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The State Legislative Institution, by Jefferson B. Fordham

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THE STATE LEGISLATIVE INSTITUTION. By Jefferson B. Fordham. Philadelphia: University of Pennsylvania Press. 1959. Pp. 109. \$2.75.

This slim little volume compiles three lectures that Dean Fordham gave at the West Virginia Law School in April 1957. Its slimness, fortunately, is no index of its significance. The main thesis lies in the first two lectures, which examine the present-day state legislature. A third lecture deals with the subsidiary question of legislative sanctions. I shall confine my comments largely to the first two.

It is not surprising that Fordham should find many inadequacies in the typical state legislature. What is surprising is the degree to which these inadequacies reflect a distrust of the practical workings of representative democracy. In a nation that professes so strongly its love of popular government it is remarkable how far the states have down-graded their legislative branches. Had the emergence of a strong Federal government meant a corresponding lessening of state responsibilities, this down-grading might not be significant. But the contrary is true: governmental responsibility has been increasing at all levels. All the more reason, then, to provide an adequate state legislative branch.

The biggest difficulty, says Fordham, is that in most states the legislature meets every other year and in many states only for periods limited by constitution. Special sessions are at the mercy of the governors, who alone can call them and prescribe the subjects that can be taken up. Legislative discontinuity is completed by the fact that between sessions even standing legislative committees have no legal status. The upshot is that the typical state has an inadequate main policy-making body in an era when the legislature has come to replace the court "as the prime agency of law reform" (p. 17).

64. For example, Rostow and Sacks, *Entry into the Oil Refining Business: Vertical Integration Re-examined*, 61 YALE L.J. 856 (1952). WHITNEY, *op. cit. supra*, note 6 suggested that crude production be related to MER. Virtually every disinterested scholar since John Ise wrote THE UNITED STATES OIL POLICY (1926) has suggested some changes for the production level of the industry.

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This inadequacy is aggravated by miscellaneous restrictions on the substantive powers of the legislature. These cover such matters as private corporations, municipal home rule, the spending of state revenues, and tax levies. Here, Fordham traces the prime fault to the state constitutions, in which he says that there should be "a minimum of constitutional provisions, beyond a bill of rights, operating as limitations upon the policy-making power and responsibilities of the legislature" (p. 27).

The author also has little patience with the myriad constitutional technicalities relating to parliamentary procedure or to the form and content of bills, such as technicalities relating to titles and amendments. Congress has almost none of these to contend with and does not appear to be the worse for it. My own experience with the preparation of Federal legislation supports this judgment.

Because legislative policy-making is a continuing responsibility, Fordham urges the adoption of annual sessions without arbitrary limitations on length. Special session should be callable also by a majority of the legislature and should not be circumscribed as to subject.

Fordham believes that once legislative continuity is achieved the most needed improvement is to bolster the committee system. This he would accomplish by limiting the number and size of committees, providing them with more adequate professional services, giving them continuing status between sessions, providing for more effective hearing procedures, departing from a pure seniority system for selecting chairmen, and, particularly, providing for recording their deliberations and expanding their reports on proposed legislation to include specific reasons for the actions they take. He would also grant them the power to investigate the performance of the respective executive departments.

The result would be to approximate the situation now obtaining in Congress, where the committee system works far more effectively. On the other hand, Fordham does not say how he would cope with one of the big weaknesses of the present Congressional system, the failure to develop an adequate system for coordinating the work of the several committees. Galloway, for one, has deplored the fact that our current Federal approach has produced no better than a federation of committees in which each committee chairman is king of a separate and largely autonomous domain. In such a framework it is difficult to develop coherent national policy.¹

While deploring the general inadequacies of modern-day state legislatures, Fordham notes with satisfaction a recent and wholesome de-

1. NATIONAL PLANNING ASS'N, CONGRESS AND PARLIAMENT 19-21, 93-96 (Washington, D.C. 1955).

velopment: the growth of governmental agencies concentrating respectively on legislative reference, law revision, and bill drafting. These, while not yet universal, have made solid contributions.

He is somewhat less enthusiastic about the growth of the legislative council, which appeared first in Kansas (1933). Although helpful in plugging some of the policy-programming holes in legislative continuity, he considers it an improvisation at best, a temporary patchwork solution to a problem better solved through unrestricted annual sessions and better equipped legislative committees.

The author spends some of his most powerful ammunition on the bicameral legislature. Not being a close student of the question, I will not challenge the validity of his conclusion. It is probably sound. I can only say that were my views on the subject to depend on the specific arguments advanced in the book I might remain something less than fully persuaded that the unicameral legislature is preferable. On the basis of strength and efficiency, I think he makes out a good case. But nowhere in the book do I find tangible evidence that the unicameral legislature produces in the long run results that are as sound and wise as those produced by the bicameral legislature. A unicameral legislature may be "stronger" (in what connection does he use the term?) and "more efficient," perhaps, but is it inherently "more able"? Certainly, efficiency, economy, speed, and mere "strength" are not hallmarks of democratic institutions.

It is significant, of course, that unicameralism has been adopted in Nebraska, Guam, the Virgin Islands, Norway, Finland, Turkey, and all the Canadian provinces except Quebec. But in what respect that fact is significant is not so clear. It must signify, of course, that unicameralism is neither impossible nor impracticable. But does it also signify that unicameralism is equal or superior to bicameralism, which has been adopted in so many more jurisdictions?

Bicameralism, says Fordham, means a diffusion of responsibility and buck passing. Although the relationship between size and diffusion of responsibility is clear, the proposition that a bicameral legislature necessarily involves more diffusion and buck passing than a unicameral legislature of equal aggregate size is somewhat less obvious. Even so, recent conversations with state legislators support the assertion. But it does not follow that buck passing is always bad. With the sudden and impulsive pressures that it meets, a legislature needs ways of cushioning or deflecting blows that might otherwise stampede it into unwise actions. One who has watched a legislature in the closing hours of a legislative session has seen the dangerous possibilities.

The observation that in "charitable, educational, and business organizations, the thought of a bicameral governing body is nothing short of startling" (p. 30) strikes me as true but of doubtful relevance. Nor am I overwhelmed by the information that the academicians generally favor unicameralism while the practical politicians do not. The implication, it would seem, is that the former are as a body infallible, while the latter are motivated only by spurious considerations. I am not so sure.²

As for the need for checks and balances, Fordham argues that the check of bicameralism is unnecessary, since numerous checks already exist quite apart from the bicameral system. "Obvious examples are the executive veto, the courts, and popular opinion" (p. 33). In the alternative, the same argument could be used, with equal force, to abolish the executive veto or any one of several other checks. In so intricate a scheme of checks and balances it is hard to say which are essential and which are superfluous. Somehow, in the big, lumbering inefficiency of bicameral deliberations there appears to be a crude institutional wisdom that is not, without the fullest deliberation, to be traded for the results of an obviously more streamlined machinery. The public consciousness develops with glacial slowness and it is valuable to maintain a legislative institution whose creative imagination is not likely to outrun the ponderous movement of public consensus, without whose support the most perfect laws that human reason can devise are but pieces of parchment. In short, I would feel much more comfortable with Fordham's espousal of unicameralism if he had found more persuasive arguments. Perhaps little more could have been done.

In marshaling support for all these reforms, Fordham solicits the aid of the lawyers, even though their court-oriented training and thinking have made them inclined to blindness in matters affecting branches of government other than the judicial. It remains one of the curiosities of our legal system that the focus of legal thinking remains almost always on the courts. Surely the shrinking significance of the courts in shaping the substance of law will someday direct attention to the wider horizons of the fully oriented lawyer needed in modern society. Unfortunately, as Fordham points out, the study of legislative problems has too often been a study of judicial behavior with respect to those problems instead of a study of the problems themselves.

2. In its recent preliminary report (October 7, 1959), the Committee on Legislative Processes of the National Legislative Conference, composed of state legislators and members of legislative service agencies, while refraining from endorsing unicameralism, was objective enough to recommend the adoption of some of Dean Fordham's other specific objectives.

I hope that I may be pardoned for slighting the third lecture, the one on legislative sanctions. Except as it may represent a special interest of the author, I see little warrant for selecting this particular subsidiary subject to complete so important a trilogy. However significant it may be as a current preoccupation, it is in this setting anticlimactic. While it is undoubtedly an admirable survey of the subject, I will leave the soundness of that appraisal to others closer to the subject than I.

Altogether, I found Dean Fordham's book stimulating and instructive. I commend it to anyone interested in the structure of sound democratic government.

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ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES (3rd ed.). By Chester Rohrllich. New York: Matthew Bender & Company. 1959. Pp. xii, 534. \$15.00.

Considering its excellence and its potential usefulness to a sizable portion of the general practitioners of law, *Organizing Corporate and Other Business Enterprises* has received surprisingly little attention from the reviewers in legal periodicals. There were five reviews¹ of the first edition which was published in 1948, no reviews of the revised or second edition published in 1953 and so far there has been only a "booknote"² on the third edition. Unlike quite a few other recent books designed primarily for the general practicing lawyer, I think this book is well worth the money at least for lawyers who expect to be called upon from time to time to assist in the organization of a new business enterprise or for advice in making any fundamental change in the character, form or ownership of an existing business. To such a lawyer the book should prove invaluable in bringing him abreast of current developments in the fields of federal taxation and close corporations, *i.e.*, achieving partnership advantages for corporations. For a bound book the author and publisher do a remarkable job of including current material. There is a discussion of or reference to the so-called "tax option corporation," (enabling legislation became effective on September 2, 1958) at all relevant points. Although the preface is dated October 1958, cases and law

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1. Field, 63 HARV. L. REV. 727 (1950); Sandgren, 24 ST. JOHN'S L. REV. 187 (1949); Wilkinson, 18 FORDHAM L. REV. 323 (1949); Wright, 4 MIAMI L. Q. 266 (1950); Zacharias, 27 CHI.-KENT L. REV. 261 (1949).

2. 33 CONN. B. J. 91 (1959).