Fair Employment Practices Legislation and Enforcement in the United States

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The Declaration of Philadelphia, which is an integral part of the Constitution of the I.L.O., provides that " all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ". The Discrimination (Employment and Occupation) Convention, 1958, which has now been ratified by 53 Members of the I.L.O., provides that each Member for which the Convention is in force shall " declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof ". The Governing Body of the International Labour Office has approved an educational and promotional programme for the elimination of discrimination in respect of employment and occupation in all parts of the world. As part of this programme the Office is preparing for publication in the *International Labour Review* a series of studies on the varied forms of discrimination in different parts of the world and the action that is being taken for its elimination.

The first of these studies is devoted to the United States for two reasons. There is no other country in respect of which full and reliable information is so readily available. Nor is there any country in which more dramatic and far-reaching action to eradicate discrimination is being taken at the present time. Studies relating to other countries will be published during the coming months.

"IN A GOVERNMENT OF LAWS, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."

The above statement by Mr. Justice Brandeis, U.S. Supreme Court, well describes the movement in the United States by the federal, state and local governments to eradicate discrimination in employment through

[1] International Labour Office.

fair employment practices legislation and administrative enforcement machinery. Concentrated efforts towards this end started as far back as 1941 and culminated in 1964 in the enactment by Congress of the Civil Rights Act, which provides a uniform fair employment practices law for the whole of the United States and reiterates that administrative enforcement of the laws against discrimination provides the best means of educating the community in the practical application of the values it seeks to preserve. An educated public demands compliance with the substantive law. " Legislation is the final and most impressive way of putting the community on record as supporting a particular principle or rule of conduct." [1]

In the following pages, after a brief review of the nature of discrimination and of early agitation for equal employment opportunity, this article will consider the action taken by the Federal Executive from 1941 to secure non-discrimination in industries working under government contracts, the evolution of fair employment practices legislation in the states and municipalities, the role of Congress culminating in enactment of the Civil Rights Act of 1964, and the attitudes adopted by the Supreme Court and the National Labour Relations Board towards discrimination in employment.

The nature of discrimination

Fair employment practices legislation in the United States has long been the foundation for a forward movement in the fight against discrimination in employment. Its purpose has been and continues to be the protection of minorities from the possibility of economic tyranny, discrimination and oppression by securing their right to unrestricted competition in the open employment market. Such legislation makes available machinery which an aggrieved person can use to assure himself equality before the law and access to equal opportunity.

Although discrimination may operate in many ways in the United States, in over-all terms it may be likened to a pyramid whose very foundation is economic discrimination, based on lack of employment opportunity. Above this broad base comes discrimination in " public accommodations ", i.e. in schools and education, restaurants, hotels, public transportation and so forth, and in private and public housing.

Discrimination not only hurts physically and psychologically—in material costs, in inhumanity—but also damages the prestige of a society whose foundation is law. When members of minority groups are denied jobs for which they are qualified, they are forced to accept less remunera-

[1] Arthur Earl BONFIELD: " State civil rights studies: some proposals ", in *Iowa Law Review*, 49 (Summer 1964), p. 1086.

tive employment or no employment at all. This discourages development of special abilities among the minority groups, and the nation in effect loses an important source of skills and manpower. The existence of groups with low living standards and purchasing power also represents a loss of markets for increased domestic production or advanced methods of manufacturing. The friction caused by deprivation of equal opportunity hampers industrial development in many communities: in the southern part of the United States, many businessmen and industrialists have been reluctant to set up plants in areas beset by racial strife.

Thus, discrimination in employment does not only represent an unnecessary economic handicap for the nation that manifests itself in an increase of social problems; it also stifles incentive and opportunity for the minority groups that are its victims.

The lack of employment opportunity and depressed economic status of the minority groups have been reflected in (1) discrimination in vocational, apprenticeship and academic programmes [1]; (2) discrimination by labour unions—particularly in the crafts and in the construction industry [2]; (3) widespread discrimination in the practices of employment services [3]; and (4) *de facto* discrimination by the federal Government, and by contractors doing business with it.[4]

Discrimination in employment has seriously affected the economic and social progress of a substantial part of the population of the United States, particularly Negro-Americans, Mexican-Americans, Puerto Ricans, Japanese-Americans, Jews and aliens. However, it is Negro-Americans, who form the largest minority group in the United States, that have suffered most and have been most consistently denied equal treatment.

From the Civil War to the First World War, the role of Negroes in the industrial progress of the South was considerably diminished and the Negro even found himself excluded from types of job he had traditionally held. Employment soon became segregated; occupations that had traditionally been held by Negroes came to be reserved for Whites, the less desirable jobs being parcelled out among the Negroes and the more desirable ones among the Whites. As technological changes took place, many jobs moved from the less desirable into the more desirable category; this was particularly true in the railway industry. In periods of

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[1] Available estimates indicate that in 1963 only 2 per cent. of those undergoing apprenticeship training in the United States were Negroes. See the statement of Hon. Ogden R. Reid, a Congressman from the State of New York, in *Hearings before the General Subcommittee on Labor of the Committee on Education and Labor*, U.S. House of Representatives, 88th Congress, 1st Session, 1963, p. 45.

[2] See *Employment*, Report of the United States Commission on Civil Rights (1961), pp. 127-151.

[3] Ibid., pp. 116-126.

[4] Ibid., pp. 19-94.

depression or recession it was natural that Negroes fared far worse and were slower to recover than other groups.

In the First World War the Negro, along with members of a few other oppressed minority groups, particularly Filipino-Americans, made some progress in his economic condition. He was admitted to occupations in steel, meat-packing, machinery and automobile industries.[1] In light industries, however, progress was all but non-existent; even as late as 1940 Negroes " constituted only 3.1 per cent. of all cotton textile workers. The 1940 census reported that only 240 or 0.2 per cent. of the 102,740 employees of the ' aircraft and parts ' industry were Negroes and that most of them were janitors and outside labourers." [2]

Agitation for equal employment opportunity

Although the progress made during the First World War was very limited, it did represent the beginning of the great surge towards equal opportunity in employment for all minority groups. Soon after the war, the passage by Congress of the Immigration Acts of 1921 and 1924, severely curtailing new immigration, allowed the various minority groups to consolidate what gains they had made without the danger of losing them to newly arrived immigrants.[3] However, it was still true that " White America, with few exceptions, was little interested in ameliorating the lot of the Negro or in gaining a more sympathetic understanding of his needs ".[4] Only through militant action was better economic opportunity for all minority groups to be gained: by demonstrations, protest meetings, mass marches.

Between the two world wars many groups organised to agitate and propagandise for equal opportunity; these groups were from all segments of American society: Negro, Jewish, inter-racial, church and civil libertarian. After the beginning of the Depression in 1929, when minority groups knew better the efficacy of pressure techniques and tactics, better organisation, and the importance of the ballot box for social gains, many changes in the social organisation and thought of " White America " took place. New and powerful allies came to the aid of the oppressed minorities. Of particular importance was the formation of the Congress of Industrial Organisations, which immediately and consistently took a forthright stand for equality for all Americans and advocated the abolition of inequality and discrimination against every minority group.

[1] Louis Coleridge KESSELMAN: *The social politics of FEPC* (Chapel Hill, University of North Carolina Press, 1948), p. 5.

[2] Ibid.

[3] The Negro was no threat to the skilled immigrant, inasmuch as he was limited mostly to unskilled or, at best, semi-skilled occupations.

[4] Louis RUCHAMES; *Race, jobs and politics : the story of FEPC* (New York, Columbia University Press, 1953), p. 8.

The misery and deprivation of the 1930s, which affected all Americans, and the vast unemployment which continued for almost a decade, helped to inject into American political thought an egalitarian spirit which had been lacking since the Jacksonian era. Mass unemployment, destitution and stark economic depression produced a sense of public responsibility for all classes irrespective of race, colour or national origin. There gradually dawned in American social thought a realisation that there was a direct relationship between unemployment and discrimination; for the effect of job discrimination was to concentrate the employment of minorities in certain industry categories, limit their income, reduce their opportunities for promotion, and contribute further to a feeling of inferiority.

This egalitarian spirit, although present in the executive branch of the Government throughout the decade of the 1930s, did not manifest itself until 1941. It must be pointed out, however, that the non-discrimination clauses in much of the Congressional relief legislation of that period was due mainly to the prodding of the executive branch.[1]

After the outbreak of the Second World War, the Government realised the necessity of utilising all available manpower resources for the war effort, and the National Defence Advisory Commission set forth a non-discriminatory employment policy for minority groups in defence industries. Since, however, there was no governmental machinery through which government officials could enforce this national policy, many pleas were received by the President for its enforcement.

In the absence of concrete action by the President, various leaders of the Negro community discussed the possibility of a mass march on Washington to exact their rights for equal job opportunity. The number of possible marchers was estimated to be approximately 100,000. At a time of national crisis, the Government could not be indifferent to mass marches and the reasons for them. After much negotiating, conferences with government leaders and the pledge that the President would take action to ensure equal access to employment, the march was called off and Executive Order 8802 [2] was issued, asserting that national unity and the morale of minority groups were being affected by continued discrimination, and reaffirming the national policy of non-discrimination. It has been said that this order " constituted the most important effort in the history of this country to eliminate discrimination in employment by use of government authority ".[3]

[1] See the section entitled " Congress and fair employment practices legislation " below.

[2] Executive orders in the United States are administrative decrees used by the President to implement certain policies without the necessity for full Congressional approval, whether in the domestic or foreign domain. However, should an executive order have financial implications, the Congress must give its acquiescence if the order is to be fully implemented.

[3] RUCHAMES, op. cit., p. 22.

Equal job opportunity and Presidential initiatives through executive orders

1941-43 (Executive Order 8802)

The use of a Presidential executive order in 1941 to ensure equal employment opportunity was considered quite revolutionary: it was the first time in American history that administrative machinery had been established for the implementation of the national policy of equality. During the long period since the Civil War the country had relied on the Thirteenth, Fourteenth and Fifteenth Amendments to the Federal Constitution for the removal of barriers to equality. American society had deemed it sufficient that the substantive law had been enacted and there were few, if any, attempts to spell out for the minorities what was available to them under the law. Even the position taken by the Supreme Court led to charges that it, too, was acquiescing in discrimination against minorities.[1]

Executive Order 8802, in establishing a Fair Employment Practices Committee (F.E.P.C.), decreed that there should be no discrimination in employment based on race, colour, creed or national origin.

The order applied to the government establishment, employers and labour organisations, and stated that it was their duty to provide for the full and equitable participation of all workers in defence industries without discrimination.

The committee, in its hearings throughout the country, made the public aware of the threat to national unity created by racial discrimination. It succeeded, to a degree, in inducing employers to abandon discriminatory practices in employment and to adopt a policy of employment based on merit. Perhaps more important for the long-range future, it gave millions of citizens a glimmer of hope and uplifted their morale. For various reasons the committee lost its effectiveness when it was transformed from an autonomous entity into an " organisational entity ". Powerful pressures from newspapers, Congress, and many government officials caused the committee to crumble from within.

1943-46 (Executive Order 9346)

Following strong requests by liberal, labour and minority groups, Presidential Executive Order 9346 was issued in 1943, creating a new Fair Employment Practice Committee, once more an independent agency

[1] See *Plessy* v. *Ferguson*, 163 U.S. 537 (1896). This case enunciated for Americans the doctrine of " equal but separate " facilities. It was not until 1954 that the Court reversed itself and declared in favour of equal treatment for all irrespective of race, colour or creed. *Brown* v. *D.C. Board of Education*, 347 U.S. 483 (1954).

specifically charged with recommending measures to eliminate discrimination and to promote the fullest utilisation of manpower.

The committee did not conceive of itself as an agent to punish contractors for non-compliance with the President's order. Although all government defence contracts contained provisions against discrimination, and the committee had power to recommend the cancellation of contracts, this power was never used. Like the first committee, its principal weapons were publicity and moral pressure. Many businesses opened their doors to Negro-American, Mexican-American and Japanese-American workers, admitting them to previously closed occupations.

The committee did not receive Congressional support and was continuously under attack from Congress. In July 1945 it was given appropriations solely for the purpose of liquidating its affairs, and its final report was issued on 28 June 1946. The dissolution of this committee ended another stage in co-ordinated government-wide efforts to promote the policy of equal opportunity until the issuance of Executive Order 10925 in March 1961, which established a single government committee with responsibility for effecting a policy of equal opportunity in employment.

Although forced to terminate its activities, the committee was not discouraged as to the effectiveness of fair employment practices legislation. In its final report it spoke convincingly of the gains during the five years of its existence in the employment opportunities of such minority groups as Negro-Americans, Mexican-Americans and Japanese-Americans in the industrial sphere. It pointed out too that " discrimination in New York and New Jersey cities, covered by fair employment practices laws, was far lower than in cities where no attempts were being made to control discrimination ".[1] In its final report, it reached certain conclusions:

(1) The majority of all discrimination cases could be settled by informal procedures such as negotiation and persuasion.

(a) With local union help, the determined employer could effectively initiate a policy of equal employment opportunity.

(b) Non-discriminatory policies of national unions could succeed if local unions firmly asserted the same policy.

(2) Discrimination could be quickly ended by negotiation when the national Government had made unequivocal its authority and intent.

(3) When negotiations failed, public hearings were essential.

(4) Congressional enactment of federal fair employment practices legislation was mandatory.[2]

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[1] *Final report of the Fair Employment Practice Committee*, 28 June 1946, p. xiv.

[2] Ibid., p. xv.

1946-53 (Executive Orders 9691, 9808, 9980)

Between 1946 and 1953 there were various efforts to tackle discrimination in employment. In 1946 when the Civil Service returned to its former career basis, Presidential Executive Order 9691 forbidding racial discrimination in temporary appointments was issued. Executive Order 9980, proclaimed in 1948, created the Fair Employment Board to enforce the policy of non-discrimination in the executive branch of the federal Government.

A further executive order (No. 9808 issued in 1946), although not specifically concerned with fair employment practices, was in effect a mandate from the President to take stock of the past and make recommendations for the future. It established a President's Committee on Civil Rights " to inquire into and to determine whether and in what respect current law-enforcement measures and the authority and means possessed by federal, state, and local governments may be strengthened and improved to safeguard the civil rights of the people ".

This committee evaluated the extent of achievement in civil rights in many fields including the employment of minority groups and pointed out in its report: " The opportunity of each individual to obtain useful employment . . . must be provided with complete disregard for race, colour, creed, and national origin. Without this equality of opportunity the individual is deprived of the chance to develop his potentialities and to share the fruits of society." [1] Among its recommendations for equality of opportunity, the committee recommended enactment of a federal Fair Employment Practice Act prohibiting all forms of discrimination in private employment, based on race, colour, creed, or national origin, and including provisions for complaint procedures, public hearings, issuance of " cease-and-desist " orders, and enforcement powers through the courts, as well as penalties for non-compliance. It recommended that the provisions of the Act should apply to labour unions and trade and professional associations as well as to employers. The Committee held that such legislation was within the competence of the Congress in virtue of its powers to regulate inter-state commerce. The executive branch was not, of course, to be exempted from continuing active policies of non-discrimination throughout the federal establishment. The committee recommended also the establishment of a government fair employment practices committee " with authority to implement and enforce the Presidential mandate ".[2]

Examination of federal action from 1946 to 1964 in the civil rights field suggests that the exhaustive study made by the President's Committee on Civil Rights and the well-considered recommendations set forth

[1] *To secure these rights*, report of the President's Committee on Civil Rights (Washington, U.S. Government Printing Office, 1947), p. 9.

[2] Ibid., pp. 167-168.

in its report may have laid the foundation for Congressional action in 1964 on the Government's broad and far-reaching legislation to ensure equal opportunity.

1953-61 (Executive Orders 10479, 10557)

Executive Order 10479, promulgated in 1953, reiterated that the Government's policy was to ensure support for all qualified citizens on the basis of merit in the areas where public funds were used. To this end the order charged each government agency to take all necessary action, including the establishment of enforcement machinery, to counter discriminatory employment practices in firms doing business with the Government. To ensure a uniform policy and implementation, the order established the President's Committee on Government Contracts.

This committee attempted to intensify the fight against discrimination by *(a)* clarifying and strengthening the non-discrimination clause in government contracts [1]; and *(b)* further developing the complaint procedures and implementing the procedure for compliance.

The new anti-discrimination clause referred not only to employment itself, but also to upgrading, demotion, transfer, recruitment and recruitment advertising, lay-offs or termination, rates of pay and other forms of remuneration, and the apprenticeship programme.

Under the terms of the order, compliance with the clause was to be mandatory. However, the effectiveness of the committee in this field was weakened by the fact that it was authorised to grant exemptions in special cases of emergency or if special requirements warranted them; the committee's records show that exemptions proved to be the rule rather than the exception.

One major contribution of the Committee on Government Contracts to the eradication of discrimination lay in its intensive development of the complaint procedure, which it improved in all its aspects—receipt, processing, analysis and disposition. When complaints were received and verified, the committee attempted by direct negotiation, conciliation and mediation with the contractor concerned to eliminate the discriminatory practices. This procedure brought some benefits but it proved slow and cumbersome; some complaints were not settled for months and some even for years.

The fact that the committee emphasised voluntary compliance and did not use its implied legal powers to enforce compliance resulted in few companies seeking out confirmatory evidence of their own progress towards compliance. Indeed, many companies preferred to refuse the government contract rather than accept the non-discrimination clause. In many cases, however, failure to comply did not necessarily indicate

[1] See Executive Order 10557.

insincerity on the part of top management, but rather its failure to communicate its intent effectively and to initiate measures sufficient to overcome inaction and inertia.

Like that of the first Fair Employment Practices Committee (1941-43), perhaps the major contribution of the 1953-61 Committee on Government Contracts lay in its role as an educator. In fact, its reluctance to use its enforcement powers and its hesitancy to recommend positive action to enforce compliance left it with only that role. Its vigorous programme of explanations to management, labour, public and private organisations, state, local and federal contracting agencies, and its negotiations and policy of persuasion established the committee as a real force.

Although the committee did not completely eliminate discriminatory practices, it contributed enormously to laying the groundwork for advancement.[1]

1961-65 (Executive Order 10925)

The most far-reaching of all executive orders aimed at the elimination of discrimination in employment was Executive Order 10925, issued in 1961, which, *inter alia*, established the President's Committee on Equal Employment Opportunity. Although the aims and intentions of the order did not materially differ in substance from previous executive orders on the subject, it represented a milestone in executive administrative action, if for no other reason by providing for specified sanctions to be used in the event of non-compliance by a firm doing business with the Government. Further, the order charged the committee to use the tools available to its predecessors but never used by them.

The new committee was authorised to cancel contracts with contracting firms refusing to comply with the Government's policy of equal opportunity and merit employment. It also had the power to block future contracts placed with non-complying firms. Although primary responsibility for enforcement was placed with the contracting government agency, the committee itself retained ultimate authority; it could assume jurisdiction over any complaint filed with any contracting agency as well as over any case pending before an agency, and process it to completion. A power lacking in former committees but possessed by the new one was that of initiating inquiries or directing any contracting agency to institute investigations. Labour union activities came within the committee's purview only indirectly: contractors were charged with the responsibility of supplying information on any union activities which might hamper their own compliance.

Under the committee's mandate, new emphasis was placed on government efforts to wipe out discrimination in firms using public funds. The

[1] *Employment*, report of the United States Commission on Civil Rights, op. cit., p. 59.

committee required both the contracting agencies and the contracting firms within their jurisdiction to develop positive programmes for affirmative action. This meant that employers had to make clear in newspaper advertisements or requests to employment agencies, for example, that their jobs were open to all qualified applicants. The employing company had to make an effort to ensure that its whole personnel programme—hiring, job placement, promotion, upgrading, training, disciplinary action, and firing—was free from discrimination.

Unlike the previous committees, the new committee established in 1961 required a report on compliance to be made within 30 days of conclusion of a contract by all firms doing business with the Government.[1] Compliance reports also had to be made at specified regular intervals after the initial report.

In the first nine months the number of complaints received by the Committee on Equal Employment Opportunity was three-fourths of the previous total for the whole period from 1953 to 1960. Corrective action was taken in 29 per cent. of the cases.[2] On the other hand, in 1964 the committee received fewer complaints against government contractors than it did in 1963. Towards the end of 1964 an average of 70 complaints were being received each month. In May 1965 the monthly average had dropped to approximately 44 complaints. In two-and-a-half years of operation 36,668 complaints had been received and 2,065 had been resolved; corrective action had been taken in six out of ten.[3]

Perhaps the most important of all the provisions of Executive Order 10925 were its provisions for sanctions that could be applied by either the contracting government agency or the committee. These ranged from publication of the names of violators (whether management or union) to actual debarment, i.e. complete ineligibility for federal contracts. Further, an ineligible contractor could only be restored after submission of a programme for future compliance, or verification that it had already complied with the non-discrimination provisions of the executive order.

The committee's experience demonstrated that persuasion can be effective when the legal duty has been defined in sufficient detail.

Fair employment practices legislation in the various states

State laws prohibiting discrimination in certain types of employment, particularly in the civil service and public employment, date back to the

[1] The previous committees received reports only when a complaint had been made or a compliance survey conducted.

[2] See the statement of Arthur H. Goldberg, former Secretary of Labour, in *Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor*, U.S. House of Representatives, 87th Congress, 1st Session, p. 1019.

[3] The President's Committee on Equal Employment Opportunity: *Committee Reporter*, No. 111, May 1965, p. 6.

early 1900s. Before 1945, some 25 state constitutions contained specific provisions against discrimination in employment. In 1945, 16 western and northern states were considering legislation against discrimination; only New York and New Jersey succeeded in passing the statutes that year.

Between 1945 and the passage of the federal Civil Rights Act in 1964, more than 25 states and more than 50 major cities had adopted fair employment practices ordinances or an anti-discrimination policy authorising a city attorney to enforce the law in respect of employers, labour unions or employment agencies that did not comply with cease-and-desist orders issued under the statutory regulations. Many of the municipalities adopted the statutes prior to the enactment of legislation by the state legislatures. The statutes in some states (for example Pennsylvania) expressly recognise the municipal ordinances. In others, for example Minnesota, the prevailing interpretation is that the municipal laws are not invalidated by the state law. The Michigan statute specifically provides for the suspension of local ordinances, as does the California state law.

Main features of the laws

Although all the state laws have the purpose of ending discrimination, there is wide diversity as to method and enforcement procedures. All are modelled on the New York statute and cover hiring, discharge, upgrading and pay; all apply to employers, employment agencies and labour unions. The majority cover hiring by government employment agencies and ban discriminatory inquiries or advertising for workers. Jurisdiction over employers, labour organisations and employment services located within the state or doing business with it is taken irrespective of their engagement in inter-state commerce. The laws, including that of New York State, in general provide for enforcement by an administrative agency responsible for receiving complaints, investigation, conciliation and persuasion, the holding of public hearings, and the issuance of cease-and-desist orders enforceable in the courts.[1]

The agencies responsible for administration and enforcement of the laws vary from state to state. In most cases they are special commissions, though in some administration is entrusted to an existing state agency (e.g. a department of labour or education). In New Jersey the task is entrusted to the Division on Civil Rights of the state Department of Education, while in Oregon an elected Commissioner of Labour administers the law. In both Hawaii and Alaska, the Acts are administered by the state Departments of Labour. In many cases the commissions are called upon to administer other laws as well as the anti-discriminatory laws on employment.

[1] In appropriate cases an appeal against such orders also lies to the courts.

Enforcement procedure

The administrative enforcement of fair employment practices or anti-discrimination legislation proceeds on the basis of a complaint by an " aggrieved person " or, in many states, by the administrative organ itself (it may be a commission or a state officer). Some states permit service organisations [1] to file a complaint.[2]

An idea of the methods of enforcement can be obtained from the following figures on the disposal of complaints taken from a report submitted by the state of New York to the House of Representatives Committee on Education and Labour.[3] During the period from 1 July 1945 to 31 December 1962, of a total of 7,725 complaints filed in the state 1,405 (18.8 per cent.) were settled " by conference and conciliation ". Less than 1 per cent. were ordered for public hearing, and a substantial proportion of these, too, were settled before or during the hearings. Nearly three-quarters of all complaints were found to have no " probable cause ", while 2.3 per cent. were withdrawn by the complainants.

In the case of the state of Michigan, from 1955 to 1961, more than 1,400 cases on discrimination were filed. In 50 per cent. of the cases, there was sufficient evidence of discrimination, or difference in treatment, to warrant conciliation efforts. In all but seven of the cases, settlement was made by persuasion and conciliation. The ultimate weapon, that of public hearings, was used only in these seven cases. More than 90 per cent. of the cases involved the question of race.

In the state of California the formal process of hearing and appeal became necessary in only four of the 1,216 cases docketed by the state commission in its first two years of operation. In all, 749 cases were found to involve discrimination; in 264 of these (35.2 per cent.) discrimination was proved and satisfactory adjustments reached, the remaining 485 cases being dismissed for insufficient proof or no evidence of discrimination.

In all states conciliation and persuasion are compulsory after the finding of " probable cause ". This procedure is the very core and essence of the administrative enforcement of fair employment practices legislation. Normally, conciliation and persuasion are effected by staff members where the members of the commission are unsalaried, and the results are presented to the full commission for approval, as required by nearly all the laws. In cases where the commissioner is salaried, he may conduct his own investigation and in general he is given wide liberty in drawing up his conciliation procedures. In some states (for example New York)

[1] " Service organisations " are any non-profit organisations dedicated to civil liberties.

[2] In some states, initiatory power is a statutory right while in others either the Attorney-General or an interested person may initiate the complaint. See *American Jewish Congress* v. *Arabian American Oil Co.*, Sup.Ct. New York County Sp.Term, Part I, No. 17182 (1962).

[3] *Hearings before the General Subcommittee on Labor of the Committee on Education and Labor*, U.S. House of Representatives, 88th Congress, 1st Session, 1963, p. 45.

the commissioner may make his judgment without the consent of the commission.

The commissions are not coercive bodies. Their strength lies in public acceptance of their role as service agencies, and without exception they rely mainly on the procedure of conciliation and persuasion. Heavy use of coercion and public hearings, as well as court injunctions, would quickly destroy the efficacy of the commissions. It is for this reason that the process or procedure of public hearing is used most sparingly:

> Conciliation is a mixture of coercion and educative persuasion. In many cases, the prospect of public hearing followed by court enforcement is a strong inducement for the respondent to accept the commission's terms, but the effectiveness of a threat of publicity varies considerably with the type of respondent involved and the fields in which discrimination is being practised.[1]

In conciliation in employment cases, drastic remedies are seldom demanded, as they are in cases relating to " public accommodations ". Obviously if an employer rehired an employee only under threat, the gains to the employee would be offset by the psychological effects of working for an employer who does not desire his services and may even bear hostility towards him.

Many states have follow-up procedures to determine whether an employer is obeying both the spirit and letter of the law. The state of New York, for example, makes it mandatory for the commission to have access to all records of a firm which has been cited before it for discriminatory practice.

As regards reconsideration of cases, a dissatisfied respondent may simply await the public hearing. A complainant is usually at the mercy of the commission, but may request reconsideration in some instances: for example in Michigan a case must be reconsidered if the complainant is dissatisfied; in Colorado, it may be at the discretion of the commission; in the state of Washington the dissatisfied complainant has the statutory right to appear before the full commission with legal counsel. When reconsideration brings no relief, the complainant may seek redress in the courts, irrespective of the provisions of the Act concerning reconsideration.

All the laws require that the decision for a public hearing must be reached by a quorum of the commission. Normally, respondents shun public hearings because of possible notoriety, which could hurt their business. Some, on the other hand, profit from such notoriety—particularly real estate agents.

Generally the commissions are represented in the public hearing by their attorney; they have the authority to amend, draft or redraft a complaint. Witnesses are called, sworn and cross-examined. Many

[1] Michael A. BAMBERGER and Nathan LEWIN: " The right to equal treatment: administrative enforcement of anti-discrimination legislation ", in *Harvard Law Review*, Vol. 74, No. 3, Jan. 1961, pp. 540-541.

commissions lack the right to subpoena either witnesses or records, which often impairs the hearing and lessens the effectiveness of the commission.

Proving the existence of discrimination is often difficult. Some states (e.g. Ohio and Rhode Island) empower their commission to take into account " all evidence, statistical or otherwise, which may tend to prove the existence of a predetermined pattern of employment or membership ".[1] Normally, commissions place the burden of proof of non-discrimination on the respondent. When discrimination has been found to exist, remedial action is required (compulsory employment or re-employment, upgrading, back pay, restoration of union membership and an order for the respondent to cease and desist discrimination). However, the judgment is not self-enforcing, and since none of the commissions has direct power to impose penalties for violations, they have to seek judicial enforcement.

Results achieved under state legislation

The policy of conciliation and persuasion has been largely successful. The respondent is in a difficult position, inasmuch as the burden of proof of non-discrimination is on him. In addition, staff investigators and those who must recommend public hearings are generally quite thorough and very selective; they seldom recommend cases that are not certain of decision in favour of the complainant. However, as indicated above, the procedure of public hearing is rarely used, conciliation and persuasion being much preferred.

Statistics reflecting the outcome of cases coming before the commissions cannot alone tell the entire story of changing patterns of employment. They do not reveal the extent and nature of job discrimination or how far the influence of the fair employment practices legislation is reaching. Nor do they reveal the pace of compliance. A single complaint, for example, sometimes even one which proves to be without merit, may lead to great improvement in the practice of a particular employer, and possibly of other firms in the same industry or area. Sometimes the hiring or working conditions of thousands of men and women are eventually affected. The progressive attitude towards minority employment that now exists in most of the industrial states is best illustrated by the findings concerning industries that have been investigated by commissions.

In 1952 the New York State Commission Against Discrimination investigated discrimination complaints brought against an aircraft factory in Long Island and noted that the large and diverse population of the surrounding community was not reflected by the firm's employment practices. Of the company's 11,032 workers only 247 were estimated

[1] Ohio Rev. Code Ann. Paras. 4112.05 (E) (p. Supp. 1960); Rhode Island General Laws Ann. para. 28-5-22 (1955).

to be Negroes; none of them, moreover, held a supervisory position and the majority were occupied as assemblers, sweepers and riveters. By 1959, in a follow-up review, it was noted that a substantial change had taken place: between 7 and 8 per cent. of the company's total working force of 14,500 were estimated to be Negroes and they were being hired at all levels and were working in all parts of the company's operations. A similar pattern of progress prevailed in another aviation firm at Deer Park, Long Island, when that company was observed in 1958.

As a result of the commission's investigations, the managements of several chain stores have made significant efforts, with observable results, to encourage more integrated patterns of employment and to increase the opportunities available to minority group employees. In 1957, after a successful complaint had been brought against the local branch of one of the largest chain stores in the United States, the company initiated an appraisal of its personnel policies, which had traditionally placed the Negro in the lower echelons of employment, especially in positions which did not involve direct contact with the public. As a result Negro sales persons are now regularly employed by the company, whereas they were excluded as recently as 1945. A study of 25 major department stores released by the commission in November 1958 indicated the extent of the change in employment. One large department store employing 5,600 persons had more than 200 Negroes working in sales as foremen, supervisors, cashiers, secretaries and clerks, although a report issued by the commission ten years earlier had revealed the presence of only six Negro sales persons in the store.[1]

In Detroit, Michigan, the policy of persuasion has been used with equal effectiveness. Two examples will illustrate the case: (1) It was discovered that in a particular taxicab company in Detroit no Negroes were employed. As a result of one or two cases brought against the company, it agreed to apply a policy of merit employment, and out of a total of 1,200 employees some 300 Negroes were hired. Other taxicab companies followed suit. (2) After conciliation efforts in another case involving an automobile supply company that employed no Negroes, the company subsequently opened all its plants in the state of Michigan to Negroes.

The acceptance and workability of state fair employment practices legislation may perhaps be best illustrated by the fact that no such statute has ever been repealed or crippled by amendment. On the contrary, many states have broadened their laws to include such measures as initiatory and enforcement powers in order to strengthen the administrators' ability to eradicate discrimination in employment.

[1] Statement by Elmer A. Carter, Commissioner and Chairman, New York State Commission Against Discrimination, in *Hearings before the General Subcommittee on Labor of the Committee on Education and Labor*, U.S. House of Representatives, 88th Congress, 1st Session, 1963, pp. 491-494.

There has been relatively little litigation on the constitutionality of state fair employment practices laws.[1] Only in one instance has it been challenged in the courts since 1945 and that was in 1961 in the state of Michigan; but the state supreme court upheld the statute.[2] In the case of *Colorado Anti-Discrimination Commission* v. *Continental Airlines*[3], the Colorado court ruled that the Colorado Fair Employment Practices Commission could not regulate hiring practices in inter-state commerce. The United States Supreme Court reversed the decision.[4]

Most of the litigation on fair employment practices legislation has been on procedure, scope and coverage of legislation; that is to say concerning the powers of the administrative agency, sufficient evidence in judgments, conditions of appeal, right of state laws to pre-empt local ordinances, interpretation of " aggrieved person ", rights of the courts vis-à-vis findings of the commission, delegation of state powers to the commissions, filing of complaints, parties to hearings, and forms of administrative orders. The experience of all the state and local commissions in administering the anti-discriminatory measures for equal access to employment shows that, in the vast majority of cases, discrimination by employers and unions can be either reduced or eliminated by negotiation and persuasion when there is sufficient backing by firm and explicit policy.

Criticism of state fair employment practices legislation

Much of the criticism of fair employment practices legislation has been directed at its reliance on the complaints procedure—which is, however, in accordance with a long tradition in the Anglo-American legal system—and the failure of minority groups to utilise fully the existing legal processes dealing with discrimination, a failure that widens the gap in understanding between the minority community and the administrators and legislators who deal with their problems. In addition, the processing of complaints and the ineffectiveness of the legislation in certain fields have given cause for criticism. Some of the most frequently voiced criticisms are briefly discussed below.

Administration of the legislation

The question whether the law has been effectively administered is intimately related to the procedure by which the law is enforced. The administrators of fair employment practices laws have chosen to rely on

[1] The main cases are *James* v. *Marinship Corporation* (25 Cal. 2c1721, 91c. para. 62, 475 (1944)) and *Railway Mail Association* v. *Corsi*, 326 U.S. 88 (1945).

[2] *City of Highland Park* v. *F.E.P.C.* (1961) 364 Michigan 508, 111 N.W. (2nd) 797.

[3] 149 Colorado 259, 368 P (2nd) 970 (1962).

[4] 372 U.S. 714 (1963).

complaints by members of minority groups before they take action to remedy discrimination.

In the initial enactment of the laws most states deemed it sufficient to record the substantive law, which provided a forum where anyone aggrieved by violation could secure redress upon filing a complaint. It was assumed that this procedure would ensure an adequate level of conformity to the legal norms of the community. In many states failure to complain was taken to indicate at least minimal contentment with the existing situation.

Many states now have the power to act (initiatory power) without the formal filing of a complaint. But for various reasons these powers have never been used in some states and only sparingly in others.

Experience has shown that complainants rarely come forward. If a person suspects that he will be discriminated against he will often avoid the potentially embarrassing situation by staying away from where he is not wanted. In this way he permits the discriminatory practice to continue by avoiding the act of discrimination against himself. Often the complainant will not file a claim even when the case is quite blatant. On the other hand the nature of discriminatory practices in some fields is such that the victims are not aware of it; this is the case in the real estate market and in many labour unions.

Observing the prevalence and persistence of discrimination and yet desiring to protect himself from embarrassment, the member of a minority group may well come to believe that the law will not assist him in improving his situation. This belief leads the individual to the inevitable conclusion that equal treatment cannot be secured through legislation and that the demand for it must be pressed through extra-legal activities.

The thesis that minority groups are reluctant to file complaints and the states' hesitancy to use their initiatory powers are extremely significant for they imply that what is merely a procedural point (reliance on complaints) can have the effect of placing a serious limitation on enforcement of the law.

On the other hand, if commissions initiate investigation of discriminatory employment practices without an individual complainant, they face certain difficulties of proof because the substantive statutory provisions are drafted in terms of individual complaints, which require proof that a specific individual has been harmed. When a person complains of discrimination in hiring, for example, the evidence adduced must prove that he was qualified for the job but it was given to someone else, and that the apparent basis for the distinction was the race, religion or national origin of the complainant. But if an agency takes the initiative there is no individual complainant; the evidence adduced will therefore have to show, in some less direct way, that the respondent has engaged in discrimination.

It is also charged that fair employment practices legislation is not as effective as it should be because of the cautiousness of those who admi-

nister the laws. The question here is whether the agencies charged with enforcement have construed their powers as broadly as reason permits so as to encompass the full range of discriminatory conduct envisaged by the legislature. All too often, it is argued, the policy statements, state constitutions, statutes, and judicial decision that condemn discrimination, although broad, are too narrowly interpreted by the administering bodies, with the result that the legislative will is frustrated.

Processing of complaints

The most frequently voiced criticism of fair employment practices legislation is the length of time it takes for agencies to process complaints.[1] Some state commissions have considered the possibility of asking the legislatures for powers to issue interim injunctions so as to preserve the *status quo* pending final solution of complaints. The New Jersey statute implicitly gives the administering agent (the Attorney-General) such authority on the grounds that the disposition of property subject to a proceeding before the Civil Rights Division could frustrate the statutory purpose for which the law was enacted.[2] The California Attorney-General now has the power to seek permanent as well as temporary injunctive relief through the courts.[3]

Ineffectiveness of the laws

There are several areas where state fair employment practices legislation has had no appreciable effect: apprenticeship training programmes, vocational training and state employment services.

APPRENTICESHIP

In the United States there is a direct relationship between discrimination against minority groups and the limited number of skilled craftsmen from these groups in industry. Of all the barriers to training, those restricting entry into apprenticeship programmes seem to have been the most unyielding to minority groups. The resulting lack of apprenticeship opportunity has been the greatest tragedy facing them, for it has severely limited their access to lucrative jobs and opportunities that have long been accessible to the majority.

[1] The federal 1964 Civil Rights Act sets a definite period of time for processing claims for voluntary compliance before instituting court action (section 706 *(c)*, *(d)*, *(e)*).

[2] See New Jersey Revised Statute 18: 25-26.

[3] The California legislature did not expressly give the Attorney-General any power with respect to the law against discrimination and it did not establish an administrative agency to implement the law. As a result there was not spelled out direct connection between the effectuation of statutory provisions and the actions of the Attorney-General. The power to seek permanent and interim injunctions had to be decided in the courts.

The hearings before the United States House of Representatives' Subcommittee on Labour in 1962 indicated that the volume of apprenticeship in the United States is insufficient to meet the needs of the economy.[1] Nevertheless, the report filed with the subcommittee by the Department of Labour states that apprenticeship openings are given little publicity, and too frequently Negroes and other minorities know nothing of them.[2]

Much of the ineffectiveness of federally stimulated apprenticeship programmes can be attributed to the absence of clear directives from the federal Government.

Participation in apprenticeship is voluntary and effective training cannot take place without the wholehearted co-operation of the employer, the apprentice and the craftsman who supervises and trains him. The selection of apprentices is the responsibility of the sponsor or sponsors of the programme. Some preference is usually given to persons who have already had the experience in industry, who have some knowledge of the trade or who have a close relative in it. This restricts apprenticeship opportunities.

The U.S. Bureau of Apprenticeship and Training is not a regulatory agency and does not subsidise apprenticeship in any way, but merely provides stimulation and technical assistance for programmes. Standards of apprenticeship programmes are established to meet local needs and registration with the Bureau is purely voluntary. Be this as it may, Presidential Executive Order 10925 took a different view and required the inclusion of a specific non-discrimination statement in all apprenticeship standards for firms handling government contracts. As a result of this action, many crafts included a so-called "equal opportunity clause" in their national standards.

Only two of the states with fair employment practices laws have tackled the question of discrimination in the apprenticeship programmes within their jurisdiction by legislative means. This neglect on the part of the states has been remedied by the adoption by the national legislature of the Civil Rights Act of 1964, which makes it illegal to deny access to " apprenticeship or other training " on " account of race, colour, religion, sex or national origin ".[3]

The stand of the federal Government on merit employment and equal opportunity for all is summed up in a statement by President Johnson in his 1965 Manpower Report to the Congress:

> The Civil Rights Act, when fully implemented, should enable Negro workers to compete more effectively for the jobs they are qualified to hold. But no solution, either economic growth or legislative mandate, will be found until better preparation

[1] *Hearings before the Special Subcommittee on Labor of the Committee on Education and Labor*, U.S. House of Representatives, 87th Congress, 2nd Session, Part 2, p. 1031. See, in particular, the report filed by the Assistant Secretary of Labour, Jerry R. Holleman.

[2] Ibid., p. 1035.

[3] Section 703 (3) *(d)*.

for work is ensured for all Negro workers. The education and the training from which Negroes have been barred for so long are in fact the very channels that have enabled other minorities to enter the main streams of American life.[1]

VOCATIONAL TRAINING

The vocational training programme administered by the Department of Health, Education, and Welfare—unlike the apprenticeship programme, which is voluntary and enjoys no government subsidies—is wholly operated and subsidised by the federal Government.

Although a regulation was issued in 1948 stating that there should be no discrimination, the programme as construed and administered by the Department does not preclude the granting of funds to segregated schools. (This point is not dealt with by either state or federal legislation.)

EMPLOYMENT SERVICES

Another area which has resisted the influence of fair employment practices legislation is that of the state employment services, which are a most important avenue of access to industrial jobs. These services were established by the Wagner-Peyser Act of 1933, the principal provisions of which are as follows: *(a)* the federal Government is required to promote and develop a national system of employment offices; *(b)* the Act sets standards and provides for reviews of state plans of operation and statistical research; *(c)* the Act makes provision for the institution and maintenance of an inter-state recruitment programme; *(d)* the Act provides for federal funds, but the services themselves are operated exclusively by the respective state employment agencies. Thus, the states do the actual placement work and provide services to employers and job seekers through approximately 1,900 local offices throughout the country. The agencies, however, are 100 per cent. financed by the federal Government. About three-fourths of all hiring in the nation's job market takes place without the use of any employment agency, public or private.

The official policy of the United States Employment Service, as laid down in its policy statements and regulations, is one of non-discrimination and encouragement of employment solely on merit.[2] Further, employees of state employment agencies are prohibited from accepting and filling job offers from the federal Government that are discriminatory.

Notwithstanding this fact, there is no state in which a policy of discrimination in employment is not widespread.[3] This policy is laid down

[1] *Manpower report of the President, 1965*, p. 23.

[2] 20 C.F.R. Section 604.8 (1961).

[3] " Even if a federal regulation were to prohibit state employment offices from accepting and filling *all* discriminatory job orders, other extant U.S.E.S. regulations would still invite discrimination in recruitment services." (*Employment*, Report of the United States Commission on Civil Rights, op. cit., p. 117.)

by the employers and acquiesced in, willingly, almost without exception, by the employment agencies, which therefore serve as the protective screen for discriminatory employers. In places like New York employment agencies have worked out elaborate codes to screen job applicants in violation of state fair employment practices laws. Of all the states that have enacted such laws none has *specifically* prohibited the employment agencies from engaging in discriminatory practices.[1] However, since discrimination itself is illegal, it is implied that all discriminatory practices by state employment agencies are also illegal. Nevertheless, even in such communities as New York, Illinois, Michigan and California, efforts to break through the discriminatory practices of state employment agencies have not been altogether successful.

In Michigan the Fair Employment Practice Commission (F.E.P.C.) has asked the state employment offices to refer to it discriminatory job placement orders which violate state law. They have refused to do so. In Baltimore there is an Equal Employment Opportunities Commission (E.E.O.C.), whose job is substantially similar to Michigan's F.E.P.C. As in the case of Michigan, E.E.O.C. has asked the employment service to inform it of discriminatory job orders and the employment service has refused.[2]

Under the new Civil Rights Act of 1964, such practices have been declared illegal. Section 703 *(f)* of the Act declares that—

... it shall be an unlawful employment practice for any employment agency to fail or refuse to refer to employment, or otherwise to discriminate against, any individual because of his race, colour, religion, sex, or national origin.

However, it would seem that the provision is too general and does not fully cover state employment offices. Further, there is no machinery established whereby discriminatory practices by employment services are reported to the proper enforcement agency. It is the responsibility of the person discriminated against to file the complaint. Such a method is unrealistic, for the individual has no idea whether a discriminatory job order has in fact been filed.

Congress and fair employment practices legislation

Congressional enactment of such legislation is the direct result of manifestation against economic and social injustice; mass demonstrations and protests and an increasingly aroused public conscience forced the State to intervene to correct the worst of these injustices. The history of efforts to secure fair employment practices legislation has established the fact that it is " both a result of social forces and an instrument of social control ".[3] Congress, however, was slow to perceive its role despite

[1] Paul H. NORGREN and Samuel E. HILL: *Toward fair employment* (New York and London, Columbia University Press, 1964), pp. 35-39 and 130-136.

[2] *Employment*, op. cit., p. 117.

[3] W. FRIEDMANN: *Legal theory* (London, Stevens & Sons, 1944), p. 186.

the fact that as early as the first decade of the twentieth century two eminent American jurists, John Chipman Gray and Oliver Wendell Holmes, saw clearly that economics and business interests are both makers and products of the law. Legislation is a means of effecting social change, though society changes more rapidly than the law evolves.

> As modern social conditions demand more and more active control, the State extends its purpose. Consequently custom recedes before deliberately made law, mainly statute and decree. At the same time, law emanating from central authority as often moulds social habits as it is moulded itself.[1]

The first sign that Congress was slowly moving towards reflecting accurately the national mood was in its enunciation in the Unemployment Relief Act of 1933 of the principle that in the employment of citizens there should be no discrimination according to race, colour or creed. Subsequent provisions incorporating this principle were included in Relief Acts from 1937 to 1943. The enabling legislation for the Civilian Conservation Corps of 1937, as well as the various Acts providing appropriations for the National Youth Administration, contained similar provisions. However, the fact that minority rights are incorporated in legislative Acts and written constitutions does not mean that they are inviolable—a fact that the Congress was slow to heed.

The first *specific* legislation proposed in the Congress for the express purpose of eradicating discrimination in employment was introduced in 1942. Since that time and until the enactment of the Civil Rights Act in 1964, more than 100 Bills and resolutions were introduced; only one of these (a Bill) passed the House of Representatives, and none the Senate.

It had been apparent, and was explicitly stated, in 1946 that fair employment practices legislation was desperately needed if minority groups were to keep the gains they had made during the Second World War[2]; and in 1947 the President's Committee on Civil Rights recommended " the enactment of a federal Fair Employment Practice Act prohibiting all forms of discrimination in private employment, based on race, colour, creed, or national origin ".[3] However, it was not until 1964 that the concept of employment based on merit alone without regard to race, colour, sex, religion or national origin finally found its way into the mainstream of the American legislative process.

The Civil Rights Act of 1964

The enactment of the Civil Rights Act of 1964 [4], in general terms, was based on the realisation that continued discrimination in employment:

[1] W. FRIEDMANN, op. cit., p. 183.

[2] " The future status of minority group workers depends, the Committee believes, on the course of action to be taken by the Congress relative to the passage of federal fair employment legislation." (*Final report of the Fair Employment Practice Committee*, op. cit., p. 5.)

[3] *To secure these rights*, op. cit., p. 167.

[4] Title VII.

(a) is a violation of basic individual rights;

(b) interferes with the effective utilisation of a nation's manpower resources.

It was a recognition that discrimination in employment is one of the most pressing problems affecting the American social scene.[1] The Act provides, in a real sense, " both protection of existing rights and means for creating new rights or altering old ones when required by new circumstances ".[2] The Congress, in its enactment, considered law as a desirable tool for eradicating discrimination, and that it could be effective once the community had reached the realisation of the depth of its discrimination policies.

In short, what the Act did was to note changes in the United States social institutions. " As a society grows and changes, its laws must grow and change." [3] It had become clear from a number of cases handed down by the Supreme Court on the illegality of unequal treatment that the national legislature could not remain indifferent indefinitely.[4] The organic nature of American law permitted such a change.

The legal justification of the Congress to consider freedom from racial discrimination in employment lay in the United States Constitution's provisions of " due process ", and the commerce clause.

DUE PROCESS [5]

Concerning " due process ", the United States Supreme Court had stated in *Railway Mail Association* v. *Corsi* [6] that fair employment legislation did not deprive the employer of his property without due process

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[1] " Of those forms of discrimination which are the target of this Act, discrimination in employment is the most widespread and undoubtedly the most harmful to its victims and to the nation as a whole. Denial to Negroes and all members of other minority groups of the right to be gainfully employed shuts off to them nearly all propsects of economic advancement." (Richard K. BERG: " Equal employment opportunity under the Civil Rights Act of 1964 ", in *Brooklyn Law Review*, Dec. 1964, p. 62.)

[2] Whitney N. SEYMOUR and Norman S. MARSH: " The evolving concept of the rule of law—an American view ", in *Journal of the International Commission of Jurists*, IV, Summer 1963, p. 273.

[3] Ibid.

[4] *United States* v. *Darby*, 312 U.S. 100 (1941); *National Labor Relations Board* v. *Jones and Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Steele* v. *Louisville and Nashville R.Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210 (1944); *Graham* v. *Brotherhood*, 338 U.S. 239 (1949); *Brotherhood of Railway Trainmen* v. *Howard*, 343 U.S. 763 (1952); *Syres* v. *Oil Workers International Union*, 350 U.S. 892 (1955), reversing *per curiam*, 223 F. 2d 739 (5 Cir.).

[5] " Due process " is a doctrine of justice explicitly set forth in the Fourteenth Amendment to the United States Constitution, which provides that no state shall " deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws ".

[6] 326 U.S. 88 (1945).

and did not deprive him of equal protection of the law. In this case, the Supreme Court entertained an argument by a labour union that admitted only Caucasians and native American Indians to its membership to the effect that the New York State legislation prohibiting discrimination according to race interfered with its right to select its members and abridged its property rights and freedom of contract. The Court was unanimous in its ruling that the New York statute was constitutional. It stated that it would be a distortion of policy manifested in the Fourteenth Amendment if the Court determined " that such legislation violated the Fourteenth Amendment ". It further stated that the amendment " was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or colour ".[1] Justice Frankfurter in a concurring opinion went further:

> The Railway Mail Association is a union of railway clerks. To operate as a union in New York it must obey the New York Civil Rights Law. That law prohibits such an organisation from denying membership in the union by reason of race, colour or creed, with all the economic consequences that such denial entails. Apart from other objections, which are too unsubstantial to require consideration, it is urged that the due process clause of the Fourteenth Amendment precludes the state of New York from prohibiting racial and religious discrimination against those seeking employment. Elaborately to argue against this contention is to dignify a claim devoid of constitutional substance. Of course a state may leave abstention from such discrimination to the conscience of individuals. On the other hand, a state may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such state power would stultify that amendment. Certainly the insistence by individuals on their private prejudices as to race, colour or creed, in relations like those now before us, ought not to have a higher constitutional sanction than the determination of a state to extend the area of non-discrimination beyond that which the Constitution itself exacts.[2]

What the Court ruled was that the " due process " clause in the Constitution was a doctrine of " basic justice and fairness "[3] irrespective of race, colour, creed or religion.

THE COMMERCE CLAUSE

Title VII of the 1964 Civil Rights Act is even more reliant upon the commerce clause—or the right of the Congress to regulate inter-state commerce. The legislative history of this clause shows that the Congress has enacted many laws which affect, or interfere with, the freedom of an employer to contract with an employee.

In 1938 Congress enacted the Fair Labour Standards Act, which required employers to pay minimum wages for a maximum number of

[1] 326 U.S. 88 (1945), pp. 93-94.

[2] Ibid., pp. 97-98.

[3] SEYMOUR AND MARSH, loc. cit., p. 273.

hours, with increased compensation for overtime, and to keep such records of wages and hours as were prescribed by administrative regulation or order. Violators of this law were to be punished by fine and imprisonment. A case [1] was brought before the Supreme Court that same year appealing from a judgment of a lower court which voided an employer's indictment under the Act. The Supreme Court reversed the judgment of the lower court, stating that the fixing of a minimum wage is within the competence and legislative power of the Congress; it was wholly within the power of the Congress to fix maximum hours of employment and a statute was not objectionable because the hours and wages it prescribed were applicable equally to men and women. Congress, declared the Court, may require an employer, as a means of enforcement of a valid statute, to keep records showing whether he has complied with it. This Act *was within the commerce power of the Congress*, the Court decreed.

Another celebrated case contesting the power of Congress to act under the commerce clause was *National Labour Relations Board* v. *Jones and Laughlin Steel Corporation.*[2] The National Labour Relations Act of 1935, *inter alia*, made it an unfair labour practice for an employer to discriminate against an employee in hiring or terms of employment because of his membership in a union. The Court held that prohibition of this kind of discrimination in employment was within the power of Congress under the commerce clause.

The Supreme Court has consistently upheld national legislation forbidding discriminatory practices; the constitutionality of the Railway Labour Act was upheld in *Steele* v. *Louisville and Nashville Railway Co.*[3], *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen* [4], *Graham* v. *Brotherhood* [5], and *Brotherhood of Railway Trainmen* v. *Howard.*[6]

The Court was not hesitant to declare that provisions of the National Labour Relations Act regarding the exercise of a union's bargaining power without discrimination according to race are mandatory.[7]

These cases leave no doubt that the Congress had the power to require non-discriminatory practices in employment through the commerce clause.

When the President's Committee on Civil Rights made its report in 1947, the authority of the Congress vis-à-vis the commerce clause was not neglected.

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[1] *United States* v. *Darby*, 312 U.S. 100 (1944).

[2] 301 U.S. 1 (1937).

[3] 323 U.S. 192 (1944), discussed below.

[4] 323 U.S. 210 (1944).

[5] 338 U.S. 232 (1949).

[6] 343 U.S. 763 (1951). This case is quite similar to *Steele* v. *Louisville and Nashville Railway Co.*

[7] 350 U.S. 892 (1955) reversing *per curiam*, 223 F. 2d 739 (5 Cir.).

Congress has exercised its broad power to regulate inter-state commerce, derived from article I, section 8 of the Constitution, to institute reforms in many fields. Outstanding examples are the Fair Labour Standards Act, which fixes maximum hours and minimum wages in work relating to inter-state commerce, the National Labour Relations Act, which regulates labour-management relations affecting inter-state commerce, and the Federal Safety Appliance Act, which specifies safety standards for inter-state transportation. *The commerce power could be the basis for fair employment legislation relating to activities affecting inter-state commerce, and for laws prohibiting discriminatory practices by inter-state carriers.*[1]

An analysis of Title VII of the Civil Rights Act

Title VII of the Civil Rights Act of 1964 concerns equal employment opportunity without respect to race, colour, religion, sex or national origin in matters of hiring, firing, wages, promotions, working conditions, etc. Its coverage is broad and is applicable to all the states, territories and possessions of the United States where business and labour unions are engaged in inter-state commerce.[2]

The only exemptions in the Act are those given: (1) to employers with respect to the employment of aliens in their offices abroad; (2) to religious institutions with respect to employment of persons of a particular religion for work connected with their religious activities; and (3) to educational institutions, which are exempt from all the provisions of the Act with respect to employment connected with their educational activities.

Among the important prohibitions of the Act are the following:

(1) It is an unlawful employment practice for an employment agency to classify an individual, or to fail or refuse to refer him for employment, or to refer him for employment, or otherwise to discriminate against him on the basis of race, colour, religion, sex, or national origin.

(2) It is an unlawful employment practice for a labour organisation to exclude a person from its membership, or to discriminate among its members in any way, or to attempt to persuade an employer to discriminate, on the basis of race, colour, religion, sex or national origin.

(3) Discrimination on the ground of race, colour, religion, sex or national origin in admission to or employment in any apprenticeship or other training programme, including on-the-job training, is prohibited.

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[1] *To secure these rights*, op. cit., p. 108. Emphasis added.

[2] The phrase used in the Act is " industry affecting commerce ", which is defined as any activity, business or industry in commerce or in which a labour dispute would hinder or obstruct commerce or the free flow of commerce. " Commerce " means trade, traffic, transportation or communication between a state and any place outside thereof. Cf. National Labour Relations Act, 29 USC 152 (7); Labour-Management Reporting and Disclosure Act of 1959, 29 USC 402 (c); *National Labor Relations Board* v. *Reliance Fuel Corp.* 371 U.S. 224, 226 (1963); and *Polish National Alliance* v. *NLRB* 322 U.S. 643, 647 (1944).

(4) Recriminations for opposing unfair employment practices or for instigating or testifying in any proceeding brought under the title are prohibited.[1]

On the other hand the Act provides that it is *not* an unlawful employment practice—

(a) to employ an individual on the basis of his religion, sex or national origin when one of those is a bona fide occupational qualification reasonably necessary to the normal operation of a particular establishment;

(b) for an educational institution owned, supported, controlled or managed by a religious organisation, or one whose curriculum is directed toward the propagation of a particular religion, to hire and employ persons of that religion in any of its activities;

(c) to apply different conditions of employment, including compensation, based on a bona fide seniority or merit system, a piece-work system, or job location system, so long as the differences do not result from an intention to discriminate because of race, colour, religion, sex or national origin;

(d) to act upon the results of a professionally developed ability test so long as the test is not designed to discriminate because of race, colour, religion, sex or national origin.

Moreover, no action taken against a member of the Communist Party of the United States or any other organisation required by a final order of the Subversive Activities Control Board to register as a Communist-action or Communist-front organisation shall be an unfair employment practice.

The Act permits preferential treatment to be given to Indians living on or near a reservation in businesses conducted on or near a reservation.

Finally it is provided that Title VII is not to be interpreted to require anyone to give preferential treatment to any individual or group because of race, colour, religion, sex or national origin, or to correct a racial, or religious, etc., imbalance between the number of persons of a particular race, etc., employed in a particular establishment and the total number of persons of that race, etc., living in the particular community, state or area.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

In the hearings of the House of Representatives Subcommittee on Labour much emphasis was given to the organisation, functions and effectiveness of the fair employment practices commissions of the various states having fair employment practices legislation. Not surprisingly

[1] See *NLRB* v. *Fansteel Corp.*, 306 U.S. 240 (1939); and *NLRB* v. *Electrical Workers*, 346 U.S. 463 (1933).

the Congress in enacting the 1964 Civil Rights Act patterned the federal Equal Employment Opportunity Commission along the lines of the state commissions.

The federal Act establishes an Equal Employment Opportunity Commission composed of five members drawn from the two major political parties of the United States and appointed by the President, with the advice and consent of the Senate, for staggered five-year terms. The President designates the chairman and vice-chairman. The commission is given power to co-operate with public or private state and local agencies and, with their permission, to use their services; to pay witness fees; to furnish technical assistance to help those covered by the title to comply with it; at the request of an employer or labour organisation, to attempt to effectuate the provisions of the title by conciliation or other remedial action when employees or union members have refused to co-operate; to make and publish appropriate technical studies; and to refer matters to the Attorney-General with recommendations to bring suit or intervene (sections 706 and 707). The commission's attorneys (like those of the state commissions) may represent it in court cases.

As in the case of the state fair employment practices legislation, the law is enforced through administrative procedures; in other words, the federal Government will rely heavily upon the complaint procedure. Under the federal Act an aggrieved individual, or a member of the commission who has reason to believe there has been an unfair employment practice, may file a written complaint with the commission. If, upon investigation, the latter finds reason to believe the charge to be true, it must attempt to eliminate it by conference, conciliation and persuasion. No part of such efforts is to be made public without the consent of the parties, and any commission employee who violates this provision is subject to a fine of not more than $1,000 and imprisonment for not more than a year.

When a violation of the law occurs in a state which prohibits the practice, an aggrieved person must wait 60 days (120 days during the first year after enactment of a state law) after notifying the appropriate state or local agency, unless state proceedings are terminated earlier, before filing a charge with the Equal Employment Opportunity Commission. Sending a written statement of the facts by registered mail is sufficient notice, regardless of any other requirement of state law.

When a commissioner files a charge with respect to a violation occurring in a state which prohibits the practice, the commission, before taking further action, must notify the appropriate state or local agency and give it reasonable time (but not less than 120 days during the first year after enactment of the state law or 60 days thereafter unless the state requests less) to act under their law.

With respect to violations occurring in states which have no laws prohibiting the practices concerned, aggrieved persons must file charges

with the commission no later than 90 days after the date of the violation. In states with laws prohibiting these practices, aggrieved persons must file charges with the commission not later than 210 days after the violation occurred or 30 days after receiving notice that state proceedings have been terminated, whichever is earlier. The commission must notify the appropriate state agency of the charge.

If the commission has failed to eliminate an unfair employment practice within 30 days after a charge is filed or within 30 days after expiration of any period of reference to a state agency (but the period may be extended to 60 days if the commission determines that further efforts to secure voluntary compliance are warranted), it must so notify the aggrieved party who may, within 30 days thereafter, file a civil action for appropriate relief. Upon application, the court may waive payment of costs, fees and security, and may appoint an attorney for the complainant. In its discretion, it may permit the Attorney-General to intervene upon timely application if he certifies that the case is of general public importance. Upon application, the court, in its discretion, may also stay further proceedings for not more than 60 days pending termination of state proceedings or efforts on the part of the commission to secure voluntary compliance.

If the court finds that a defendant has " intentionally engaged in an unlawful employment practice ", it may not only enjoin such practice but may issue appropriate affirmative orders including reinstatement or hiring, with or without back pay; but no such order is to be issued if the adverse action against the complainant was taken with any intent other than discrimination on account of race, colour, religion, sex or national origin, or recrimination for having participated in efforts to enforce Title VII of the Act.

The commission may commence proceedings to compel compliance with any court order that an employer, labour organisation or employment agency has refused to obey.

INVESTIGATION AND RECORDS

The Attorney-General may bring a civil action if he has reasonable cause to believe that any person or group is engaged in a pattern or practice of resistance to the rights outlined in Title VII if the intent is to deny full exercise of those rights. He may also request that the action be heard by a three-judge court from which an appeal will lie directly to the Supreme Court. If the Attorney-General makes no such request, the Chief Judge of the District is to assign the case immediately to one of the District Judges who is to conduct the hearing and determination of the case.

The Congress, taking cognisance of the structure and intent of the existing legislation against discrimination in employment in the several

states, made provision that nothing in the federal Act is to interfere with the operation of any state law. The Act does, however, permit interference should there be a state law which permits an unlawful employment practice (section 708).

If there is evidence of discrimination in connection with the filing of charges, the commission or its agents have the right to examine and copy any evidence relating thereto (section 709). Several of the states with fair employment practices legislation have enjoined their local fair employment practices agencies from engaging in discriminatory practices in matters of employment.

The Act requires employers, employment agencies and labour organisations to keep relevant records and make such reports from them as the commission may prescribe by appropriate regulation or order, after a public hearing. Those in control of covered apprenticeship or other training programmes are required to keep appropriate records, including a list of applicants and the order in which they applied, and to furnish a detailed description of the methods of selecting trainees or apprentices. Such records need not be kept by those who are covered by a state or local fair employment law unless the commission finds that certain records are necessary because of differences in coverage or methods of enforcement between the state or local and federal laws.

The commission has the authority to examine witnesses under oath and to require the production of documentary evidence relevant to investigation of any charge.

When a defendant or witness refuses to testify or comply with a demand for production of evidence, the commission may seek and the courts may issue appropriate orders requiring compliance, but the attendance of a witness may not be required outside the state in which he is found, resides or transacts business, and the production of documentary evidence may not be required outside the state where such evidence is kept.

Within 21 days of a demand by the commission to produce, or permit copying of, documentary evidence, a person may petition a court to modify or set aside the demand.

The Act further requires employers, employment agencies and labour organisations to post on employee and applicant bulletin boards notices approved or prepared by the commission containing excerpts from or summaries of pertinent provisions of the title. Wilful violations are punishable by a fine of not more than $100 for each separate offence (section 711).

It is to be pointed out that the Bill originally presented by the administration had no provisions regarding private employment or labour organisations. It simply gave the President's Committee on Equal Employment Opportunity, established in 1961 under Executive Order 10925 with responsibility for carrying out the Government's pro-

gramme of non-discrimination, statutory authority to deal with discrimination in federal employment and under federal and federally assisted contracts and subcontracts. It was the House Committee on the Judiciary which added provisions prohibiting discrimination by private employers, employment agencies and labour organisations, establishing the Equal Employment Opportunity Commission and permitting the commission itself to initiate court action to enforce the prohibitions of the title.

The Senate's amendments, on the other hand, had the main effect of emphasising local enforcement and voluntary compliance. Under the House Bill, an aggrieved individual could file a charge with the commission immediately. It was the Senate that added the provision requiring a person to wait 60 days after notifying the appropriate state or local agency, if the violation occurred in a state with a fair employment law, before filing a charge with the commission, and thereafter at least 30 days for the commission to try to obtain voluntary compliance before bringing a court action. Even after an individual has filed an action, it will be remembered, the court may stay proceedings for as long as 60 days pending termination of state or local proceedings or efforts of the commission to obtain voluntary compliance.

Of increasing interest as the administration of the law develops will be the relations between the commission established under it and the President's Committee on Equal Employment Opportunity, which will continue to carry out the Government's programme of non-discrimination in government employment and in employment by government contractors. The powers of the President's committee to deal with discrimination (the power to cancel contracts) and its investigatory powers are far broader than those given to the commission. However, in some respects the commission possesses power superior to the President's committee. The latter has no direct authority over labour unions, for example, while the commission's jurisdiction extends to a very wide class of employers who in the main are untouched by any executive order. Not to be forgotten is that the President's committee has no statutory basis and has to rely on voluntary compliance.

The Supreme Court and equal job opportunity

A major role of the Supreme Court in upholding anti-discriminatory legislation has already been cited above. Here a brief review will be made of the Court's role in ruling against discrimination designed to deprive citizens of economic livelihood, which has been consistent since the last century.[1]

[1] This notwithstanding the fact that the Supreme Court declared null and void the Civil Rights Act of 1875 (18 Stat. 335); 109 U.S. 3 (1883).

As early as 1886, in *Yick Wo* v. *Hopkins* [1], the Court ruled that city ordinances (City of San Francisco) designed to prevent employment for arbitrary reasons were null and void.

> For the cases present the ordinances in actual operation, and the facts shown, establish an administration directed so exclusively against a particular class of persons [Chinese] as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws [secured] by the broad and benign provisions of the Fourteenth Amendment of the Constitution of the U.S.

This policy was re-enunciated in *New Negro Alliance* v. *Grocery Co.*[2] when the Court upheld paragraph 13 of the Norris-La Guardia Act providing for fair and equitable conditions of employment irrespective of race, colour, or persuasion. Perhaps the Court reached its zenith in a number of rulings handed down between 1944 and 1951 [3] in which, whether against unions or management, it upheld equality of treatment.

In a concurring opinion in *Steele* v. *L. and N.R. Company*, Mr. Justice Murphy stated:

> The Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or colour. . . . Racism is far too virulent today to permit the slightest refusal, in the light of a Constitution that abhors it, to expose and condemn it whenever it appears in the course of statutory interpretation.

The *Railway Mail Association* v. *Corsi*, as cited above, established the primacy of the Fourteenth Amendment in ensuring equality in employment as forcefully as the *Steele* case.

A case of a different nature, but no less important, concerned the right of the state of California, under the federal Constitution and laws pursuant to it, to use racial ineligibility for citizenship as a basis for barring a person from earning his livelihood.[4] The Court was sweeping in its judgment:

> The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws.

Justices Murphy and Rutledge, concurring, stated: " Even the most cursory examination of the background of the statute demonstrates that it was designed solely to discrimination against such persons in a manner inconsistent with the concept of equal protection of the laws. Legislation of that type is not entitled to wear the cloak of constitutionality."

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[1] 118 U.S. 356 (1886).

[2] 303 U.S. 552 (1938).

[3] *Steele* v. *L. and N.R. Company*, 323 U.S. 192 (1944), discussed above; *Railway Mail Association* v. *Corsi*, 326 U.S. 88 (1945), discussed above; *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948); *Hughes* v. *Superior Court of California*, 339 U.S. 460 (1950); and *Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1951).

[4] *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948).

Of late in the United States, much has been said about " reverse discrimination ". Such a concept is not new to the Court. In 1950 [1] the Supreme Court affirmed that picketing was illegal when used to coerce employment on the basis of race. The Court declared: " We cannot construe the Due Process Clause as precluding California from securing respect for its policy against involuntary employment on racial lines by prohibiting systematic picketing that would subvert such policy." What was at stake was the petitioners' demand for proportional employment, i.e. a demand that a place of business should hire its employees in proportion to the racial origin of its customers. It was the judgment of the Court that an employer need adopt such a policy at his discretion only.

The National Labour Relations Board and non-discrimination

In conclusion a brief word must be said concerning the authority of the National Labour Relations Board and non-discrimination. Under the statutory powers given to the board, the specific authority to prevent racial discrimination was not made clear and unions are not specifically denied the right to discriminate in membership on racial grounds. The board does, however, have the power to revoke certification of a union for violating its duty of fair representation and to enforce the union security and unfair labour practices provisions of the National Labour Relations Act. This authority was only used once, in 1964.[2]

The result of the board's cautiousness is that it has been more reluctant than the Supreme Court to take specific action against discrimination on racial grounds. Nevertheless, it would be unfair to say that over the years it did not move steadily towards the inevitable action it eventually took in the *Hughes Tool* case. As far back as 1945 there were hints at its power to strike out against racial discrimination in union practices.[3]

Conclusion

Although the fair employment practice legislation of the several states, the Civil Rights Act of 1964, decisions of the Supreme Court and the rulings of the National Labour Relations Board form an impressive array of measures to combat discrimination in employment in the United States, such discrimination is nevertheless widespread and will continue

[1] *Hughes* v. *Superior Court of California*, 339 U.S. 460.

[2] In the *Hughes Tool* case (104 N.L.R.B., No. 33).

[3] Cf. *Larus Brothers* (1945), 62 N.L.R.B., 1075; *Pioneer Bus Company, Inc.* (1962), 140 N.L.R.B., 54; *Independent Metal Workers Union, Local 1* (1964), 147 N.L.R.B., No. 166; *Boyce Machinery Corporation* (1963), 141 N.L.R.B., 756; *Sewell Manufacturing Co.* (1962), 140 N.L.R.B., 220; *Allen-Morgan Sign* (1962), 138 N.L.R.B., 73; *Associated Grocers of Port Arthur, Inc.* (1961), 134 N.L.R.B., 468.

to be for a long time to come. What is important is the emphatic resolve at all levels of society to eradicate economic discrimination as a source of unequal treatment leading to other forms of discrimination. An indication of the legislative resolve is that in the last four years the United States Congress has enacted more legislation aimed directly at inequities in employment than it did from 1919 to 1961.

The adoption of a public policy and the enactment of legislation to eliminate discrimination in employment is a relatively recent development—scarcely 25 years old—and the process of educating the public to accept the proposition that employment and promotion should be based exclusively on merit has been slow and often painful. The legislation has sometimes been weak and the administrators have not all been zealous in administering the policy. But irrespective of these shortcomings, fair employment practices legislation has been successful in breaking through the legal and social barriers with which minority groups had to cope, and has now been accepted as an important and necessary manifestation of the prevailing moral sentiment of the community.

The experience of the several states with fair employment practices legislation and the recent adoption by the Congress of the Civil Rights Act (Title VII) illustrates the heavy reliance placed in the United States on the tools of conciliation and persuasion backed up by the ultimate sanction of legal enforcement. Throughout the history of this legislation the means to this end was the maximum utilisation of administrative enforcement rather than the application of legal sanctions. The experiment has shown that the most substantial progress in combating organised discrimination was made in states with enforceable laws, and that discrimination is considerably less in those states now than it was before the passage of the laws. The inclusion in the federal legislation of the type of administrative machinery long existent in the states demonstrates conclusively that until some other method has been devised, administrative enforcement of the law by fair employment practices commissions is the most effective manner of ensuring the oppressed minorities equal treatment when discrimination in employment has occurred.

The method most consistently used by the administrators has been that of voluntary compliance with the non-discrimination policy. Although under many of the state laws recourse has been had to measures of compulsion in order to stimulate voluntary compliance, there is no evidence that a purely compulsory non-discrimination programme is more successful than a voluntary programme backed up by the ultimate threat of sanctions. On the contrary, the results of the use of education, persuasion and conciliation are impressive. Substantial gains in employment on an egalitarian basis have been made with firms holding government contracts, amounting to billions of dollars annually and affecting millions of employees either directly or indirectly; and although the various

government committees on contracts have at times had to employ the threat of sanctions and of contract cancellation with recalcitrant contractors, the emphasis is on voluntary compliance. This has also had the effect of influencing areas that are beyond the reach of the law.

Of importance in employers' attitudes towards equal job opportunity has been the pressure from certain segments of the public, especially the vigilant civil rights organisations whose militancy relieved the employers from certain social pressures that perpetuated job discrimination. A particularly effective tool used by these organisations has been the economic boycott. Everything indicates that this instrument of pressure will continue to be applied to employers until job discrimination and inequities in employment have been completely eliminated from the public sphere. However, in spite of the vast array of legislation on the books, a determined employer may still find ways to refuse employment on merit. The legislation as now enacted is far too loose to prohibit every degree of discrimination and it is doubtful if any legislation can be devised that is absolutely foolproof. Nevertheless, the enactment of legislation, especially of the Civil Rights Act of 1964, is necessary if for no other reason than to create an affirmative environment for minorities. This should not mean either preferential treatment or the use of quota systems for the disadvantaged groups; such is prohibited by legislation in practically all the states. Nevertheless, the administration of the laws by the various fair employment practices commissions and by the President's Committee on Equal Employment Opportunity certainly implies adoption of quota systems and preferential treatment. Decisions by the National Labour Relations Board also lend themselves to such an interpretation. The 1964 Act is not clear as to the legality of these practices, but consistency would surely dictate that discrimination against the majority of the population would be quite illegal. Although preferential treatment for the minorities should not be practised to the detriment of others, this is not to say that special measures to ensure equal employment opportunity are not desirable. Such measures do not in any way imply discrimination against any segment of the population, whereas preferential treatment would mean employment of minorities irrespective of qualifications. They would include the improvement of the quality of education, an active manpower policy providing better job training, improved counselling and information as to the availability of jobs, co-ordination of anti-discrimination and manpower policies to assist minority groups to equip themselves better to compete in the open employment market.

The enactment of fair employment practices legislation has also had a salutary effect on the practices of labour unions in the United States. Throughout the history of the labour movement, discrimination has been widespread, especially in the craft unions. Legislation has assisted the more liberal union leaders to change formal discriminatory practices and open up job opportunities by removing the restrictions on union membership

and apprenticeship training. Many unions have now given high priority to minority group demands as a result of these pressures. Effective administration of state and federal fair employment practices legislation will further erode the nepotic practices still existing in many trade unions.

Although the key is enforcement, much of the effectiveness of fair employment practices commissions has been due to their public image: that of service agencies dedicated to conciliation and persuasion and not that of police agencies. It is important for students of fair employment practices legislation to understand that, where there is a pattern of non-enforcement of the laws, this is intimately related to two intertwined concepts of American law. These concepts involve the difference between public interest and private rights, and the distinction between enforcement and education. A cardinal feature of the legislation is to prohibit employers and unions from discriminating in their commercial affairs as long as these ventures are in the public domain, and yet to preserve their constitutional prerogatives.