, as usually understood, cannot be transplanted into the public service. It has its distinct and insurmountable limitations when applied to public management. The very nature and purpose of government make it impossible for administrative officials to represent fully or to bind the employer in mutual discussions with Government employee organization."⁴ To come to an opposite conclusion would be the same as to say that governmental officials and legislatures should be replaced by the private rule-makers in collective bargaining between the officials of government and labor unions. Collective bargaining can never properly be conceived of as an unconditioned or absolute process. It rests (even for its own enforcement) on a foundation of government. It cannot replace its own foundation. Where our political institutions are involved, the exigency for limitation and conditioning by *law* is all the more pronounced. Liberty for all of us can be effectual and valid only to the degree in which we take part in our political system *by complying with its good laws or by improving or repealing our bad ones*. The omniscient method of improvement is not collective bargaining.

When we speak of a juridical order in the concrete we mean an order in formation rather than order in complete achievement. But the very process of formation would be impeded if private groups could make their own rules to replace or displace legal standards.

To my mind, a most obvious limitation upon collective bargaining for governmental employees concerns the so-called "closed shop" in its variant forms. Such an incident to collective bargaining for governmental employees is in my opinion especially out of place. I quite agree with the majority condemnation of such monopolies and discriminations as incompatible with the legal rules reasonably appropriate for governmental employees. As Don Luigi Sturzo has written in his book, "The Inner Laws of Society": "Today in a democratic regime, the state is almost as omnipotent as in a totalitarian one. There is only one great difference: that in a democratic regime there is the freedom of the press, of assembly, of voting, there is the possibility of modifying majorities, overturning the government without recourse to revolts and wars." Toleration of the "closed shop" principle in government employment would restrict this possibility and bring us to dangerous proximity to a totalitarian regime.

Finally, I agree in the main with Conclusions 10 and 11 as listed by Mr. Rhyne: "10. It is conceded that there is no right of strike for governmental employees. 11. It is conceded that any picketing which prevents or interferes with the carrying out of a city's functions is illegal."⁵

4. P. 436.

5. P. 152.

It seems to me that only circumstances and events of the order of those which would morally justify revolution or rebellion can justify strikes of governmental employees. Even in industrial conflict the strike is morally unjustifiable, unless it is an absolutely last recourse. The urgency that the right to rebel be considered an *ultimate* recourse is far, far greater. Every government is simply an order and a defense of that order. If the order is bad; if in some respects the order contains elements of disorder; the means for improvement should be those legally available to the citizens at large. Governmental employees because of their peculiarly strategic position should not be permitted to capitalize their own selfish interests without regard for the common good. When the situation gets so bad as to warrant revolution or rebellion there is no longer any question of a juridical system.

All in all, in these days of industrial and social ferment, the book is a very convenient tool for city officials faced with the problems of unionized civil service workers.

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