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CONSTITUTIONAL LAW

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.

—LEARNED HAND.

CHANGES IN THE ILLINOIS LAW OF CIVIL RIGHTS

MANLY W. MUMFORD

LAW AFFECTING RACIAL or religious discrimination has, in recent years, come under the designation "civil rights" whether affecting discrimination by units of government or by persons or corporations in their business capacities. Indeed, many seem to believe that this area of law is the only one to which the phrase applies. Purists might argue that civil rights are those of the individual against his government, not those against individuals, and suggest that some other adjective than "civil" be used to describe the rights of a man to be free of non-governmental discrimination. Yet in practice, the enactment into law of rights against both private and governmental discrimination is generally urged by the same people, opposed by the same people, and dedicated to the same major purpose—the elimination of all forms of racial and religious discrimination. Thus the phrase "civil rights" has, in use, been broadened to include rights not strictly civil.

PROTECTION AGAINST GOVERNMENTAL DISCRIMINATION

Civil rights further include the rights which protect a citizen against other abuses and excessive restraints on liberty by governmental agencies. Classic examples are rights to free speech, religion, assembly, and press. For the purpose of this article, two categories of civil rights are set up, one consisting of rights against religious and racial discrimination, the other category comprising all other civil rights. In Illinois the law existing in 1950 in the first category has changed but little in the succeeding ten years. No law by its terms (as is the case in certain sister states) required racial or religious discrimination then, and none

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does now. On the other hand, few restraints were placed on private or business discrimination then, and not many more have been added. In the second category, several laws have been enacted to protect the individual against excesses by various arms of the government; one law does, in this author's opinion, constitute such an excess.

The most significant law in the latter field is probably chapter 38, section 601.1 of the ILLINOIS REVISED STATUTES, which declares that in a criminal trial in a state court, a previous trial and acquittal or conviction for the same act or omission by a federal court is a sufficient defense. This law was designed to prevent the double jeopardy situation permitted under the interpretation of the United States Constitution by the United States Supreme Court in *Bartkus v. Illinois*.¹ In that case, the defendant, after acquittal in federal court of robbing a federal savings and loan association, was tried and convicted in an Illinois court for robbery of the same institution. The FBI agent who gathered evidence before the federal trial turned over all that evidence, plus some obtained after the trial, to the Illinois prosecuting officials. The United States Supreme Court held that this second trial and subsequent conviction did not violate either the double jeopardy clause of the fifth amendment to the United States Constitution or the due process clause of the fourteenth. The Illinois statute would not, and could not, prevent a federal trial of a crime for which a man was previously tried in Illinois, but it can and does prevent a subsequent trial in an Illinois court for an act for which the defendant was previously tried in a federal court.

The Illinois Post-Conviction Hearing Act is of sufficient importance that it is mentioned in this article even though adopted a little before the ten-year period dealt with here.² This act permits a man convicted of a crime to show, after conviction and sentencing, that his conviction resulted from a trial at which the rights guaranteed him by the United States Constitution were not observed. How the law came to be enacted after the United States Supreme Court severely criticized our legal system for failing to provide any such safeguard is admirably told in a commentary by Albert E. Jenner, Jr.³

¹ 359 U.S. 121 (1959).

² For a discussion of The Illinois Post-Conviction Hearing Act, see Starrs, *The Post-Conviction Hearing Act—1949—1960 and Beyond*, 10 DE PAUL L. REV. 397 (1961).

³ ILL. ANN. STAT. ch. 38, §§ 581-end (Smith-Hurd, Supp. 1960) at 313.

Chapter 38, section 580a of the ILLINOIS REVISED STATUTES authorizes a court on motion of the prosecuting attorney to grant immunity to a witness from prosecution for any crime under Illinois law about which he may testify at a trial or grand jury investigation. Often the witnesses who know most about a crime were closely enough connected to it so that they might be prosecuted as accomplices or accessories, or for some other related crime. Consequently, a witness who chose not to tell all he knew could invoke the constitutional privilege against self-incrimination and could not be compelled to testify against another, even though the witness himself were not on trial. The act gives sanction to a practice which, it is said, has been used in the past—*i.e.*, the practice of the prosecutor promising not to go after one of a group of people who allegedly committed a crime, in exchange for the testimony of that individual. Further, this act clears the way so that such a witness can, perhaps, be compelled to accept the bargain. A state's attorney attempting to secure an order compelling such testimony from an unwilling witness, however, faces practical hindrances. The testimony of such a witness might help show that he violated a federal law (that he got income which he failed to report on his federal income tax return, for instance) or the law of another state. Also, if a witness refused to accept the immunity grant on the grounds that he might incriminate himself under federal law, or the law of another state, the prosecution might have a hard time getting an order compelling him to show how such testimony would incriminate him.⁴

Chapter 38, section 206.1 prohibits "electronic eavesdropping." Before 1957, wiretapping as such was prohibited,⁵ but modern technology and the need for enforcement provisions required a more sophisticated law. The new law prohibits, with certain minor exceptions, the use of any device employing electricity to hear or record an oral conversation without the consent of any party thereto. Both civil and criminal penalties are imposed, and evidence obtained in violation of the act is not admissible at a trial or legislative or administrative hearing. Now it is illegal to use "bugs" (powerful microphones concealed in a room or attached to the adjoining wall of the next room)

⁴ The Federal Government is not so inhibited. Under the immunity section of the Narcotic Control Act of 1956, the court can compel testimony and grant immunity from state or federal prosecution. 18 U.S.C.A. § 1406 (Supp. 1960); *Reina v. United States*, 364 U.S. 507 (1960).

⁵ ILL. REV. STAT. ch. 134, § 15a (1959).

and induction coils (which can pick up a conversation on a telephone by merely being near the wire without physical contact).⁶

Chapter 38, section 449.1, imposes a fine of from \$100 to \$1,000 or a sentence of ten days to six months in jail on anyone convicted of denying a prisoner the right to consult with counsel or holding a prisoner over twenty-four hours without letting him notify his family that he is being held. This is a step in the right direction toward adding meaning to the right a man has to petition for a writ of habeas corpus, or to get legal advice before lengthy imprisonment and extensive questioning by the police. A difficulty of this law is that by setting a criminal penalty for the proscribed behavior, it makes enforcement rely on the willingness of a state's attorney to prosecute a policeman, maybe even one of his own men. As the state's attorney may in the future rely on the same policeman to get the evidence necessary to successful prosecution of another case, he might find such interest in conflict with his duty to enforce this particular law.

Chapter 38, section 736.2, provides that in a criminal trial the court may not require, request, or suggest a lie detector test or the taking of sodium pentathol (truth serum) by a person charged with crime. To make any such requirement at a criminal trial would be reversible error,⁷ but previously, certain judges would occasionally suggest the lie detector test or truth serum. This law recognizes the fact of life that a judge whose suggestion for a lie detector test is rejected by a defendant might form an opinion as to that defendant's guilt before all evidence and arguments were complete.

Chapter 51, section 57, provides that no witness can be compelled in a trial or administrative hearing or other tribunal to testify before radio or television or moving picture cameras. This, of course, was an attempt to prevent some of the abuses which had, during the hearings of Senator McCarthy's subcommittee of the United States Senate Committee on Government Operations, subjected many people to accusations in the form of questions over national radio and television networks without opportunity to show the accusations untrue.

⁶ For an excellent collection of material on the techniques of modern electronic eavesdropping and arguments for and against their use, see the appendix to *Hearings on Wiretapping, Eavesdropping, and the Bill of Rights Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 86th Cong., 1st Sess. (1959).

⁷ *People v. Sims*, 395 Ill. 69, 69 N.E.2d 336 (1946). See also *Henderson v. State*, 94 Okla. Crim. 45, 230 P.2d 495 (1951); Annot., 23 A.L.R.2d 1306 (1952).

Another attempt to prevent other abuses of the legislative committee inquiry was chapter 63, sections 13.1-5. This law grants to any witness before any legislative or administrative investigation the right to counsel and certain other rights to protect his reputation against public accusations.

These original, rare, and welcome restraints of the General Assembly upon its own behavior are, in this author's opinion, worthy of considerable praise. So are the other laws abovementioned, as they exhibit a continuing attempt by our state government to increase the civil freedom of our people. One black mark is chapter 127, section 166b. One of the Broyles Bills, of which a number were introduced in the 1951, 1953, and 1955 sessions of the General Assembly, this law requires all public employees to subscribe to oaths stating that they are not knowing members of any organization which advocates overthrow of the government by illegal means.⁸ Considering the temper of the times when it was enacted, we are probably lucky that nothing worse became law. There would be no objection if every public employee were required to take an oath to support and defend the Constitutions of the State of Illinois and of the United States, but this law, by striking at mere membership in an organization regardless of the loyalty of the individual to the State and the United States, violates the common legal precept that a transgressor is determined to be such on the basis of his own actions, not those of one of the organizations to which he may belong. A very loyal American might join a communist front organization with the intention of lessening its effectiveness or "subverting" it to the principles of democracy.

RACIAL AND RELIGIOUS DISCRIMINATION—THE NEED FOR LEGISLATION

Our sins in the field of civil rights, however, have mostly been those of omission rather than commission, and largely deal with our failure to enact measures to end racial and religious discrimination.⁹ Some

⁸ ILL. REV. STAT. ch. 127, § 166a (1959), is another Broyles bill, and prohibits the use of any state funds for compensation or expenses of a person advocating overthrow of the government by illegal means or knowingly remaining a member for twenty days or more or joining an organization which advocates overthrow of the government by illegal means.

⁹ AMERICAN JEWISH CONGRESS, *THE LOST DECADE* (1960), analyzes Illinois legislation in the field of racial and religious discrimination, 1949-1959.

legislation has been adopted, but it measures up to that enacted in other northern industrial states in neither quality nor quantity.

The Public Accommodations Law was enacted in 1935 and has changed little since then.¹⁰ In 1957, it was extended to prohibit racial and religious discrimination by public golf courses and public golf driving ranges, and in 1959, it was made to cover crematories. Enforcement of this sort of law rests on the individual discriminated against, and is therefore very likely to be unenforced. A man can hardly be expected to stop at the courthouse on his way to lunch to get an injunction so that he can be seated in the restaurant.

Hospitals can lose their tax exemption under a 1959 law for discriminating on admission because of race, color or creed,¹¹ and a concessionaire in a state park can lose his lease for the same reason.¹²

What laws there are in Illinois against discrimination in employment apply only to state agencies or subdivisions. A few statutes have been enacted in this area during the last ten years. Chapter 24½, section 38b.5 prohibits the asking on a university civil service system examination of any question relating to political or religious affiliation or racial origins of the examinee. Local school districts are denied state aid by chapter 122, section 18-14 if they discriminate in the hiring of teachers on account of color, creed, race, or nationality. Possibly this legislation is superfluous in a way, because discrimination by state agencies on such grounds is in violation of the fourteenth amendment to the United States Constitution.

A 1953 amendment¹³ to the Neighborhood Redevelopment Corporation Act¹⁴ requires a redevelopment corporation to agree in writing that in selling, leasing, and managing all real property subject to the plan under which the corporation operates, there will be no discrimination against any person on account of his race, color, creed, or national origin. Section 10 of the act¹⁵ requires that shares in the corporation be available to all regardless of race, color, creed, or national origin. Section 10 (10)¹⁶ prohibits the corporation from acquir-

¹⁰ ILL. REV. STAT. ch. 38, §§ 125-128g (1959).

¹¹ ILL. REV. STAT. ch. 120, § 500.7 (1959).

¹² ILL. REV. STAT. ch. 105, § 468.1 (1959).

¹³ ILL. REV. STAT. ch. 67½, § 267(2)(d) (1959).

¹⁴ ILL. REV. STAT. ch. 67½, §§ 251-94 (1959).

¹⁵ ILL. REV. STAT. ch. 67½, § 260(10) (1959).

¹⁶ ILL. REV. STAT. ch. 67½, § 260(12) (1959).

ing title to property solely because of the race, color, creed, or national origin of the owner.

Illinois is the only northern industrial state without a law prohibiting racial or religious discrimination in employment. Most northern industrial states have Fair Employment Practices Commission laws. Such legislation has been submitted to the General Assembly for the last several sessions, but so far has failed to pass.

The typical FEPC law prohibits racial or religious grounds as reasons for hiring or firing employees in firms of larger than a specified small size. To enforce the law, a commission is created with the power to hear complaints of people who claim that illegal discrimination was applied to them. The commission is empowered to subpoena witnesses and hold hearings to determine whether in fact any such discrimination did occur. On a finding of illegal discrimination, the commission can enter an order directing the offending employer to cease and desist from it. Such an order can be appealed to the courts, or the commission can apply to the court for enforcement of the order if, absent a court decree reversing it, the order of the commission is not complied with.

In conclusion, it seems to this writer that Illinois has done well in enacting laws to promote the civil rights of its citizens—with one large exception in the very field where the most needed to be done. The law prohibiting state court criminal trials for the same act for which a man was tried in federal court, the Post-Conviction Hearing Act, the laws prohibiting electronic eavesdropping, holding prisoners incommunicado, suggestion by judges that suspects take lie detector tests, and compulsory testimony before radio, television, or moving picture cameras, and the law granting rights to witnesses before a legislative or administrative hearing, all are to our credit. The grant of immunity to witnesses does no serious harm to our civil rights, and the law requiring non-communist oaths of public employees, though unnecessary and impertinent, can be lived with. But we have not done so well as we should have in the area of racial and religious discrimination. Much has been said about the damage the existing discrimination does to our foreign relations; some has been said about its wastefulness in economic and human resources. More should be said, though, to remind us that an unjustly discriminatory society is not a society we believe in, and that the standards we require our state to live up to should, in this area, be higher than they are.