Chicago-Kent Law Review

Volume 37 | Issue 2 Article 11

October 1960

# Book Reviews

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# BOOK REVIEWS

INTRODUCTION TO BRITISH CONSTITUTIONAL LAW. D. C. M. Yardley. London: Butterworth and Company, 1960. Pp. ix, 151.

As the title suggests, this small volume, written by a Barrister-at-Law, presents a brief introduction to the constitutional law of the British Isles; however, significant discussions of some of the main areas of comparison with the constitutional law of the Commonwealth and the United States are also presented owing to the fact that the comparative method is frequently employed in order to show important similarities and differences between the English system, other common law nations, and Scotland.

The general aim of this book is not to present an additional learned treatise on the subject of English constitutional law. Rather, the express purpose of the work is to provide, ". . . a brief composite sketch of the field that any student of the subject must traverse, and to suggest the problems which exist rather than to attempt to solve them."[1] In brief, an elementary law school text has been written. As the author states: "This volume is therefore directed primarily towards the needs of university law students just beginning their study of constitutional law . . ."[2]

Part I, which comprises three-quarters of the text, is devoted to a discussion of the "Principles of British Constitutional Law," and in this section, the main problem, or the reason that the book was written, is presented—namely, what precisely constitutes the unwritten constitution? In other words, from what portions of the mass of source material that forms the entire body of English, Scottish, and Northern Irish law, might a student, or for that matter a Barrister, be able to glean the provisions of their constitution?

Specifically, the constitution is derived partly from custom, ancient documents, and written sources such as common law cases; but primarily from the acts of Parliament, which are the "supreme law of the land" in a legal system lacking a concept of judicial review as it exists here in America. The author, consequently, takes the position that ". . . the Constitution of any country must comprise the fundamental structure and organization of that country . . ."[3] He goes on to state: ". . . therefore

[1] P. vii.

[2] P. viii.

[3] P. 2. Yardley adopts the following definition of the constitution of a state as ". . . the system of laws, customs and conventions which define the composition and powers of organs of the State and regulate the relations of the various State organs to one another and to the private citizen." O. Hood Phillips, Constitutional Law of Great Britain and the Commonwealth (2nd Ed., 1957), p. 5.

constitutional law is its fundamental law, its basic, essential law, whether it be civil, criminal, public or private, together with those rules of conduct laid down to govern the exercise of state power by the official organs of the state.''[4]

Thus, the main problem confronting any Barrister is to determine which of the numerous laws of the state actually comprise the constitution. Of course, the supremacy of the British Parliament permits a much easier change of this basic law than would be the case in a country that had established a complicated system of amendment providing for the alteration of a written constitution.[5]

The greatest single difference between the judicial systems of Great Britain and America is the lack of any concept of judicial review for the reason that, ''. . . Parliament in its legislative capacity may introduce, alter or repeal any law it thinks fit, and in each case the effect will have been to formulate a new law for the future. Such law is absolutely binding upon all courts, and the only discretion permitted to the courts is that of deciding how the law is to be applied to particular facts.''[6]

The author points out, and correctly so, that the courts have the absolute duty of applying the letter and spirit of the statute in question and to enforce the law once its meaning has been determined. In addition, in the United Kingdom, acts of Parliament are completely binding upon the courts.[7] In particular, ''. . . it is never possible for the courts to question the validity of existing Acts of Parliament.''[8]

The rhetorical question is then answered by the following: '' . . . United Kingdom constitutional law comprises all those laws, derived from the various sources referred to above, which are fundamental to the organisation of the state, together with such lesser rules as are laid down to facilitate the working of this organisation, but it also includes a certain element of pure convention.''[9]

[4] P. 2.

[5] The author also incorporates in Chapter V, "The Rule of Law," the main propositions of Dicey that are considered to be basic, especially the maxim that all men are equal before the law. A. V. Dicey, Introduction to the Study of the Law of the Constitution (9th Ed., 1938), pp. 188-196. Yardley says at page 57: "The great value of Dicey's work in this field has been to provide lawyers and jurists with an ideal. . . . [I]t cannot be considered as a basic tenet of our constitutional law. But as a guide to law-makers and reformers it can be of inestimable value. . . . In short, the rule of law is not a rule or a law, but a persuasive guide for the legislature, the executive and the judiciary."

[6] P. 44.

[7] Pp. 43-46.

[8] P. 45.

[9] P. 4.

Since the precise subjects that may be included in the scope of the fundamental law may be defined differently, or even be open to dispute, the author provides a short list, which he feels will adequately cover the subject matter areas to be included in the text, as follows: "(1) the law concerning the composition of the national legislature and legislative powers; (2) the law concerning the composition and functions of national government; (3) the hierarchy and status of courts of law; (4) the limits of personal liberty and the rights of the individual; (5) the relationship between the executive and the individual; (6) the law of nationality and the status of aliens; (7) the status of certain national institutions, such as the armed forces and the Church; (8) the relations between central and local government; and (9) the relationship between the United Kingdom and its dependencies, and with the independent members of the Commonwealth."[10]

Moreover, separate chapters are devoted to an explanation and analysis of the branches of the Government, particularly the Parliament, the Executive, and the Judiciary. Much of the data presented deals with the basic structure and function of these units in the British system; nevertheless, in Chapter VI, the problem of "Separation of Powers" is briefly discussed, and it is significant to note that the British concept of separation of powers differs from that in the United States. To illustrate, the United States system is described as a system of checks and balances; but, on the other hand, the basic structure of the English system under which the government ministers sit in the two houses of Parliament, plus the lack of a separate executive head not directly responsible to a legislative body, and the lack of any judicial review, render a similar strict separation of powers impossible.[11]

In particular, this chapter on "The Doctrine of the Separation of Powers" serves to bring into sharper focus the more precise and detailed data dealt with in the earlier chapters wherein the branches of government were discussed individually.

The remaining chapters in Part I are devoted to the position of the Church[12] and the unique constitutional features of the legal systems of Scotland, Northern Ireland, the Isle of Man, and the Channel Islands.[13]

Perhaps, the most significant chapter is entitled "Rights and Duties of the Citizen," for it is here that the author offers the observation that

[10] P. 6.
[11] See pages 58-62.
[12] Chapt. IX.
[13] Chapt. VII.

". . . as far as British constitutional law is concerned, our main task is to determine in what ways individual liberty is *restricted* by law, and not how it is preserved."[14] Therefore, his view is that the English constitution does not confer or even protect any of the common law rights of Englishmen; furthermore, an interesting comparison is made with the United States Constitution and Bill of Rights. In short, the view presented is that basically the individual citizen may take any action he desires, since he has all basic rights and freedoms in so far as his actions and acquisition of property are concerned; but the state—meaning the branches of Government acting in their respective spheres—restrict the actions of the private person by placing limitations upon him in order to provide for the common good. The result of this *negative approach* is that certain basic rights are curtailed by operation of law; consequently, the remainder of the chapter presents an elaboration of the particular restrictions placed upon individual actions by English law.[15]

Part II of the book contains a brief analysis of the system of administrative law in Great Britain, while Part III, comprising only one short chapter, reviews the concept of the Commonwealth and the legal status of the various independent members in the scheme of the unwritten British constitutional law.

This small text should serve as a valuable source book for the comparative study of constitutional law in differing legal systems; and, furthermore, enable legally minded individuals to obtain a clearer understanding of the development of the fundamental common law even though the book was not originally intended for use in America.

W. PAUL GORMLEY

FELIX FRANKFURTER REMINISCES. Recorded in Talks with Dr. Harlan B. Phillips. New York: Reynal & Company, 1960. Pp. ix, 310.

Here is a delightful collection of reminiscent conversation by the present Justice relating in random fashion events of his life from student days to the time of his appointment by President Roosevelt to the Supreme Court of the land.

[14] P. 72.

[15] The basic fundamental rights that the author feels are curtailed include the following: "(1) freedom of the person to behave as he pleases, (2) equality before the law, (3) freedom of property, (4) the right to free elections, (5) freedom of speech and to write, (6) freedom of public worship, (7) freedom of assembly and association, and (8) family rights." See page 72. Each of these common law rights receive individual coverage in the book.

In casual and subjective manner, Justice Frankfurter recites the elements of chance which brought him to Harvard Law School. He follows with his initial assignment to the United States Attorney's office, and the call to teaching with rich and rewarding years as a professor at Harvard Law School. Throughout, he tells of various government services, which from time to time interrupted his academic work. As a series of disconnected expressions, the book nevertheless maintains a strong continuity of subject matter, and the whole combines as an enthusiastic account of rich and well-spent years.

As often in the case of accounts such as here, this series of reminiscences combines excellently the full expression of Justice Frankfurter's inspiring philosophy together with a stimulating account of surges and patterns of thinking in the changing United States.

Of course, the primary emphasis is upon his own views and thinking, but it is the very intensity of his examination which brings into sharpest focus the changing years of government and social growth which he witnessed. Nor is he charitable of men in high position who for one reason or another he found inadequate.

First, Frankfurter himself lived a full and rewarding existence during the period when government began the swing, with the Theodore Roosevelt administration, from its position as servant of large industry and smug isolationism to "trust busting" under "Teddy" and the growth of social legislation, and the new concept of America as a responsible world power, which started under Wilson and came to fullest realization under Franklin Delano Roosevelt. Secondly, he participated actively in almost every phase of the newer concepts of government responsibility both on the scene, and in world affairs.

Through all this, and from his vantage point as a professor at Harvard University Law School, Frankfurter participated actively in this social growth. In his reminiscences Justice Frankfurter speaks with genuine enjoyment of the share that fell to him in drafting of legislation, in prosecuting matters as First Assistant United States Attorney, and the several opportunities for public service which came his way under such diverse presidents as Taft, Wilson, Hoover, and, of course, Roosevelt.

As a nostalgic discourse on Justice Frankfurter and the many greats, both high and law, this small volume has a charm all out of proportion to its pages.

At all times its author held to his own ideas; at all times he made sharp incisive evaluation of people and events around him. These he

shares generously in this work. Indeed, the spice and richness of the book lies in great part in his unhesitating freedom with which he expresses strong opinion, favorable and otherwise, of the people whom he met and with whom he worked.

Of President and later Chief Justice Taft, he quotes Brandeis approvingly, "It's very difficult for me to understand why a man who is so good as Chief Justice . . . could have been so bad as a President."[1]

Of Henry Morgenthau, he held great contempt; for Herbert Hoover the feeling that the man was guided by violent prejudice with little contact in reality.

The very light heartedness of Frankfurter's approach brings a greater appreciation of the professor himself. It presents a most inspiring story of the events of his life, and as by accident, a critical evaluation of the changing times around him.

Frankfurter took a leading part in such unpopular causes as the Tom Mooney and Sacco-Vanzetti cases, remote to us now, but which stirred America and the world in the decades past. And even as he held to his own ideas and convictions, his reputation continued to grow in completely reactionary as well as liberal circles.

We see, also, in this gentle philosophical account of a rewarding academic life, the beautiful value placed on friendship and the rewards of friendship which came to the Justice.

The list of those in this country and in England with whom he maintained such friendships is a list of the intellectual and political leadership of the period. He tells a touching story of ideas shared, the greatest value lies in his simple accounts advanced and explored through enriching years of simple luncheon and dinner discourses. From his recollections we share in the exchange and contribution of ideas.

Even so simple a work as this tells a moving account of the years in which Frankfurter made his great intellectual contributions.

He came on the scene during the administration of President Theodore Roosevelt in 1906, served through Taft, Wilson and remained in one capacity or another to work on much of the Franklin Delano Roosevelt, New Deal legislation.

He quotes his wife's apt description of President Coolidge as "arid," and expresses freely his wonder at the continued Republican party victories

[1] P. 85.

in 1924 and 1928, despite the scandals which rocked the Harding administration.

Of New Deal legislation, he says simply, "Of course much of the legislation was poorly drawn. Roosevelt was compelled in a few short months to catch up with more than a hundred years of social legislation already enacted by all European countries."[2]

He tells, too, of the changing philosophical attitudes of the legal profession from the twenties to the thirties. While during the nineteen twenties the leading graduates turned their eyes to the well paying New York offices, without thought to the complexities of the world in which they lived, by 1932 the direction was to Washington and opportunity to participate in the great social activity there going on. The great depression brought a belated recognition by the profession of its social responsibilities.

For the greater part, Justice Frankfurter remains severely critical of his profession. He feels that lawyers generally have the obligation to lead, rather than simply implement the predatory wishes and activities of their clients. In this, the profession has not met its obligation.

Here is a simple but remarkable piece of writing by a remarkable jurist of our times. Justice Frankfurter combines driving social conscience with rare intellectual ability. The simple and unaffected study of basic philosophical concepts is an inspiration to lawyers, and represents a concept of social responsibility and intellectual growth, in the framework of unshaking integrity.

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[2] P. 128.

# CHICAGO-KENT LAW REVIEW

VOLUMES 37 AND 38

1960 AND 1961

*Published by the Students of*

CHICAGO-KENT COLLEGE OF LAW

CHICAGO, ILLINOIS