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BOOK REVIEW

Alan Harding, *A Social History of English Law.*

By MASAO HORIBE*

I

In the course of one hundred years after the Meiji Restoration in 1868, the development of Japanese modern law was exerted a great influence by western laws, among which English law was dominant especially in the early Meiji period, and a good deal of literature thereupon was introduced to our country. The study of English law in Japan began at the beginning of Meiji era under the influence of foreign countries, and its history may be divided into the four periods: the first period (1868—1896) is from the beginning of Meiji to the completion of the condification of laws; the second period (1896—c. 1918) covers the term from the completion of the Codes to the middle years of Taishō; the third period (c. 1918—1945) is from the middle years of Taishō to the end of World War II; and the fourth period (1945—1968) extends from the end of World War II to the present day.1

If we confine our consideration to the field of English legal history in general, English school of historical jurisprudence and the names of scholars belonging thereto were known2 in the first period which was characterized by the introduction of literature on the constitutional law, particularly on English parliamentary system3 in preparation for the enactment of Meiji Constitution and the opening of the Imperial Diet.

The History of English Law before the Time of Edward I, 2 vols. 1895, by Sir Frederick Pollock and Frederic William Maitland were probably read in the second period in which the influence of English law retired because of the compilation of Codes modelled on German and French laws. Also during this period Sir William Holdsworth’s *History of English Law,* vol. 1 (1st ed., 1903), and Edward Jenks’ *Short History of English Law* (1st ed., 1912) were received and read by many Japanese students.

During the third period in which Japanese jurists began to look foreign legal systems more objectively together with the appearance of several specialists in English law, Holdsworth’s *History of English Law,* vols. 1–12 and other books on English legal history were studied in our country.

The fourth period began at the end of World War II which brought a great change in

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1 For the reception and research of foreign laws in Japan, see Masao Horibe, An Annual Survey of Comparative Law, 15 The Japan Annual of Law and Politics 117 (1967).
2 For example, Sir Henry Sumner Maine was well-known in this period, and his *Ancient Law* was translated into Japanese by Kazuo Hatoyama in 1885.
3 For example, the works of May, Hadley, Amos, De Lolme, Baghot, Dicey, etc. were rendered into Japanese during this period.
our relationship with foreign legal systems. Most of the law reforms during this period has been influenced by American law, which caused a drastic alteration of attitudes and studies of Japanese legal scholars who had been specialized in Continental laws. Researches on American law led them to English law, from the point of view that the latter is the mother law of the former, or by reason that American law cannot easily understood without a historical study of English common law and equity. It is no doubt largely due to these requirements that the interest in English legal history is no longer confined to a small body of specialists. As a result, C.H.S. Fifoot's *English Law and its Background* (1932) was translated into Japanese with the title, *Igirisuhō—Sono Haikei* (1952) by Masami Itō, Professor of Anglo-American law of Tōkyō University. Theodore F.T. Plucknett's *Concise History of the Common Law* (4th ed., 1956) was also done by the research group of English law under the leadership of Itō. However, the translation of Plucknett’s is not as yet completed, and now its book one, general survey of legal history, is published in two volumes entitled *Purakkunetto Igirisu Hoseishi* (1959).

Recently reprinted edition of Holdsworth's *History of English Law*, in 16 vols., were received by some Japanese students and university libraries, but as they are too voluminous to grasp easily the whole history of English law, a short and handy book on English legal history is heartily desired. Therefore, Alan Harding's *Social History of English Law* is welcomed in our country.

II

Harding’s work consists of *Introduction: Law and History*, three *Parts*, and *Epilogue: Reform Continued?*, though each *Part* has no title. In his *Introduction*, he refers to the relationship between law and history and says,

“For the daily work of the courts in applying legal rules real history may be unnecessary; but hardly when it comes to making and changing the law. For law is not, or ought not to be, the product of itself, but of past society (that is, history), and it is difficult to see how things can be changed without knowing how they came to be as they are. Further, and unexpectedly, the historical approach introduces the element of irreverence which keeps the law alive, for it shows by what absurd shifts and accidents much of the law has been arrived at; that a small part of it may be essential, but most is contingent.” The author also makes reference to the relationship in other parts of the *Introduction*.

*Part One* begins with Chapter I on *Old English Law* which deals with English law before the Norman Conquest, followed by Chapter 2: *The Common Law Takes Shape* which

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4 When the first volume of *History of English Law* was published in 1903, it was reviewed as follows: “A short history of English law has been a badly needed book. To recommend a short history of German or of French law has been easy. The inquirer could be sent to Schröder or Esmein. If he asked for a short history of English law, we had to tell him that there was none to be had. There were some elaborate histories of periods—for the more part early periods—and there were some elaborate histories of branches, institutions, doctrines. But a summary view of the whole was nowhere to be had.... This gap Mr. Holdsworth has set himself to fill. As yet he has given us but one volume.... It is to have one successor and, as we understand, one only. It is a handy and handsome volume.... We hope that Mr. Holdsworth will seriously consider whether his second volume shall not become two volumes.” 19 *Law Quarterly Review* 335 (1903). But it has now fifteen successors, and the reviewer’s hopes were disappointed.
contains “feudal tenures”, “the king’s courts become supreme”, “the sworn inquest in criminal law”, “the original writ and the first forms of action”, “right and seisin”, “the king’s justices”, “legal records and contracts”, and “the great charter, due process and the rule of law”. Chapter 3: All Sorts of Justices: the Criminal Law to 1642 treats of “the eyre”, “the felonies”, “breach of the peace and misdemeanour”, “the breakdown of the eyre”, “‘ keepers of the peace’ and local rivalries”, “the justice of the peace”, “the sixteenth-century pattern of justice”, “methods of prosecution”, “the statutory definition of political crimes”, “pardons, clergy and the classification of crimes”, “forms of punishment”, and “the effectiveness of the criminal law”. Then comes Chapter 4: Private Law to 1642 which comprises “the beginning of entail”, “leasehold and copyhold”, “trespass and tort”, “the action on the case, negligence and fraud”, “case as a remedy for breach of contract”, “the mortgage and the use”, “the statutes of uses, enrollments and wills”, “chancery, the trust and the family settlement”, and “from feudalism to commerce: private law and society”. As the author said in the Introduction, Part One describes the development of English law to 1642 as a system of ideas.

Part Two is divided into six chapters, ranging from Chapter 5 to Chapter 10. “Since procedures were the beginning of English law and remained central to it,” the author watches closely the movement of cases through the Common Law courts in Chapter 5: The Old Procedure, and leaves the new procedure of Chancery and conciliar courts to the next chapter. In the first chapter of Part Two, he deals with “initial and mesne process”, “the law’s delays”, “pleading”, “the jury and the separation of evidence and verdict”, “the judges take control”, “judicial refereeing and legal argument”, and “final process and appeal”. He goes on to describe the New Procedure and New Courts in Chapter 6, treating of “paper pleading and interrogation”, “the rise of the Court of Chancery”, “the substance of equity”, “Privy Council and Star Chamber”, “the Courts of Requests and the regional councils”, “statutory and administrative courts”, “the Church Courts and the High Commission”, and “the Court of Chivalry”. Then he makes mention of the Legal Profession in Chapter 7 which contains “gentlemen, administrators and lawyers”, “the earliest judges”, “the lay attorneys”, “serjeants-at-law and barristers”, “solicitors and conveyancers”, “the staff of the courts and the crown’s law officers”, “country lawyers”, “the schools of the common lawyers”, and “the staff of the conciliar courts and the civil lawyers”. Next comes Chapter 8: Lawyers and Law Books dealing with “written laws”, “the register of writs and other formularies”, “plea-rolls, year books and reports”, “textbooks”, “jurisprudence and legal history”, “lawyers’ language”, “the lawyers in society”, “the cost and reputation of the lawyers”, “lawyers and politics”, and “Sir Edward Coke”. Then follow the key chapters 9 and 10 showing how it was the product of society (Chapter 9: Law in the Making) and in return (Chapter 10: Law in English History) shaped the great seventeenth-century crisis of the constitution. The author begins to see how English law came into existence in Chapter 9 in relation to “law and custom”, “procedure as a source of law”, “judge-made law and following precedents”, “legislation”, “the place of statutes in the law”, “the legislators and the uses of statute”, “the legal concepts and fundamental law”, and “the European background”. In Chapter 10, he tries to justify the assertion in the Introduction that the history of the law is the history of society and to a large extent also of politics and the constitution. For this purpose, he discusses the problem by taking up “the law and liberty”, “the law and inequality”, “the law and community”, “the law, the king and the state”, “the courts and the constitution”, and “law, history and the English Revolution”.
Part Three "carries the history of the law in relation to society down to the present day". It begins with Chapter 11: The Age of Improvisation, 1642—1789 which contains "the interregnum: a lost opportunity", "the justices and policing in a changing society", "criminal liability, procedure and punishment", "Lord Chancellor Nottingham and equity", Lord Mansfield and the common law", "lawyers and eighteenth-century society", "eighteenth-century law-making", and "law in the history of eighteenth-century England". The author goes on to describe Empire and Commerce: The Expansion of the Common Law in Chapter 12 which comprises "English law in the colonies", "the common law in the United States", "colonization, trade, maritime law and international law", "the origins of English commercial law", "trading associations, monopolies and joint-stock companies", "the facilitation of credit", "negotiable instruments", "insurance", and "law and the industrial revolution". Then there are two Chapters 13 and 14 on Law Reform in the Nineteenth Century: one is the Legal System and the other the Substantive Law. The former deals with "stagnant law in a changing society", "Bentham and Brougham", "the reformers' methods", "the reform of the civil courts", "the criminal courts", "the renaissance of jurisprudence", "the legal profession", and "case-law". The latter consists of these heads—"criminal law: the protection of the person", "criminal jurisprudence: the triumph of morality", "criminal procedure and punishment", "modern civil procedure", "towards a law of tort", "marriage and divorce", "towards a law of property", "the emancipation of the company", "the rights of the worker", "law and the modern corporate state", and "administrative law".

The book ends with the Epilogue: Reform Continued?, in which the author writes, "It is not the historian's business to criticize the present state of the law. But he may ask how its recent development measures up to its earlier history, and he will probably conclude that a falling-off from the nineteenth-century impetus of reform is one of the causes of present dissatisfaction," and continues to discuss the reforms in many fields of law from the historian's viewpoint, treating of "a conservative profession", "the machinery of law-reform", "the attitude of the courts", "property and family law", "industry: the trend to corporateness continued", "a backward criminal law?", "trial and punishment", "the condition of public law", "the law and politics", and "law and contemporary history".

III

This Social History of English Law has some characteristics as compared with other treatises on English legal history in general hitherto published.

Firstly, one of the things that impressed us most is that the author describes the legal history from the historian's point of view. As he writes in the Introduction, Maitland once said that the history of English law was not written because legal historiography was the handmaid of legal dogma, and since then there have been some heroic attempts to describe the growth of English law in an historical way as mentioned above. His personal history shows that from Guildford Grammar School he went as an Exhibitioner to read modern history at University College, Oxford, where legal history attracted him and after completing his first degree he worked for the degree of B. Litt, on an edition of a thirteenth-century plea-roll which is shortly to be published by the Selden Society, and that he was appointed in 1961 to a lectureship in Medieval History at Edinburgh University. The following characteristics
are derived from this different angle.

Secondly, as its title proclaims, legal history is related to social history. This book, to use his words, "does at least try to be real history; to relate the development of the law as a whole, and forwards, to the development of English society, not to trace backwards a bundle of legal doctrines." However, on the other hand, he mentions, "If the result looks untidy to the lawyer, perhaps it is because history is untidy by nature; and if the law of past centuries is not described in the proper modern terms, perhaps this will be excused on the grounds that it was not modern law, nor even moving unerringly towards it. The layman who writes in general terms of recent law may inevitably seem irresponsible to the lawyer. But such a discussion of the relationship of law to society is what students of both history and law need and rarely get." It may be said that his object to relate the development of law to that of society is to a large extent attained.

Thirdly, the period of English Revolution in the seventeenth-century is regarded as an important epoch in the history of English law. So far some legal historians have disregarded the importance of this revolutionary period. For example, Holdsworth remarks as follows: "The legal historian must pass briefly over the period of civil war; and he cannot describe in any great detail the legislation of the Commonwealth, as that legislation was all swept away at the Restoration. It is only so far as the events of this period influenced the future development of English public law that it is of importance in legal history."

Fourthly, although this characteristic has close relation to the third, it is worthy of taking up as another feature that the author does not necessarily believe a continuous character of English law. It may be said that almost all English lawyers believe it one of the principal characteristics of English law that it can trace a continuous development from the early middle ages and there has been no sharp break in the common law. But statements of this kind is to be criticized, for they conceal the fundamental transformation in the law which took place with the gradual substitution of capitalist relations of production for feudal relations, and with the political victory of the capitalist class in the English Revolution. Harding’s work divides legal history into two main periods by the English Revolution.

Fifthly, the book is both short and handy, but it is a high level. As a short clear account of legal history nothing better has, so far as we know, been written. The useful notes which appear in the pages from p. 435 to p. 471 add greatly to the value and attractiveness of the work.

Nevertheless, Harding’s work is not free from weaknesses in some ways. For instance, the chief object of this work to relate legal history to the development of society is not altogether accomplished, or some of his sentences are rather difficult to understand, or it is not necessarily apparent why he divides the book into three parts. However, these defects are small, and we cannot but recognize the great achievements of this book. It can confidently be recommended to all who are interested in English law and history.

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