

## BOOK REVIEWS

GEOFFREY MARSHALL,

*Constitutional Theory.*

O.U.P., Rev. Ed. 1980, \$16.50.

British Constitutional law is a strange subject. Traditionally, it brings together a motley assortment of topics, which are not obviously related to each other, such as the nature of the State and its relation to the Crown, the theory of sovereignty and the supremacy of Parliament, and the rights and freedoms of the individual, such as freedom of speech, freedom of association and religious freedom. In countries such as Australia and the United States, it is easy to understand why these or similar topics are seen to be part of constitutional law; they are topics which are dealt with, either wholly or in part, in the Constitution itself.

In the United Kingdom, which has an unwritten constitution, it is not so easy to understand why particular topics fall within constitutional law. Tradition plays an important part in defining the scope of the subject. Topics which were dealt with by Dicey as part of constitutional law remain part of constitutional law unless, like administrative law, they have developed to such an extent that they have become a separate, specialised subject. However, these topics are not simply linked by tradition. They consist of those areas of law which embody the community's attempt to answer the questions which have puzzled political philosophers for centuries: What is the best form of government? Should governmental power be centralised in one institution or shared among many? What is the source of the government's authority? Can that source be equated with the sovereign? Should the State require people to join a particular religion or should it tolerate most or all religions? To what extent should the people be free to engage in politics, criticize government policy and even disobey the law as a means of protest?

Constitutional theory is the critical examination of a particular society's answers to these perennial problems. Therefore it is political philosophy but political philosophy of a special kind. Most political philosophy is speculative, attempting to work out the truth about the nature of the state and the sovereign and attempting to provide the best possible answers to questions about the degree of latitude which should be allowed to citizens for political action and criticism. Constitutional theory is much more concrete. It takes existing law and existing institutions of government and considers whether they are rational, the justification which is offered for them, and the political theory, if any, which

lies behind them. If it is intended to be critical, it can be used to consider whether the law is adequate to implement the ideas which lie behind it.

Geoffrey Marshall's main area of concern is British constitutional law but he brings in a great deal of comparative material, especially from the United States and the Commonwealth. He examines the law's response to all of the traditional problems of political philosophy. Accordingly, the book naturally divides into three parts. After an introductory chapter about the law and the constitution, he deals first with the abstract problems of political philosophy, problems about the nature of the state, of authority and of sovereignty, before moving on to consider the institutional structure of government, parliamentary sovereignty, the courts, the independence of the judiciary, separation of powers and judicial review. Finally, he examines the protection given by the law to civil rights, such as freedom of religion, freedom of expression and speech, and equality under the law.

The greatest weakness of the book is that it accepts the traditional boundaries of British constitutional law. As a result, it fails to deal with the new problems for political theory which were not foreseen either by classical political philosophers or nineteenth century constitutional lawyers but which have arisen because of the growth of government in this century. The book contains nothing about the civil service or about attempts to increase its accountability or to make the information which it has available to the general public. It is time that these typically twentieth century problems were recognized for what they are; — constitutional problems with which an adequate constitution ought to deal. In many ways making the civil service accountable and gaining access to government information are as necessary for freedom and democracy as is protecting traditional rights such as freedom of speech and assembly.

Within the confines which Geoffrey Marshall has set himself, he is a good constitutional theorist. He handles his material lucidly and well. However, he does not avoid all of the pitfalls which bedevil British constitutional theory. In particular, he makes the error, common to many British constitutional theorists, of equating the abstract conceptions of political philosophy with the particular doctrines of British constitution law. In particular, like so many others before him, he sees the supremacy of the British Parliament in terms of the abstract concept of sovereignty. This leads to an enquiry into whether Parliament's sovereignty is continuing or self-embracing, in which he attempts to reach a conclusion by analysing the nature of sovereignty and of rules of law. In my opinion, it is not only futile but misleadingly dangerous to attempt to answer questions about the powers of the legislature or any other institution in a particular political system by appealing to abstract analytical considerations. To understand the nature of the

supremacy of the British Parliament, it is necessary to examine the role of that Parliament in the British political system. The traditional view that it is legally supreme reflected the fact that its task is to represent the people and to govern in the national interest on their behalf. The rule that Parliament cannot bind its successors, despite the fact that it has often been presented in the garb of an analytical deduction from the nature of sovereignty, is simply designed to enable Parliament to carry out its role of representing the people. If Parliament could bind its successors by ordinary legislation, it would have the power to prevent its successors acting in the national interest as they see it. To allow Parliament to bind its successors would be unfair, especially given the party structure which exists in Britain (and in the Australian States, where similar problems arise) because it would enable one party to entrench legislation which it favoured, but which it knew that the other party intended to repeal. Entrenchment in the British system should only be accepted if the entrenched legislation was not only enacted by the normal procedures, but was endorsed by the special majorities or by the referendum which is required for its repeal. Regardless of the conclusions suggested by an analysis of the concept of sovereignty, it is an abuse of the British system to allow Parliament to bind its successors by ordinary legislation.

The best part of the book is the discussion of the way in which civil rights are protected in the U.K. and the U.S.A. It leaves one with the impression that the American system of allowing the courts to enforce an entrenched bill of rights is far superior, both because it provides better protection for fundamental rights and because it encourages a far higher standard of analysis and debate about the proper scope of those rights. The British system provides no guarantee at all other than a sense that fair play ought to prevail. If that sense of decency is lost in a crisis, or is simply disregarded in pursuit of other goals, it is commonplace that all the Englishman's civil rights are at the mercy of Parliament, which is an unacceptable conclusion.

This is a good book. Despite its age (it was written originally in 1971 and has not been updated) and the fact that it is primarily about the British system, it is of considerable relevance to Australia. We share enough of the British system, including the system of responsible government and the quaint notion that our sense of fair play is a sufficient guarantee for our fundamental rights for this book to be of value to us. Its lucidity, clarity and the comparative material which it contains makes it an excellent introduction to basic constitutional ideas.

*M. D. Stokes*

J. D. HEYDON, W. M. C. GUMMOW, R. P. AUSTIN,

*Cases and Materials*

on

*Equity and Trusts*

Butterworths, 2nd Ed. 1982, \$59 Cloth, \$49 Limp.

For some years, one of the most notable absences in Butterworth's lists of student texts has been a really good casebook on Trusts. This gap has now been filled by Meagher, Gummow and Austin's *Cases and Materials on Equity and Trusts*.

This new work is, in fact, the second edition of the authors' already well-known *Cases and Materials on Equity*, expanded to cover trusts and trustees. The advantage to teacher and student of this arrangement is that the basics of the trust in equity, the operation of equitable remedies and, in particular, the relationship of equitable doctrines such as estoppel and part performance to the law of trusts, can be more efficiently explained and emphasised, without recourse to several different texts.

The content of the book displays a nice balance between the parts on equity and trusts and between those on trusts and trustees. The trusts section would be about twice as large as the section on trustees, fairly reflecting, I think, the sort of bias which lecturers in trusts commonly accord to these two distinct parts of their course. All the cases which one would expect to be there are dealt with to greater or lesser degree and, in addition, the authors ask searching questions of their readers, a technique which is reminiscent of the same publisher's *Property Law — Cases and Materials* by Sackville and Neave. The only fault I occasionally find with such an approach is that the questions are sometimes asked in a 'vacuo', with no point of reference for the student to follow. For example, the authors ask, at page 462, 'Is *Fletcher v. Fletcher* a just decision?', and, at page 3221 simply, 'Is *Holder v. Holder* correct?'. Without some indication as to the point of the question (how or why might the interpretation of the case be incorrect?) the student may be left floundering for the essential point of reference on which the question relies. The authors do, however, usually include brief notes on particular points dealt with by the case in question as well as references to further reading material (Jacobs, *Law of Trusts in Australia*) and extracts from useful articles. This reviewer is also pleased to see that on occasion the authors have also seen fit to include a more general introductory narrative to particular topics, thereby helping to place the cases which are to be discussed in the general context of the framework of the law within which they were decided. This approach was adopted successfully in the celebrated English casebook Nathan and Marshall's *Cases and Commentary on the Law of Trusts*.

The Commentary helps to remind the student of the essential rules

and of the basic arguments in problem areas, without undermining the necessity to procure a decent textbook. Continual reference to Jacobs for a 'refresher' would tax even the most ardent student! Perhaps more general commentary would have been welcome but, certainly, there is a lot more in this casebook than in the only other comparable Australian text, Ford's *Cases on Trusts*.

All in all, this casebook is excellent material for the student and teacher alike. It places major cases and arguments in context, deals with all the expected cases, and maintains a nice sense of balance. There are some valuable notes and commentaries on the cases and some thought-promoting questions and analyses which might help teachers preparing tutorial and seminar work. In short, the market has been waiting for this sort of casebook, produced in Australia, for quite some time.

G. M. Bates

## BOOKS RECEIVED

- Akehurst M. B., *A Modern Introduction to International Law*, George Allen & Unwin, CL. \$49.50, L. \$17.95.
- Antieau C. J., *Constitutional Construction*, Oceana Publications Inc., \$30.00.
- Pryles M. C., *Citizenship Law*, Law Book Co., \$24.50.
- Sawer G., *Australian Constitutional Cases* (4th Ed. L. Zines and G. J. Lindell), Law Book Co., CL. \$49.50, L. \$37.50.
- Baxt R., *Introduction to Company Law*, Law Book Co., CL. \$22.50, L. \$14.50.
- Miller R. V., *Annotated Trade Practices* (3rd Ed.), Law Book Co., L. \$15.00.
- Waller K. M., *Coronial Law*, Law Book Co., CL. \$27.50.
- Graham T., *Pleading Precedents*, Law Book Co., CL. \$35.00.
- Sykes E. I., *Strike Law* (2nd Ed. 1982), Law Book Co., \$35.00.
- Dawson F. & McLauchlan D. W., *Contractual Remedies*, Sweet & Maxwell (N.Z.), CL. \$29.50, L. \$22.00.
- Hayes S. & R., *Mental Retardation*, Law Book Co., CL. \$29.50, L. \$19.50.
- Pengilly W., *Trade Associations*, Law Book Co., \$36.00.
- O'Donovan J., *Company Receivers*, Law Book Co., \$47.50.
- Howard C., *Criminal Law* (4th Ed. 1981), Law Book Co., CL. \$32.50, L. \$22.50.
- Hill E. F., *Principles of Workers' Compensation*, Law Book Co., CL. \$29.50.
- Teaching Human Rights — An Australian Symposium*, Australian National Commission, \$8.80.
- Cheshire & Fifoot's Law of Contract* (4th Aust. Ed. 1981 by J. G. Starke, P. F. P. Higgins & N. C. Seddon), Butterworths Pty. Ltd., CL. \$44.50, L. \$35.00.
- Weeramantry C. G., *An Invitation to the Law*, Butterworths Pty. Ltd., CL. \$35.00, L. \$25.00.
- Mannix E. F., *International Transactions and Australian Income Tax*, L. \$9.50.
- Potas I., *Just Deserts for the Mad*, The Australian Institute of Criminology, \$5.00.
- Boer B. & Gleeson V., *The Law of Education*, Butterworths Pty. Ltd., L. \$19.50.
- Sykes E. I. & Tracey R. R., *Cases and Materials on Administrative Law* (4th Ed.) Butterworths Pty. Ltd., CL. \$49.50, L. \$39.50.

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*Inclusion in this section does not preclude review in a subsequent issue.*

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