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BOOK REVIEWS

Law and Social Action. By Alexander H. Pekelis. Ithaca, New York: Cornell University Press, 1950. Pp. 272. \$3.50.

This book is essentially a venture in social engineering. Its primary purpose appears to be, through the use of sociological techniques, the development of a subtle and effective strategy by which racial discrimination may be lessened in the United States.

The best of the thirteen essays, in the opinion of the reviewer, is "The Case for a Jurisprudence of Welfare," which has been appropriately placed at the beginning of the book. The author writes of his hopes for what "may be the dawn of a new judicial approach, the beginnings of what I should like to call a jurisprudence of welfare. In other words, our judges, who have long been asking themselves a series of inadequate questions about canons of construction, intents of the legislators, or lines of judicial authority, may be about to ask themselves, with increasing frequency, the only question that really matters: 'Which course of my action—which rule of law—is going to serve best the general welfare of the society I am sworn to serve?' And they may be inclined to ask this question openly and explicitly, and attempt to answer it intelligently, with the help of all available data that the social sciences can offer" (p. 8).

As is to be expected in a collection of writings of a legal scholar who has studied and practiced his profession under two legal systems, there is an essay on comparative law. Instead of engaging in the more familiar comparison of the common law with civil law at large, Professor Pekelis in his essay on "Legal Techniques and Political Ideologies: A Comparative Study" has compared the Anglo-American legal system with the legal system of the so-called Latin countries of Europe and South America. Most comparative studies, on the civilian side, have emphasized the law of countries of the German type. But putting his emphasis on a different group of countries, Professor Pekelis has added to the completeness of the picture.

There are three powerful groups of individuals in America organized either to protect the civil liberties of all or to advance the cause of particular minority groups. They are the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP), and the Commission on Law and Social Action of the American Jewish Congress (CLSA). Each of these pressure groups has come into existence in response to the conviction of their

founders that in some ways America was not fulfilling its promise of equal opportunity and fair play. Planning theorists have discovered that governments will best serve those who merge their efforts into effective organizations.

This collection of essays by Professor Pekelis was written and published to promote the purposes and objects of the CLSA of the American Jewish Congress. The author was born in Odessa, Russia, in 1902. After graduating from the Odessa Gymnasium in 1919, he studied in the Universities of Leipzig, Vienna, Florence, Rome, and London. He was admitted to the Italian bar in 1931, and from 1935 to 1939 was professor of jurisprudence in the University of Rome. The Fascists finally made his life uncomfortable, so he went to Paris and practiced law there for two years. In 1941 he came to the United States and was appointed a professor in the Graduate Faculty of the New School for Social Research, and he maintained this position to the time of his death. In 1942 he registered in the Columbia University Law School, carrying the heavy load of legal study along with his full-time teaching program. He became the first foreign-born editor-in-chief of the *Columbia Law Review*, an office he filled with such extraordinary competence that upon his graduation there was created for him the new editorial office of graduate editor-in-chief of the *Review*. In 1945 he became the Chief Consultant of the CLSA of the American Jewish Congress. His death occurred in an airplane accident in Ireland on December 27, 1946. He was on his way home from Switzerland, where he had attended a World Zionists Congress. This volume of his writings has been published by his friends as a memorial to his great genius.

Discrimination against Jews in the United States is usually non-governmental, non-violent, and extremely subtle. To combat it the CLSA has decided upon a merging of legal skills with social science research. It has adopted a policy of using sociological research as a basis for legal action. It has been the first of the civil rights organizations to clearly formulate and extensively publicize a positive "law and social action" approach to the handling of complex civil rights problems. The CLSA seeks to carve out new and more extensive rights rather than merely defend an individual against violations of clearly recognized rights.

The CLSA is primarily concerned with problems of discrimination affecting Jews. But since it realizes that a legal principle established by one minority group will often accrue to the benefit of others, it frequently takes affirmative action in racial discrimination of persons who are not Jews. Some of its best legal work has been done in support of the more direct campaigns of other organizations in the field of civil

liberties. As an illustration, there appears on page 159 of the book under review a brief prepared by Professor Pekelis for the American Jewish Congress as *amicus curiae* in the case of *Westminster School District v. Mendez*.¹ This brief was filed in opposition to the segregation of children of Mexican and Latin descent in the public schools of Orange County, California, and is a brilliant and devastating analysis of the social effects and unconstitutionality of segregation. This brief deserves to become famous for the cause it espouses.

The CLSA was organized in 1945 as an agency of the American Jewish Congress. The officers of the American Jewish Congress, with Dr. Stephen S. Wise as president, asked Professor Pekelis to prepare a program of action for CLSA. The result was a paper, published in the last chapter of this book under the title "Full Equality in a Free Society: A Program for Jewish Action." Dr. Wise hailed the paper as a "historic document." The paper has served as the "constitution" of CLSA, as a chart of its program and as a statement of its philosophy. The document has as its bases the contributions of Professor Pekelis to cultural pluralism, the religion of the Jewish Prophets, and the political theory of the Declaration of Independence and the Bill of Rights. Professor Pekelis asserts that full equality in a free society involves the recognition of individual equality and group distinctiveness.

Professor Pekelis says that the forces that limit the Jews in the full enjoyment of equality are not the forces of government but those of industry and trade, of banking and insurance companies, of real estate boards and neighborhood associations, of college faculties and trustees—in a word, the forces of what could be called the "private governments" of America. He contends that these *de facto* governments can be law-makers, power holders and sovereigns, as real as the state itself, and should not escape constitutional controls.

The author presents a forceful and logical argument against the popular maxim that "the Constitution runs against governments only." He feels that the Supreme Court in *United States v. Classic*² has greatly limited this much-quoted maxim and that the language used in the decision is rich in several untapped potentialities. The *Classic* case held that interference with the right to vote in a primary is prohibited by the Constitution, regardless of whether or not the interference can be described as state action. Professor Pekelis says: "This means, to begin with, that when the Constitution says nothing as to who shall refrain from a violation of a provision or rule, everyone, official or

¹ 161 F. 2d 774 (9th Cir. 1947).

² 313 U. S. 299 (1940).

private government, group or individual, will be under the constitutional duty to refrain from an interference therewith. . . . In the light of this proposition, let us compare the due process clause of the Fifth Amendment with that of the Fourteenth Amendment. The latter says, 'nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny a person the equal protection of the laws.' But the Fifth Amendment says, 'No person shall be deprived of life, liberty or property, without due process of law.' The subject of the Fourteenth Amendment is 'state'; the subject of the Fifth Amendment is 'person.' The language of the Fourteenth Amendment is that of a restriction on the power of government; the language of the Fifth Amendment is that of assertion of an individual right" (pp. 107-108).

A gratifying feature of this book is the author's uniform and conspicuous fairness in the weighing of his own theories against those of others. It raises and discusses some interesting questions. The book has been written in a scholarly manner. It should be especially stimulating to those of our jurists, more often found in our federal courts, who are in quest of extralegal guidance. It contains material on which such jurists can exercise their judicial wings.

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Modern Law of Nations. By Phillip Jessup. New York: Macmillan Company, 1948. Pp. viii, 236. \$4.00.

Dr. Jessup has based this book on the assumption that the traditional system of international law needs overhauling to meet the demands of the modern world. In exploring the possibilities of such a reorganization, he looks particularly at two points as keystones. The first of these is "that international law, like national law, must be directly applicable to the individual." The second is "that there must be basic recognition of the interest which the whole international society has in the observance of its law." From this background Dr. Jessup proceeds to discuss in the remaining seven chapters a number of familiar topics such as recognition, nationality, responsibility of states, contractual agreements, etc., always with a keen eye on the development of his keystone propositions. It is a tribute to the persuasive effect of the writing that these two points, starting as "possible bases," rapidly become "hypotheses," and by the end of the book are accepted as the prerequisites of a new international order.

This is a volume which no one interested in the continuing development of international law should miss reading. Recent crises have highlighted its significance. When it first appeared three years ago it was generally hailed as a work which would contribute greatly to intelligent thinking in a field of growing importance. Time has not served to change this verdict, for Dr. Jessup has brought to his writing a wealth of research and an incisive mind which make the result not merely informative but stimulating.

As a matter of historical fact it is abundantly evident that international law has demonstrated consistently a capacity for promising growth, although in the nature of things its failures are likely to be more spectacular than its successes. In the words of Hall (as quoted on page 8 of the book under review), "Looking back over the last couple of centuries, we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the period." Under such circumstances, if customary development is working thus with sureness, albeit slowly, a question may be raised as to the wisdom of any attempt to force growth on the basis of arbitrarily assumed hypotheses. Possibly these hypotheses should be regarded less as assumptions than as already discernible trends in a continuing process.

In the meantime Dr. Jessup, the roving ambassador, is exploring a broader and in some ways a more significant field than was open to Dr. Jessup, the scholar. The reflection of this experience in his later writings will be awaited with eagerness.

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Some Problems of Equity. By Zechariah Chafee, Jr. Baltimore: Twentieth Century Printing Co., Inc. 1950. Pp. 441 (including index and table of cases).

Zechariah Chafee's latest contribution will not be a best seller, even among law books, for, as its title suggests, it is directed at a rather limited field of interest, but the little (441 pages) book contains much to recommend it to everyone concerned with the growth of equity, its principles and its prospects. The reader cannot doubt that so long as men like Mr. Chafee are around there need be little concern that equity's path will lack for guideposts.

This book is composed of nine chapters, two of which were reprinted

from former articles written by Mr. Chafee in law reviews and others of which were lectures delivered by the author at the University of Michigan Law School in 1949 as the Thomas M. Cooley Lectures. Thus Chapter IV was first printed in the *Pennsylvania Law Review* in 1926 and Chapter V first appeared in the *Harvard Law Review* in 1932. That these articles could now be fitted, without serious alteration, into a book published some twenty years later is a ringing tribute to the proficiency of this author who is unquestionably one of the leading scholars in this field. Mr. Chafee is primarily a legal technician, but one with a sense of humor. Thus his lectures are interspersed with robust language and his points are circumscribed with briefs of cases which are presented in a readable and entertaining fashion. It adds to one's legal education just to read his case briefs since he has a decided knack of pointing out the vital features as well as pointing out the humor in the situation.

The purpose of Mr. Chafee in writing this book was, to use his approach, to repair and sharpen some of the convenient tools of equity which are designed to accomplish justice. Some of these tools Mr. Chafee sharpens and re-sharpens until, to this reviewer's mind, some of the steel is lost. He analyzes and re-analyzes and draws many fine distinctions so that the slightest inattention by the reader will cause him to miss a turning. But the lecture series, as well as this book, presented an opportunity to an outstanding teacher and scholar to display some of his reflections upon a great field of our jurisprudence. For instance, the first three chapters treat with considerable detail the maxim, "He who comes into Equity must come with clean hands." Mr. Chafee easily convinces the reader that this maxim is not of universal application—that it is not all things to all people—but that, contrary to general belief, it ". . . does not govern anything, that it is a rather recent growth, that it ought not to be called a maxim of equity because it is by no means confined to equity, that its supposed unity is very tenuous and it is really a bundle of rules relating to quite diverse subjects, that insofar as it is a principle it is not very helpful but is at times capable of causing considerable harm." Thus he bursts the bubble.

In Chapter V the author discusses the applicability and trustworthiness of another phrase which has come to be known as a maxim: "Equity follows the law." He refers to many of the ancient limitations and exceptions circumscribing the application of equity and deplors the fact that equity has shown little capacity for growth in recent years. Mr. Chafee dislikes the modern tendency of leaving new reliefs to a legislative cure and feels that the old treatments should be refurbished

when necessary and that whether or not equity follows the law is unimportant.

The next three chapters deal with bills of peace with multiple parties, and representative suits with special emphasis on Federal Rule 23 and the discussion revolves around the complex situations which are possible. The author concludes with a dissertation upon the attendant dangers and points out numerous factors to be considered by a trial judge to assure protection for outsiders who are not before the court but who are entitled to consideration.

The final two chapters, which are entitled, "Lack of Power and Mistaken Use of Power—1 and 2" contain a real contribution to a currently active field and deal with the problems caused by the "serpentine wall" that runs between, on the one hand, decrees of a court which are invalid for being improperly decided according to correct principles of decision and, on the other hand, decrees which are void for lack of power in the court to decide the issues. Mr. Chafee here advances his own theory as to the true meaning of the term "equity jurisdiction" and says, in effect, that it is not jurisdictional at all but is "simply a bundle of sound principles of decision concerning particular kinds of relief." Or, as it has been put by another writer, "Equity jurisdiction has as little to do with jurisdiction as quasi-contracts has to do with contracts." Thus Mr. Chafee tells us that equity is omnipotent, provided the court has jurisdiction over persons and subject matter, and its decrees may be improper, stupid, or otherwise erroneous, but they are never void. The court has power to act, in other words, but it may act mistakenly. The author was reminded of the old story of the bartender's shouted conversation with the saloon owner in the back room:

"Is Hennessey good for a drink?"

"Has he had it?"

"He has."

"He is."

In defense of his proposition that equity jurisdiction is not jurisdictional, Mr. Chafee analyzes and classifies the case law arrayed against him and he does an excellent job of keeping the reader convinced of the soundness of his position.

The final chapter is given over to a discussion of the recent celebrated case involving John L. Lewis and the United Mine Workers. Mr. Chafee agrees with very little in the opinion of the Supreme Court except the result reached. He particularly deplores the holding that void decrees must be obeyed by a defendant except when the question of jurisdiction is "frivolous and not substantial." Although Mr. Chafee

thinks, as is pointed out before, that there can be no void decrees, he readily admits that when the Supreme Court says there can be void decrees that they are at least as "real as Santa Clauses in department stores before Christmas." According to Chafee this holding creates new distinctions between which a defendant must choose in deciding whether or not he can safely disobey the decree of a trial judge. The author argues that if there is jurisdiction of the person and subject matter the equity court has power to act. Its decrees cannot be void save for lack of jurisdiction over the person and the only question is whether or not the use of the court's power is mistaken. Ergo, since there can be no void decree a defendant is never safe in disobeying the court. But this raises another problem, for an improper decree, whether void or not, may cause much hardship and litigants are entitled to a speedy determination of the issue. Rather than sanction flat disobedience of the decree to raise the question Mr. Chafee argues for some more modern procedure, as, perhaps, a supersedeas.

There is a great deal packed into this smallish book. There is much that will be of profit to the average practitioner. No reader can go through this book without saying to himself, "Hmm, I wonder why I haven't thought of that?" and most readers will jot down a number of citations as having a bearing on matters pending in their own offices. This reviewer did.

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