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## Book Review of Comparative Constitutional Process

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COMPARATIVE CONSTITUTIONAL PROCESS: By THOMAS M. FRANCK. London: Sweet & Maxwell, 1968. Pp. 595

Comparative legal studies, and particularly comparative constitutional studies, are distinctly arcane subjects in most American law schools. Until the considerably broadened horizons—literally and figuratively—of American law practice in the past two decades, the need for studying any system of law outside the common law frame of reference was recognized only by a small group of schools with specialized interests and opportunities. The first “breakthrough” took the form of an expansion of the curriculum offerings in international law—the traditional public law course being complemented by a broadening of the standard American “conflict of laws” course to something more closely resembling the European “private international law.” On the heels of this development came the quite popular course in international business transactions, usually with admiralty law as a complementary offering.

Now a steadily growing number of law schools are moving into the next logical area of study, comparative law. Yet some distance away is the last area, foreign law itself. Comparative law, or the analogizing and contrasting of basic principles among different systems of law, can begin at home, of course, as anyone knows who has had occasion to trace principles of American law from the traditional common law states into those of the Southwest, particularly Louisiana.

Comparative legal studies, like those in international law, probably will begin with public law, and here again the first step may be within the geography of the United States. Comparative constitutional law, between federal and state constitutions, would seem to be an obvious beginning—although one soon discovers that state constitutional law is more in the nature of fundamental legislation and can most practically be studied as a course in that field. Next comes comparative study between the American and English constitutional systems, both the outgrowth of the same mother lode of common law and offering more similarities than contrasts.

More challenging, perhaps, is comparative study between the Anglo-American constitutional systems and those of continental Europe, which often resemble the organic or fundamental legislation of American state constitutions. But newest of all is the type of comparative constitutional study dealt with in Professor Frank's pioneering book—the development of “fundamental rights in the common law nations.”

Perhaps more revealing of the book's subject is the title of the introductory essay: "Western Law in Non-Western Nations."

The author has set for himself, then, the task of documenting the effect of transplanting basic rules of Anglo-American constitutional law into newly developing countries of Africa and Asia. For better or possibly for worse, says Professor Franck, those nations have accepted these as "the traffic rules of the economic-social-political road to modernization." The study is conducted on rather familiar ground, since most of the nations involved had developed, under the colonial system, a body of law which is distinctly English in orientation and, in the process of independence, a written constitution often patterned after that of the United States.

The reliance on contemporary emphasis in American constitutionalism is evident in the chapter headings—of the ten chapters, eight deal with such subjects as judicial review, due process, equal protection, and the like. The more esoteric chapters deal with such subjects as the interaction between transplanted "anglo-phonic" law and local mores, and the considerations entering into limitations upon "political association" and travel.

The fundamental problem, as the author points out, is the practical difficulty of applying a rule of law which emerged from centuries of cultural evolution in Western Europe, to nations which have not had time to develop the institutions or the trained personnel to give meaning to the rule. How does one guarantee the right of counsel, for instance, in nations where trained counsel hardly exist? Franck suggests that the only realistic alternative may be an exclusionary rule on evidence obtained from pre-trial detainees for whom counsel simply cannot be found. Emphasizing this need, the author observes, is the fact that deep-rooted hostilities between police and populace in many former colonies make any pre-trial interrogation suspect.

How current is the treatment of constitutional subjects in this volume is illustrated in a section on "preventive detention," a proposal advanced by the Nixon Administration as a device for the stepped-up war on crime in the United States. While constitutional liberals and conservatives alike condemn this as a flouting of basic guarantees of the American Constitution, many of the new nations have followed the English doctrine of legislative supremacy and have held that the courts were barred from inquiring into "legislatively-created fields of executive discretion."

On the other hand, the clear flouting of fundamental constitutional tradition embodied in the British Habeas Corpus Act, a fundamental of the English constitution accepted as equally fundamental by all of the new nations, seriously prejudices the question of whether western constitutional principles can be put to work in such totally different contexts. A heartening answer, suggests Professor Franck, is the action of the revolutionary council in Ghana, upon the deposition of Premier Nkrumah in 1966, in abolishing the country's preventive detention act.

It is also interesting, in a time when the fifth amendment provision against self-incrimination is being questioned by some high authorities in the United States, to note that the trend in new nations is definitely in the direction of solid affirmation of this principle. There are some interesting differentiations, as in courts of India and other parts of the former British colonial empire in Asia, between persons in custody and those not in custody as to the degree of incriminating evidence which may be obtained from them and corroborated. In former colonial areas in Africa, on the other hand, the rule against self-incrimination seems to be zealously administered.

A reading of this book cannot help but place traditions and constitutional law in a fresh perspective. It is the type of reading which will lead American law students naturally and effectively toward the next area of professional understanding, beyond the basic courses in international law into the most rewarding experiences in comparative law.

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