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Book Review

The Legal System and American Constitutional Democracy
Edited by Maria Frankowska & Albert P. Melone

Reviewed by Emilia Kandeva-Spiridonova

Dr. Kandeva-Spiridonova is a Professor of Law in the Institute of Law at the Bulgarian Academy of Sciences. As the first director of the Bulgarian National Center for Public Administration, she played a significant role in educational and administrative reform during Bulgaria's move from communism to democracy. Dr. Kandeva-Spiridonova is a specialist in administrative law and has taught at many universities, including the Indiana University School of Law in Bloomington, Indiana. She is the author of over fifty publications, and is currently teaching at Indiana University of Pennsylvania.

The past few years have witnessed how events that occurred in central and eastern Europe have spilled over national boundaries, involving many States in worldwide complicated processes. Moving from totalitarian regime toward the goal of democratic polity, east European countries have experienced dramatic political and economic changes. Today, these societies in transition, among them Bulgaria, want to develop a new legal order providing for democratic political institutions and a market economy. They are attempting to achieve this goal by building upon their own national heritage, and by adopting in modified form the most relevant models of Western democracies.

The Legal System and American Constitutional Democracy has the ambition to explore the nature of the basic truths of U.S. law and democracy in order to present them as role-models for Bulgarian democratic development. This book, a 350-page collection (175 pages in English and

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175 pages in Bulgarian translation), is a product of the efforts of the faculties of law and political science at Southern Illinois University at Carbondale. It reproduces papers originally presented at the American-Bulgarian Symposium on American Courts and Protection of Democracy.

This edited collection of papers is designed to point out some of the basics central to the operation of U.S. legal and political institutions, processes, and systems, to help identify some crucial stages of transition from totalitarianism to democracy, and to serve as a resource for Bulgarian lawyers, politicians, and scholars who seek a better understanding of democratic developments. Although no surprises are found in its theme, the book is a goldmine of information about the machinery of democratic government in the United States, its court system in particular.

The book is unique both as a comparative study and as a publishing form. Two main approaches have been mostly applied in comparative legal studies: comparing entire systems in the countries of consideration; or surveying particular detailed issues of the compared systems. A study that examines the main features of the legal institutions in one country in order to provide a basis for defining, analyzing, and understanding the current problems in another country is certainly a new event in the comparative approach that should be congratulated. This book focuses on an analytical comparative approach to the legal system and constitutional democracy of the United States, aiming to expose its most salient features and particular points of interest for the political and legal specialists in Bulgaria and other "new" democracies in eastern Europe. The book tries to combine a review of the basic concepts and structures of the U.S. legal system with a certain degree of a foreign analytical differentiation and should prove a valuable addition to existing comparative legal studies.

The book is mirror-organized with two identical sides and two title covers, one in English, and one in Bulgarian. Innovative and challenging in form, The Legal System and American Constitutional Democracy is addressed to both the international English-reading audience and to Bulgarian readers. This is one of the rare cases when the form and the content of the book are completely derived from its purpose.

The coverage of topics is quite broad and inclusive, and the articles are authored by distinguished scholars. The authors range widely in subject matter, but they all draw upon U.S. experience in their efforts to assist in the improvement of the Bulgarian legal system. They address certain pressing issues of democratic development that provide a challenge to policymakers
and lawyers in the formally socialist countries of eastern Europe. The book seems to derive its clear and professional style in part from the staunch academic background of the authors, and in part from their acquaintance with the current processes in Bulgaria.

The first two articles in the book are by Patrick J. Kelly. The article *Law and Courts in the United States* is a proper introduction to the theme of the book. It provides a compelling and highly essential synthesis of the main features of the U.S. judicial system. Recent processes of privatization, marketization, and foreign investment in eastern Europe involving legal interests and legal persons from different countries require an acquaintance with judicial systems these people will have to deal with when their eventual claims arise. In this regard, the article is successful. By examining such areas as the fundamental constitutional theory of the people as sovereign, delegation and redelegation of sovereign law-making authority, hierarchy of legal norms in the federal constitutional order, and judicial resolution of conflicts between legal norms, Kelly suggests ways to heighten understanding of the dual court systems in the United States. He draws upon the conflict and preemption doctrines to present the problems of overlapping legal norms. An analysis of the Illinois state court system not only provides a good illustration to the arguments presented but also points out the ways in which other court systems may differ.

The other article is *Judicial Decisionmaking in Civil Cases in the United States*. The framework for this skillful narrative on the most salient differences between inquisitorial and adversarial justice systems is derived from civil law. The article makes its points economically and wittily, and shows how integrating particular approaches with a general methodology revitalizes the comprehensive explanation of the common law. The author explains the role of the jury in fact-finding, judicial interpretation of statutory law, and the processes of following, expanding, distinguishing, and overruling precedent authority. The Bulgarian judiciary is based on the adversarial system and traditionally belongs to the Romano-Germanic family of law despite political modifications forced on it during the totalitarian communist regime. Yet the current judicial reform in Bulgaria sharpens the interest, if not in radical changes, at least in the logic of the decision-making process in U.S. common law courts.

The article *The American Civil Jury* by Keith H. Beyler concentrates on three principal questions: why does the U.S. system give fact questions to juries; how does the jury trial work; and what does the U.S. experience with
the jury trial have to offer a country like Bulgaria? The answers reflect live issues from jury practice, illustrated by an entertaining historical review, comparative patterns, and short case-studies. Beyer asserts that jurors are not only better fact-finders, but also that the jury system offers an effective means of securing liberty in a democratic society. He argues that the European lay judging systems lack the essential political safeguards offered by the jury system. This argument is invalid, as least in Bulgaria's case. In Bulgaria and other European countries, lay jurors serve together with professional judges in various courts, mainly in criminal cases. The selection of lay jurors provides the same independence for them as for that of judges. The U.S. experience is useful because it suggests that neither the cost argument nor the unpredictability argument should stand in the way of a jury trial.

Four Political Roles Played by the United States Supreme Court: Rule Interpretation, Boundary Definition, Supervision and Legislating, by Albert P. Melone, highlights several important characteristics of the Supreme Court as part of the U.S. political system. Providing a thought-provoking blend of political analysis, ideological concepts, judicial doctrines, and court decisions, Melone argues that the Supreme Court contributes to the overall stability of the political system, and that judges and courts act as agents of change. Expertly crafted and rich in detail, the article contains a powerful critique of the narrow and simplified approaches toward Liberal-Lockean thought. Melone offers a new view of legalism, civic virtues, group theory, litigation, and the objectivity and neutrality of judges, presenting a picture of the judicial decisionmaking process that is highly contingent and up-to-date. This critical appreciation of U.S. courts would encourage Bulgarian scholars to look at the newly established institutions of the Supreme Cassation Court, Supreme Administrative Court, and Constitutional Court from a political perspective.

John S. Jackson takes as objective Political Parties, The American Constitution, and the American Political Process. Countries like Bulgaria, where more than forty-one parties registered for the first democratic elections after the fall of totalitarian government, will find the article valuable and important. The democratic revolutions in eastern Europe found socially amorphous communities lacking a definite ideological and political orientation. The fledgling opposition movements had only one clear platform—rejection of the communist regime. Numerous political parties mushroomed across these countries. However, political emotions and petty
interests often overrode, and continue to override, professionalism and the quest for reforms. It is worthwhile for these countries to examine the recent history of U.S. parties, their organization, constitutional foundations, the variables of their relations with government, and their connection with the electorate.

Jackson's article provides an excellent background on why and how political parties are essential to the operation of pluralistic democracy. It asserts that the rise of political parties is one of the principal distinguishing marks of modern government. There are certain functions that are so important and critical to the political system, Jackson believes, that no other structures but political parties can provide them. Jackson searches through several recent constitutional law cases to prove the enhancement of power of the national parties in the United States and the establishment of supremacy of national party law. The article is laced with refreshing comparative insights.

Parliamentary democracy established in east European countries displays a tendency toward an imposing presidential presence in day-to-day politics. Therefore, it faces the questions whether the president should reign or rule, and whether presidential powers should be broader or more limited. Although Bulgaria lacks a constitutional framework of presidential superiority, the Bulgarian constitution substantially modified the status of the president in the post-communist republic. The president is elected by direct popular vote, which is the rule in presidential and semi-presidential systems and an exception in parliamentary systems. The Bulgarian president appoints one-third of the members of the Constitutional Court, but the Constitutional Court is the institution before which the president can be impeached for high treason or a violation of the Constitution. In addition, the Constitutional Court decides the constitutionality of presidential acts, which makes the relations between a Bulgarian president and the Constitutional Court quite complicated.

Against this background, David R. Derge, in The Presidency and the Court, examines the relationship between the powers of the presidency in the United States and the interpretation of those powers by federal courts. Divided into three parts, the article provides a rich backdrop in the search for a model of effective safeguards of a democratic presidential institution. Among the topics covered, of special interest for foreign readers are the phases in the development of judicial review of power, the "two presidencies" notion, and the degree of discretion of the president's power.
Derge integrates much theory and practice to articulate an intellectual, informative, and surprisingly enjoyable read.

The article *The Legislative-Administrative Relationship: Oversight of Quasi-Judicial Boards*, by Diane E. Schmidt, explores the independent regulatory commissions that have rule-making, implementation, and judicial functions, and their relationship with Congress. Following an overview of the experience of the National Labor Relations Board (NLRB), the article examines how Congress has developed mechanisms for controlling the bureaucracy without violating the separation of powers or interfering directly with the executive branch. The narrow scope of the study, concentrating only on the NLRB, makes Schmidt's portrayal of the legislative-administrative relationship somewhat limited, although the NLRB's experience could be useful for experts of certain administrative fields, especially labor-management agencies attempting to adapt to a post-communist market economy.

It should be remembered that the official view of the communist doctrine was that law, and therefore the legal profession, would ultimately become superfluous in a socialist society. Thus, people who were interested in studying law were discouraged from doing so because it was uncertain that such training would enhance their careers. The legal profession was highly politicized. Furthermore, according to the Bulgarian justice system, nonlawyers, particularly in civil cases, retain the right to participate personally in trials.

One must compare the role of lawyers in Bulgaria to the role of lawyers as professionals in the larger U.S. society. In today's workplace, legal professionals are confronted with growing legal and public scrutiny of their decisions and activities. Lawyers play a significant role in social innovative processes. The article *The Legal Profession in the United States*, by Jill Adams, examines the process of admission and regulation of lawyers, the role of bar organizations, and the career paths and work lives of lawyers in the context of the burgeoning growth of the profession. The article is descriptive and uncritical. Still, some of the topics covered, such as ethical standards and their enforcement, and availability of legal services, present a special interest for comparative legal study and can aid in improving legal culture in eastern Europe.

Maria Frankowska, in her article *Legal Education in the United States*, describes the main features of U.S. legal education, highlighting the differences between European and U.S. systems, and offers reform proposals
for Bulgarian consideration. This excellent overview of the U.S. system of legal education is based on a comparative historical, functional, and structural analysis of institutions and curricula in law schools. The article is filled with useful tips, such as how to apply to U.S. law schools, what the Law School Admission Test (LSAT) is, what the exams are like, how they are graded, and even, what the preferred teaching methods of U.S. law professors are. It closes by addressing whether Europeans can learn from the U.S. experience in legal education. Frankowska concludes that they can.

The last three articles deal with the constitutional protection of human rights. Although all Bulgarian constitutions—the Tarnovo Constitution of 1879, the new 1991 Constitution, and even the two socialist constitutions of 1947 and 1971—have explicitly proclaimed the basic rights of citizens, the U.S. example of constitutional protection of human rights is a useful resource for politicians and scholars.

The Protection of Constitutional Rights by Thomas B. McAffee, addresses the basic premise of the U.S. constitutional system. The U.S. Constitution was written to secure the people’s rights, both by the way it distributes power to avoid its abuse, and by the inclusion of specific limitations on the exercise of government power. McAffee argues that U.S. constitutional rights may be characterized and categorized by the nature of the guarantee involved. The strong emphasis on constitutional liberties in the U.S. political system can be a guide to Bulgaria, a country attempting major reform after years of totalitarian rule.

Michael Esler’s article The Supreme Court and Equal Protection discusses the role of the Supreme Court, this time examining its role in relation to the Equal Protection Clause. This effective, provocative, and well-focused article not only provides an essential introduction to the topic, but also takes a critical look at the practice of the Supreme Court in this field while covering a range of issues: the traditional and modern standards of the Court’s interpretation of the Equal Protection Clause; defenders and critics of the Supreme Court; and specific Supreme Court decisions. The article is centered around the important theoretical question of how we explain the changing doctrinal positions of the Court’s interpretation of the Equal Protection Clause, especially the shift from the traditional single standard to the modern three-tiered approach.

The last article is The Role of the Judge in Promoting Democracy and Human Rights: Constitutional Limits on Governmental Powers in Criminal Cases by William A. Schroeder. The article explains the adversarial system
of justice, compares it with the inquisitorial system, and provides an introduction to the constitutional principles and rules basic for the protection of human rights in criminal cases. The author concludes that primary responsibility for the enforcement of constitutional rights in the U.S. system rests with trial judges. The conclusion is broader than the argumentative support in the article, but it fits well as a final assertion in the book.

Explanatory notes and a glossary of terms, prepared by the translator Silvy Chernev, accompany the Bulgarian part of the book. This section provides a useful guide to the non-U.S. reader who may be unfamiliar with terms common to the U.S. scholar.

Overall, the book could have a more logical arrangement of the articles included. There are slight overlaps in the topics covered. Some articles could be found deficient for their shortage of theoretical underpinnings and their failure to develop models of change or reform. Furthermore, the book does not offer new insights into the U.S. legal system and constitutional democracy, nor does it compare in quality with the luxurious editions of the leading books in this area. But it possesses one great advantage: interested parties can obtain it, look at the familiar U.S. institutions featured in it, and see the key problems of the legal systems in the new east European democracies. The U.S. system can be a model for eastern Europe.

Many questions are left unanswered, but questions and questioners alike shine with professional intelligence and sincere intent to assist in democratic reforms. As university teachers, the authors realize that their best material is their lectures, and from that material they have created a serious, interesting, and scholarly book. They may not solve the riddle of legal, democratic reforms in post-communist societies, but they know how to teach in international classrooms.

The Legal System and American Constitutional Democracy is an important, sophisticated, and practically-oriented book that deserves close attention from anybody interested in a modern comparative approach. It is a useful contribution to cross-cultural value analysis and the cross-cultural study of the contemporary needs of democratic and legal reforms. This important work can be of great assistance to legal scholars in eastern Europe who are attempting to reform their systems based on the U.S. model. Perhaps it may end up on the shelves of law libraries and in the classrooms of law schools throughout eastern Europe.