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Book Review: Constitutional Theory, by Geoffrey Marshall

P. W. Hogg
Osgoode Hall Law School of York University

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BOOK REVIEWS
REVUE DES LIVRES

Constitutional Theory. By GEOFFREY MARSHALL. Oxford: Clarendon Press. 1971. Pp. ix, 238. (£2.25 U.K.)

This is a book about "constitutional theory": it seeks, in the author's words, "to sketch out some of the basic questions that face students of constitutional government".[1] The topics considered include the definition of constitutional law; the Crown; sovereignty; the functions of judges and legislators; the enforcement of civil rights; equality under the law; freedom of speech and assembly; and civil disobedience. It is something of a salad, and yet the topics all share the characteristic of being fundamental to the study of constitutional law. In my mind too they share the characteristic of being inherently interesting. They lose none of their inherent interest, and they gain greatly in sophistication, when subjected to the critical and thoughtful analysis of Dr. Marshall.

In Canada there has always been such an abundance of pressing concerns with the federal distribution of powers that much of this constitutional theory has tended to be pushed out of law school syllabi. And yet constitutional theory has practical implications in Canada. The proposals which have been made from time to time to "patriate" the constitution suggest some of Marshall's basic questions. Indeed the problems of patriation (or autochthony) were analyzed in his book on *Parliamentary Sovereignty and the Commonwealth.*[2] There is more discussion in the present book.[3] He points out that the more extreme proposals for patriation involve a confused identification of *continuity* between an old and a new system with *subordination* of the new system to the old; the author describes them as "a wish on the part of the offspring of the Mother of Parliaments simultaneously to cut the umbilical cord and to deny that it ever existed".[4]

The Canadian Bill of Rights also raises some fundamental questions. If it is to be effective with respect to federal statutes

[1] P. v.
[2] (1957), ch. 7.
[3] Pp. 57-64.
[4] P. 63.

enacted after 1960, then a federal Parliament has succeeded (in some sense) in binding its successors. Curiously, there has been only a little discussion of the constitutional (or political) theory which would justify such a result.[5] Unfortunately Marshall's earlier book on *Parliamentary Sovereignty* was published in 1957—before the enactment of the Canadian Bill of Rights. I would have thought that the problem was sufficiently interesting to warrant discussion in the present book. Instead it is dealt with in a single sentence —almost an *obiter* dictum—which implies (1) that the notwithstanding clause in the Bill of Rights is not a "manner and form" limitation, and (2) that the notwithstanding clause is nevertheless effective even with respect to future legislation.[6] If these two apparently inconsistent propositions are indeed correctly inferred from what is an uncharacteristically cryptic sentence, then the topic would certainly seem to justify more elaborate discussion.

Another topic which is becoming important for the Canadian reader is the idea of equality under the law, or "equality before the law", as section 1(b) of our Bill of Rights would have it. The Canadian courts have been using this guarantee to strike down various provisions of the Indian Act, and the most recent decision at the time of this writing seems to leave the entire Act vulnerable to judicial attack.[7] My own view is that these decisions articulate absurdly crude concepts of "equality", and that, unless counsel and judges take the time to examine the literature and refine their concepts, the guarantee of equality in the Bill of Rights is going to become an unmanageable nuisance. The discussion of equality in this book, although fairly short,[8] analyses the various possible meanings of the concept and shows how difficult it is to keep within justiciable bounds. He offers no solution, but he does "unpack" the problem in a way which should help us to avoid the grosser judicial excesses.

Anyone with so much as a nodding acquaintance with the literature of Commonwealth constitutional law is familiar with some of Marshall's work. All constitutional lawyers are indebted to his scholarship and powers of analysis. The present book is not as original and important as *Some Problems of the Constitution*[9] or *Parliamentary Sovereignty and the Commonwealth*,[10] each of which took a narrower field and explored it more thoroughly. The present

[5] *E.g.*, W. S. Tarnopolsky, The Canadian Bill of Rights (1966), ch. 3.
[6] P. 42.
[7] *Canard* v. *A.-G. Can.* (1972), 30 D.L.R. (3d) 9 (Man. C.A.). See also *R.* v. *Drybones*, [1970] S.C.R. 282, 9 D.L.R. (3d) 473; *Re Lavell and A.-G. Can.* (1971), 22 D.L.R. (3d) 188 (Fed. C.A.); *Bedard* v. *Isaac* (1971), 25 D.L.R. (3d) 551 (Ont. H.C.).
[8] Pp. 136-153.
[9] With G. C. Moodie (1959).
[10] *Supra*, footnote 2.

book is more introductory in nature. In fact the author says in the preface that he has written it for political scientists rather than lawyers. Nevertheless it is compulsory reading for all serious students of the constitution, whether political scientists or lawyers, and none of them will fail to learn from the experience. It is a very good book.

P. W. HOGG*

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* P. W. Hogg, of Osgoode Hall Law School, York University, Toronto, Ontario.