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Gough: Fundamental Law in English Constitutional History

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FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY. By *J. W. Gough.* London: Oxford University Press. 1955. Pp. ix, 229. $4.

The author reveals that he was motivated in making the researches which resulted in this study by the difference he noted in the attitude toward fundamental law as exhibited by English and American writers. The latter, it is said, are inclined to treat the motion of fundamental law with greater respect than English writers who may frequently dismiss as historical or political confusion arguments based on fundamental rights. Gough explains that this English reaction to the idea or theory of fundamental law probably stems from the belief that there is no precise meaning which may be attached to the term "fundamental law."

Consequently, it is interesting to consider both of the problems suggested by Gough's work. The first question is whether or not there is a substantial basis for resisting the view which is said to be prevalent among English thinkers on this matter. That is, may there be some fairly precise meaning which attaches to that still frequently heard political battle-cry "fundamental rights"? Gough's presentation and analysis of English historical sources and material results in the development of a rather surprisingly firm contour for the notion of "fundamental law." True, no sharp and unambiguous constitutional doctrines emerge, but then, even where there is fairly specific constitutional language embodied in an organic instrument, as in America, sharp and unambiguous constitutional doctrines are seldom found.

Particularly interesting in the book is the development of the meaning of "fundamental law" in regard to the extent of parliamentary sovereignty. Gough first traces the evolution of the relevant doctrines and ideas from some of the earliest legal records and then examines in greater detail the development of the problem during the times of Coke, James I, and Charles I. In a legal system, such as that prevailing in England, where limitations upon judicial review make Parliament so much more powerful than the analogous governmental branch in the United States it is particularly important to determine the limitations, if any, which operate to restrain the exercise of sovereignity. And where, as in England, there is not available a specifically promulgated fundamental law to determine the internal balances of power, it is especially helpful to discover what were the believed-to-be fundamental restrictions upon Parliament in the various stages of history.

The second question, suggested also by Gough's remarks, concerns the author's indication as to the difference in attitude between American and English writers on the notion of fundamental law. This is hardly the place to develop the thesis, but I wonder if most recent or contemporary representative American writers do, in fact, exhibit greater respect for the idea of fundamental or natural law than is the case with their English counterparts. This is not to suggest that the American Constitution was not bred against a "higher law background," to use part of the title in

Corwin's well known *Harvard Law Review* articles.[1] However, the increased recognition that reliance upon or appeal to natural rights has been too often ineffective in securing the kind of interpersonal unanimity and understanding necessary for generally acceptable constitutional development, has, I believe, resulted in a noticeable diminution in the respect paid by many American writers to notions of fundamental or natural law. In addition, it has become ever clearer that appeal to labels like "natural law" may serve but to obfuscate issues which are otherwise relatively easy to discern. It requires no special talent to refill a bottle which formerly contained California red wine with a liquid that looks, smells, and indeed tastes like vodka. Like the American Constitution, that of Romania (art. 85) contains express guarantees of freedoms of speech and press. One may be tempted, therefore, to conclude that in both countries those freedoms are fundamental law. But the labels do not change the contents of the bottle: in the United States we have the line of cases including *Near v. Minnesota;*[2] in Romania they have decree no. 583, article 1 of which requires registration with the police of all "typewriters and duplicating machines . . . as well as material necessary for duplication. . . ."[3]

My suggestion that perhaps American writers are according less and less respect to the notion of fundamental law is not intended to derogate from Gough's thesis that there are discernible in English history some fairly definite indications as to the meaning of fundamental law in England. Rather, I intended to suggest that perhaps recent English writers should not be rebuked for abandoning concern with the notion of a fundamental law and for turning instead to other devices for ascertaining and fixing the relationships between a sovereign and its subjects.

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1 Corwin, "The 'Higher Law' Background of American Constitutional Law," 42 HARV. L. REV. 149, 365 (1928, 1929), recently reprinted as a Great Seal book, Cornell Univ. Press, 1955.

2 283 U.S. 691, 51 S.Ct. 625 (1931).

3 See BUL. OFFICIAL, No. 51 (June 9, 1950).