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Tim Koopmans, *Courts and Political Institutions. A Comparative View* (Cambridge, Cambridge University Press 2003) XXI + 299 p., ISBN 0521 82662 4 (hard) / 0521 53399 6 (paper)

This path-breaking book, full of facts and ideas, is the fruit of life-long research by a courageous author, who knew what a difficult task he was undertaking but was qualified, both as a teacher of law (in Leiden and Cambridge) and as a judge (in the Court of Justice of the European Communities) and as an Advocate-General (in the Dutch Supreme Court). The book is devoted to the comparative study of the constitutions of the United States, the United Kingdom, France and Germany, and it deals with a remarkable variety of topics of great interest to lawyers and political scientists.

It is amazing that one jurist could manage to analyze the forms of government of such different countries. Indeed, in spite of the shared common-law tradition, the American and the British constitutions are fundamentally and irrevocably distinct, and they both differ again from the German and the French models. The chasm between America and Britain was particularly brought home to me when I went to a lecture delivered in Oxford in 1989 by Mr. Justice Brennan of the U.S. Supreme Court and entitled *Why Britain needs a written constitution*. To me, as a continental listener, his arguments seemed irrefutable, but his British audience was not in the least impressed. To them a written constitution led (like in the United States) to judicial review of the constitutionality of the laws, and that meant government by non-elected judges instead of the chosen representatives of the people.

The number of hotly debated constitutional themes that pass the review in this thought-provoking survey is considerable. I mention, *inter alia*, judicial review, constitutional and administrative courts (including, for example, the French *Conseil d'Etat*), the position of the French President and the working of the *cohabitation*, the 'higher law' (an 'emotionally charged expression'), the sovereignty of Parliament, the democratic legitimacy of judicial decisions, judicial protection of indi-

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European Constitutional Law Review, 2: 310–312, 2006

doi: 101017/S1574019606003105

vidual rights, capital punishment and the role of the U.S. Supreme Court, which has pushed judicial activism to the limit, if not beyond: numerous lawyers wonder how the legalization of abortion could possibly be based on the Constitution, which does not mention it, for the simple reason that to the Founding Fathers it was an unmentionable abomination. Among the most penetrating pages I would like to mention those on judicial review in America, the French presidential regime and the different role and meaning of the term 'public law' in different countries (where a discussion of J.W.F. Allison's, *A Continental Distinction in the Common Law. A Historical and Comparative Perspective on English Public Law*, Oxford, 1996, would have been useful). The author has, of course, analyzed the texts of the law and, to a lesser degree, the legal literature, but he has studied most closely the relevant lawsuits (see his five tables of cases), possibly the most innovative element of his book.

A critical review is supposed not only to explain what a book has to offer but also to formulate some critical remarks. Koopmans's characterization of the Belgian constitution of 1831 as an attempt 'to write down the unwritten rules which determine the British constitutional framework' (p. 20) may mislead some readers who do not know that, in fact, this constitution was essentially copied from the Fundamental Law of the United Kingdom of the Netherlands of 1815 and the French *Chartes* of 1814 and 1830. This was established in 1967 by John Gilissen, who calculated that c. 40% of the provisions were taken from the Fundamental Law of 1815, c. 35% from the French *Charte* of 1830 (and indirectly from the French *Charte Octroyée* of 1814) and c. 10% derived from the French constitution of 1791, whereas some 5% was probably inspired by the British constitution – only 10 articles being truly original. Sometimes the author is in danger of taking the normative texts too much at their face value. He still believes, for example, in the *trias politica*, i.e., that there are in Western democracies three autonomous powers – the executive, the legislative and the judicial – which hold the balance in the running of the state (p. 11). The constitutional texts certainly support the *trias politica* idea, but the reality can look very different. In some countries the subservience of Parliament to the government as well as the predictable voting pattern of the majority (no back bench revolts here) point in another direction, where ministerial responsibility is a farce and members of the cabinet disdain to appear before Parliament and to reply to the questions of the opposition, letting some underling read some vacuous statement about 'communication problems'. In such a situation the *trias* has become sheer fiction and the term *duo politicum* seems a more accurate description of the real state of affairs, as the only truly independent powers in the state are the government (and its appendix of majority – M.P.'s, who vote as ordered by their party leaders) and the judicature. The Mother of Parliaments has fortunately avoided this pitfall and still is a place of daily lively

debate where, at question time, ministers are called to account for their actions and where a back bench revolt is a real risk, as the Labour government found out on 31 January 2006, when its Religious Hatred Bill was defeated in the House of Commons. For Labour Prime Minister Tony Blair, Labour members of Parliament voting against their own government are a fact of life, to the extent that his government sometimes has to count on opposition votes to obtain approval for its proposed legislation. Nevertheless, even at Westminster the spook of the *duo politicum* is not that far away, and it is Tim Koopmans himself who highlights the risk of a form of presidential regime, where the Prime Minister dominates the cabinet and usually gets his way in Parliament thanks to political discipline and vigilant party whips. He speaks of the 'Prime Ministerial government' (p. 181) and a system that 'begins to look like "an elective dictatorship"' (p. 183). The author also writes (p. 162) that 'separation of powers, in the American sense of the expression, hardly exists in countries with a parliamentary regime of government: although the judiciary is independent, the other two powers are intertwined' – a good description, it seems to me, of the *duo politicum*. And the author writes again (p. 167) 'that in Britain there is no separation of powers between the cabinet and the Parliament'.

It may seem churlish in such a rich book to cavil at the absence of certain topics, but I believe some readers will be disappointed that so little attention is paid to the Swiss constitution, as established in 1848. The chapter on federalism (pp. 168-175) fails to mention Switzerland and the lemma 'direct democracy' does not appear in the index, although 'referenda' does. And yet, federalism is a major issue in the present world, and direct democracy is to many observers a most welcome antidote to the prevailing omnipotence of the professional politicians. Koopmans's book is profound, important and well written: judges, legislators and professors will ignore it at their peril.